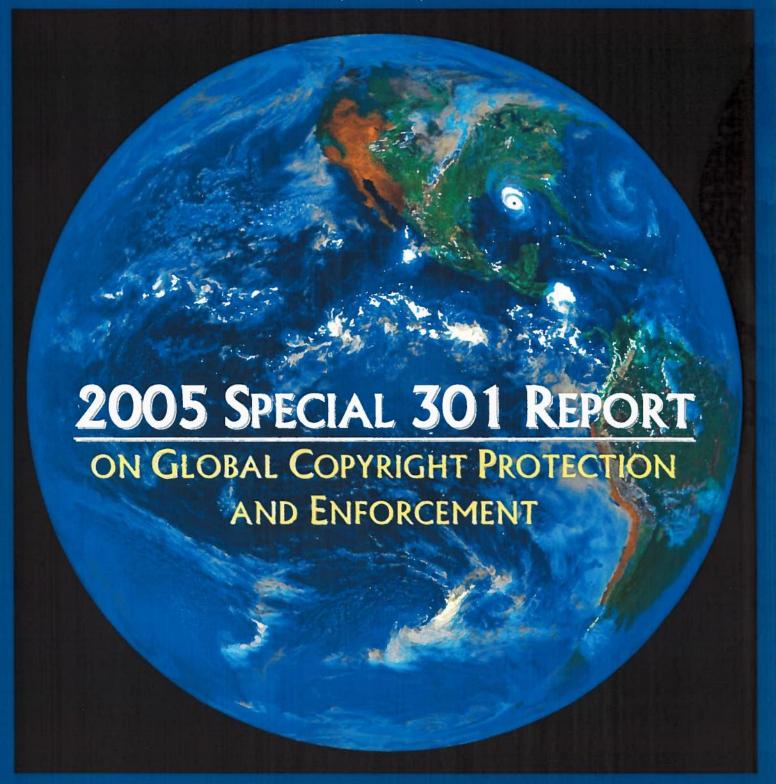
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE® (IIPA®)



Submitted to the United States Trade Representative February 11, 2005

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February 11, 2005

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"), 70 Fed. Reg.

134 (Jan. 3, 2005)

Dear Mr. Mendenhall:

This filing responds to the Request for Written Submissions appearing on January 3, 2005 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 (IIPA) submits our discussion of the status of copyright law reform and enforcement in 42 separate country reports and identifies two countries where FTA dispute settlement proceedings should be initiated if changes in implementing legislation/regulations aren't promptly made. We also highlight six challenges and initiatives in this letter that define our agenda for the coming year. Finally, we mention 23 additional countries/territories 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 1,300 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 October 2004, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2004 Report, the tenth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the "core" U.S. copyright industries accounted for 6% of U.S. GDP or \$626.6 billion in valueadded in 2002. In the last 25 years (1977-2002), 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 25 years, employment in the core copyright industries grew to 5.48 million workers (4% of total U.S. employment). In 2002, the U.S. copyright industries achieved foreign sales and exports of \$89.26 billion. The copyright industries' foreign sales and exports continue to be larger than other major industry sectors, including chemicals and related products, automobiles, parts and accessories, and aircraft and associated equipment sectors. 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:

- <u>This letter</u>, which (1) outlines IIPA's recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2005; (2) summarizes our submission this year; and (3) points the reader to various appendices;
- <u>Appendix A</u>, which contains IIPA's country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy;
- <u>Appendix B</u>, which describes our members' methodology for calculating estimated trade losses, piracy levels, and global data on optical disc factories and production capacity;
- Appendix C, which includes all the country surveys² and at the end lists 23 countries/territories that deserve continued U.S. government attention but which we have not recommended for placement on the Special 301 lists;

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; Michael Schlesinger, IIPA Vice President and Associate General Counsel, and Ryan Lehning, counsel to IIPA, and

- Appendix D, which provides a historical chart of countries/territories' placement on Special 301 lists by USTR since 1989; and
- <u>Appendix E</u>, which contains the Special 301 histories of countries/territories which we have recommended for placement on a list this year, many other countries that have appeared on USTR's lists in the past and are still candidates for monitoring intellectual property practices, and certain other countries/territories that have never appeared on a USTR list but which deserve attention.

C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2005

The goal of this submission is to improve copyright protection by employing the various bilateral, plurilateral and multilateral tools available to the U.S. government. Without these trade tools and their full implementation, the U.S. copyright industries would still be facing a world of inadequate copyright laws—a world which our industries faced in the early 1980s. This was a world where most countries' laws did not even protect U.S. works at all, and 90% to 100% piracy levels prevailed in most developing countries. 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 to both U.S. and local copyright industries. However, despite these successes, the U.S. copyright industries (and copyright creators and their industries worldwide) still face grave, and in many respects, growing, threats in the 21st century. These threats emanate 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. An effective response to these challenges will require a renewed commitment to use both the old and new tools available to industry and governments.

In our last six 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 efforts in promoting copyright reform and effective enforcement. But, as is clearly demonstrated in the country surveys included in this report, organized commercial piracy, whether digital or analog, tangible or over the Internet, threatens to outpace the fight to combat it. IIPA believes that a significantly heightened effort is called for to make further progress on these objectives in 2005. We believe the tools exist to make significant progress—the issue is whether all governments have the political will to take the actions necessary to address piracy meaningfully 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.

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 access to high-speed Internet connections is being used to distribute unauthorized copies of sound recordings, software, videogames, literary material, and motion pictures. This has suppressed legitimate consumption.

The unprecedented growth of the Internet and increased availability of broadband connections, coupled with the absence of adequate copyright law and/enforcement in the online environment in many countries, 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 have decreasing practical significance.

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. 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. As of February 4, 2005, official deposits of the treaties with WIPO stand at 51 for the WCT and 49 for the WPPT. More and more countries are now beginning to legislate in this area.

Ensuring that these standards are effectively embodied in national law is the heart of the critical second phase of the WIPO Treaties implementation effort. 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 as well as with the WIPO Internet Treaties. If countries delay in making these needed changes, the prejudicial impact on electronic commerce and the protection of intellectual property online might be 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.³

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 lose much of their practical relevance 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 Council of Europe Cybercrime Convention, which requires countries to adopt effective remedies for online copyright infringement, and which facilitates law enforcement cooperation across borders—something which must develop if governments are to be successful in addressing this pressing problem.

These law reform and enforcement measures are critical to deter pirates from destroying the incredibly promising new tools for making copyrighted products available globally before right holders have had a chance to gain a foothold. 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 essential tool that should be made available globally is notification of ISPs by copyright owners through cease and desist letters in order to obtain their cooperation to "take down" or block access to infringing material immediately, and otherwise to prevent infringing conduct of all kinds. The effective use of such a "notice and takedown" tool is, in turn, dependent on a system of secondary liability, which exists in some but not all countries, and which must be effectively multilateralized to encourage responsible conduct at all levels of the delivery chain. Finally, as we know from our own experience here in the U.S., we must find a global solution that discourages unauthorized peerto-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 provide these tools for the purpose of encouraging and profiting from infringement. For new legal Internet-based services for delivery of copyrighted material to succeed, we all need to ensure that legal services do not face unfair competition from unauthorized sources.

³ 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.

It is 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 of copyrighted materials, including through the use of peer-to-peer technologies. In addition, 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

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.

Optical Disc Piracy and Its Effective Regulation

Piracy of optical disc (OD) 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-Recordables (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. Based on our survey of optical disc production in 77 countries/territories:

- There were as many as 973 optical disc production plants producing "finished" optical discs worldwide, having 4,405 production lines, with a production capacity of nearly 16 billion discs in 2004.⁴
- Well over 1,100 optical disc plants exist worldwide producing both finished and blank discs, having over 7,800 production lines, with a production capacity of more than 27.8 billion discs in 2004.
- Production capacity of finished discs shot up to as much as 16 billion discs in 2004, from a reported 9.5 billion discs in 2003, a 66% increase in reported production capacity over the previous year.

The following chart details this information. It is noteworthy that the greatest optical disc piracy threat continues to be in Asia and Eastern Europe/Russia. Also, it is important to note that while this chart provides capacity for finished and blank discs, it does not report the number of blank discs being used for CD-R burning, a global problem the impact of which is especially severe in Asia; in several European countries, such as Italy, Germany and Spain; and in Latin America.

⁴ For several major optical disc producing countries, there is no breakout between plants producing finished optical discs and blank CD-R/DVD-R.

E	STIMATED OPTIC	CAL DISC F	PRODUCTION	N CAPACIT	y in 77 Cou	JNTRIES/TE	RRITORIE	:S ⁵		
	Pla (excl. (PRODUCT	MATED TION LINES CD-R)	IN MIL	CAPACITY LIONS CD-R)		JCTION NES CD-R)	ESTIMATED MILL	
	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003
ASIA										
Australia	11	9	59	19	206.5	66.5	59	96	206.5	374
BANGLADESH	2	NA	6	NA	21	NA	6	NA	21	NA
Burma	1	1	2	1	7	3.5	2	1	7	3.5
CAMBODIA	1	1	1	1	3.5	3.5	1	1	3.5	3.5
CHINA	83	71	763	569	2,670.5	1,191.5	763	808	2,670.5	3,875
Hong Kong	88	112	455	623	1,592.5	2,181	805	538	2,817.5	2,455
India	12	9	35	14	122.5	49	378	334	1323	1,353
Indonesia	40	27	75	31	262.5	108.5	75	37	262.5	197
JAPAN	21	34	237	NA	829.5	231	297	941	1,039.5	2,783
Korea	32	31	72	96	252	336	72	93	252	404
Laos	0	2	0	2	0	7	0	2	0	7
MACAU	4	2	5	2	17.5	7	16	NA	56	0
Malaysia	32	38	93	86	325.5	301	126	NA	441	1,871
PAKISTAN	10	8	25	25	230 ⁷	180 ⁸	25	25	230	140
PHILIPPINES	16	7	26	21	91	73.5	26	21	91	73.5
SINGAPORE	14	15	76	29	266	101.5	96	169	336	698
SRI LANKA	2	NA	2	NA	7	NA	2	NA	7	NA
TAIWAN	44	61	315	310	1,102.5	1,085	2,818	2,171	9863	7,779
THAILAND	40	39	135	126	472.5	441	157	98	549.5	556
VIETNAM	4	3	12	3	42	10.5	12	3	42	10.5
SUB-TOTAL	457	470	2,394	1,958	8,521.5	7,177	5,736	5,338	20,218.5	22,583
EASTERN EUROPE/CIS ⁸										
Belarus	1	NA	1	NA	5.2	NA	1	NA	5.2	NA
Bulgaria	8	7	12	7	55	24.5	12	9	55	19
CROATIA	1	NA	1	NA	3.5	NA	1	NA	3.5	NA
CZECH REPUBLIC	4	4	44	25	154	87.5	44	43	154	193
ESTONIA	1	NA	1	NA	3.5	NA	1	NA	3.5	NA
Hungary	4	3	14	3	49	10.5	14	7	49	37
Kazakhstan	1	1	1	1	8.1	3.5	1	0	8.1	0
LITHUANIA	1	1	2	1	7	3.5	2	1	7	5
POLAND	9	9	101	48	597.2	385.6	101	154	597.2	501
ROMANIA	1	1	2	2	7	7	2	1	7	6
Russia	34	32	80	52	390	371.6	83	52	390	220
SERBIA AND MONTENEGRO	4	NA	5	NA	25	NA	5	NA	25	NA
SLOVENIA	2	NA	5	NA	17.5	NA	5	NA	17.5	NA
UKRAINE	5	4	11	7	42.5	24.5	13	5	49.5	31
SUB-TOTAL	76	62	280	146	1,364.5	918.2	285	272	1,371.5	1012
WESTERN EUROPE9										
AUSTRIA	4	NA	6	NA	21	NA	6	NA	21	NA
BELGIUM	4	NA	25	NA	87.5	NA	25	NA	87.5	NA
DENMARK	4	NA	16	NA	56	NA	16	NA	56	NA
FINLAND	3	NA	6	NA	21	NA	6	NA	21	NA

⁵ The methodology used by IIPA to calculate the estimated capacity in 2003 and 2004 for production of finished optical media product encoded with infringing content, as well as a combined estimated capacity for production in 2003 and 2004 of finished as well as "blank" media such as CD-R and DVD-R, is described in Appendix B of IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁶ For the following major optical disc producing countries, there is no breakout between plants producing finished optical discs and blank CD-R/DVD-R, but it is believed that most of the capacity in these countries is devoted to finished discs: Australia, China, Indonesia, Korea, Pakistan, Philippines, Bulgaria, Czech Republic, Hungary, Poland, Belgium, Denmark, France, Germany, Ireland, Luxembourg, Netherlands, Spain, Sweden, Switzerland, United Kingdom, Argentina, Canada, Colombia, United States, Venezuela, Israel, Turkey, Nigeria, and South Africa.

⁷ Pakistan: This number represents what is believed to be actual production based on polycarbonate imports and various countries' customs data.

⁸ In Belarus, Bulgaria, Kazakhstan, Poland, Russia (2003 number), and Serbia and Montenegro, the capacity numbers are based either on more specific on-the-ground knowledge of a plant's production capacity, or different numerical methodologies than that described in Appendix B at www.iipa.com/pdf/2005spec301methodology.pdf.

⁹ Plant numbers are not broken out by finished and blank (CD-R/DVD-R) production for the following countries in Western Europe: Austria, Belgium, Denmark, France, Germany, Ireland, Luxembourg and Netherlands; and Canada and the United States.

	ESTIMATED OPTIC	CAL DISC F	RODUCTION	N CAPACIT	y in 77 Col	JNTRIES/TE	RRITORIE	S ⁵		
	Pla	NITC	Estin	MATED	ESTIMATE	CAPACITY	Produ	ICTION	ESTIMATED (CAPACITY II
	(EXCL. (PRODUCT	ION LINES	in Mil	LIONS	Lin	IES	MILLIONS	
	`	,	(EXCL.			CD-R)	(INCL. ((INCL. (
	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003
FRANCE	23	NA	156	NA	546	NA	156	NA	546	NA
GERMANY	44	NA	132	NA	462	NA	132	NA	462	NA
GREECE	5	5	19 ¹⁰	11	66.5	38.5	40	73	140	NA
IRELAND	8	NA	70	NA	245	NA	70	NA	245	NA
İTALY	23	23	102	51	357	178.5	119	182	416.5	801
LUXEMBOURG	2	NA	19	NA	66.5	NA	19	NA	66.5	NA
NETHERLANDS	18	NA	62	NA	217	NA	62	NA	217	NA
PORTUGAL	3	NA	5	NA	17.5	NA	5	NA	17.5	NA
SAN MARINO	2	NA	NA	NA	NA	NA	NA	NA	NA	NA
Spain	16	12	123	98	430.5	343	123	100	430.5	600
SWEDEN	7	NA	9	NA	31.5	NA	9	NA	31.5	NA
SWITZERLAND	3	NA	11	NA	38.5	NA	11	NA	38.5	NA
UNITED KINGDOM	19	NA	90	NA	315	NA	90	NA	315	NA
SUB-TOTAL	188	40	851	160	2,978.5	560	889	355	3,111.5	1401
WESTERN HEMISPHERE ¹⁶										
ARGENTINA	11	10	26	26	91	91	26	26	91	142.8
Brazil	11	9	88	11	308	38.5	91	128	318.5	624.9
CANADA	17	NA	78	NA	273	NA	78	NA	273	NA
CHILE	2	2	5	2	17.5	7	5	3	17.5	19
COLOMBIA	2	2	9	8	31.5	28	9	8	31.5	48
Costa Rica	1	NA	1	NA	3.5	NA	1	NA	3.5	NA
DOMINICAN REPUBLIC	1	1	1	1	3.5	3.5	1	1	3.5	7
MEXICO	12	12	211	136	738.5	476	23111	101	808.5	514
PARAGUAY	1	NA	1	NA	3.5	NA	1	NA	3.5	NA
PERU	3	3	5	5	17.5	17.5	5	3	17.5	17
UNITED STATES	143	NA	348	NA	1,218	NA	348	NA	1,218	NA
URUGUAY	1	NA	1	NA	3.5	NA	1	NA	3.5	NA
VENEZUELA	2	2	7	4	24.5	14.0	7	7	24.5	40
SUB-TOTAL	207	41	781	193	2,733.5	675.5	804	277	2,814	1412.7
MIDDLE EAST										
ALGERIA	3	NA	NA	NA	NA	NA	NA	NA	NA	NA
EGYPT	4	4	6	6	21	21	6	4	21	23
IRAN	2	NA	2	NA	7	NA	2	NA	7	NA
ISRAEL	7	5	18	5	63	17.5	18	23	63	114
JORDAN	1	NA	NA	NA	NA	NA	NA	NA	NA	NA
LEBANON	1	1	1	1	3.5	3.5	1	1	3.5	7
PALESTINIAN AUTHORITY	3	2	4	2	14	7	4	4	14	23
SAUDI ARABIA	3	1	6	1	21	3.5	7	NA	24.5	NA
SYRIA	1	1	1	1	3.5	3.5	1	NA	3.5	NA
TURKEY	8	8	23	18	80.5	63	23	NA	80.5	NA
SUB-TOTAL	33	22	61	34	213.5	119	62	32	217	167
AFRICA									-	
Nigeria	8	NA	25	NA	87.5	NA	25	NA	87.5	NA
SENEGAL	1	NA	1	NA	3.5	NA	1	NA	3.5	NA
SOUTH AFRICA	3	3	12	7	42	24.5	12	NA	42	NA
SUB-TOTAL	12	3	38	7	133	24.5	38	NA	133	NA
TOTALS	973	638	4,405	2,498	15,945	9,474	7,814	6,275	27,7865.5	26,575.

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,

¹⁰ Greece: Most DVD capacity in Greece is hybrid CD/DVD-5.

¹¹ Mexico: There are believed to be several "underground" mass duplication CD-R replicators in Mexico

including the cross-border traffic in production equipment and raw materials, principally opticalgrade 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 Bulgaria, China, Hong Kong, Malaysia, Philippines, Singapore, Taiwan and Macau, and are under consideration in Thailand, India and other countries. Ukraine has adopted a system of regulatory controls as well, but this law is flawed and must be corrected. 12 Increasingly, pirate optical disc production is migrating from jurisdictions with optical disc production regulatory regimes to countries that as vet have not adopted these regulatory tools, such as Russia, Pakistan, India, Thailand, Vietnam, and many 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, Eastern Europe, Russia and the countries of the former Soviet Union—to put comprehensive optical disc regulatory controls into place promptly. Otherwise, pirate syndicates will continue to transfer their optical disc operations across borders in an effort to stay one step ahead of enforcement efforts.

IIPA and its members have 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 endorsed 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.

As these regimes have been adopted and enforcement under them has matured, the pirates have again taken advantage of 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 uses 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 exploitationoften 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 many others, seizures of pirate product in 2004 were overwhelmingly of "burned" product. development calls for innovative responses—in this case, through improved enforcement machinery aimed at implementing zero tolerance policies against the offer for sale of pirate product. If pirates have no place to sell their products, their ability to manufacture becomes superfluous. Some countries are already responding by enacting absolute bans on street sales, with some positive results. Commitment from more countries to do the same is sorely needed.

In sum, regulations controlling and monitoring production need to be adopted, implemented and enforced, and must be accompanied by 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" operations, and they must use that authority vigorously. Deterrent penalties—including license revocation, confiscation of equipment and raw materials, and heavy fines and imprisonment—

¹² 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.

must be consistently and efficiently imposed on optical disc pirates, and governments must adopt and implement zero tolerance policies on the sale of infringing materials.

Piracy by Organized Crime Syndicates

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. Starting in 2003, responding to improved enforcement against factory pirate production, the syndicates began moving their illegal trade into CD-R and DVD-R "burning" and to the Internet (see, for example, the country survey on Taiwan). This phenomenon will be even more pronounced in 2005.

*Time/Europe*¹³ 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 August 2004, the owner of a pirate video shop in a popular Bangkok, **Thailand** shopping mall was shot dead in the Mall by an assailant on a motorbike. Police suspect the murder was ordered by the criminal gang that controls the piracy business in this and other malls. Police believe the murdered man was trying to break the protection racket that insulated the shops from possible police raids.
- In **Australia**, by the middle of 2004 the number of stalls selling pirated film DVDs at Melbourne's Caribbean Gardens Markets had increased fivefold (to more than 135 stalls); the price of pirated DVDs had substantially dropped (from AU\$15-\$20 per disc to AU\$10); traders not affiliated with two main organized criminal gangs were forced to pay protection money or were simply muscled out of the market; and a well-organized lookout system had been put in place. In August 2004, the Caribbean Market hosted the largest concentration of DVD sellers under one roof in the Asia-Pacific region and an at times armed battle for control between two criminal gangs resulted in physical intimidation of investigators from the motion picture industry's Australian anti-piracy program.

¹³ "Busting Software Pirates," *Time/Europe*, November 18, 2002.

- 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 were deported without the fine being paid.
- In 2004, enforcement authorities in the United Kingdom uncovered the involvement of Triad and Snakehead gangs in **China** in forcing illegal immigrants from China to sell pirate DVDs on the street to pay for their illegal passage to the UK.
- An April 2004 Interpol report on the links between terrorism and IPR crimes noted a year 2000 case of a CD plant in Russia run by Chechens who remitted funds to the Chechen rebels. The average monthly earnings of the organization were estimated at US\$500,000-\$700,000. During the raid on suspects' houses, a number of explosives and arms were seized.
- In 2004, turf wars between syndicates operating out of Russia and Bulgarian organized crime gangs were numerous, particularly over control of piracy at some of Bulgaria's most blatant pirate hotspots. Bulgaria's anti-organized crime agency has acknowledged the involvement of these syndicates in the pirate distribution business.
- A recent press report noted that a new OD factory had been set up in Burma close to the border with northern Thailand near Chiang Rai. The plant produces pirate CDs, VCDs, and DVDs and is owned by the notorious drug lord Wei Hseuh-kang. The production lines reportedly were imported from China and the blank discs are reportedly also from China. Annual profit from this plant was estimated at US\$6.5 million. Pirates in the border town in Thailand near the plant sold pirate product from the plant and DVDs of the newest U.S. films imported from China.
- In November 2004, police in Bangkok, Thailand raided a night market at King Rama I Bridge and were attacked by 30 piracy gang members. Some of the officers were injured.
- 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 17, 2003, 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 intercepted as part of a long-term investigation into a very well organized syndicate operation.
- In late 2004, **Hong Kong** Customs smashed an extensive OD piracy syndicate allegedly run by a woman dubbed the "queen of piracy" and her sons. Ten locations were raided and close to US\$200,000 worth of pirate copies and equipment were seized. It was estimated that this ring generated more than US\$1.5 million per year over a four year period. In this same period, another sweep led to the arrest of 284 organized crime gang members with more than US\$330,000 worth of pirate product seized. The raids were aimed at the revenue sources of Triad societies in West Kowloon. The sweep involved over 500 law enforcement officials.

- Also in 2004, Hong Kong Customs ran "Operation Sunrise," which disrupted a criminal syndicate run by the Sun Yee On Triad Society, yielding the arrests of 30 people, including a 12-year-old girl. Police raided 435 locations and inspected 1,921 entertainment premises, making arrests at 18 gambling establishments, 9 pirate optical disc shops, 23 brothels and 6 drug dens. Seizures included 1,700 Ecstasy tablets, 200 grams of ketamine, weapons, 160,000 pornographic or pirate optical discs, 9,500 liters of unlicensed gasoline and about 3.9 million cigarettes. The operation followed another successful anti-organized crime operation on June 25, 2004 when Hong Kong police and other agencies conducted a three-day operation code-named "Windpipe" that resulted in the arrest of 499 people and the seizure of over 12,200 copyright-infringing items including pirate optical discs.
- In August 2004 in Malaysia, it was reported that one of the suspected members of a
 Malaysian criminal syndicate distributing pirate ODs crashed his van into several
 vehicles while attempting to escape MDTCA officers. The suspect was apparently
 unloading 250,000 discs of local and international musical repertoire worth US\$400,000.
- In July 2001 in a Malaysian city, a City Council President received a personal death threat along with a threat that his daughter would be raped if he continued his crackdown on the city's illegal VCD traders. He also received a handwritten letter containing a tencentimeter-long razor blade. Newspaper reports noted seven death threats reported to the police in the months following aggressive action by the enforcement officers against VCD pirates. The then-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 carried out aboard ships anchored in international waters off the Malaysian coast. The ships later offloaded their cargo at obscure points along the coast.
- 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 was forced to abandon the premises after a local armed militia group sought to engage the police in a firefight 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 have assumed 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 **Paraguay**, in April 2004, a key organized crime leader, Antonio Gonzalez Neira, was jailed for seven and a half years. The conviction was for the illegal import of blank CD-Rs suspected of being used in piracy. Neira was one of the most powerful pirates in Paraguay, and his family has a long and documented history of assisting Chinese and Taiwanese organizations involved in smuggling in the country.
- In **Brazil**, the notorious piracy kingpin Law Kim Chong was arrested in June 2004 for attempting to bribe the Chairman of Brazil's Congressional Anti-Piracy Committee. As part of the follow-up to this arrest, authorities raided one warehouse owned by Chong at which over 7.5 million blank CD-Rs and 3.5 million blank DVD-Rs were seized. The bribe was alleged to be for between US\$1 million and \$2.3 million. Chong owned numerous shopping centers and supplied product from China to over 10,000 points of sale throughout the country. Chong is now in jail and the investigation continues.
- In **Mexico**, police discovered a massive CD-R operation in raids in October 2001 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. In late 2004, a Naples Fiscal Police officer was shot at by suspected Mafia gang members. He was uninjured and was the coordinator of "Operation Jolly Roger," which had recently uncovered a major criminal syndicate producing and distributing pirate CDs and DVDs. During the Jolly Roger raids, seven people were arrested and more than 3 million music and movie CDs and DVDs were seized.
- In early 2004, 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.

- In **Germany** in August 2004, law enforcement authorities seized a major "release group" server (named "dRAGON") at a university in Frankfurt. The server was being used by three of the largest release groups believed by the authorities to be responsible for up to 80% of online releases of German-language versions of movies, since a prior operation in March 2004 resulted in closing down 19 such servers. The server contained approximately 180 copies of newly-released films and about 20 interactive games. It was being used as a so-called mux-server (combining picture material with German soundtracks) by three of the largest and recently reorganized release groups, FLT (Flatline), TOE (Titans of Entertainment) and BBP (Block Buster Productions).
- 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.
- One individual, who has been identified by the U.S. Treasury Department as a "Specifically Designated Global Terrorist," is understood 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 the U.S. government for additional leadership, 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.

End-User Piracy of Business Software and Other Copyrighted Materials

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 2004 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 90 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, and deterrent criminal penalties for piracy. More specifically, it is critical that countries provide *ex parte* search orders in an expeditious manner, deterrent civil damages and criminalization of corporate end-user piracy as required by Article 61 of TRIPS. Industry, along with USTR, has raised the need for strong procedural and remedial enforcement measures around the world. Although some countries have made attempts to improve enforcement through special enforcement periods and action plans, most of these proposals for action have not been sustained over time or resulted in deterrent criminal fines and jail terms. Additionally, most countries still do not criminalize corporate end-user piracy or provide civil *ex parte* measures—both in violation of their TRIPS obligations.

End-user piracy is of course not limited to software but, in part because of the Internet, now affects all copyright sectors. Hard goods piracy using the Internet to advertise and sell pirate product, and unauthorized downloading of music, movies, videogames and books from websites as well as through peer-to-peer file swapping services have all skyrocketed. Unauthorized digital streaming, where bandwidth permits, is also growing. A great deal of this activity is being conducted through government-owned Internet Service Providers and from servers owned and operated by governments, schools and universities. Likewise, in government, school and university facilities photocopy machines are routinely used for commercial scale book piracy. Where the government is directly involved or directly responsible for the facilities and implements used, policies and decrees must be promulgated and strictly enforced to ensure that these facilities are not used for infringing conduct.

Where the activity is confined to the private sector and to private individuals, the mechanisms for strict enforcement against pirate websites, P2P services and against individual uploaders and downloaders must be put into place and deterrent penalties imposed. Where lacking, legislation must be passed clarifying secondary liability as well as infringement liability for unauthorized uploading and downloading. Statutory notice and takedown regimes, with narrowly-crafted safe harbors for ISPs, should be adopted, which allow for expedited action (with minimal and reasonable notification procedures) to block access to infringing material or take down infringing websites or FTP sites. Piracy directly by individual or enterprise or government end-users is on the increase; the appropriate and effective enforcement tools must be put into place immediately.

Piracy of Books and Journals

The book and journal publishing industry faces not only the same challenges encountered by other entertainment and high-tech industries (digital and online piracy), but must contend with other methods of infringement as well. This piracy comes primarily 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 for-profit and non-profit institutions (often accompanied by failure to compensate reprographic 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, and electronic files containing book text are now routinely recovered as part of enforcement actions against copyshops.

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 Egypt, Pakistan, India and China, 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.

<u>Improving Copyright Protection and Enforcement, Including Through Free</u> Trade Agreements

The tools available to the U.S. government to improve copyright laws around the world and to ensure that these laws are effectively enforced are many and varied. They include not only the Special 301 mechanism, but various trade preference programs, such as the Generalized System of Preferences (GSP) program, which incorporate copyright (and other

IPR) criteria as conditions for continuing benefits. Along with these bilateral tools, the TRIPS agreement in the WTO has also caused many countries not only to improve their statutory laws to meet their new international obligations to protect intellectual property rights, but also to improve their enforcement systems to bring them into compliance with the new enforcement obligations in TRIPS. As we have noted, most countries have now brought their substantive laws into compliance with the TRIPS substantive law obligations. The same cannot be said, however, for the TRIPS enforcement obligations, and this submission is a testament to the need for WTO members to do much more in this critical area. The enforcement challenge is now accompanied not only by the need to upgrade substantive laws to deal with the new digital and online world, through implementation of the WIPO Treaties, but also to ratchet up enforcement systems once again, to match the technological challenges brought on by factory pirate OD production, OD burning, and the rising tide of Internet piracy.

The first yardstick that countries must measure up to is their obligation under the TRIPS agreement, both in respect of substantive law and enforcement. In addition, the U.S. government, beyond the bilateral and multilateral tools available to it, is now making effective use of the Free Trade Agreement process to adjust protection and enforcement to the new piracy and technology challenges of the 21st century. The biggest challenge today, of course, is correcting enforcement deficiencies. The TRIPS agreement and the FTA process are central to this effort.

<u>The TRIPS Agreement:</u> 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. ¹⁴ Even for WTO members that did qualify for a transition period, the national treatment and MFN provisions of TRIPS applied fully as of January 1, 1996. ¹⁵

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. As we note throughout this submission, compliance with TRIPS enforcement obligations remains sparse, but is essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round.

Non-Compliance with TRIPS Enforcement "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

¹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

¹⁵ 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 11, 2005, 148 countries were members of the WTO, including all countries surveyed in this submission with some exceptions, e.g., Lebanon, Russia, Saudi Arabia, and Ukraine.

meet the Special 301 statutory standard of "adequate and effective" protection. Accordingly, in the country surveys and as part of the Special 301 process itself, IIPA has paid special attention to the extent to which the countries (or territories) surveyed in this submission are in compliance with these obligations. Where TRIPS incompatibilities are found, they can appropriately be dealt with in the context of Special 301, 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, trade book and journal offset printing piracy, as well as commercial photocopying.

<u>U.S. Government Actions on TRIPS:</u> 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.¹⁷

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. This year we have, in particular, highlighted China's failure to meet its TRIPS obligations in the enforcement area and have recommended that consultations be commenced in the WTO in a new effort to persuade the Chinese authorities that complying with their international obligations is not only their duty as global citizens, but is firmly in the interest of China itself. We have also highlighted the need for Pakistan to comply with the enforcement obligations of TRIPS, given its nearly 100 percent piracy rate and the massive exports of pirated product flowing out of Pakistan.

¹⁶ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

¹⁷ Snapshot of WTO Cases in the United States (updated Jan. 15, 2005 at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf. 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).

IIPA urges USTR to use all the tools available to it, including GSP, ¹⁸ CBI, ¹⁹ CBTPA, ²⁰ ATPA, ²¹ ATPDEA, ²² and AGOA, ²³ 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.

The Free Trade Agreement Process: 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, Chile, Australia, Jordan and Morocco have entered into force. FTAs with Central America, the Dominican Republic and Bahrain have been concluded. Negotiations with Panama and the Andean Pact countries of Colombia, Ecuador and Peru are slated to end soon, and negotiations with Thailand have begun. IIPA trusts that the valuable precedents established in these earlier agreements will be carried forward to the ongoing FTA negotiations with the South African Customs Union (SACU) and also to the newly announced negotiations with the United Arab Emirates and Oman, 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 requirement 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.

¹⁸ 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.*).

¹⁹ 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.*).

²⁰ 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.*).

²¹ 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.*).

²² Andean Trade Promotion and Drug Eradication Act, Pub. L. No. 107-210 (2002) (codified at 19 U.S.C. §3201 *et seq.*)

²³ 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.*).

D. IIPA RECOMMENDATIONS FOR THE 2005 SPECIAL 301 LISTS

This year IIPA has considered deficiencies in copyright protection in 42 countries/territories and has recommended them for placement in the categories of <u>Priority Foreign Country</u>, <u>Priority Watch List</u>, <u>Watch List</u>, and <u>Section 306 Monitoring</u>. We also identify two countries that have failed to comply with their copyright or enforcement obligations under FTAs currently in force. Finally, we mention specific issues in 23 additional countries/territories that deserve increased U.S. government attention.

IIPA recommends that USTR designate Russia as a Priority Foreign Country in 2005 and that Russia's eligibility for GSP benefits be immediately suspended. Russia's copyright piracy problem remains one of the most serious of any country in the world. Piracy rates for most sectors are estimated at around 80% in 2004 and losses exceed \$1.7 billion. Despite the repeated efforts of industry and the U.S. government to convince the Russian government to provide meaningful and deterrent enforcement of its copyright and other laws against OD factories and all types of piracy—including some of the most open and notorious websites selling unauthorized materials such as www.allofmp3.com—little progress has been made over the years. Meanwhile, piracy continues unabated in the domestic market and pirate exports continue to flood both Eastern and Western Europe.

IIPA also recommends that Pakistan be designated as a <u>Priority Foreign Country</u>. The government of Pakistan has largely 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 few results. Furthermore, the Pakistani government has failed to take adequate measures to stop rampant book piracy and commercial photocopying, which decimate the market for legitimate publishers.

IIPA recommends that USTR should keep Ukraine as a <u>Priority Foreign Country</u> and that trade sanctions should continue accordingly in 2005. 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 five 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). IIPA hopes that last year's historic elections will produce an environment conducive to the resolution of these long-standing issues, and that Ukraine will take the necessary steps to restore its trading benefits with the United States.

IIPA recommends that the remaining countries/territories be placed on, or maintained on, the <u>Priority Watch List</u> or the <u>Watch List</u>, where they are subject to ongoing bilateral scrutiny.

²⁴ The methodology used by IIPA member associations to calculate these estimates is described in IIPA's 2005 Special 301 submission, at www.iipa.com/pdf/2005spec301methodology.pdf. For example, ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

IIPA recommends that 15 countries be placed on the <u>Priority Watch List</u>: Argentina, Brazil, Bulgaria, Chile, Colombia, the Dominican Republic, Egypt, India, Indonesia, Kuwait, Lebanon, the People's Republic of China, the Philippines, South Korea, and Thailand. IIPA also recommends that 23 countries/territories be designated or kept on the <u>Watch List</u>. We also recommend that <u>out-of-cycle reviews</u> be taken in three countries that already appear on the various 301 lists: Malaysia, the People's Republic of China, and the Philippines.

With respect to the People's Republic of China, IIPA recommends that USTR immediately request consultations with China in the World Trade Organization, and that it place China on the <u>Priority Watch List</u> pending an <u>out-of-cycle review</u> to be concluded by July 31, 2005, at which time further appropriate multilateral and bilateral action, including the possible establishment of a dispute settlement panel in the WTO, would be considered. China has failed to "significantly reduce piracy rates," as promised by China's Vice Premier Wu Yi at the Joint Commission on Commerce and Trade (JCCT) meetings in April 2004. Piracy rates continue to hover around 90%, where they have been for years, and losses are estimated at \$2.5 billion in 2004. While there have been some raiding improvements, the copyright industries are concerned that, without moving to a hopefully more effective forum and a new dialogue, little will happen in the near term to change the current dismal picture.

IIPA commends Paraguay for the efforts that it has made over the course of this past year, and recommends that USTR continue to monitor developments in Paraguay under <u>Section</u> 306 of the Trade Act of 1974.

Appendix C contains a survey of a total of 67 countries or territories. The countries/territories appear by recommended category and in alphabetical order within each category.

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²⁵ See footnote 24, *supra*.

PRIORITY FOREIGN COUNTRY	PRIORITY WATCH LIST	Watch List	Section 306 Monitoring	FTA DISPUTE SETTLEMENT	OTHER COUNTRIES DESERVING SPECIAL MENTION
Pakistan (GSP) Russia (GSP) Ukraine	Argentina Brazil (GSP) Bulgaria Chile Colombia Dominican Republic Egypt India Indonesia Kuwait Lebanon (GSP) PRC + OCR Philippines + OCR South Korea Thailand	Bolivia CIS (5) ²⁶ Belarus Kazakhstan (GSP) Tajikistan Turkmenistan Uzbekistan (GSP) Ecuador Hungary Israel Italy Latvia Lithuania Malaysia +OCR Mexico New Zealand Peru Poland Romania Saudi Arabia Serbia and Montenegro Taiwan Turkey Venezuela	Paraguay	Jordan Singapore	Bahamas Bangladesh Bosnia and Herzegovina Burma Cambodia Canada CIS (2) Azerbaijan Georgia Croatia Cyprus Czech Republic Estonia Greece Hong Kong +OCR Iceland Kenya Laos Macedonia Nigeria South Africa Spain Switzerland Vietnam
3	15	23	1	2	23

Appendix D provides a history of countries/territories appearing on IIPA and USTR lists since 1989, a year after the Special 301 legislation became effective. Fifteen of these countries/territories 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 15 countries/territories named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 17 years that Special 301 has been in existence.

Ongoing GSP IPR Reviews: IIPA also calls attention to ongoing intellectual property rights reviews under the Generalized System of Preferences (GSP) trade program. IIPA has been a strong supporter of the GSP program and over the years has filed petitions requesting the U.S. Government to initiate review of copyright law and enforcement practices in targeted

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).

countries. In June 1999, IIPA filed 11 GSP petitions against: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, and the Kyrgyz Republic. 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 more petitions for GSP reviews of the copyright practices of 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 Russia. GSP hearings were held on March 9, 2001. USTR 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 the cases against Brazil, Russia, the Dominican Republic, Kazakhstan, Uzbekistan and Lebanon. On July 2, 2004, USTR announced its decisions in seven copyright cases in the 2003 GSP cycle by accepting the Pakistan petition, extending a special 90-day review in the Brazil case, terminating the investigation against the Dominican Republic, and keeping the cases open against Russia, Lebanon, Kazakhstan and Uzbekistan. On December 6, 2004, USTR extended its investigation of Brazil through March 31, 2005.

E. FTA DISPUTE SETTLEMENT COUNTRIES

As discussed above, the FTAs negotiated to date have set new global precedents in copyright protection and enforcement, providing further impetus to e-commerce and to global economic growth and employment. However, these benefits will not be realized unless the obligations agreed to are rigorously implemented into the national laws of our FTA partners. In the submission we identify two such partners—Jordan and Singapore—which have not yet fully implemented their FTA obligations. Unless the current issues with these countries are promptly and satisfactorily resolved in current informal negotiations, the U.S. should not hesitate to use the FTA dispute settlement process set up for just this purpose.

F. COUNTRIES DESERVING SPECIAL MENTION IN 2005

In addition to the 42 countries/territories for which IIPA has provided comprehensive country reports, IIPA also highlights issues in 23 countries/territories which deserve special attention this year but which are not recommended for placement on the Special 301 Lists. These countries/territories 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." These countries/territories are: Azerbaijan, Bahamas, Bangladesh, Bosnia and Herzegovina, Burma,

Cambodia, Canada, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Greece, Hong Kong, Iceland, Kenya, Laos, Macedonia, Nigeria, South Africa, Spain, Switzerland, and Vietnam.

G. ESTIMATED LOSSES DUE TO PIRACY

As a result of deficiencies in the copyright regimes of the 67 countries/territories highlighted in this submission, the U.S. copyright-based industries suffered estimated trade losses due to piracy of \$13.4 billion in 2004.²⁸ On a global basis (that is, in all countries/territories including the U.S.), IIPA conservatively estimates that total losses due to piracy were at very minimum \$25-30 billion in 2004, 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 the five copyright-based industry sectors—the entertainment software, business software, motion picture, sound recording and music, and book publishing industries—for 2003 and 2004. In most surveys, IIPA has described the piracy levels in each of the sectors in each of these countries/territories (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 IN 67 SELECTED COUNTR (in millions of U.S. d	RIES IN 2004
Industry	Estimated Losses
Motion Pictures	1,800.7
Records & Music	2,657.4
Business Software	6,448.0
Entertainment Software ²⁹	1,847.5
Books	603.0
Total	13,356.6

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. Appendix B also describes how IIPA and its members estimate global OD production capacity, including factories, types of

²⁸ The methodology used by IIPA member associations to calculate these estimates is described in IIPA's 2005 Special 301 submission, at www.iipa.com/pdf/2005spec301methodology.pdf.

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.

OD production lines, and capacity for both production of content and blank media (CD-Rs and DVD-Rs). The use of recordable media has now come close to becoming the pirate's tool of choice, particularly as enforcement pressure on factory production has increased.

H. 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/territories 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 dispute settlement machinery to encourage countries/territories 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
(2003-2004)
FOR
IIPA'S 2005 SPECIAL 301 RECOMMENDATIONS

APPENDIX A: IIPA 2005 "SPECIAL 301" RECOMMENDATIONS

IIPA 2003-2004 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (in millions of U.S. dollars)

and 2003-2004 ESTIMATED LEVELS OF COPYRIGHT PIRACY

		Motion F	Pictures		F	Records	& Music	:	Вι	ısiness So	ftware ¹		Ente	rtainme	nt Softw	are ²	Во	oks	Tot	tals
	Los	ses	Lev	els	Los	ses	Lev	els	Los	ses	Lev	vels	Los	sses	Lev	vels	Loss	Loss	Loss	Loss
	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003
PRIORITY FOREIGN COUNTRY																				
Pakistan (GSP)	12.0	12.0	NA	95%	70.0	70.0	100%	100%	9.0	9.0	83%	83%	NA	NA	NA	NA	52.0	44.0	143.0	135.0
Russia (GSP)	275.0	275.0	80%	75%	411.9	405.0	66%	64%	751.0	704.0	87%	87%	255.8	NA	73%	80%	42.0	40.0	1735.7	1424.0
Ukraine	45.0	45.0	90%	90%	115.0	125.0	65%	75%	64.0	59.0	91%	91%	NA	NA	NA	85%	NA	NA	224.0	229.0
PRIORITY WATCH LIST																				
Argentina	30.0	30.0	45%	45%	41.5	30.6	55%	53%	63.0	44.0	75%	71%	NA	NA	80%	NA	4.0	4.0	138.5	108.6
Brazil (GSP)	120.0	120.0	30%	30%	343.5	338.7	52%	52%	330.0	309.0	63%	61%	120.4	125.7	74%	56%	18.0	14.0	931.9	907.4
Bulgaria	4.0	4.0	35%	25%	6.5	7.0	75%	80%	16.0	16.0	71%	71%	NA	NA	50%	NA	NA	0.3	26.5	27.3
Chile	2.0	2.0	40%	40%	24.8	21.1	50%	40%	41.0	42.0	63%	63%	37.9	NA	70%	NA	1.0	1.1	106.7	66.2
Colombia	40.0	40.0	75%	75%	51.6	49.4	71%	70%	34.0	37.0	50%	53%	NA	NA	NA	NA	6.0	5.4	131.6	131.8
Dominican Republic	2.0	2.0	20%	20%	10.3	9.9	75%	65%	3.0	3.0	76%	76%	NA	NA	NA	NA	1.0	1.0	16.3	15.9
Egypt	NA	NA	NA	NA	7.5	8.0	40%	45%	35.0	34.0	68%	69%	NA	NA	90%	90%	30.0	25.0	72.5	67.0
India	80.0	77.0	60%	60%	67.3	6.0	50%	40%	220.0	187.0	74%	73%	59.5	113.3	86%	84%	38.0	36.5	464.8	419.8
Indonesia	32.0	29.0	92%	92%	27.6	44.5	80%	87%	112.0	94.0	87%	88%	NA	NA	NA	NA	32.0	30.0	203.6	197.5
Kuwait	12.0	12.0	95%	95%	8.0	3.0	65%	55%	24.0	24.0	68%	68%	NA	NA	NA	95%	1.0	2.5	45.0	41.5
Lebanon (GSP)	10.0	10.0	80%	80%	3.0	2.5	70%	70%	15.0	14.0	75%	74%	NA	NA	75%	80%	3.0	2.0	31.0	28.5
People's Republic of China (OCR)	280.0	178.0	95%	95%	202.9	286.0	85%	90%	1465.0	1787.0	90%	92%	510.0	568.2	90%	96%	50.0	40.0	2507.9	2859.2
Philippines (OCR)	33.0	33.0	85%	89%	20.0	22.2	40%	40%	38.0	33.0	70%	72%	NA	NA	90%	95%	48.0	45.0	139.0	133.2
South Korea	40.0	40.0	20%	20%	2.3	3.5	16%	20%	263.0	275.0	46%	48%	349.0	248.4	43%	36%	42.0	38.0	696.3	604.9
Thailand	30.0	28.0	60%	60%	24.9	26.8	45%	41%	90.0	84.0	78%	80%	NA	NA	76%	82%	30.0	28.0	174.9	166.8
WATCH LIST																				
Belarus	NA	NA	NA	NA	26.0	22.0	71%	74%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	26.0	22.0
Bolivia	2.0	2.0	NA	100%	16.0	16.0	90%	90%	7.0	7.0	78%	78%	NA	NA	NA	NA	NA	NA	25.0	25.0
Ecuador	NA	NA	NA	95%	20.0	19.0	95%	95%	7.0	7.0	69%	68%	NA	NA	NA	NA	2.5	2.3	29.5	28.3
Hungary	20.0	20.0	35%	30%	11.5	8.0	38%	30%	56.0	55.0	42%	42%	21.5	NA	59%	NA	4.0	4.0	113.0	87.0
Israel	30.0	30.0	40%	50%	34.0	40.0	40%	63%	36.0	35.0	37%	35%	12.4	NA	88%	75%	1.0	1.0	113.4	106.0
Italy	160.0	140.0	15%	20%	45.0	42.0	23%	22%	567.0	642.0	47%	49%	NA	168.5	34%	47%	23.0	23.0	795.0	1015.5
Kazakhstan (GSP)	NA	NA	NA	NA	23.0	22.7	68%	70%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	23.0	22.7
Latvia	NA	NA	NA	85%	12.0	10.0	85%	80%	9.0	10.0	58%	57%	NA	NA	80%	95%	NA	NA	21.0	20.0
Lithuania	1.5	NA	65%	NA	15.0	13.5	80%	85%	11.0	10.0	58%	58%	NA	NA	85%	90%	NA	NA	27.5	23.5
Malaysia (OCR)	36.0	38.0	50%	50%	55.5	40.0	52%	45%	74.0	77.0	63%	63%	12.9	NA	91%	90%	10.0	9.0	188.4	164.0
Mexico	140.0	50.0	70%	45%	326.0	360.0	60%	61%	230.0	220.0	65%	63%	132.2	136.9	76%	66%	42.0	40.0	870.2	806.9
New Zealand	10.0	6.0	8%	9%	NA	NA	NA	NA	12.0	14.0	22%	23%	NA	NA	NA	NA	NA	NA	22.0	20.0
Peru	4.0	4.0	75%	45%	68.0	87.0	98%	98%	18.0	19.0	67%	68%	NA	NA	NA	NA	8.5	8.5	98.5	118.5
Poland	30.0	30.0	35%	30%	36.0	34.0	37%	45%	175.0	171.0	58%	58%	109.3	NA	94%	NA	5.0	5.0	355.3	240.0
Romania	8.0	8.0	55%	35%	18.0	18.0	78%	80%	32.0	28.0	74%	73%	NA	NA	65%	NA	2.0	2.0	60.0	56.0

APPENDIX A: IIPA 2005 "SPECIAL 301" RECOMMENDATIONS

IIPA 2003-2004 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (in millions of U.S. dollars)

and 2003-2004 ESTIMATED LEVELS OF COPYRIGHT PIRACY

		Motion F	Pictures		F	Records	& Music	;	Bu	siness So	ftware ¹		Ente	rtainmer	nt Softw	vare ²	Во	oks	Tot	tals
	Los		Lev		Losses			els	Los		Lev			ses		vels	Loss	Loss	Loss	Loss
	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003
WATCH LIST (continued)																				
Saudi Arabia	20.0	20.0	40%	40%	15.0	16.0	35%	40%	85.0	76.0	56%	54%	NA	64.0	68%	83%	14.0	14.0	134.0	190.0
Serbia and Montenegro	NA	NA	85%	90%	12.0	9.0	80%	75%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	12.0	9.0
Taiwan	40.0	42.0	40%	44%	49.4	58.0	36%	42%	83.0	83.0	43%	43%	123.0	261.8	63%	42%	20.0	20.0	315.4	464.8
Tajikistan	NA	NA	NA	NA	5.0	5.2	81%	82%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0	5.2
Turkey	50.0	50.0	45%	45%	15.0	15.0	70%	75%	99.0	81.0	66%	66%	NA	NA	NA	NA	23.0	25.0	187.0	171.0
Turkmenistan	NA	NA	NA	NA	7.0	7.0	85%	89%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	7.0	7.0
Uzbekistan (GSP)	NA	NA	NA	NA	31.0	30.5	81%	81%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	31.0	30.5
Venezuela	25.0	25.0	NA	50%	31.0	29.0	80%	80%	36.0	33.0	75%	72%	NA	NA	NA	NA	NA	NA	92.0	87.0
SPECIAL 306 MONITORING																				
Paraguay ³	2.0	2.0	95%	80%	127.8	154.6	99%	99%	6.0	5.0	83%	83%	NA	NA	NA	NA	2.0	2.0	137.8	163.6
FTA DISPUTE SETTLEMENT																				
Jordan	2.0	2.0	80%	80%	NA	NA	NA	NA	10.0	9.0	67%	65%	NA	NA	NA	NA	NA	NA	12.0	11.0
Singapore	10.0	8.0	12%	15%	3.7	3.2	9%	10%	57.0	55.0	44%	43%	NA	NA	NA	NA	2.0	2.0	72.7	68.2
SPECIAL MENTION																				
Azerbaijan	NA	NA	NA	NA	12.0	12.2	82%	83%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	12.0	12.2
Bahamas	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	NA
Bangladesh	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.0	NA	6.0	0.0
Bosnia and Herzegovina	4.0	4.0	90%	90%	NA	3.0	NA	99%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.0	7.0
Burma	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.0	NA	4.0	0.0
Cambodia	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.0	NA	4.0	NA
Canada	NA	120.0	NA	NA	NA	NA	NA	NA	486.0	500.0	36%	35%	NA	NA	NA	NA	NA	NA	486.0	620.0
Croatia	2.0	2.5	25%	27%	NA	NA	NA	NA	22.0	26.0	55%	59%	NA	NA	50%	NA	NA	NA	24.0	28.5
Cyprus	8.0	8.0	50%	50%	NA	NA	NA	NA	5.0	5.0	56%	55%	NA	NA	NA	NA	NA	NA	13.0	13.0
Czech Republic	10.0	NA	25%	NA	12.0	NA	60%	NA	58.0	60.0	39%	40%	NA	NA	NA	NA	NA	NA	80.0	60.0
Estonia	2.0	2.0	30%	35%	6.5	6.5	60%	60%	9.0	9.0	57%	54%	NA	NA	60%	60%	NA	NA	17.5	17.5
Georgia	NA	NA	NA	NA	8.0	8.0	80%	80%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	8.0
Greece	10.0	10.0	15%	15%	20.0	NA	60%	NA	48.0	53.0	62%	63%	NA	NA	70%	NA	NA	NA	78.0	63.0
Hong Kong (OCR)	28.0	28.0	20%	20%	4.8	14.4	19%	30%	56.0	56.0	52%	52%	NA	NA	NA	NA	7.0	9.0	95.8	107.4
Iceland	0.2	0.2	12%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.2	0.2
Kenya	NA	NA	NA	NA	12.6	NA	98%	NA	10.0	8.0	83%	80%	NA	NA	NA	NA	NA	NA	22.6	8.0
Laos	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	3.0	NA	3.0	NA
Macedonia	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0
Nigeria	NA	NA	NA	NA	50.0	NA	99%	NA	33.0	29.0	85%	84%	NA	NA	NA	NA	4.0	NA	87.0	29.0

APPENDIX A: IIPA 2005 "SPECIAL 301" RECOMMENDATIONS

IIPA 2003-2004 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (in millions of U.S. dollars)

and 2003-2004 ESTIMATED LEVELS OF COPYRIGHT PIRACY

		Motion	ļ	Records	& Musi	C	Business Software ¹					rtainmer	t Softw	are ²	Во	oks	Totals			
	Losses Levels		Los	sses	Le	vels	Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss		
	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003	2004	2003
SPECIAL MENTION (continued)																				
South Africa	35.0	35.0	40%	40%	NA	NA	NA	NA	91.0	87.0	37%	36%	NA	NA	NA	NA	2.0	NA	128.0	122.0
Spain	40.0	30.0	25%	10%	90.0	60.0	24%	25%	283.0	305.0	43%	44%	103.6	NA	46%	NA	NA	NA	516.6	395.0
Switzerland	14.0	11.0	20%	15%	NA	NA	NA	NA	137.0	174.0	27%	31%	NA	NA	NA	NA	NA	NA	151.0	185.0
Vietnam	10.0	7.0	NA	100%	NA	NA	NA	NA	27.0	24.0	92%	92%	NA	NA	NA	NA	16.0	12.0	53.0	43.0
TOTALS	1800.7	1671.7			2657.4	2777.6			6448.0	6728.0			1847.5	1686.8			603.0	535.6	13356.6	13245.1

Endnotes:

BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in each country as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

²ESA'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.

³Paraguay: 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.

"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 2005 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 2004 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 number of new software units installed (based on hardware shipments and software load), and the legal supply of new software units. The amount of pirated software is equal to the difference between paid-for or legitimate packaged software units and the total software base. The piracy rate is the percentage of the total packaged software base that is pirated.

The total amount of software, legitimate and pirated, installed during the year (the total software base) is obtained by multiplying the number of new hardware units and the number of existing hardware units getting new software by their respective software loads.

Hardware shipments are determined from tracking data on 60+ countries that IDC collects as a matter of routine. For the additional 30+ countries and markets, the data was either collected in-country or modeled regionally out of our rest-of-region estimates. The basic tracking data is generated from suppliers, including local suppliers. Similarly, the hardware installed base is based on this tracking data.

The software load is the amount of software units installed and/or pre-installed (OEM) on the computers during the year. To obtain the number of software units for each type of hardware platform, including those running software on Windows and those running software on non-Windows operating systems, IDC surveyed consumers and business in 15 countries: China, Malaysia, Taiwan, Spain, Romania, Brazil, Bolivia, Chile, Colombia, Mexico, Costa Rica, Dominican Republic, Guatemala, Kuwait, and the United States. The results of these surveys were used to populate our input models for the other countries. Within software load, IDC accounted for:

- Software running on new computers
- New software running on existing computers
- Software obtained from retired computers

- Software obtain for free as shareware or open source
- Software that runs on Windows and non-Windows OS

Legitimate software shipments are determined by dividing the software revenues in a country by the average system value (ASV) for that country. Software revenues are captured annually in 60+ countries by IDC software analysts around the world. Revenues are gathered from interviews with suppliers in the country and cross checked with global numbers and financial statements. For the countries not normally covered by IDC, the data were either collected in-country or modeled regionally out of our rest-of-region estimates. Software revenues are gathered by type – such as application, infrastructure, and development tools – and by software running on Windows and non Windows operating systems. It was also allocated to software running on new systems bought during the year and on systems that were already in place.

ASVs are estimated country-by-country by country and regional analysts for five software categories (e.g., collaboration, office, security, OS, other) for each hardware type and Windows and non-Windows software. Prices were gathered from IDC's pricing trackers, local research, and interviews with the channel. They included adjusting for OEM and channel-loaded software, as well as software from local suppliers. ASVs were gathered in the appropriate currency depending on how the country analysts collected software revenues.

Dollar losses are calculated off the piracy rate and the market for legitimate software in a country. For instance, if the piracy rate is 60% and the market \$100 million, then the legitimate market is 40% of the total value of all software, which would be \$250 million (\$100M/40%). Pirated software is that total minus the legitimate market (\$250M-\$100M). Thus the value of pirated software is \$150 million. The dollar losses to U.S. vendors are computed by multiplying the value of pirated software by the percentage market share of U.S. vendors in a particular country.

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.

For developed markets:

- 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.
- 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.
- 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.

For partially developed markets:

- 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.
- 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.
- 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.

For fully pirate markets:

- 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.
- 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.

- 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.
- The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission.
- 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.
- 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.

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Public Performance: Losses are estimated using the following method.

- 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.
- 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.
- 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.

RECORDS AND MUSIC

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.

OPTICAL DISC PRODUCTION CAPACITY

IIPA collects information from authoritative sources on the production capacity and actual production of optical media products in more than 77 countries, which are represented in a chart in the IIPA submission. Figures presented reflect estimated capacity in 2003 and 2004 for production of finished optical media product encoded with content, as well as a combined estimated capacity for production in 2003 and 2004 of finished as well as "blank" media such as CD-R and DVD-R.

Optical disc production in certain countries is almost entirely unauthorized (i.e., no licenses were believed to have been granted by right holders for legitimate production). In addition, in many of the same countries (and some others), there exists at the present time no adequate legal regime to control of optical disc production. Furthermore, transparency, even in those countries having optical disc regimes in place, remains problematic. As a result, it is unavoidable that some plants continue to operate covertly. In part because of such covert activity, IIPA considers the number of plants and lines reported in this submission to be a conservative estimate.

IIPA estimates the production capacity of plants within most countries represented in the chart by multiplying the number of known production lines by 3.5 million, a figure itself derived through the application of conservative assumptions. These included: that the average speed of a replication line to produce a DVD is approximately three seconds per disc, with a daily production of 9,800 units per line (20 discs per minute x 60 minutes x 8 hours), or a monthly production of 294,000 units (30 days x 9,800 units), or an annual production of 3,528,000. These estimates apply other conservative assumptions, including those relating to plants' hours of operation. Notwithstanding our applied assumption, sources suggest that most plants operate well in excess of eight hours a day, and that some regularly operate 24 hours a day, seven days a week, only shutting off occasionally for maintenance. Second, the number - 3.5 million discs per line per year - assumes the production of DVDs on a double-head injection mould. Production time for regular music CDs or CD-ROMs, regardless of the replication equipment, tends to be faster. Finally, it should be noted that in some countries, particularly in Eastern Europe, different calculations were made based on either more specific on-theground knowledge of a plant's production capacity or different numerical methodologies, which is why the capacity numbers in this region may differ from the above equations and assumptions.

2005 Special 301: Methodology

APPENDIX C

COUNTRY SURVEYS

PRIORITY FOREIGN COUNTRY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT PAKISTAN

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Pakistan be designated as a <u>Priority Foreign Country</u>.

Overview of Key Problems: Pakistan remains one of the world's leading overproducers and exporters of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs) of copyrighted material (sound recordings, motion pictures, business software, published materials). Ten known facilities in Pakistan produced upwards of 230 million discs in 2004 (up 30% from the 180 million discs produced in 2003). An estimated 205 million of those discs were exported from Pakistan in 2004, and based on the latest anecdotal evidence, upwards of 30% of those discs were ultimately destined for the United States. Pirate exports of copyrighted materials from Pakistan are harming markets in at least 40 countries. The Pakistani government, at various times of the year, seemed to indicate that it was ready to take serious action (e.g., four of the plants voluntarily closed in March, but reopened when it became apparent the government did not intend to enforce). A new phenomenon in 2004 was export of pirate "prerelease" sound recordings and motion pictures — a highly damaging activity to those right owners. Piracy in Pakistan continues to gravely harm local Pakistani copyright owners, as well as the Indian music, movie, and software industries. Book piracy and other forms of piracy (e.g., cable piracy, end-user piracy of business software, Internet café piracy) remain particularly serious in Pakistan. A change to the law in 2000 which added a royalty-free compulsory license for the National Book Foundation (NBF) and similar institutions to copy books is a TRIPS violation and must be deleted. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Pakistan were \$143 million.

Promised enforcement action in 2004 by the Pakistani government against optical disc plants engaged in piracy never materialized beyond the brief effort noted above. Thus, the number of plants and suspected capacity and output both grew in 2004. Some progress was made in 2004 on intercepting exports at the border, as a Directive issued by the Central Board of Revenue requiring Customs to monitor all exports of optical media was implemented by Pakistani Customs authorities.

In June 2004, IIPA's GSP petition against Pakistan (filed in June 2001) was accepted by the GSP Committee of USTR, to evaluate whether Pakistan remains eligible to retain its duty-free GSP trade benefits despite poor copyright protection and enforcement. We note that this petition was granted at a time when the U.S. wishes to promote stronger trade ties with Pakistan as evidenced by the 2003 Trade and Investment Framework Agreement (TIFA) and the announcement on September 28, 2004 of the commencement of Bilateral Investment Treaty (BIT) negotiations. If Pakistan wishes to see progress in its trading relationship with the U.S., it must, as the acceptance of the GSP petition signifies, more effectively address the growing piracy problem first. IIPA believes further trade and investment developments must await the

evaluation of whether to remove all or part of Pakistan's GSP benefits due to inadequate enforcement against rampant copyright piracy in Pakistan. At the very least, IPR protection, and enforcement against copyright piracy in Pakistan, must continue to be a prominent part of any continuing trade dialogue with the government of Pakistan.

Actions to be Taken in 2005:

- As a temporary measure, <u>shut down at least the ten known production facilities</u> (e.g., 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 to permit the legitimate production. Licensing documents to prove legitimate manufacture would be forwarded to interested private parties to ensure legitimacy of the licensing documents; right holders should be permitted to visit optical disc plants and obtain exemplars of discs.
- For the long term, <u>pass and implement an effective optical disc law</u> to enable control
 over optical disc production, including mandatory licensing, inspections (including by
 representative organizations), closure of plants in violation, monitoring and control on
 imports of production equipment and raw materials (including optical grade polycarbonate),
 requirements to use unique source identifiers (SID Code) to track location of production, etc.
- Expand and intensify <u>implementation of Central Board of Revenue (CBR) Directive</u> requiring Pakistani customs officers to inspect every export shipment to ensure the shipment contains only Pakistani repertoire. Customs authorities outside Karachi must also enforce this CBR directive.
- Conduct <u>effective anti-piracy enforcement actions</u> with active Federal Investigation Agency (FIA) involvement, and provide *ex officio* authority; establish an IPR task force within FIA.
- <u>Combat other forms of piracy</u> that hurt the domestic markets, including book piracy, cable piracy, end-user piracy, and Internet café piracy. Successfully prosecute at least one key case for each of these areas, resulting in a jail sentence and a large fine.
- Issue a <u>directive to courts on the seriousness of copyright crime</u> 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 <u>strengthen maximum criminal fines</u> and to <u>implement the WIPO</u>
 "Internet" treaties, and join the WCT and WPPT.
- Conduct a <u>public awareness</u> campaign against copyright piracy.

For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.hrml.

PAKISTAN

Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	12.0	NA	12.0	95%	12.0	95%	11.0	NA	10.0	60%
Records & Music	70.0	100%	70.0	100%	60.0	83%	60.0	90%	65.0	90%
Business Software ²	9.0	83%	9.0	83%	11.2	80%	9.2	83%	24.5	83%
Entertainment Software ³	NA									
Books ⁴	52.0	NA	44.0	NA	44.0	NA	NA	NA	45.0	NA
TOTALS	143.0		135.0		127.2		124.2		144.5	

COPYRIGHT PIRACY IN PAKISTAN

Pakistan Is One of World's Worst Optical Disc Producers/Exporters

Due to the Pakistani government's fundamental failure to address optical disc piracy, Pakistan remains one of the world's worst overproducers and exporters of pirate optical media. In 2004, the situation worsened, as there are now ten known optical media production plants (containing at least 25 production lines) that churned out an estimated 230 million discs, 205 million of which were destined for export. Importation of optical grade polycarbonate increased by more than 30% in 2004 in comparison to 2003 — a disturbing trend which is consistent with greater production capacity, and also suggests the likelihood that there are several underground facilities operating. Exports continued to pour out of Pakistan in 20004, many passing through Dubai, and despite increased efforts of Customs as a result of a Central Board of Revenue Directive, reports indicate seizures of pirate optical discs in Ireland, the Netherlands, France, Germany, the UAE, South Africa, Belgium, Canada, Kenya, Kuwait, Nepal, India, Singapore, the United Kingdom (UKFACT reports more than 260,000 optical discs intercepted in 2004

International Intellectual Property Alliance

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, at www.iipa.compdf/2005spec301methodology.pdf.

² BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Pakistan, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$16 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

³ 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.

⁴ 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 40 to 80% of the market, depending on the title, and 90% for the most popular titles used at universities.

⁵ Estimated actual demand in Pakistan was approximately 25 million units. The ten plants include the eight plants reported in the 2004 IIPA report. IIPA has learned that a new plant opened in Karachi in June 2004, and an additional plant was identified recently. The U.S. government informed the Pakistani government last year where the eight plants are and who owns them.

⁶ It was confirmed that over 500,000 kg of optical grade polycarbonate was imported into Pakistan in April 2004 – a new monthly record.

⁷ A recording industry survey over a seven month period (January to July 2004) revealed a total of 1,353 'airfreight shipments' from Karachi, totaling more than 5 million units being transported out of Pakistan. It could be established in that survey that almost 30% of the Karachi shipments were transported to the U.S. – more than 1.6 million pirated optical discs.

originating from Pakistan), and the United States. Sources indicate that pirated exports from Pakistan were also destined for Austria, Australia, Bahrain, Bangladesh, Burundi, Denmark, Fiji, Greece, Hong Kong, Italy, Japan, Kosovo, Maldives, Mauritius, Namibia, New Zealand, Nigeria, Norway, Oman, Qatar, Saudi Arabia, Spain, South Africa, Swaziland, Switzerland, Taiwan, Tanzania, Uganda, the United States, Yemen and Zambia.

Plant owners in Pakistan are exhibiting behavior common to organized criminals. 8 They have become more evasive in their techniques throughout 2004, probably in part as a result of Pakistani government announcements of intent to enforce (which never materialized). For example, IIPA has learned that the respective plant owners do not keep 'stock' (polycarbonate, finished discs, masters, stampers) at their premises if they can help it. Warehouses at unknown locations are used to keep these materials.9 A disturbing new trend is that Pakistanis and Malaysians have apparently teamed up, such that, in addition to Pakistani-produced materials, Pakistani criminals are chief recipients of product produced in Malaysia, which is then transshipped through Pakistan (much of it ultimately destined for the UK market). Pakistani pirates also appear to be following the example of the Malaysians and have begun to use other countries (e.g., particularly the UAE but also Belgium) as transshipment points for Pakistaniproduced pirate products. These trends further demonstrate the organized nature of the piratical activities and the need for the Pakistani government to tackle organized piracy through the use not only of copyright laws, but organized crime statutes (such as those aimed at money laundering, fraud, tax evasion, etc.). The evidence all points to a highly organized, increasingly international enterprise of criminals engaged in copyright piracy as a high-profit, low-risk criminal enterprise; the organized and international nature of this highly damaging commercial activity requires an organized and international response. Such a response is just beginning to occur, but not by the Pakistani government. Instead, Customs officers in ports in the EU, for example, have become more active in seizing Pakistani-produced pirate product coming into those ports. 10

Pakistani Domestic Market Remains Mostly Pirate

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. In April 2004, the Deputy Inspector General (DIG) of Karachi Police warned the members of a "trade association" (of pirate vendors) 11 of the notorious "Rainbow Centre" in Karachi¹² to withdraw all pirated optical discs or face raids and seizures.¹³ Upon this warning, many Pakistani vendors in retail outlets moved underground for a time.

⁸ It has long been known that a principal financier of one or two of Pakistan's largest optical media plants is identified by the U.S. Department of Treasury as a "Specifically Designated Global Terrorist."

These practices mirror what we are seeing in other markets, e.g., Malaysia, where it is becoming commonplace for a raid to yield no product, stampers, order documentation, etc. at the plant premises themselves. At one plant, the owner took a "wait and see" approach, believing a raid was forthcoming "to please the Americans."

¹⁰ UK Customs is working with other EU customs authorities (and with respective local APOs) to educate them about the problems of transshipment and frequently used routes. The most recent initiative is a campaign to have all offices review the manifests of shipments routed out of Dubai. Furthermore, UK Customs is also working with officers from Switzerland in order to prevent that country from becoming a "laundering" facility for pirate products.

11 Pirate retailers belong to "trade associations" which are powerful and pose additional threats (e.g., threats of

violence) to anyone attempting to uphold the law.

Rainbow Centre is a 12 story building in the heart of Karachi and Pakistan's biggest center for pirate product with

more than 200 shops virtually all selling illegal product.

¹³ Other piracy centers include "Hafeez Center" in Lahore, which 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.

However, soon thereafter, piracy activities returned to normal due to failure of the government to act.

There remain at least seven major duplicating centers for VHS videocassettes and which also burn CD-Rs to order (of motion pictures not yet released in Pakistan, as well as previously released home videos). 14 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 the legitimate. 15 A new phenomenon in 2004 is major pirating of "pre-release" sound recordings of international repertoire. For example, in early November 2004, it was reported that pre-release pirate versions of Eminem, Destiny's Child, U2, Elton John, Ja Rule, Shania Twain, and Vanessa Carlton albums had surfaced in the Pakistani market for sale; the motion picture industry experiences similar pre-release piracy. The press has noted the deleterious effect piracy has had on the market, noting that "[u]p until 20 years ago, Pakistan was ranked among the top 10 film producing countries in the world with over 100 new films released every year," and that ironically, many of the cinemas (only 40 theaters remain in Karachi, a city of 15 million people) are being torn down and replaced by malls, which feature, among other products, pirated goods. 16

Book Piracy Remains Extremely Serious

The situation regarding book piracy in Pakistan is extremely serious and large-scale. There is large-scale photocopy piracy (mainly in universities, in which one student purchases the title "adopted" for a class and then organizes the photocopying for the entire class, or lends the book to other students for them to copy any material they require). There is also "print piracy" which is more sophisticated, often being carried out by business people within the supply chain on an organized basis, i.e., distributors or booksellers who sell genuine stock but also often organize their own pirate printings, or offset printing. All types of books are pirated — practically anything that is popular and sells more than 500 copies. English language novels and other trade books are popular, and as a result, U.S. publishers of mainstream commercial fiction and non-fiction are struggling. The academic market, in turn, has been completely overrun. Elementary and high school courses taught in English routinely feature pirate versions of books. Piracy at the university levels is even worse, with rates soaring over 90%. Some medical titles have been pirated, usually in one color, so legitimate importers point out the danger of medical students using pirated texts which have misleading and inaccurate illustrations. While the quality of the pirated copies is often poor across the board, some pirates

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¹⁴ Much of this activity occurs on the upper floors of Rainbow Centre; the number of such operations fluctuates as alliances shift and deals are made. We also have confirmation of similar operations on Hall Road in Lahore

¹⁵ For example, pirate music CDs sell for around PKR35 to 65 (US\$0.59 to 1.09) 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\$1.68 to 2.53) per unit for international motion pictures, to PKR210 (US\$3.54) per unit for Indian or Pakistani motion pictures.

¹⁶ Hasan Zaidi, Curtains down for most cinemas in Pakistan, June 7, 2004.

¹⁷ The professional pirates are usually situated in the 'Urdu Bazaar,' the market area in either Karachi or Lahore where people go to buy their school books and college texts. Purchasers routinely ask for 'cheap' versions of the titles in their book lists and know that they are buying pirated versions. The main book pirates are known within the trade.

¹⁸ Some commercial trade book publishers report that there has been a mild decrease in the openness, at least, of trade book piracy, with one popular retail chain in particular ceasing its dealings in pirate editions.

¹⁹ It should be noted that the potential market for elementary and high school materials in English is immense, given the sheer numbers of middle-class families in Pakistan who are sending their children to English-medium schools.

²⁰ By contrast, publishers report a high rate of legitimate sales of reference materials to libraries. This is likely attributable to the high cost of producing these materials and the relatively small market over which to spread production costs. It is simply not an attractive market for pirates.

are now able to produce better-quality copies that are difficult to differentiate from the legitimate versions.²¹ To this end, publishers are forced to employ measures such as the use of holograms to distinguish legitimate product from counterfeits. Lack of government motivation to reduce book piracy levels results in an almost total lack of prosecutions, or cases proceeding to the imposition of fines or iail time, even in cases in which pirates are arrested. Thus, there is no deterrence in the market. Piracy levels can range from 40% to 80% of the market, depending on the title, and well over 90% for the most popular titles used at universities.²²

Pakistan is quite vulnerable to the importation of pirated books from India. The existence of pirated imports, counterfeit imports, "India-only" imports, and fully legal imports (i.e., where the importer has the right to all of South Asia, including Pakistan) complicates the enforcement environment. However, it is clear that unauthorized, illegal, and counterfeit copies pose a growing threat to legitimate imports from the U.S. and U.K. As such, it is important for Pakistani Customs to equip itself to deal with such shipments, and seize pirated, counterfeit, or unauthorized copies at the borders. A recent example involved a pirated Koranic text from India imported into Pakistan; the stock was seized by Pakistani Customs and destroyed.

The government of Pakistan amended its copyright ordinance in 2000 to include an amendment [Section 36(3)] that allows a royalty-free compulsory license. This provision is clearly overly broad and violates TRIPS. Section 36.3 provides that the government can grant any "institution," including the National Book Foundation (NBF), which is part of the education ministry, reprint rights without authorization of the right holder and without royalty. 23 This amendment was passed without any opportunity for comment from publishers and threatens to further diminish a market already almost completely overrun by piracy. This royalty-free compulsory license violates TRIPS²⁴ and Pakistan must delete it.

No Improvement in Satellite/Cable or Business Software Piracy in 2004, and Emergence of Internet Café Piracy

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 U.S. 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. An emerging problem is Internet café piracy: Internet cafés operate throughout Islamabad, Karachi, Lahore, and elsewhere. However, the cafés mostly operate without licenses from right holders. The entertainment software industry wishes to work with owners of the cafés to license personal

'The Federal Government or the Board may, upon an application by any government or statutory institution, in the public interest, grant a licence to reprint, translate, adapt or publish any textbook on non-profit basis.'

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²¹ This is further evidenced by the fact that U.S. publishers receive routine requests for free supplementary materials from professors who have apparently adopted the book, in regions where there are absolutely no legitimate sales.

²² There are even "regional" pirate editions of highly successful school books, i.e., Karachi may have one or two pirated editions, and Lahore one or two of its own. Local school texts are pirated at the rate of at least 50%, while imported college texts lose far more than this.

²³ Section 36.3 provides,

²⁴ It also, incidentally, may run afoul of private property rights enumerated in the Constitution of Pakistan and should be considered in light of this domestic provision as well.

computer versions of the games especially for the cafés. There also appears to be some console-based entertainment software piracy in Pakistan.

COPYRIGHT ENFORCEMENT IN PAKISTAN

The enforcement snapshot for Pakistan in 2004 is disheartening as there remains no overall Pakistani government will to address piracy. The enforcement environment remains difficult given the general social instability, 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 (e.g., the police will not undertake a raid without a complaint), forcing right holders to undertake and fund enforcement actions on their own. Nonetheless, some raiding continued on suspected locations of piracy, and there were small pockets of cooperation, for example, from the Central Board of Revenue's (CBR) export monitoring which remains fairly effective. The Pakistani government claimed that the Pakistan Intellectual Property Rights Organization (PIPRO), established in early 2004, would result in an effective interagency process led by the Ministry of Commerce to coordinate copyright, patent and trademark issues. This organization has yet to have any effect on piracy in Pakistan whatsoever. In early 2005, press reports indicated the organization was in transition and had yet to become a major anti-piracy force. Originally intended to be coordinated by the Ministry of Commerce, PIPRO has apparently become the subject of debate as to leadership among several different ministries. However, IIPA does not believe ultimately that establishing a new bureaucratic entity is likely to be the answer; what is needed is good deterrent enforcement against the key piracy problems facing the country.

Enforcement Against Optical Disc Plants Non-Existent, and Against Retail Piracy Ineffective

The year 2004 began somewhat hopefully, as U.S. pressure and an apparent recognition of the severity of the optical disc piracy problem led the Pakistani government to send warning messages in April 2004²⁵ to plant owners that enforcement would be forthcoming if they did not shut their doors. The warnings apparently worked for a time, as several plants were reported to have shifted production capacity out of the country or at least to have operated for a time at reduced capacity as a reaction to government pressure. However, with no major raids forthcoming, all ten of the current plants remain in operations (and IIPA understands that the level of well-placed persons with investments and involvement in the primary plants has made police raids nearly impossible). Similarly, while the Pakistani government took steps such as talking with chief owners at the notorious Rainbow Centre, as noted, with no raids forthcoming, the pirates quickly realized they could once again operate openly in the market without fear of punishment.

Enforcement Against Pirate Exports: Customs' Newly Invigorated Role

One bright spot in the enforcement landscape in 2004 was Pakistan's Central Board of Revenue (CBR) Directive ordering Customs officials to intercept exports at the borders (of non-

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²⁵ The press in Pakistan even reported that Commerce and Trade Minister Hamayun Akhtar Khan announced on April 1, 2004 the initiation of a nationwide campaign to enforce the intellectual property rights, but no raids were forthcoming as a result of this announcement.

Pakistani repertoire).²⁶ Specifically, the June 2004 Directive ordered all Customs officers at the international airports to prohibit commercial exports of CDs and DVDs with international sound recordings, western movies and western software, by airfreight companies or as hand baggage. 27 The CBR directives required Pakistani Custom officers to inspect every export shipment and sign the necessary documents permitting the export of only Pakistani (regional) repertoire. Under the Directive, Karachi Customs made tens of seizures in 2004 totaling more than 300,000 unauthorized optical discs. Five customs officers at Karachi International were temporarily suspended for not complying with the directive during the summer of 2004. However these officers have reportedly been re-instated. Pakistani Customs courts have reportedly decided four export cases resulting in fines ranging from Rs5,000 (US\$84) to Rs1,000,000 (US\$16,860). However, as of late, the pirates are aggressively seeking reevaluation of the Directive, claiming the ban has resulted in "losses" of \$3 million per month (IIPA notes the \$3 million the exporters speak of is illegal revenue!). 28 Nonetheless, as of June 2004, reports indicated that while there were still some seizures of copyrighted materials out of Karachi, much of it was Indian music sound recordings (an estimated 60%), while the rest was a combination of games, software and international sound recordings (an estimated 40%); however, overall numbers of seizures and amount of product had fallen off precipitously.





March 14, 2004 seizures of pirated discs from Pakistan at Zaventem Airport in Brussels. Belgium by the Belgian Customs unit ZAD. Note that the seized items include Mel Gibson's "Passion of the Christ" and a compilation of three Ben Stiller movies on one DVD.

It has been reported to IIPA that corruption may have taken hold at Karachi International Airport since the CBR Directive was implemented, and that Customs agents may be being offered payments to allow pirate shipments by air-cargo' services as well as 'couriers' carrying pirated optical discs as hand luggage. In addition, increasingly, pirates are diversifying their transship points, from Dubai in the United Arab Emirates, to Belgium, 29 to the Netherlands, in attempts to circumvent European customs authorities and free up the piratical product

export of illegal audio and video recordings (these provisions would mirror provisions already contained in the Copyright Act).

²⁹ Both ports of Anwterp and Zaventem Airport Customs unit ZAD have made significant seizures in 2004.

²⁶ CBR has also become involved in a more direct way, establishing IPR units within various regional Customs units. IIPA understands that CBR constituted an anti-piracy cell at the Collectorate of Customs in Rawalpindi to control the export and import of pirated and counterfeit products. ²⁷ CBR has advised industry that language in the Customs Act 1969 would be substituted with new text to prevent the

Imran Avub. CD exporters seek MoC intervention to lift ban. Daily Times, at http://www.dailytimes.com.pk/ default.asp?page= story 23-10-2004 pg5 2 ("over 20 exporters of CDs and DVDs of movies, dramas and entertainment have approached the Commerce Ministry seeking its intervention to remove a ban on the export of these products ... the ban as exporters said has resulted in losses of \$3 million a month").

throughout the EU.³⁰ If it is true that there are irregularities, this is a major issue that must be addressed by Pakistani Customs in 2005.

Enforcement Against Book Piracy Remains Largely Self-Funded But Serious Hurdles to Good Enforcement Remain

The publishing industry, as in prior years, has largely had to self-fund any enforcement actions in Pakistan. Raids are run and pirated copies seized, leading to low-level prosecutions. However, these actions continue to fail to provide the level of deterrence needed to lower losses due to piracy. The result has been that some publishers have had to resort to inventive means to protect copyright in Pakistan, everything from using holograms to distinguish genuine from pirated/counterfeit product (although reports indicate the pirates have started importing fraudulent holograms to confuse the public further), to using unique watermarks, to physically monitoring printers near schools to avoid overruns. These measures, of course, add considerably to the cost of conducting legitimate business in Pakistan and add further insult to the piracy-laden market legitimate publishers face.

Enforcement Against Business Software Piracy Continues at a Slow Pace, and Little Done Against End-User Piracy

The business software industry continued to obtain some raids against "resellers" of pirate software and "hard-disk" loaders in 2004,³¹ but received little to no help in addressing the unauthorized use of software in businesses in Pakistan – so-called end-user piracy of business software.

Courts Still Do Not Mete Out Deterrent Results

Aside from the Customs' record in 2004, very few raids have been carried out, and as a result, the courts have not been put to proper use in meting out deterrent penalties against copyright piracy. For example, for publishers, although the law now enables a judge to put someone in jail for 1 to 3 years, and fine them up to Rs100,000 (US\$1,680), the maximum fine that a pirate has received from prosecutions for publishing piracy was Rs15,000 (US\$253) in 2004, hardly a deterrent, and most cases resulted in far lower fines. No sentences involving imprisonments were meted out in 2004. IIPA members report that judges routinely adopt the public view of piracy as a minor offense, along the lines of a straightforward traffic offense in the U.S. Thus, punishments are often more token than effective. As noted above, IIPA advocates, among other things, minimum jail sentences/fines for crimes involving copyright infringement. Pakistani court processes are also marred by procedural hurdles. For example, court cases in Pakistan require significant documentation to support prosecutions, further delaying already slow dockets.

³⁰ In January 2005, Customs officers at Charles de Gaulle Airport in Paris intercepted two suspect shipments of pirate DVDs sent from Pakistan to companies in Paris and Reims. Over 31,000 discs were seized. According to French Customs, one of the companies had imported about 30 similar shipments from Pakistan since November 2004.

³¹ See, e.g., Police raiders run software pirates aground, March 20, 2004, at http://www.dailytimes.com.pk/default.asp?page=story_20-3-2004_pg7_35 (describing a Karachi police raid on five vendors selling unlicensed software, seizing 1,774 CDs and seven computers loaded with pirated computer programs); Software pirates arrested, illegal CDs seized: BSA, Channelnewsasia.com, June 1, 2004 (describing Karachi police raid on a pirated software seller in which two persons were arrested for breaching copyright law, 56 unlicensed CDs were confiscated and five PCs loaded with illegal computer programs were seized).

U.S. – Pakistan Trade Dialogue A Possible Conduit for Change

In 2003, USTR signed a Trade and Investment Framework Agreement (TIFA) with Pakistan. In April 2004, the first TIFA discussions were held. IIPA is heartened that copyright was apparently a key topic of discussion in this and the September TIFA meetings, and believes these dialogues hold promise for success if the Pakistani government follows through on the actions it must take to seriously impact the piracy situation there. IIPA has noted at the top of this report the many steps that need to be taken by the Pakistani government to tackle copyright piracy. The exchanges should touch upon many issues, including acknowledgement of CBR's necessarily invigorated role monitoring exports, the disturbing increase in optical disc overproduction and polycarbonate imports in 2004, the urgent need for an optical disc law, the need to immediately close the optical disc plants, the need for greater enforcement against book piracy, end-user piracy, Internet café piracy, etc., the need for criminal prosecutions focused on deterrent penalties, and IIPA's GSP petition. IIPA is hopeful that the TIFA discussions can continue to focus seriously on the list of actions which must be accomplished in order for piracy to be reduced, and for the concerns expressed in IIPA's GSP petition and this report to be addressed.

U.S. Copyright Industry Offers Significant Technical Assistance in 2004

IIPA members provided significant technical assistance in 2004 to the Pakistani government:

- Industry provided computers, printers and scanners for Pakistani Customs at the Karachi,
 Lahore and Islamabad airports and the Karachi port.
- Industry provided "product identification training" for Customs officers at the Karachi International airport during the week of September 27 (while the second TIFA discussions occurred).
- The record industry conducted "product identification" training for Islamabad Customs and Customs Intelligence on January 10, 2005.
- Motion picture industry representatives will conduct a re-evaluation visit to Karachi and conduct training with Pakistani Customs in February 2005.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Pakistan is generally provided under the Copyright Ordinance, 1962 (as last amended in 2000), which 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.³² Remaining problems in the ordinance include criminal fines that remain far too low to deter piracy, in violation of TRIPS.³³ Criminal penalties must at least be amended to include minimum fines and prison terms. The law also retains a TRIPS-incompatible royalty-free compulsory license to copy published materials which would allow

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³² 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.

³³ Some industries have suggested that the minimum fine must be increased to PKR500,000 (US\$8,420).

institutions such as the National Book Foundation to copy materials without the permission of publishers.³⁴ The new section is a violation of TRIPS and must be deleted. There are 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, the WCT and WPPT, which establish the framework for the protection of copyrighted works in the digital environment, and Pakistan should quickly join 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.

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. 35 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 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. Unfortunately, there has been no progress in 2004 toward passage of an optical disc regulation. IIPA understands that in recent meetings between the U.S. and Pakistani governments, the government of Pakistan represented to the U.S. government that once PIPRO is established, they will consider passage of optical disc legislation. IIPA notes that passage of this desperately needed legislation cannot wait.

Generalized System of Preferences

IIPA is heartened that, as noted above, IIPA's GSP petition against Pakistan (filed in June 2001) was accepted in June 2004 by the GSP Committee of USTR, to evaluate whether Pakistan remains eligible to retain its GSP trade benefits due to poor copyright protection and enforcement. IIPA believes that Pakistan's copyright protection and enforcement system do not meet the criteria in order to qualify for such unilaterally granted trade preferences (i.e., USTR

³⁴ The amendment created Section 36(iii), 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.

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.

must be satisfied that Pakistan meets certain discretionary criteria including providing "adequate and effective protection of intellectual property rights"). In addition to optical disc pirate 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. During the first 11 months of 2004, \$85.6 million of products from Pakistan were imported into the U.S. duty-free, representing 3.22% of Pakistan's total imports into the U.S. ³⁶ Pakistan should not continue to receive such favorable treatment since it fails to meet the discretionary criteria in this U.S. law.

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³⁶ The total trade between January and November 2004 was almost \$2.6 billion. During 2003, the United States imported \$91.9 million worth of products into the United States duty-free, or 3.76% of its total imports to the U.S.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT RUSSIAN FEDERATION

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that the Russian Federation should be designated a Special 301 <u>Priority Foreign Country</u> in 2005¹ and that the United States government should immediately suspend Russia's eligibility for any duty-free trade benefits that it enjoys under the Generalized System of Preferences (GSP) program.²

Russia's copyright piracy problem remains one of the most serious of any country in the world—over \$1.7 billion in losses in 2004. Five years ago, the IIPA filed a petition with the U.S. government for the removal or suspension of Russia's GSP trade preferences, worth hundreds of millions of dollars per year, until the Russian government addressed enforcement deficiencies in a straightforward and effective manner. The copyright industries have lost over \$7 billion in the past eight years in Russia as a result of poor enforcement so it is reasonable to link U.S. trade losses with Russia's trade benefits. We continue to press the U.S. government to use the GSP and other trade measures to get the Russian government to make progress on a piracy problem that has significantly deteriorated during the past few years. In large measure, the explosive growth in piracy is a result of the Russian government's legacy of failing to meet its commitments to improve IPR enforcement.

The Russian government has taken some IPR action during the past five years, mostly focusing on legal reforms, such as passage in 2004 of much-needed improvements in the copyright law. But these steps are meaningless without actual enforcement of old and new laws. The piracy problem has gotten worse and our losses have increased as Russia has become one of the world's largest producers and distributors of illegal optical media material. The production has devastated the domestic market, and exported Russian pirated optical discs have been forensically identified in over 25 countries. This activity must be addressed immediately by the Russian authorities with effective criminal enforcement to stem persistent commercial piracy.

IPR Enforcement Priorities: Russia must make enforcement its highest IPR priority to (1) stem the explosive growth of illegal optical media plants run by organized crime syndicates with widespread distribution networks; and (2) improve overall enforcement, in particular, focusing on deterrent criminal penalties addressing the problem of persistent commercial piracy. It is also important for Russia to make necessary enforcement-targeted legal reforms, including

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¹ As detailed below, the Business Software Alliance (BSA) joins this recommendation solely as a result of the Russian government's failure to take effective action against the broad distribution of counterfeit software over the Internet, primarily through unsolicited e-mails (spam) originating from groups operating in Russia. BSA notes the adoption in July 2004 of positive improvements to the Copyright Law, and recognizes the willingness of Russian law enforcement agencies to take action against channel piracy (i.e., illegal software preloaded on computers sold in the marketplace), not only in the Moscow area, but also in other Russian regions. In addition, BSA is appreciative of progress made in software legalization in the public sector.

² For more details on Russia's Special 301 history, see IIPA's "History" appendix to filing at http://www.iipa.com/pdf/2005SPECIAL301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.html.

further updating the criminal code, the criminal procedure code, and administrative code (as detailed in this and prior reports).

There are seven critical steps that the Russian government must undertake in the next few months to begin to effectively confront optical disc ("OD") piracy:

- Announcing, from the office of the President, that fighting copyright piracy is a
 priority for the country and law enforcement authorities, and instructing the InterMinisterial Commission, headed by the Prime Minister, to deliver reports every
 three months to the President on what steps have been taken to address the
 problem;
- 2. Inspecting, on a regular, unannounced and continuous basis, each of the 34 known OD plants, and immediate closing and seizing the machinery of any found to be used to produce pirate product (some of these steps require additional legislative or regulatory measures);
- 3. Adopting by the Supreme Court a decree setting forth sentencing guidelines for judges—advising the courts to impose deterrent penal sanctions as provided under the penal code as amended (Article 146):
- 4. Immediately taking down websites offering infringing copyright materials, such as allofmp3.com, and the criminally prosecuting of those responsible;
- 5. Pledging to investigate all complaints from copyright owners with respect to the commercial replication, distribution or export of pirate optical discs;
- 6. Initiating investigations into and prosecutions of organized criminal syndicates that control piracy operations in Russia (including operations that export pirate material to markets outside Russia); and
- 7. Introducing, either via executive order or legislation, the necessary modifications of the optical disc licensing regime so that it clearly provides more effective control over the operations of the plants, including the granting of licenses to legal plants and withdrawing and sanctioning of illegal plants; stricter controls on the importation of polycarbonate and machinery; mandatory seizure and destruction of machinery used to produce pirate materials; and the introduction of criminal penalties for the owners of such plants.

These steps will not by themselves resolve the situation, but they would represent significant progress toward more completely addressing the range of continuing problems, both legal and enforcement related. Along with these steps, the Russian police and prosecutors must show significant improvement in the number and disposition of criminal cases brought against commercial pirates (especially the organized criminal enterprises). Separately, the Russian government must ensure that the Supreme Court will notify the judiciary that judges are to impose deterrent criminal penalties.

Russia did make important law reforms in 2004, to bring its laws into compliance with the 1992 Bilateral NTR Trade Agreement and the Berne Convention by, among other things, providing protection of pre-existing works and sound recordings. Now it needs to focus all its energies on enforcement, addressing the problem of piracy in Russia, and the pirated material (especially optical discs) which is made in Russia and exported around the world.

Russia also needs to seriously address the problem of optical disc piracy that has been "discussed" for far too long without meaning action. Nearly ten years ago, IIPA and the U.S. government first identified optical disc plant production as an important emerging problem in Russia, and suggested the need for an enforcement "action plan" to address it, including

legislative reforms. Two optical disc plants were identified in the IIPA's 1996 Special 301 Report. There are now 34 optical disc plants with a total plant capacity of 390 million discs per year of all types of optical discs. The local legitimate market is significantly less than this figure. At all levels of the Russian government there have been promises to address this problem (starting in 1999), including a 2002 pledge, never fulfilled to issue an "action plan"—but to date, there has been no effective action taken against the plants, no comprehensive plan of action issued by the Russian government, and no legislative reforms that have even been introduced to tackle optical disc plants' unauthorized activities.

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 these (mostly unfulfilled) commitments were first made, was included in IIPA's 2003 filing and is available at: http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf

RUSSIAN FEDERATION Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ³											
INDUSTRY	2004		2003		2002		2001		2000		
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	
Motion Pictures	275.0	80%	275.0	75%	250.0	80%	250.0	80%	250.0	90%	
Records & Music	411.9	66%	405.0	64%	371.9	66%	285.0	64%	250.0	70%	
Business Software ⁴	751.0	87%	704.0	87%	370.0	89%	90.6	87%	89.0	88%	
Entertainment Software ⁵	255.8	73%	NA	80%	NA	90%	173.6	90%	NA	94%	
Books	42.0	NA	40.0	NA	40.0	NA	48.0	NA	48.0	NA	
TOTALS	1735.7		1424.0		1031.9		847.2		637.0		

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Illegal Optical Media Production and Distribution

The number of optical disc plants (of music CDs, DVDs, videogames, and VCDs) in Russia manufacturing and distributing products has more than doubled in the last three years; at present, there are at least 34 optical disc plants in operation in Russia and at least 24 of them are known to be producing pirate product. Production capacity has nearly tripled in the past four years as criminal operations have encountered little hindrance in expanding their activities. The

International Intellectual Property Alliance

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

www.iipa.com/pdf/2005spec301methodology.pdf.

BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Russia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$1.104 billion) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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.

Russian government has acknowledged that as many as 18 plants are located on facilities of Russian military-industrial enterprises. As noted, it is estimated that Russia's annual manufacturing capacity now stands at 390 million CDs, despite the fact that the demand for legitimate discs is significantly lower.

Organized criminal enterprises are involved in many aspects of optical disc piracy in Russia, and they run operations in other countries as well. In late 2004, the Russian government announced that 18 plants, including those on military-industrial properties, would report on their activities to the government by the end of 2004. To the best of our knowledge, that meeting was postponed because, IIPA was informed, the government was having a hard time determining the owners of each of the plants. This is precisely why optical disc regulation is needed: to properly license and hold accountable the (licensed) owner of each plant for that plant's activities. The planned (and subsequently postponed) meeting with the government is simply, in our view, a measure of "self-policing" as an information gathering tool, and a dubious one at that. But it is not an enforcement tool. What is needed is government-directed criminal enforcement, not private party action, with actions undertaken by law enforcement authorities. With piracy profits rivaling or exceeding those made through the distribution of illegal drugs, the government must commit itself to cleaning up the criminal syndicates running piracy operations.

It appears that these enterprises are using the Internet as one means of distributing their counterfeit products. The business software industry reports that there is a persistent problem of counterfeit software promoted and sold all over the world using unsolicited e-mail advertisements (spam) and via mail-order. These spam e-mails originate from an organization operating under various names: CD Cheap, OEM CD Shop, OEM Software, and other aliases. Most of the counterfeit products are mailed to consumers from Yekaterinburg and other cities in the Sverdlovsk region. The spam and scam operation is apparently run by a well-connected, sophisticated Russian criminal network. In January and February 2004 two police raids and related arrests were carried out in Yekaterinburg, but the key figures were not touched and there was no noticeable impact on this criminal enterprise. While recognizing some legislative improvements, as well as in other areas of enforcement—especially against hard disc loading, or HDL piracy, which entails loading illegal software onto computers sold in the marketplace—the failure of Russian law enforcement agencies to effectively address online solicitation and sales of counterfeit software led BSA to join in this year's PFC recommendation.

IIPA has documented the problem of optical disc production and distribution in Russia since 1996, when there were two known plants. The nearly ten years of inaction by the government of Russia has allowed the problem to mushroom to today's 34 known plants. The steady growth of optical disc production has been documented (in numerous IIPA filings) as follows: In 1996, there were two known plants; in 1998, three plants; in 1999, six plants with a capacity of 60 million discs; in 2000, ten 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; in 2003, 26 plants, including 5 DVD plants, with a total capacity exceeding 300 million discs; and in 2004, 34 plants, including 8 DVD plants (7 in operation), with a total of 80 lines (excluding the 3 CD-R lines), and a total capacity of 390 million discs per year.

To address optical disc production, the Russian government (formerly the Ministry of Press and Mass Media) used 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. This is why the provisions are inadequate—because even blatantly pirating plants cannot have their

licenses revoked (withdrawn) absent a court order. Another major shortcoming is the lack of deterrent criminal penalties for such violations (e.g., seizure and confiscation of the equipment used for pirate production). In fact, last year, the government noted that four plants did have their licenses "withdrawn", but for other reasons: in one case for the failure to pay the appropriate fees; in the other three cases the plant operators asked that their licenses be withdrawn. Year-end figures on the number of licenses issued and the number of plant inspections conducted in 2004 were unavailable, probably because of the March 2004 government reorganization. Unofficial reports are that as many as 24 licenses were issued and 28 plants "inspected"—but, no surprise inspections occurred. This government reorganization resulted in a loss of enforcement momentum in 2004 when the Ministry of Press and Mass Media was transformed and the new enforcement authority (the federal service known by the acronym FSCLMM—Federal Service for Supervising Compliance with Laws Regarding Mass Communications and the Protection of Cultural Heritage) which took over the licensing function had not—in all of 2004—even begun the process of issuing or suspending operating licenses. After the reorganization, plant inspections and licensing were placed in this new federal service (FSCLMM) within the new and overarching Ministry of Culture (which has none of the experience or staff of the former ministry). Copyright policy was vested in the new Federal Service on Intellectual Property within the Ministry of Education and Science, setting up the potential for bureaucratic wrangling, or at best unclear lines of authority, over IP enforcement.

In short, the existing laws 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. Until better provisions exist, however, the existing laws must be utilized to the fullest extent possible. Draft resolutions and legislation started to circulate at the end of 2004 to change optical disc licensing requirements, including a much-needed proposal to adopt mandatory SID codes, and another to license the importation of polycarbonates used to manufacture optical discs. In the absence of a comprehensive scheme, however, the existing regulations, and any piecemeal additions, must be seen 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 more than three years ago.

Raids and Seizures in 2004

In 2004, there were eight actions taken against optical disc plants, including raids and seizure of illegal materials, according to industry and Russian government reports. While the raiding of plants is a positive development, enforcement problems persist. In almost all cases the plant operators go unscathed by the criminal justice system and/or the plants continue in operation.

In one example, the Economic Crime Police along with the motion picture industry's antipiracy organization, RAPO, conducted a raid on the UVK Stimul plant in Zelenograd on June 21, 2004 (this same plant was raided in April 2003). The plant had 2 DVD lines and one CD line in operation; a total of 37,000 pirate CDs and DVDs, and 8 stampers, were seized. The plant however continued to operate, as it did after the raid in 2003, and is still in operation today, reportedly working 24 hours a day. On January 14, 2005, a Moscow court imposed a suspended one-year prison sentence on the plant's chief technician, after he confessed to ordering the plant's personnel to replicate pirate DVDs. The court apparently heard the case under a "special procedure" in the absence of RAPO because the accused had agreed to plead guilty. While the result in this case is highly disappointing, it is nevertheless the first time that a Russian court has convicted <u>anyone</u> for replicating pirate DVDs. RAPO now plans to seek the immediate suspension by the Ministry of Culture of the plant's replicating license.

Other plants raided in 2004 included: the Puskino plant (3 DVD lines, seizing 25,000 pirate DVDs and computer games discs, and 800 stampers) situated on a government defense facility; the Samara plant (2 DVD lines); the Koroliov plant (2 DVD lines and one CD line); and 2 CD plants engaged in producing illegal music CDs. Raids against the Rufon/Card Media plant (in April and August 2004) have not yet resulted in the initiation of a criminal case pending further investigation by the local prosecutor's office. Following raids in cooperation with the recording industry (IFPI), the prosecutor's office did initiate criminal cases against two replication plants: the "TINE-Invest/Data Media" plant at which 35,000 DVDs and CDs were seized in April 2004 and an additional 22,721 CDs in June 2004; and the "Rubin" plant, at which 30,000 CDs were seized. Investigations are still ongoing on the activities of both plants. Separately, a criminal case against the plant "Synograph" is being considered by the Moscow Regional Noginsk City Court, and civil proceedings against "Russobit" and "ROFF Technologies" are pending before the Moscow Regional Arbitration Court.

In all of these cases, it is reported that the plants remain in operation. While criminal investigations proceed in some, but not even all instances—and with extensive delays—the operators and owners of the plants remain unpunished. In the case of the Koroliov plant that was raided on April 30, 2004, the plant continued to work illegally. RAPO and the Economic Crime Police have since intercepted trucks full of illegal DVDs leaving the plant. The plant operator pleaded guilty in December 2004 to replicating pirate product and is awaiting a sentencing hearing in February 2005. Not only should a deterrent penalty be meted out, but the court needs to order the destruction of the plant's illegal lines, as well as the closure of the plant's operations until and unless it can be inspected and licensed for legal operation.

IFPI has cooperated with 24 total cases in the past two years against optical disc producers, large warehouses, and distributors. In 21 out of the 24 cases, there has been no resolution, that is, no prosecution of the operators of illegal CD plants, as investigations have dragged on. In the other three cases, the pirate CDs were destroyed, but no sentences were handed down. The only exception to this pattern (which has been true for years) was in June 2002 when the Disc Press MSK plant (raided in September 1999) was finally closed and a Zelenograd court handed down 4-year prison sentences to two operators of the plant. In February 2004, there was a one-year conditional sentence given to a manager of the Zelenograd plant which was raided in December 2002, resulting in the seizure of 234,493 pirate CDs (over 59,000 were music CDs). The more typical case is that of the Synograph plant, raided in October 2000. There was a four year criminal investigation aimed at the director of the plant; a court hearing is scheduled for early 2005, and the plant is still in operation.

The Samara plant raid, conducted by the Economic Crime Police in April 2004, is another example of the frustrations of poor enforcement. That plant was found to be a pirate DVD plant during a routine tax inspection at a cement factory; the police discovered two DVD lines and contacted RAPO. RAPO later uncovered over 7,000 pirate DVDs and 30 stampers at the plant. However, although the plant director was questioned and a criminal prosecution prepared, the local prosecutor closed the criminal case twice in 2004 (it was reopened the first time after a regional prosecutor ordered the case re-opened). The plant, without a license, remains in operation. The local prosecutor ordered the seized stampers to be returned to the plant operator, and RAPO has again filed a protest with the prosecutor to re-open the case.

In August 2004, the Moscow Economic Crime Police, RAPO, and IFPI raided a warehouse located on a military base in Odintzovo, near Moscow and uncovered 1 million pirate discs. A nearby second warehouse was found that contained an additional 1.5 million pirate discs. The discs included DVDs, VCDs, and MPEG-4 CD-ROMs containing movies, as well as music and interactive games. A criminal investigation has been initiated, but no criminal case has been opened yet.

In short, the copyright industries can report some successful raids and seizures in 2004, but these activities have not resulted in any appreciable reduction in the amount of pirate optical disc product being produced in Russia, nor in meaningful criminal convictions. Pirate manufacture continues unabated and the pirates are getting more entrenched.

To address retail piracy, two years ago, the government of Russia adopted a legal ban on the street sales of audio and audiovisual products, for example, at kiosks, especially in Moscow. 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 2004, 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 generally followed up by prosecutors and the courts. The pattern of successful raids without successful prosecutions (with a few exceptions) is a recurring problem. In addition, it is estimated that up to 70% of pirated product seized in raids in Russia finds its way back into the market through either the Veteran's Fund or the Trade Houses in the Ministry of Justice, which both claim the right to sell pirate discs on the open market. The government of Russia must put a stop to these practices.

In total, major warehouse raids have been successful in the total numbers of DVDs and CDs seized. As in recent years, about half of the DVDs contained two feature films. The film industry's anti-piracy organization, RAPO, seized over 4.75 million pirate DVDs in raids on warehouses and outlets across Russia in 2004; in 2003, this number was approximately 1.4 million DVDs.

In 2004, the recording industry (IFPI) assisted in the investigation of, 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 (mainly as administrative proceedings) and even then, the disposition was disappointing because the operators received neither deterrent penalties nor imprisonment. A total of 1,530 police raids (on different levels in various regions) were carried out with the participation of the Russian experts (IFPI). These resulted in the seizure of: 2,086,000 CDs; 17,600 cassettes; 28,400 CD-ROMs; 209,500 music DVDs; 130 stampers; 74 units of recording equipment; 656,000 CD inlays (the printed material for the jewel boxes); 126,000 blank CD-Rs; and 11,200 music VHS tapes.

In 2004, the business software industries focused their enforcement activities on the prevention of hard disc loading ("HDL piracy") by computer resellers, and on the illegal use of software by corporate end-users ("end-user piracy"). The business software industry is aware of approximately 50 raids on hard disc loading operations, and approximately 25 end-user raids conducted in various parts of Russia. Regarding resellers, recent signs of police action—

especially in Moscow and the surrounding region—are encouraging, even though to date only a small number of these cases have resulted in criminal convictions. Regarding end-user enforcement, there are persistent problems, especially prosecutorial procedures and delays. For example, the difficulty in proving intent and the inability to impose criminal liability on legal entities under Russian law are two obstacles to enforcement. Consequently, the identification and prosecution of the specific individuals making actual installations is needed—a very tough enforcement standard. As a result, most end-user cases end up treated 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 the key piracy operations involved in the production, distribution and export of pirated entertainment software products. These syndicates are destroying not only the Russian market, but also markets in many other countries. These same syndicates are believed to control distribution of pirate entertainment software products in Russia, Ukraine, and much of Eastern Europe as well. entertainment software products, primarily for play on personal computers, are shipped from Russia to Poland, Latvia, Lithuania and other neighboring countries. While domestic production is still high, pirated materials produced in Ukraine are also being shipped through the Russian markets. Pirated cartridge-based video games in Russia are imported from China, and some of the pirated console game material is imported from Malaysia. Piracy at Internet cafés is also problematic; of the 7,500 cafés in the country, only 10% are licensed, with the remainder using either pirated or unlicensed product. Flea market-type venues are increasing in the country (it is estimated that there are about 50,000 in the country); this is the primary outlet for pirated video games in the country.

The key issue for the entertainment software industry in Russia is organized criminal syndicate involvement. There are a few syndicates that control the entire market for pirated optical disc entertainment software products, both domestically and for export. Shutting down these syndicates will significantly impact the entertainment software piracy problem. Furthermore, not only do these syndicates produce, distribute and export, they are also trying to hijack the trademarks of ESA member companies by attempting to record the company trademarks themselves, and using the false recordations to exploit pirated copies of the games. It is imperative that the government begin to address in earnest criminal syndicate involvement in piracy.

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 operators of optical disc plants and crime syndicates.

Instead, Russia continues to mete out low penalties and only a small number of jail sentences for piracy.

The motion picture industry reports that with 90% piracy rates for DVDs, sales of legitimate DVDs have fallen back to 1999 levels, despite significant increases in the number of households with DVD players as well as efforts by foreign producers to quickly get legitimate locally replicated DVDs into the Russian market. Evidence that piracy is negatively impacting home video sell-through revenues is revealed by comparing box office growth with home video growth. Between 2000 and 2003, box office spending in Russia rose by a cumulative 438%, compared with only 75% cumulative growth for home video sell-through over the same period. This runs counter to the trend in virtually every other country where the motion picture industry does business, where home video grew much faster than box office revenue during the last three years. Television piracy, especially outside of Moscow, remains a problem, and cable piracy abuses outside of Moscow are rampant.

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. New pirate markets are prospering on the outskirts of Moscow (for example, Tsaritsinio, Mitino, etc.). A major raid was undertaken by the police and RAPO against the Tsaritsinio market on January 28, 2005 (netting 67,000 discs and temporarily closing 52 shops in the market); five criminal investigations have commenced with more cases expected. Audiocassette piracy levels remain very high (above 68%), as well as CD piracy (over 65%), despite major raiding activity and the expenditure of major resources by IFPI. Overall losses in the recording industry were \$411.9 million in 2004.

The level of piracy for entertainment software is at 73% 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, the majority of illegal material is produced in Russia, though there are some copies imported from Ukraine. Cartridge-based video games (like Nintendo Game Boy products) continue to be imported from Asia, particularly China. 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. There are four principal criminal syndicates which control the production and distribution of pirated entertainment software in Russia, and the scope of their operations do not appear to have diminished. The 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 including the markets in Poland and Latvia, and that they also have ties with syndicates operating in Ukraine. One ESA company reports that in 2004, one of these piracy syndicates attempted to register one of the company's trademarks for a videogame product that was being pirated by the syndicate. Given these circumstances, it is imperative to use the criminal code against organized criminal syndicates, and that the Russian government focus its attention on a course of action to fight piracy by the criminal syndicates.

Book piracy continues to hurt the publishing industry in Russia. Although increased licensing of legitimate product has sporadically resulted in some improvement in the piracy rates,

significant and lasting improvement has remained elusive. While bestsellers were the target of the pirates in the 1990s, popular items for pirates now also include an array of reference works and textbooks, increasingly a large market in Russia as the penetration of English-language materials in the market grows. Unlicensed imports of pirated reprints from neighboring countries, and pirated reference books and medical texts, still abound. Illegal commercial photocopying is also a problem, especially in the academic sector.

Publishers are also experiencing a degree of Internet piracy, mostly in the form of unlicensed translations of fiction bestsellers available for download on websites in Russia. This phenomenon is appearing in a number of countries worldwide, but seems to be especially problematic in Russia. The "hidden print run" and "overrun" problems remain, where printers of legitimate editions deliver additional unauthorized copies to unauthorized distributors before delivering books to legitimate publishers. The Association of American Publishers (AAP) estimates losses in Russia in 2004 at \$42 million.

In 2004, the Russian government, including certain senior members of the Putin Administration, continued to note a "pricing" issue with IIPA which raises serious questions about their commitment to fighting piracy. There have been a number of reports in which Russian officials have suggested that the prices for legitimate goods are to blame for the piracy problem. This comment reflects both an ignorance of what is happening in the marketplace, and a misunderstanding of the nature of the problem that we confront in Russia. The criminal enterprises manufacturing and distributing pirate product are largely servicing foreign markets (at least for music and film), making the Russian price for legitimate materials wholly irrelevant to their motivation or profitability. As noted earlier, Russian manufactured product has been found in over 25 countries over the past year. In addition, existing efforts by certain industries to offer low cost Russian editions have not had the effect of reducing piracy rates. The record industry, for example, is already manufacturing locally, and sells legitimate copies for an average price of \$6 to \$8 dollars—a price that is extremely low, not just in relation to prices for music elsewhere, but also with respect to other consumer goods sold in Russia. The motion picture producers have also lowered the prices of DVDs offered in certain Russian markets to about \$10. Similarly, entertainment software products are already reasonably priced. It is not the price of legitimate product that is creating opportunities for piracy—it is the opportunity for easy profits that has brought criminal enterprises into this business, and Russia must stop offering such excuses for its inaction.

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. Although legislative efforts were undertaken (in 2003) to "fix" the Criminal Code, implementation of these provisions remains troubling.

Four 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 and software industries, as well as some of the entertainment software companies.

Tracking cases for over five years, we note that less than 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 heard were the offenders punished at all—often with small fines, confiscation of pirate products, or suspended sentences (even this is very rare)—and, according to Russian statistics provided to IIPA, only 1% of those convicted of crimes were sentenced to any jail time and fewer than 25% were fined (most of these were not even deterrent fines).

In August 2004, MPA was able to get its first-ever unsuspended prison sentence for a pirate in Russia; the defendant was a video shop owner found in possession of a DVD burner and hundreds of pirate DVDs, DVD-Rs and VHS cassettes. The defendant was sentenced to three years and two months in prison; this was the second time this defendant had been convicted (he received a suspended sentence of two years in the prior case).

The business software industry (BSA) reports some encouraging enforcement developments in 2004. The police did undertake several criminal actions against illegal resellers (i.e., hard disk loaders) in 2004, and the Moscow criminal courts sentenced hard disk loaders. The most notable of these sentences was a first-ever unsuspended imprisonment sentence (six months) for a hard disk loader in February 2004. In addition, a number of other cases resulted in one or two year suspended sentences, with one or two years of probation. The Russian criminal courts issued several criminal judgments against smaller resellers (selling pirate CD-Rs) with sentences that included, for example, a two year suspended sentence plus two years of probation. In some cases, the criminal courts were also able to adjudicate the civil matter involved, making the process more cost efficient and expeditious. consistent problems with end-user enforcement, however, due to little or no prosecutorial cooperation. Also, although the business software piracy level is estimated to be well over 87% outside of Moscow, the police there have only recently started to take action against illegal resellers. Finally, Internet piracy and piracy by organized crime networks are growing problems for the software industry, especially in the face of little prosecutorial assistance and huge procedural hurdles in the criminal courts.

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 numerous administrative raids. 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 2004, IFPI reported that 1,300 raids against audio pirates were undertaken, many of which resulted in administrative actions. The average administrative fine imposed was about US\$50 per case; this is obviously not a deterrent penalty. RAPO reported that it is able to average nearly ten administrative court decisions a week against pirate retailers that order illegal product to be confiscated and that impose small fines (on average, less than 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

In 2004, as in years past, 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 who install unlicensed copies of business software onto sold computers as well as against corporate endusers that used illegal copies of software in their business operations. However, the remaining deficiencies in the copyright law—including the unclear status of temporary copies—make it very difficult to apply civil remedies in end-user piracy cases. Also, the unfortunate delay (until September 2006) in implementing the new copyright law amendment on the making available right seriously hinders enforcement actions against certain types of Internet piracy.

In 2003, the recording industry (IFPI) commenced civil claims against optical disc plants in Russia, seeking damages of millions of dollars, a prohibition against production of the pirate CD titles named in the suits, and confiscation of the machinery and equipment used by the plants. This was the first time that a civil cause of action was commenced in Russia against an optical disc plant. IFPI was being pressed to do so by the Russian government, which was convinced that civil procedures would prove effective. There is now a total of 16 IFPI civil claims lodged against two plants—Russobit and Roff Technologies. Instead of showing any effectiveness in the enforcement regime of Russia, those cases have been bogged down with procedural hurdles that will likely mean that there will be either no resolution, or a total vindication of the plant operators. That would mean the absolute failure of civil proceedings in these types of cases.

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 should provide them with the necessary resources to allow effective enforcement. There are numerous examples of Russian made material being seized, not by Russian authorities who failed to detect illegal product, but by enforcement authorities in other countries. To use Poland as an example because it is a major marketplace for Russian-made material, the local Polish anti-piracy organization for the film industry (FOTA) seized over 76,000 Russian-made pirate DVDs through September 2004, compared with 17,000 in all of 2002. Other destinations of Russian pirate DVDs include Estonia, Finland, Ukraine, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Israel, Turkey, and for the first time (in 2004), the UK. The music industry reports that Russian-made pirate CDs are exported to as many as 25 countries, including many of those noted above. The entertainment software industry reports that Russian sourced pirate video games are shipped into Poland, Latvia, Lithuania and Israel.

Russian Government Efforts to Address Piracy

In 2002, the Russian government established an Inter-ministerial Commission to combat piracy, which was, at least in theory, a positive step. The commission meets quarterly and is headed by the Prime Minister. Unfortunately, the government reorganization in 2004 stalled much of the important enforcement action that the commission needed to undertake. To date, the commission has taken small steps by focusing on legislative reforms more than on truly combating optical disc production and retail piracy. The commission needs to get more decisive and focused on these key enforcement objectives including stopping the production of optical

media on military-industrial properties and at the other facilities; consideration of more effective optical media laws; curtailing piracy by street vendors and kiosks; and revisiting the question of a federal stamp for optical disc products.

The Business Software Alliance (BSA) reports on the government's increased focus on the legal protection of software. Especially encouraging are steps towards ensuring the use of licensed software within the public sector. In September 2004, the Russian government adopted a policy statement for the use of information technologies by federal governmental agencies through 2010. Among other things, the policy statement declares the need to use only licensed software as part of overall government management strategies, and sets forth a procedure for an annual report on the use of legal software by governmental agencies (including a factual listing of any copyright infringement by each agency). BSA appreciates this progress.

GENERALIZED SYSTEM OF PREFERENCES PROGRAM

Even with piracy rates and losses among the highest in the world, Russia continues to receive trade benefits from the U.S. government. 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 held in March 2001). The U.S. government now must decide whether to fully or partially suspend GSP benefits for Russia. In 2003, \$429.8 million worth of Russia's imports to the United States benefited from the GSP program. During the first 11 months of 2004, \$515.3 million worth of Russian goods 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 2004 amounted to well over \$1.7 billion. The IIPA recommends that Russia should immediately lose its eligibility for GSP benefits until it 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.⁶ These reforms include the need to adopt:

- Proper optical media regulations to address (with criminal sanctions) the production and distribution of optical discs and the equipment and machinery used to produce them;
- Immediate regulation of the use of copyright materials on the Internet;
- Criminal code provisions for the confiscation of equipment used to make illegal copyright materials:
- 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);

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⁶ 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 ease the role of collecting societies—which are overly regulated (and, in some cases, mandatory).

Further amendments to the criminal code may be needed if the new Article 146, as implemented, remains a problem. Amendments to the criminal code (adopted in 2003) provided *ex officio* authority to allow prosecutors, but not the police, to commence and investigate certain IPR criminal cases. This resulted from the Article 146 amendment (although the division of authority between police and prosecutors is set out in the corresponding criminal procedure code), which made the prosecution of copyright-related cases a "public" matter, meaning it no longer requires a formal complaint from the rightsholder (although as a matter of practice, such a complaint is still necessary).

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, but 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 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 2005. 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 at http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf on 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 those plants operating on government soil. In addition, criminal enforcement against known commercial pirates must be undertaken. Some of the copyright industries are further frustrated that

enforcement authorities have not worked cooperatively with rightsholders in targeting known commercial pirates for enforcement action.

Copyright Law Amendments

At long last, in 2004, Russia adopted copyright amendments including the protection for pre-existing works (prior to 1973) and sound recordings (prior to 1995). The copyright amendments were also intended to implement (for eventual accession) the WIPO digital treaties. Unfortunately, one key provision, the exclusive right of making available (and right of communication to the public), although adopted, was delayed until September 1, 2006. The new right would be a particularly useful enforcement tool for both authors and producers of phonograms. This short-sighted step means that effective enforcement of certain types of digital piracy will face unnecessary legal obstacles until at least the last half of 2006.

Other deficiencies in the copyright law (detailed in earlier IIPA reports) remain, such as overly broad private copying exceptions, weak provisions on technological protection measures (because they are linked to copyright infringement), and on collective management issues. For example, the poorly worded provisions in Article 45 permit collective management organizations to claim representation of the rights of foreign copyright owners. This provision has been used, totally contrary to logic, by a local organization in St. Petersburg to deny motion picture producers (MPA) their own rights against pirated copies of their works, thus allowing piracy to flourish. The Inter-Ministerial Commission was asked to study the problems of collective rights management in Russia, but preliminary discussion on this matter in December 2004 did not result in any actual changes.

Criminal Procedure and Criminal Code Amendments

In 2003 the Russian Criminal Code Article 146 (pertaining to infringement of copyright and neighboring rights), was finally amended to fix the previously ambiguous "grave harm" standard. The amendments (effective December 11, 2003) increased the fixed threshold amount (i.e., value). 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 linked to multiples of the minimum wage, with fixed amounts.

Article 146 provides for fines of up to 250,000 rubles (or ~US\$8,800), 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 constitute a "significant amount." 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 rubles for the lowest level criminal violation (about US\$1,775), and 250,000 rubles for the most serious criminal violation (about US\$8,800). This means that any activity below US\$1,775 cannot be treated as a criminal matter. The amendments unfortunately leave almost all retail and some wholesale activities outside the scope of criminal prosecution.

Some of the copyright industries remain concerned that the threshold in the newly adopted Article 146 will thus fail to give the police the necessary tools when they are conducting initial raids, and will complicate anti-piracy campaigns as authorities must sift through determinations concerning 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.

Last, there are now efforts underway to revise Article 146 to add criminal penalties for illegal acts with respect to technological protection measures and rights management information. The IIPA supports adoption of such criminal penalties necessary to enforce against digital piracy.

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 for all types of actions. including criminal, civil and arbitrage proceedings. In 2004, amendments were made to Article 49 of the copyright law, but not to the criminal code or the criminal procedure code, to grant police a legal basis to confiscate infringing goods, materials, and the equipment used to produce such items. The current Criminal Code (Article 146) does permit the confiscation and destruction of pirate and counterfeit goods—that is, 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. Now the copyright law makes clear that copies as well as "materials and equipment used for the reproduction of counterfeit copies of works or phonograms and other tools" used to violate the criminal law can be confiscated. However, local counsel advises that these new provisions in the copyright law will not be used in criminal cases, much less in civil or arbitrage cases, because the provisions are *not* provided for in the criminal code. Thus, as a practical matter "machinery" used to create illegal copies cannot be confiscated in criminal A provision in the Copyright Law (Article 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. Last, the available remedies are not available against legal entities, so they will prove useless in criminal enforcement actions.

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 Criminal Procedure Code 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 146, 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

WIPO Treaties; Electronic Commerce; Notice and Takedown Procedures: As a result of the explosive growth of Internet piracy in Russia, the Russian government needs to accelerate its accession to the WIPO digital treaties (WCT and WPPT). The Copyright Law

amendments adopted in July 2004 have moved Russia closer to implementation of and therefore accession to the treaties. Unfortunately, the legislation postponed until September 1, 2006, the effective date of a key provision in the copyright law—an exclusive right of making available applicable for all authors (communication to the public right consistent with Art. 8 of the WCT) and for phonogram producers (consistent with Art. 14 of the WPPT). Russia should accede to the digital treaties as quickly as possible, and should move up the effective date of this provision. Swift and complete implementation of these treaties 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 may be considered in 2005. 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.

Civil Procedure Code Amendments: A major revision of the Civil Procedure Code (effective February 1, 2003) set the rules for initiating and examining civil cases, including disputes pertaining to copyright and neighboring rights infringements. But unfortunately, the code still 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 to date one time in actual practice (although the case was cited by the High Arbitration Court as a de-facto precedent); overall, the procedure remains a difficult and onerous proposition. A major contributor to the problem is that the judges who must impose it lack experience. The overall inefficiencies of the court-mandated bailiff system also are problematic.

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 revised code on administrative misdemeanors went into force allowing 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 to 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 in other cases of administrative misdemeanors. Amendments to the code are set for consideration by the *Duma* in early 2005. IIPA understands the current draft would permit a two month administrative investigation, which, if adopted, would be satisfactory for effective enforcement. IIPA urges its adoption.

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: 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. Effective January 1, 2004, the Moscow City government required a city identification system. Several alternative systems, including a federal stamp, and a self-regulating system have since been under consideration (most recently at the December 2004 Inter-Ministerial Commission meeting). 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 thus 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.

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 2005 SPECIAL 301 REPORT UKRAINE

EXECUTIVE SUMMARY¹

Special 301 Recommendation: IIPA recommends that Ukraine remain a Special 301 Priority Foreign Country, and, as a consequence, that the current trade sanctions and suspension of Ukraine's duty-free trade benefits under the Generalized System of Preferences ("GSP") continue in force, until Ukraine fulfills its obligations under the Joint Action Plan signed by then-President Clinton and then-President Kuchma in 2000. In the past two years, implementation of the Joint Action Plan has been ignored by the Ukraine government, rather than treated as a priority. Instead the Ukraine government has sought to end the U.S. sanctions and GSP suspension through diplomatic means while it has failed to adopt the promised legislative reforms that are needed to end optical disc piracy in Ukraine and permit the development of a healthy legitimate industry. 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 in order to terminate the PFC designation and the trade sanctions (and to restore GSP benefits). required actions include adoption of the necessary criminal enforcement tools as well. situation in Ukraine the past two years has been static—with numerous failed attempts to remedy the shortcomings of the 2002 law. 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). In addition, Ukraine's overall legal system for the protection of copyright and the related enforcement regime falls short of compliance with the TRIPS obligations of the World Trade Organization. Until its legal regime is remedied and Ukraine is fully compliant with TRIPS, Ukraine should be prevented from accession to the WTO.

Ukraine has recently undergone a dramatic regime change. The copyright industries are encouraged by the perceived willingness of the new President of Ukraine to develop a more open trading policy with its main Western trading partners, to implement measures to rid the country of corruption, and to eliminate other obstacles that have discouraged foreign investment and economic development. The coming year will show whether the new regime is capable of dealing with the challenge posed by well-organized and well-connected pirated criminal syndicates that control the illegal production and distribution of copyrighted materials.

Overview of Key Problems: The three highest IP priorities that the Ukraine government must address are: (1) the inadequate regulation and ineffective enforcement of optical media production and distribution facilities, that, for example, permit optical disc plants to continue operating despite strong evidence of on-going large-scale piracy; (2) the complete absence of criminal prosecutions and deterrent sentencing coupled with 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.

Copyright 2005 International Intellectual Property Alliance

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.html.

Actions that Need to be Taken by the Government of Ukraine

In order to reinstate GSP benefits and to end the trade sanctions, the Ukrainian government must, after years of delay, take the following six steps:

- 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;
- 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 widespread practice of issuing holograms to bad-acting 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 in the civil procedure code to facilitate better enforcement.

COPYRIGHT ENFORCEMENT

Amendments necessary to 2002 Optical Media Law to properly regulate the production and distribution of optical discs

In 2000, 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). The then-existing optical disc problem was not adequately addressed by the 2000 legislation, nor by the flawed Optical Media Law introduced in 2002. More recently, the problem has been further complicated: CD-R production by plants and pirates has become a coordinated effort where the plants sell discs (often with pre-printed artwork) to pirates who subsequently illegally burn the music onto discs for public sale. This is a growing problem in Ukraine.

In addition to CD-R production, piracy by organized criminal syndicates continues to flourish because of Ukraine's weak criminal enforcement regime. The legal reforms adopted in 2000 and 2002 have fallen short of the comprehensive steps necessary for effective enforcement, and do not meet the commitments the Ukraine government made to the U.S. government. It was unfortunate that the Verkhovna Rada rejected the government of Ukraine's proposal for proper optical disc regulation and instead adopted a flawed law in 2002 which ultimately resulted in the

imposition of U.S. trade sanctions and suspension of GSP benefits. It is further disappointing that the Rada has, since 2002, failed to rectify the problem.

The Ukraine government needs to take the six steps outlined above in order to end the sanctions and restore GSP in compliance with the 2000 Action Plan. For three years, the IIPA and its members have spelled out the details of what this compliance looks like in numerous filings. 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

As late as last month, on January 13, 2005, yet another bill (Bill # 5520) to remedy the flawed system was rejected by the Rada. In several previous attempts at passage, the pirates have added provisions to the so-called "remedy" legislation that would make the existing legal regime even weaker. As one example, in May 2004, a proposal was circulated that would have fined the rightholders who requested a plant search if such a search revealed no infringing materials. This is preposterous. Ukraine agreed to adopt a comprehensive plant inspection and plant licensing regime to stop piracy, not a system that penalizes the very rightholders who are losing millions as the result of piracy. On the other hand, an appropriately crafted legislative fix (Bill #3676) did not even make it past the first reading in the Rada when it was considered, and rejected, on February 17, 2004. Another version (Bill #5182) that would also have met Ukraine's obligations was also rejected in 2004.

It is also true, however, that over the past three years optical disc production has slowed in Ukraine. In 2003, a fourth plant (formerly Lazer-Inform, now Replitec) came on line. In February 2005, the copyright industries were made aware of a fifth plant in Ukraine, Odyssey Disc, capable of producing CDs and DVDs. There is the ongoing possibility that others will follow now that the pirates understand 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 (thus, pirates are often tipped off and are able to dispose of contraband in advance of an inspection); (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). Rightholders' organizations should get access to production samples of optical discs via SDIP so that they can properly conduct anti-piracy investigations. To date, SDIP has failed to cooperate, which has further frustrated anti-piracy activity.

Although overall optical disc production has declined somewhat, 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 CDs and DVDs dominate the market in Ukraine and are sold in markets, kiosks and street stalls; one example is the Petrovka market in Kiev, which has close to 300 stalls openly selling pirate material.

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., IIPA's Ukraine filing.

In 2004, four plants remained in operation in Ukraine, albeit at less capacity than at their peak five years ago. Even the government acknowledges that illegal production continues. The slowdown in overall production by the pirates is understandable. It took almost two years of debate for the Ukraine Parliament to adopt the flawed 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. Further, the government of Ukraine has not effectively inspected, licensed and/or sanctioned the few plants that are in operation. For example, the ineffective inspection of the Rostok (Kiev) plant in mid-2004 revealed only that the plant operators anticipated a search, and the search did not produce the type of professional samples and evidence necessary to properly conduct an investigation into the alleged illegal activities of that plant. The government of Ukraine needs to do a better job both on the ground and legislatively.

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 were 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 and deterrent punishments for the individuals infringing these regulations; and to monitor the importation of raw materials (optical-grade polycarbonate) used in the production of CDs, DVDs and CD-ROMs (and other optical disc media). All of the plants would be required to adopt source identification (SID) codes on all molds and mastering equipment to deter plants from infringing production of optical discs.

There are numerous 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, in 2003, the Noiprox plant (in L'viv) invited IFPI representatives to the plant to inspect the application of the code on their equipment.

An example of the failed system has been the regulation of the Rostok (Kiev) plant. After producing CD-Rs without SID codes for more than a year, the plant operators decided to produce blank CD-Rs with a SID code. But there are no legal obligations to monitor molds (a major shortcoming of the licensing law). As a result, the copyright industries suspected Rostok of using a coded mold for a single production run, and any number of other molds for undeclared production of CD-Rs—all as a result of other regulatory shortcomings including the lack of checks on polycarbonate imports/use and production records. Such CD-Rs would then subsequently enter the pirate market with copyrighted music and other works recorded on these discs for sale in the Ukraine market. In addition, without a comprehensive set of samples from the Ukrainian plants' lines and molds there can be no effective evidence of wrongdoing. In July 2004 a search was undertaken of the Rostok plant by the Ukraine government. However, it was so poorly executed that it yielded no results. First, the inspection was not a surprise inspection, contrary to

the government's claims; second, it was only carried out by inspectors from the SDIP, with no law enforcement agency present during the inspection; third, it did not yield any evidence of plant operations that could be used in a professional investigation; finally, as a result of the failed inspection, the plant was able to continue its operations.

SDIP, despite having access to a wealth of detailed and well-documented evidence of large-scale pirate production at this plant, simply concluded that no illegal activity had taken place. This demonstrates once more that (under the former regime in Ukraine) the relevant state bodies were not given a clear political message from the highest levels, that strong and truly effective measures needed to be undertaken to definitively root out pirate production. It is hoped that the new government will make IPR enforcement a priority, and take plant inspections and licensing much more seriously.

In 2003, the motion picture industry reported that Rostok had added a DVD line to its operations, although there was no clear evidence it was then or is now replicating pirate product. The July 2004 inspection of the plant proved inconclusive because SDIP concluded that the DVD line was "disabled." But as further evidence of the failed licensing system, SDIP was not aware, until told by private industry, 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 such a line. There is evidence now that another DVD line is in operation at the same plant—but by an operating company that "leases" space from the Rostok plant—further obfuscating the lines of ownership and responsibility for optical disc operations. In short, SDIP failed in its investigation of this matter, both before and after the July 2004 inspection. This example illustrates both the flawed licensing scheme and the failure of on-the-ground optical disc regulations in practice.

The key remaining optical disc plant enforcement problems

- 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;
- A database needs to be established by the 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 estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the current total production capacity of optical media material is around 50 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 five plants means that production of even more unauthorized material is highly likely at any time, as evidenced by the addition of new lines at existing plants (e.g., Rostok) without proper licenses. Because the plants are not properly regulated, existing plants can ramp up their illegal operations to former levels and new plants can come on line.

In the past two years, because of the failure of legal authorities to control and, where necessary, prevent the import or export of equipment suspected of having been used in illegal production, two of the Ukraine plants that suspended their operations were able to move their production lines to Belarus, Russia, and Bulgaria, and then move back into Ukraine. The plants that moved out of the country simply recommenced pirate production, utilizing their traditional distribution routes and channels in Ukraine. One of the lines that moved to Bulgaria returned to Ukraine in 2003; IFPI alerted the authorities of its return at the time without enforcement action (to date). 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. In addition, Ukrainian nationals suspected of being part of organized crime syndicates have been arrested recently in Portugal and Thailand.

A fifth plant in Ukraine was recently disclosed (February 2005) when the plant, Odyssey Disc, made an application to Philips Electronics BV for a source identification (SID) code (Philips is responsible for allocation of SID codes). The plant is capable of producing both CDs and DVDs, and has a total annual capacity of at least 7.5 million discs. The SDIP seems to be completely unaware of the existence of this new plant and has not been able to provide any information on its operations. This is yet another example of SDIP's inability to reliably monitor, let alone regulate, optical disc production in Ukraine.

In short, the government of Ukraine has failed to use its existing criminal enforcement tools against illegal producers and distributors of optical media material. Much more work is needed. The government needs to re-appoint the Economic Crime Division within the Ministry of the Interior as the prime unit responsible for fighting IPR crimes. It must speed up and simplify the prosecution of IPR crimes, especially against organized syndicates. And it must instruct the courts to hand down deterrent penalties for IPR crimes.

Another misstep that has undercut effective enforcement was the adoption of the controversial Hologram Sticker law in 2000. The inconsistent and haphazard 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. The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; DVDs are \$20 compared to the pirate price of \$4) and printing materials in Cyrillic for local distribution. However, legitimate rightholders cannot compete against the pirates without effective enforcement by the Ukraine government to stop piracy, and to stop the misuse of the hologram system.

Entertainment software companies are also experiencing problems with the hologram stickering program. One member company of the Entertainment Software Association (ESA) only recently entered the market; yet, it found that over 70 labels/stickers had already been issued for its entertainment software products—all to pirates selling illegal versions of their games. In addition, the pirates appear to have convinced the government that labels or stickers should be issued on a "genre" basis, rather than just on a single title basis. This "genre" rather than per title labeling means that a slew of entertainment software gets the labels all at once, rather than having to meet the more rigorous application (and proof) requirements for a label for each particular title. With the widespread use of false documents to obtain "genre" stickers, pirates are not only obtaining these stickers, but are getting a toehold in the unauthorized distribution network within Ukraine and in neighboring countries.

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 early 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 a 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. However, the Business Software Alliance (BSA) reports that the registry, to date, has not fulfilled its intended function to distinguish legal software manufacturers/distributors from illegal ones.

The full 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 the 2003 Ukraine report available on the IIPA website at http://www.iipa.com/rbc/2003/2003SPEC301UKRAINE.pdf at page 5.

A summary of the deficiencies of the 2002 Optical Disc (OD) Law

- 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 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 time-consuming
 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 effective provisions for the confiscation or destruction of discs, material or equipment (beyond Article 9.4 of the Optical Disc Law);
- It has weak administrative and criminal penalties (a high threshold bars the use of the criminal penalties in many cases).

Lack of effective criminal and border enforcement, and other enforcement deficiencies

In addition to the optical media law, two additional key enforcement tools are needed: (1) enforcement efforts targeted at the criminal syndicates (and administrative remedies directed against smaller scale activities); and (2) strong border enforcement measures to stop the export and transshipment of illegal optical media.

In 2004, there were encouraging signs of increased and geographically wider 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 effective police action undertaken against large-scale commercial piracy grows. There remain serious concerns over the very few deterrent prosecutions or sentences by the courts, which are often burdened by long delays. Also, there are still too few administrative actions against stores, kiosks and other street piracy. Virtually all of the reports of activity in 2004 were directed against sellers and small-scale distributors, with the criminal gangs involved in organized large-scale piracy remaining unscathed. Thus, the most critical criminal enforcement step is for Ukraine to use its criminal code to crack down on these organized crime syndicates who distribute 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 26,200/US\$4,931), 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.

Provisions do exist in the Ukrainian criminal code (e.g., Article 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. The entertainment software industry notes that Russian organized criminal syndicates control distribution of pirated video game products in the country through their local affiliates and are not being prosecuted under the criminal laws. In fact, pirated entertainment software products bear the "marks" of the criminal syndicate producing and distributing particular pirated product. The business software industry (BSA) reports that the criminal code is (albeit rarely) being applied to smaller groups of collaborating pirates, such as two individuals selling illegal software in a store. But overall, the criminal laws are not being more broadly applied to large-scale organizations as is necessary to stem the levels of piracy.

The copyright industries did report one large-scale seizure operation, in May 2004, involving raids by the police, customs, tax authorities and the Security Service across Ukraine. The raids netted over 580,000 discs of music and audiovisual material (including 60,000 DVDs). The operation included a raid on an underground warehouse (a former bomb shelter) in Lugansk which netted 100,000 discs and thousands of forged hologram stickers; it also uncovered gang activity involved in the production of over 400,000 hologram stickers (using forged licensing documents).

Ukraine has also failed to properly police its borders, which has resulted in wide-scale shipment from and transshipment of these materials through Ukraine, to other countries in Eastern and Central Europe. The soon-to-be created common trade regime among 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 been nearly enough to stem the flow. In fact the government of Ukraine, in its semi-annual enforcement report (July 2004) was only able to identify a single criminal case of two individuals (Russian nationals) arrested at the border, in this instance, in the Kharkiv region in April 2004, with 793 CDs seized.

Comparisons of seizures by Polish and Czech customs officials against those by Ukraine officials bear out the paucity of seizures by Ukraine border enforcers. Customs authorities have not commenced or undertaken criminal investigations of pirating operations against organized crime syndicates. In November 2004, the Ukrainian Customs Agency signed a Memorandum of Understanding of cooperation with IFPI and the Motion Picture Association (MPA) in Kiev. Since then, IFPI and MPA report that Ukrainian customs officials have demonstrated better cooperation for enforcement of IPR crimes at the border. However, the copyright industries generally report an absence of political willpower necessary to improve border enforcement to the extent needed to have a real impact on cross-border trade in pirated goods.

The Ukraine government must devote more resources and show more willingness to enforce IPR crimes at the border. Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code effective January 1, 2004). With this *ex officio* authority customs officials can 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 without 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 narrowed 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. The government needs to re-appoint the Economic Crime Division within the Ministry of the Interior as the prime unit responsible for fighting IPR crimes and otherwise provide clear government strategies and lines of authority.

In addition to 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 support sites offering pirate DVDs (for on average US\$10).

In 2004, the recording industry continued to suffer from large-scale pirate optical disc production and distribution, with estimated piracy levels at around 65% for international repertoire, and losses estimated at \$115 million (including losses from exports of pirate product made in Ukraine), slightly down from 2003 figures.

Pirate films are sold in kiosks, and retail stores sell pirate DVDs including pre-release (in Ukraine) materials, available within days of the U.S. theatrical release. In 2004, estimated losses for the motion picture industry were \$45 million, with piracy levels remaining at 90%.

Pirated entertainment software products continue to be exported from and through Ukraine (from Russia). ESA member companies report that optical discs containing pirated entertainment software are now being produced in Ukraine for sale both locally and for export. Several thousand pirated video game products, sourced from the Ukraine, have been seized in foreign countries (including Israel and Lithuania); sales of this material have also been confirmed in the United States. Many are shipped with fake documentation claiming that the shipper has the appropriate licenses for the products shipped. Forensics identification information indicates that these pirate entertainment software discs are being made in well-known factories in Ukraine.

BSA reports (and appreciates the) good cooperation with the State Department of Intellectual Property (SDIP) in improving IPR awareness (helping legitimate sales), and reducing software piracy rates. SDIP has coordinated special IPR events including press briefings, practical training programs for law enforcement and other government officials, and projects regarding needed legislative amendments.

During the first half of 2004, Ukraine law enforcement officials reported that officers had inspected shops, businesses and warehouses and provided anecdotal evidence of effective enforcement. For example, the Ministry of Internal Affairs reported that it had commenced 103 copyright criminal investigations and 313 cases of administrative violations in the first half of 2004. In total, it reported seizing 167,000 audiovisual works and phonograms (no breakout was provided of videos, DVDs and CDs per se). Other regional police representatives reported on additional investigations, such as a raid in Crimea that netted 8000 pirate DVDs and the commencement of a criminal investigation; another in Donets'k netted 41,000 CDs and the initiation of a criminal investigation. In sum, the government reported that in 2003 a total of 33 individuals were convicted of IPR crimes (including trademarks and copyrights) compared with 11 in 2002. However, the report did not detail the nature or severity (suspended sentences or served) of the criminal cases. Separately, the Tax Police reported in July 2004 at a press conference that in the previous year, they had destroyed 140,000 to 150,000 pirate CDs. Over 150,000 pirate discs were publicly destroyed in Kiev in July 2004 (these were the discs seized by the Tax Police over the preceding 18 months), and another 30,000 discs were destroyed in October 2004. No yearend totals were available as of the time of this filing for the total number of inspections, raids and seizures by police and customs officials.

The copyright industries reported the following enforcement statistics in Ukraine. In 2004, the industries reported that the total number of opened IPR criminal cases was 455; in 2003, there were 374 such cases. Of these 311 (of 455) were Article 176 copyright and neighboring rights cases in 2004; in 2003, the figures were 297 (of 374). Approximately 60% were music and audiovisual cases and 31% were software cases. The total amount of material seized in 2004 was 600,000 copies, compared with only 300,000 in 2003. The total amount of material destroyed was 70,000 units in 2004; in 2003, it was 80,000. The Tax Police reportedly seized (in all formats) 340,000 copies and destroyed 150,000 discs; in 2003, the figures were 200,000 seized, 5,000 destroyed. Customs authorities seized 100,000 copies in 2004; in 2003, they seized 34,411 copies. Last, administrative actions by state inspectors (there are 16 in all of Ukraine) resulted in the seizure and destruction of 270,000 analog (VHS) and digital copies; in 2003 the figure was 50,000 copies seized and 25,000 destroyed. There were 390 administrative cases in 2004; in 2003 there were 110 cases. The state inspectors opened 58 cases in 2004 compared with 40 in

2003. Last, during 2004, SDIP issued close to 22 million hologram stickers for optical discs for music and video (43 million total), compared with 8 million in 2003.

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 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 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, did not repeal the restrictive "commercial purpose" threshold nor the onerous registration and fee requirements for IP-related materials; 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. In June 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. However, practical difficulties remain, most critically, the inability of the authorized enforcement agency (the state executive service) to actually undertake *ex parte* searches.

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. Several problematic provisions in the 2001 law were never corrected, 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; legal entities and foreign rightholders should be permitted to be members on their own in Ukrainian collecting rights societies. In addition, as noted below, Ukraine must further revise the Copyright Law to fully comply with the digital treaties in order to properly protect the production and dissemination of materials on digital networks.

Other Legal Reform Issues

Criminal code and criminal procedure code reforms: The criminal code was completely reformed in September 2001, and further revised in May 2003. As revised, 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 times the minimum tax-free incomes (previously it was 500 to 1,000 times), which is the equivalent of US\$3,200 to \$6,400; the term of imprisonment ranges from two up to five years. A new system for the calculation of minimum tax-free incomes entered into force in January 2004, applicable to the Article 176 provisions—the 2005 minimum monthly wage is UAH 262 (US\$49.31) for purposes of the threshold calculation (for purposes of actual fines, the minimum tax-free income of UAH 17 [US\$3.20] still applies). The criminal code provisions sanction both copyright and neighboring rights violations.

In general, the criminal penalties can only be imposed for "substantial material damage" which creates a threshold that is too high to commence a criminal copyright piracy case. Before January 2004 the threshold was UAH 3,400 (US\$639). But the thresholds are rising as follows: in January 2004 the threshold rose to UAH 12,300 (US\$2,314); starting November 2004, the threshold was UAH 14,220 UAH (US\$2,676) and on January 2005, it rose again to not less than UAH 26,200 UAH (US\$4,931). Next year, it will rise to UAH 45,120 UAH (approximately, US\$8,492). If the value of seized illegal product is below the threshold there will is no criminal responsibility, only administrative fines (usually very minor).

Obviously, there has been a substantial increase in the threshold for activities to qualify as a crime which is a problem for two reasons: (1) the level is too high (and getting higher); and (2) it is 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 needs to be amended to provide a lower and clearer threshold to instigate a criminal action. IIPA recommends a threshold no higher than the equivalent of 50 times the minimum daily wage or some other low and clear threshold. Not only would this help to identify criminal infringing acts for prosecutors, but it would also provide critical guidance for the police when they are conducting initial raids and need to assess, in a particular situation, whether a case should be brought under the criminal code or the administrative code. 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, three years after enactment of the criminal code amendments, deterrent criminal sanctions are very rare. In 2004, the one industry that did have success was the BSA which received eight criminal judgments in software piracy cases, all resulting in fines of between US\$500 and US\$1,600; these included five cases against end-users, one hard-disc loading case, and two CD-R cases.

The criminal procedure must also be fixed in law and practice so that police can act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require rightholders to file complaints to initiate actions. This acts as a bottleneck to successful enforcement. The procedure code should be changed 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.

WIPO Digital Treaties: In 2001, Ukraine acceded to the two digital treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell 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.

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: The Customs Code of Ukraine (Law No. 92-IV, "On Amending the Customs Code of Ukraine") entered into force on January 1, 2004. It provides clear *ex officio* authority to customs officials to seize suspected illegal material at the border, thus closing a major legal loophole in 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 limits 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. Now that *ex officio* authority is in place, Ukraine customs authorities must use it because customs enforcement has been uniformly weak.

Civil Code should not weaken copyright law: A new civil code 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, setting up the possibility of confusion, especially for judges who need to provide effective IPR enforcement. 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). Experts in Ukraine report that the 2004 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 will continue to monitor the progress of copyright law implementation and enforcement and any redundancy in the laws. IIPA urges the enforcement agencies and the judiciary in Ukraine to rely on the copyright law, not the Civil Code Chapter IV, for effective enforcement.

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 (among other things) for 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. In March 2004, the government issued a new regulation to implement legalization. It assigned all procurement authority for software products to a single entity, SDIP, in order to try to eliminate the use of

pirated software products in the public sector. In addition to the software legalization program, the government created separate budgets for legalization funds in the state budget for various government agencies; this plan was approved by the Ukrainian Parliament. Separately, the BSA reported similar developments in the commercial sector. For example, the Association of Ukrainian Banks created a special program for software legalization to reduce the level of unlicensed software use within the financial sector.

PRIORITY WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT ARGENTINA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2005.

Overview of Key Problems: Despite the recent upswing in the Argentine economy, which has helped sales of legitimate products in some industries (e.g., CDs, DVDs, business software), piracy remains an endemic problem in the country. More and more optical media and the illegal use of CD-R burners undermine the ability of all the copyright industries to compete with legitimate product in Argentina, and photocopying remains a major problem for book publishers. Estimated U.S. trade losses due to copyright piracy in Argentina were \$138.5 million in 2004.

The copyright industries face continuing enforcement hurdles in Argentina, despite concerted efforts by industry anti-piracy actions. Raids and seizures still have not translated into numerous prosecutions and deterrent sentences. With respect to legislative efforts, a package of copyright amendments to Argentina's 1933 Copyright Act, aimed at elevating the law's substantive obligations, was circulated in mid-2001, but has been stalled for years. Additional legislative projects aimed at improving distinct legal issues (such as damages, criminal sanctions, term of protection) have been proposed and merit consideration by the legislature, especially if comprehensive reform is not forthcoming.

Actions Which the Argentine Government Should Take in 2005

Enforcement

- Enforce the current copyright and criminal laws in practice, by conducting more raids, and importantly, pressing for more criminal prosecutions;
- Commit to a coordinated anti-piracy campaign as a matter of national priority;
- 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. Forge partnerships at the tri-border region with counterpart Brazilian and Paraguayan officials that would include establishing a program to inspect goods in transit for potential pirate product; and
- Encourage federal and local police Internet crime units to address the problem of illegal downloads.

Legislative

 Revive efforts to improve the draft amendments to the 1933 Copyright Act, which are still being reviewed within the Ministry of Justice. Any revival effort must include implementation of the obligations of TRIPS and the two WIPO digital treaties; this should include (for example):

Copyright 2005 International Intellectual Property Alliance

- Affording express protection of temporary copies, distribution and rental rights. and communication to the public/making available right;
- Adopting provisions on technological protection measures and electronic rights management information;
- Providing for notice and take down provisions, including clear ISP liability; and
- Adopting provisions on border measures (ex officio).
- Adopt the bill to amend the copyright law to provide for statutory damages and the seizures of infringing equipment;
- Consider proposing an anti-piracy bill that will increase criminal penalties for piracy and characterize IPR violations as a serious crime:
- Support legislation to 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 that would require government legalization of current business software programs on computers and improve procurement practices; and
- Improve provisions of a draft Presidential decree seeking to incorrectly implement the scope of performers' rights in Article 56 of the Copyright Law.

ARGENTINA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ¹										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	41.5	55%	30.6	53%	26.0	60%	78.2	47%	76.0	46%
Entertainment Software ³	NA	80%	NA	NA	NA	NA	NA	95%	141.4	94%
Business Software ⁴	63.0	75%	44.0	71%	10.7	62%	72.5	62%	92.9	58%
Motion Pictures	30.0	45%	30.0	45%	30.0	45%	30.0	45%	32.0	45%
Books	4.0	NA	4.0	NA	NA	NA	8.5	NA	8.5	NA
TOTALS	138.5		108.6		66.7		189.2		350.8	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf. information on the history of Argentina under Special 301 review, see Appendix at (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E at (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

Estimated trade losses for the recording industry reflect the impact of significant devaluation during 2002. The levels of pirate product in 2003 and 2004 are based on a third-party survey to improve accuracy of the statistics. ³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from

definitive industry "losses."

⁴ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Argentina, as in October 2004 (based on a BSA/IDC July 2004 worldwide study, http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$69 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

COPYRIGHT PIRACY

Piracy losses are once again increasing in some industry sectors after coming down sharply over the past few years.⁵ It is important to note, however, that the decline came as a result of overall economic instability in Argentina at the time, not because of lower piracy levels in-country.

The audiovisual industry reports that Argentina's continuing economic rebound is changing the dynamic of piracy in the audiovisual sector. Through June 2004, estimates from local video representatives indicated that sales of DVD players increased 200% over all of 2003. Consequently, the piracy market in Argentina has also begun a steady and sustained shift to this format. Piracy in Argentina's retail stores remains the number one piracy issue. With DVD rentals increasing in the past six months, reports indicate that high-quality DVD-Rs are coming into the market. Illegal duplication labs previously producing high-quality VHS counterfeits are now engaging in pirated DVD-Rs, which are provided to video stores. For example, pirate DVD copies of the feature film Troy were available on the streets of Buenos Aires for 17 pesos (US\$5.80) only days after its debut in U.S. theaters. The growth in the sale of DVD players has had an impact on the demand for pirated optical discs, making DVD-Rs an even greater threat to theatrical exhibition and home entertainment sell through markets. Finally, content from the Internet downloaded and burned onto CD-Rs is also available during or just prior to theatrical These CD-Rs, combined with increasingly available DVD-Rs, are being sold at storefront kiosks and via the Internet on specialized websites. With the increased availability of broadband both in homes and Internet cafés, concerns are escalating that illegal Internet downloads will become more of a threat to legitimate sales and distribution.

The recording industry indicates that the preferred piracy format in Argentina is burned CD-Rs; the blank CD-Rs come mostly from Taiwan, go through Uruguay and land in Argentina, as goods in transit, on their way to Paraguay. These 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 tax-paying legitimate retailers out of business. Although some raids have taken place in downtown Buenos Aires, the interior of the country is plagued with street vendors selling pirate product. States like Tucuman, Santa Fe and Cordoba have been practically lost to pirates. Another major concern is the widespread offering of "home delivery" for pirate product. These services advertise in newspapers, websites, and through e-mails, custom replication of any music CD and direct delivery to a customer's home. The recording industry estimates that roughly 20% of all pirate products are being sold through this "home delivery" system. Some informal surveys indicate that millions of songs are being pirated through illegal downloads. The industry is working on measuring the full impact of Internet piracy, but this situation is consistent with any country that has a high level of Internet penetration.

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); (b) reproduction-on-demand whereby entertainment software is burned onto blank

⁵ IIPA also has filed 301 reports on Argentina in previous years; they are all 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 2004, \$503.1 million worth of Argentine goods (or 14.8% 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 23.4% increase over the same period in 2003.

CD-Rs; and (c) Internet piracy, where websites offer pirated videogame software for sale. Internet café piracy, where the café owners install unlicensed or pirated entertainment software onto café computers, is a growing problem.

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. During 2004, shipments of computer software improved because of the stronger economy, and this in turn produced a larger market for pirated software. Furthermore, the software industry is concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice.

The book publishing industry reports widespread photocopying in and around university campuses. Commercial copyshops located near the universities, as well student unions and organizations within the universities, are the primary venues for this illegal photocopying.

COPYRIGHT ENFORCEMENT

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 unavailability of deterrent civil damages.

Criminal enforcement has always been cumbersome, costly, time-consuming and lacking in deterrent impact on the market for copyrighted products. While the results on criminal enforcement remain far from ideal, the willingness of the Argentine authorities to take initial actions was somewhat encouraging in 2004. IIPA is encouraged by the role being played by the *Secretaria de Seguridad Interior* in coordinating key raids in major flea markets during 2004. We have been informed that the *Secretaria* will be assigned more enforcement personnel in 2005. IIPA hopes to see more actions in 2005.

In 2004, the MPA supported the UAV (Argentine Video Committee) and the INCAA (National Film Institute) in forming a closer and more effective alliance for the purpose of identifying pirate video material, and giving store owners the opportunity to surrender counterfeit product. Of the approximately 6,000 video stores in Argentina, more than 600 have been jointly inspected by UAV and INCAA. These efforts have served to raise anti-piracy awareness while simultaneously increasing the availability of legal video products and tax revenue for the government of Argentina. In public outreach efforts, the UAV, MPA legal counsel, and the INCAA also have cooperated on anti-piracy public education activities and programs held at national film festivals, individual seminars, and workshops.

The business software industry has relied on civil enforcement, given the difficulties with criminal enforcement. However, the industry reports that they face procedural delays before being able to obtain and conduct civil searches in business piracy cases. Moreover, in 2004 BSA noted a tendency of the courts to increase the amount of the bond required to grant the

civil search. This TRIPS violation has forced BSA to withdraw several requests for inspections. The good news is that the mediations required by civil procedure facilitated the resolution of quite a few cases by the BSA during 2004.

COPYRIGHT LAW

Argentina's 1933 Copyright Act (as amended) has been under review for many 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. Several legislative reforms are underway.

The package of copyright amendments, circulated in July 2001 to selected industry representatives, apparently is still under review within the Ministry of Justice. As reported in our previous filing, the 2001 package failed to address many of the enforcement deficiencies and required further clarification with respect to other key issues for the copyright industries. These deficiencies still need to be corrected before introduction to the Congress if Argentina is to have a modern copyright law which promotes e-commerce and investment.

Also 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. Unfortunately, this bill was not approved within the requisite time frame, and subsequently did not pass. IIPA urges the government of Argentina to reintroduce and pass this bill.

In November 2004, the Argentine Senate approved a bill to increase the term of protection for phonograms. The bill will be introduced to the House of Representatives in March 2005 when the new legislative session begins. We encourage the government of Argentina to support approval of this bill to ensure protection of the vast and rich catalog of Argentine music.

In addition, draft anti-piracy laws are pending in Argentina which would increase penalties for copyright infringement and circumvention of technical measures for all media.

In 2004, the President issued a draft decree implementing Article 56 of the Copyright Law. This decree gives performers (including actors and musicians) the exclusive right to authorize (in writing) the reproduction, distribution, and public performance of their performances. In addition, the decree provides performers with an unwaivable right of compensation for the rental of their works. The draft decree also allows for the creation of a

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⁶ For examples of some of the key problems with this proposal, see IIPA's 2002 Special 301 submission at http://www.iipa.com/rbc/2002/2002SPEC301ARGENTINA.pdf (pages 63-64). In fact, separate comments filed then 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.

performers' collecting society. The proposed decree appears to exceed the scope of the Copyright Law by granting these exclusive rights to performers, to the extent that the current law only grants performers a right of remuneration for reproduction, public performances, and some other communications. MPA notes in particular that the draft decree further exceeds the scope of the current law by extending to actors the right of remuneration for public communication of their performances. Currently, this right extends only to musicians.

In addition, the decree subjects these rights of remuneration to mandatory collective management, with the burden of payment falling on users, and, with respect to rental remuneration, on video retail outlets. The portion of the decree seeking to provide performers with exclusive rights of authorization, in writing, should be deleted as it would provide performers with more rights than they currently enjoy under Article 56. The application of mandatory collective management to the remuneration rights granted to performers should be revised to allow for individual rights management, in recognition of freedom of contract principles and transferability of economic rights (including remuneration rights). Mandatory collective management applied across the board to all copyright works renders ineffective contractual agreements controlling the assignment of rights and payment of remuneration (for example, as in collective bargaining agreements and individual agreements normally concluded in connection with the production of U.S. audiovisual works).

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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT BRAZIL

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Brazil remain on the Special 301 Priority Watch List in 2005. We believe that Brazil continues to fail to provide "adequate and effective protection" for U.S. copyrights as required by the GSP trade program. We will be closely monitoring Brazil's progress on improving copyright enforcement during the extended GSP review through March 31, 2005.

Overview of Key Achievements/Problems in 2005: High levels of copyright piracy and inadequate criminal enforcement in Brazil have harmed both Brazilian and U.S. creators for many years. After a year of investigation, in August 2004 a Congressional Parliamentary Inquiry (CPI) released a comprehensive report on the problems of piracy and counterfeiting in Brazil, and containing a series of proposals. Unfortunately, these proposals have largely been ignored by the Administration, and we express our continuing disappointment with the lack of active engagement by the Executive Branch—engagement which is direly needed at both the federal and state levels.

The most serious deficiency in Brazil continues to be ineffective, non-deterrent criminal enforcement. Although a few Brazilian police units continued to conduct a substantial number of raids in 2004, these raids resulted in very few criminal prosecutions. Over the last seven years, the ratio of convictions to the number of raids run each year has been 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 copyright industries. consistent and systematic anti-piracy results from the Brazilian government are few. With respect to civil copyright infringement enforcement, this is one area of moderate success reported by the business software industry due primarily to the statutory damages available under the copyright law. However, the downside to such success on damages is the lengthy time it takes to resolve a civil case and the costly expert fees and court bonds. 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. Estimated 2004 trade losses due to piracy in Brazil amount to US\$931.9 million.

Measures Which Could be Taken by the Brazilian Government in 2005: 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 IIPA hopes that the Brazilian government will take sustained and tangible steps to improve copyright enforcement in practice.

In the immediate timeframe for early 2005, IIPA believes that the Brazilian government should, at a minimum, take the following actions:

- o Continuous self-initiated raids in the well-known pirate marketplaces;
- More inspections and seizures at the Brazil-Paraguay border which result in cases forwarded for prosecution;
- Prosecutions initiated against a number of the high-profile individuals identified in the Brazilian Congress' CPI report;
- Recommendations issued to state and federal public prosecutors to make all efforts to expedite criminal copyright prosecutions;
- Producing federal- and state-level educational and media campaigns about the antipiracy fight and how piracy threatens national cultural, scientific and economic interests;
- The swift operational implementation of the new National Council to Combat Piracy and Intellectual Property Crimes.

Of course, while immediate actions by the Brazilian government are critical, the goal should be the lasting and effective reduction of copyright piracy.

GSP Investigation: 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.² In both its 2003 and 2004 Special 301 decisions, USTR stated that Brazil continues to have serious problems with widespread piracy and ineffective enforcement.³

Brazil also has been undergoing a review of its intellectual property rights regime under the U.S. government Generalized Systems of Preferences (GSP); this review was based on a petition filed by the IIPA in August 2000. 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. On July 2, 2004, USTR announced that it would extend a special 90-day review (through September 30, 2004) of Brazil's IPR practices. At that time, IIPA again called on the Brazilian

International Intellectual Property Alliance

¹ The IIPA proposed "action plan" in Brazil first appeared in our April 2001 post-hearing brief in the Generalized System of Preferences review of Brazil. That list was repeated in IIPA's 2003 Special 301 submission (pages 61-62), posted at http://www.iipa.com/rbc/2003/2003SPEC301BRAZIL.pdf. See also all IIPA Special 301 reports on Brazil, posted at http://www.iipa.com/countryreports.html.

We incorporate-by-reference our 2004 Special 301 report on Brazil, which is posted at http://www.iipa.com/rbc/2004/2004SPEC301BRAZIL.pdf. For more details on Brazil's Special 301 history, see Appendix D (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

³ See USTR's 2004 report on Brazil, May 3, 2004, posted at http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Special_301_Priority_Watch_List.html, and USTR's 2003 report on Brazil, May 1, 2003, posted at http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report_Special_301_Report_Priority_Watch_List.html.

⁴ During the first 11 months of 2004, \$2.86 billion worth of Brazilian goods (or 15% 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 15% increase over the same period in 2003.

⁵ See USTP Press Balance of Brazil' COS See in Table 15.

⁵ See USTR Press Release on Brazil GSP Review, Dec. 6, 2004 at http://www.ustr.gov/Document_Library/Press_Releases/2004/December/Brazil_Generalized_System_of_Preferences_Intellectual_Property_Rights_Review_Extended.html.

government to take swift and effective action to improve copyright enforcement. ⁶ On December 6, USTR announced that the review would be extended another 180 days, through March 31, 2005. In response to this decision, IIPA notes that the Brazilian government's promises for prospective policy-based actions, while laudable, are not equivalent to tangible raids, prosecutions and deterrent criminal convictions for commercial piracy. IIPA stated Brazil could have taken significant enforcement-related actions during the original 90-day GSP review to reduce piracy, but failed to do so. On a positive note, IIPA continues to express our hopes that the Brazilian government will take sustained and tangible steps to remove the cloud of possible GSP withdrawal.⁷

BRAZIL Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁸										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	30%	120.0	30%	120.0	35%	120.0	33%	120.0	33%
Records & Music	343.5	52%	338.7	52%	320.4	53%	302.0	55% (MC99% CD47%)	300.0	53% (MC98% CD35%)
Business Software ⁹	330.0	63%	309.0	61%	260.8	55%	272.3	56%	264.1	58%
Entertainment Software ¹⁰	120.4	74%	125.7	56%	NA	NA	NA	99%	248.2	94%
Books	18.0	NA	14.0	NA	14.0	NA	14.0	NA	18.0	NA
TOTALS	931.9		907.4		715.2		708.3		950.3	

⁶ See also IIPA Press Release on Brazil, July 2, 2004 at http://www.iipa.com/pressreleases/2004_July2_GSP-rev.pdf.

⁷ IIPA Press Release on Extending Brazil's GSP IPR Review, Dec. 6, 2004 at http://www.iipa.com/pressreleases/2004_Dec6_GSP_Brazil.pdf.

⁸ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁹ BSA's 2003 piracy statistics for business software piracy were not available as of the February 13, 2004 filing of IIPA's 2004 Special 301 report to the U.S. Trade Representative. In May 2004, BSA's 2003 preliminary statistics (of \$186.8 million and 55%) were posted on the IIPA website. In October 2004, BSA and IDC were able to parse out the U.S. publishers' share only of its global piracy losses in Brazil, and these revised, now final, statistics for 2003—which comport more closely to BSA's traditional methodology for 301 purposes—appear above. Historically, BSA's trade loss estimates reported in the Special 301 context represent losses due to piracy which affect only U.S. computer software publishers in Brazil, and differ from BSA's piracy 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 Poland. In July 2004, BSA and IDC issued a new Annual Global Piracy Survey. Unlike prior surveys, this 2004 BSA Global Survey now includes more computer applications, such as operating systems and consumer applications such as PC gaming, personal finance, and reference software, all of which were not reflected in prior BSA surveys. According to its 2004 survey, BSA reports that the piracy rate in Brazil was 61% with \$519 million in estimated losses in 2003. See BSA's Global Piracy Study at http://www.bsa.org/globalstudy/.

¹⁰ 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).

COPYRIGHT PIRACY

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.

Copyright piracy remains widespread, and did not improve in 2004.

The recording industry reports that legitimate sales continue to plummet due to piracy. Record piracy still remains at 52% of all CD sales in Brazil. The latest piracy survey shows a total number of 103 million pirate CDs being duplicated, which translates to trade losses that exceed <u>US\$343 million</u>. The legitimate market showed a slight improvement—primarily the result of increased music for DVDs, while CD sales remained essentially flat. The industry continues to release low priced product to attract more consumers from various income levels. As a result, average record prices in Brazil are among the lowest in the world.

Most of the pirate audio products are burned CDRs. While a small amount of finished product may be imported from Paraguay or elsewhere, the great preponderance are locally reproduced in hundreds of facilities spread out around the country. These CD burning facilities range from large operations operating in commercial warehouses with over 100 burners, to small outfits operating out of residential houses producing only a small amount of product.. Most of the blank media used to replicate the pirate CDs come from Paraguay by mainly an army of individuals crossing the "Friendship" bridge between Ciudad del Este and Foz de Iguacu. The original source of the blank CD-Rs continues to be Southeast Asia, primarily Taiwan and China.

Audiovisual piracy in Brazil continues, with VCD and DVD piracy on the rise. With only a few concrete actions by the government to point to in 2004, audio visual piracy enforcement in Brazil remains a disappointment. The priority areas of concern to MPA and its member companies are: (1) optical disc piracy, (2) Internet sales, (3) retail piracy, and (4) inadequate border measures to halt imports of infringing digital product. 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 2004.

MPAA reports that the optical disc piracy rate for films in Brazil is approximately 15% of the market and now accounting for about 40% of total seizures of pirate product. Although most pirate optical discs are still CD-Rs, DVD-Rs will soon overtake CD-Rs in the market. Currently 30% of optical discs seizures are DVD-Rs. In addition, the recent growth of optical disc hardware (burners) in Brazil will open the door to future counterfeit sales. In addition, the sale of hard goods over the Internet, both CD-Rs and DVD-Rs, is also increasing rapidly in Brazil. With the increased availability of broadband both in homes and Internet cafes, local member company executives are increasingly concerned that illegal Internet downloads and internet-based hard good sales of CD-R and DVD-R will become more of a threat to legitimate sales and distribution. Brazil has the largest internet user-base in Latin America with over 15 million users. Twenty-four percent (24%) of Brazil's four million Internet households have access to broadband. Furthermore, retail video store piracy continues to be of concern in Brazil because of the continuing importance of video store revenue for local home entertainment operations.

About one third of the VHS 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. Finally, Ciudad del Este, Paraguay, is the principal port of entry and the source of both hardware and more than 100 million blank optical discs (CD-Rs, but increasingly DVD-Rs), entering Brazil annually. These optical discs turn up quickly in major cities throughout Brazil as counterfeit copies further impacting sales in the legitimate market of products.

Business software piracy continues in a variety of formats. 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 2004, 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. Preliminary estimated trade losses due to software piracy are US\$330 million, with a 63% piracy rate.

The entertainment software industry suffers from both optical media piracy imports as well as locally produced pirate product. Piracy of entertainment software products occurs through local CD-R burning as well as imports of factory-produced products, typically exported to Brazil from Asia through Paraguay, or increasingly through other transshipping countries. Similarly, pirated cartridge-based entertainment software products continue to be shipped from Asia (primarily China) through Paraguay, sometimes assembled there before being transported across the border into Brazil. ESA estimates that the value of pirated videogame product in the Brazilian marketplace was US\$120.4 million in 2004, with an estimated 74% piracy rate.

Pirated entertainment software products are sold in a variety of venues. 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. 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. The Entertainment Software Association (ESA) works with the local association ABES on anti-piracy actions. The compliance rate for requests for

takedown of infringing product has been quite satisfactory. Progress made last year in getting newspapers to stop running advertisements of pirated entertainment software products has continued. In São Paolo, for instance, advertisements in the major newspapers have been reduced to zero, while advertisements in newspapers in Rio de Janeiro have been reduced from 50 per month to 8-12 ads per month. 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. Unfortunately, enforcement actions against such operations have only had the effect of cleaning out the on-site stocks of pirate products, which are replaced within days of the action. This replenishment of stocks is evidence of the lack of any real deterrence from enforcement actions because there are no resulting prosecutions nor penalties imposed on the operators. 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. Internet café is also of concern, as of the 1,500 cafés in the country, only 15% are licensed.

Unauthorized photocopying continues to undermine the legitimate book **publishing markets.** The publishing industry reports that unauthorized photocopying of entire textbooks as well as study materials, individual lessons and chapters from textbooks continues to be the major form of book piracy in Brazil. AAP estimates losses to its members of US\$18 million in 2004 and those losses multiply sharply for local Brazilian publishers. 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 day of classes, which gives the booksellers no chance to import or sell the books before classes. Some estimate that the annual number of unauthorized photocopies ranges from 3 to 5 billion pages. Universities are tacitly, and sometimes actively, condoning these practices, and are certainly taking no role at present in fighting these illegal activities in and around their campuses. The Ministry of Education has likewise failed to address this issue in any way, and the publishing industry really needs this ministry to step up and engage on this Furthermore, illegal copying flourishes in commercial establishments adjacent to issue. institutions of higher learning. Government action on illegal photocopying of academic materials. which cost both domestic and foreign publishers millions of dollars and cost the Brazilian government thousands of jobs and millions in tax revenues, is practically nonexistent. IIPA asks the Ministry of Education and the administrative bodies of universities and colleges to work with the enforcement authorities to make sure that a clear message is sent to those engaged in illegal photocopying, both on and off campus, that this activity will not be tolerated. The recently reorganized Associação Brasileira de Direitos Reprograficos (ABDR) has been working with authorities to conduct enforcement actions and plan for future endeavors. AAP will be monitoring closely the degree of cooperation the ABDR receives from authorities.

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 web pages in Brazil which offer piratical copyright content

The audiovisual industry has seen an increase in the use of the Internet as a distribution system for optical disc piracy, usually offered on websites for delivery collect-on-delivery. In 2004, MPA obtained good results in getting the ISPs to remove websites selling pirated

goods as well as suspending accounts of users who were downloading films illegally. Nevertheless, more needs to be done by the government and police in this arena—for example, 18 people were arrested for selling pirated goods on the Internet and yet none was indicted.

The recording industry reports that through a local internet anti-piracy campaign over 2,300 web and FTP sites were taken down and 23 investigations were conducted during 2004 that resulted in burners and pirate CDs being seized.

With respect to videogames, the ESA's domestic enforcement program continues to take action against local websites and auction listings. In 2004, 217 pirate websites and over 15,000 auction listings for pirated products were taken down. The entertainment software industry (in cooperation with other copyright industry sectors) is also working with "mercadolivre.com" to take down listings for pirated products. With the stepped up local enforcement efforts against online piracy, there has been increased cooperation from the operators of the domestic auction sites and as a result, a decrease in the monthly volume of auction listings of pirated games. Nonetheless, the absence of any legal deterrence plays a key role in the persistently high volume of such listings.

The business software industry reports positive responses in auction sites and specifically in the biggest one (Mercadolivre.com—85% of market share). In 2004, 15,474 advertisements were removed of the Brazilian auction sites. Nevertheless, 14,568 notices were sent to Internet sites (*hotwarez*) and 14,479 Internet sites were removed, totaling 29,953 of takedowns in 2004. However, BSA has seen a significantly increase in the use of the Internet as a distribution system for software piracy, usually offered on websites for delivery (know as *hotwarez*). The takedowns of *hotwarez* have been increasing insufficiently to combat software Internet piracy efficiently in Brazil.

Optical media piracy harms 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 Brazil has 11 CD plants, with 88 production lines; most of these plants are believed to be operating legitimately and are not a significant source of pirated OD product. Growing numbers of small duplication facilities can produce a significant amount of pirate CDs each day. A related, and continuing, 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.

Organized crime remains a significant factor in piracy.

The Law Kim Chong case developed by the CPI was the major organized crime/piracy case developed in 2004. In June 2004, the notorious piracy kingpin Law Kim Chong was arrested for attempting to bribe the Chairman of Brazil's Congressional Anti-Piracy Committee. As part of the follow up to this arrest, authorities raided one warehouse owned by Chong in which over 7.5 million blank CD-Rs and 3.5 million blank DVD-Rs were seized. The bribe was alleged to be for between US\$1 million and \$2.3 million. Chong owned numerous shopping

centers and supplied product from China to over 10,000 points of sale throughout the country. Chong is now in jail and the investigation continues.

The Federal Police have taken few organized crime-related investigations with no effective results after the ending of anti-piracy CPI. Ironically, the most important illegal commercial centers keep working normally. There is no federal effort at the police level and the existing state-funded task forces are small operations in the states of Rio, São Paulo and Rio Grande do Sul, all with human and financial resources far below the requirements needed, as described by the CPI.

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 civil system on the other hand has, by contrast, offered some relief in appropriate civil cases involving computer software. For years, the industries, especially those based in Brazil, have presented requests to Brazilian officials to take specific actions. Immediate progress on improving copyright enforcement is long overdue, and we are hopeful that the government will quickly implement many of the actions and reforms proposed in the report of the renewed CPI. IIPA and its colleagues believe that immediate progress on improving copyright enforcement is long overdue, and are hopeful that the renewed focus generated by the CPI progress will result in improved federal and state enforcement raids and investigations. Over the years IIPA has publicly outlined possible actions the Brazilian government could take to improve investigations and anti-piracy actions 11 strengthening prosecutorial and judicial efforts. 12

¹¹ In IIPA's 2004 Special 301 filing, we outlined a series of actions through which the government could take to begin to solve the enforcement problem. Over the last year, including during the CPI review, various copyright industry representatives have raised these same issues. We hope that the Brazilian authorities will enact these kind of actions: (a) Prepare and conduct a national anti-piracy campaign, as a matter of national priority and security; (b) Significantly improve and implement deterrent criminal enforcement, including continuous raiding, effectively prosecuting and convicting copyright pirates in all industry sectors; (c) 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; (d) Create a centralized unit of police officers to work on important copyright cases, and provide them with specific guidelines to conduct their cases; (e) 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; (f) Initiate more investigations using the tax evasion element of the Software Law (for example, using the Policia Fazendaría); (g) Expedite issuance of search warrants, especially in criminal cases where sometimes it has taken up to six months to obtain such warrants; (h) Ensure that all intellectual property in use in government information technology (IT) systems is properly licensed.

¹² Prior IIPA 301 filings have recommended that the Brazilian government take the following illustrative actions to improve prosecutions and convictions: (a) Speed up criminal copyright infringement prosecutions and expedite judicial orders to destroy confiscated piratical and counterfeit products; (b) 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; (c) Secure convictions against businesses that are replicating and distributing optical discs illegally; (d) Apply the new criminal code amendments in copyright infringement cases; (e) Assign piracy cases to judges trained and experienced in IP cases with a view to establishing specialized IP courts; (f) Reduce bonds and increase timely decisions in civil copyright infringement cases; (g) Create a specialized court which adjudicates copyright infringement cases.

The Congress and the CPI Report

The Brazilian Congress has taken steps to examine and confront the piracy problem harming its economy and culture. 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, and many IIPA member associations and their local representatives testified. In addition, 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 over 100 members of Congress, led by a smaller core leadership group.

The CPI, originally set to end its investigation at the end of September 2003, extended its efforts until June 2004. In August 2004, it released its comprehensive report, which included descriptions of the scope of piracy, problems related to enforcement as well as policy and legislative recommendations to begin to improve the situation. The report noted the lack of national leadership and coordination to date. For example, the CPI recommended the creation of a National Plan to Combat Piracy. Shortly thereafter, the federal government announced the formation of the "National Council to Combat Piracy and Protect Intellectual Property," and regulations establishing this entity were published in October 2004. The Lula Administration later defined the activities and makeup of the council that will be headed by a senior Ministry of Justice official and have participation of six private sector representatives. Although the council has been created, unfortunately it appears to lack authorization to actually undertake raids and legal actions, and none have been initiated by the government of Brazil despite private-sector recommendations.

The new National Council to Combat Piracy and Organized Crime held two preparatory meetings in Brasilia in late 2004 with members from government and industry. However, it did not take any substantive anti-piracy initiatives by the end of 2004. The National Council has agreed to begin actions by February 2005, which we hope will be the basis for its long promised integrated national plan to address anti-piracy in Brazil. We understand that during the first meeting of the council that took place in January 2005. That first meeting was aimed at discussing various internal operating issues, and a decision was reached to apply the same tools employed in the fight against corruption to the fight against piracy. The second meeting will take place on February 27-28, 2004, and that agenda will include a National Plan to Combat Piracy for the next two years. At present, it is not yet possible to analyze the councils' ability to actually undertake strong anti-piracy measures. While we look forward to the adoption and implementation of this plan, we highlight that Special 301 and GSP decisions should reflect results achieved rather than goals that are announced—particularly bearing in mind that the National Council is a consultative (non-executive) body, and that the eventual execution of this plan will depend on various other public agencies like the Federal Police, the Receita Federal, the Secretary of National Security, the Federal Highway Police, and others (most of them represented at the Council), not to mention the states and municipal authorities.

Organized Actions at the State and Local Levels

The increased national awareness of piracy caused by the CPI report and media coverage appears to have encouraged new enforcement efforts among state and municipal

authorities ranging from police IP Task Forces, to coordination among organized crime prosecutors. For example, the Justice Ministry's Anti-Piracy Council announced in September 2004 a new measure prohibiting the shipment of blank optical discs into Brazil through the Paranagua and Santos ports if those shipments were marked for transit through Paraguay and then to be return to Brazil. Other measures, though, are based more on the good will of a few individual enforcement authorities than on any improvement in or commitment by governmental institutions. Overall, the sum of these new improvements is insufficient to lead to any material improvement in the piracy situation.

The level of governmental anti-piracy attention varies throughout Brazil. 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 its Special Anti-Piracy "Delegacia" (Precinct) has been quite active. 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—was enmeshed in investigations of corruption that reach to higher levels and include the arrest of police officers and commanders. The São Paulo state government has appointed a new commander of the organized crime (DIEC) unit to replace its last division chief suspended for corruption. It is still too soon to assess how effective the new commander will be in addressing piracy in Brazil's largest city.

Other state-level anti-piracy efforts have arisen on an ad hoc basis, including similar police task forces in Goias 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. The industries have identified the need to have anti-piracy task forces in additional cities/states such as Belo Horizonte, Salvador, Fortaleza e Cuiritiba as well as expanding the São Paulo force to cover effectively rest of the state.

Criminal copyright enforcement is not effective and not deterrent.

Some police raids take place but inconsistently 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.

RIAA reports no major changes in record industry cooperation with the many police forces. The one bright spot is the effort made by the municipal police to eradicate street vendors from major traffic areas in Rio de Janeiro. This police force has not been discouraged by the aggression shown in some cases by street vendors or the low numbers seized in each location and have been consistently carrying out raids all over the city.

The ESA saw a positive enforcement trend in 2004, with more police actions focused on laboratory operations involved in the production of pirate optical media, including game software. Police cooperation has also been a factor in raids against retail outlets, such as a December 2004 raid at the Stand Center in São Paulo, which resulted in the inspection of 21 stores. Almost 76,500 units of pirate material were seized by a contingent of 51 professionals, including 15 military police officers, 2 bailiffs, 2 court experts, 16 assistants and others. Both the Guarda Municipal da Cidade de São Paolo and the Guarda Municipal da Cidade do Rio de Janeiro (the specialized police forces of these cities) have also been very helpful taking actions against "camelos" (street vendors), seizing pirated products with the goal of reducing the sale of pirated products on the streets. Unfortunately, all such actions produce little in the way of lasting results as defendants remain largely unprosecuted and pirate stocks are replenished soon after these seizures.

In 2004, the BSA reports an increase of police actions focused on the biggest centers of illegal commerce specially at the Stand Center in São Paulo, where there were three strong raids resulting approximately 150,000 of pirate optical media, including business software. Nevertheless, this frequency of raids is far below the need shown by private sector, mainly because these illegal shopping centers have an impressive number of consumers per day, including the weekends. It is strongly required the closing of all those illegal commercial centers as a matter of morality.

In recent news, on January 20, the famous Maracanã soccer stadium in Rio de Janeiro was the site of the destruction of more than 1,000,000 pirated VHS, DVD and CD recordings of film, music and software. Print and electronic media outlets provided broad coverage of the spectacle, describing piracy as a crime and explaining to audiences its harmful effects on society. Associations representing the film, music and software industries helped promote the event, which Rio de Janeiro state organizers announced would be followed by others, at which contraband seized by that state's civil police force since mid-2003 will be destroyed.

The industries rely on the good will of individual law enforcement officials to address piracy problems. The problem, however, remains prosecution of criminals engaged in piracy.

Brazilian prosecutors pursued very few criminal cases in 2004. 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 seven years, the ratio of convictions to the number of raids run each year is 1% or less (see chart, below). 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 continue to be issued by the courts. In those very few criminal copyright cases which do reach judgment, the sentences are primarily small fines,

probation and community service. Between 1995 and 2004, 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 for first-time offenders. The Brazilian criminal code was amended in 2003 to clarify and strengthen certain procedures and penalties which had hobbled effective enforcement throughout the 1990s (see discussion, below). The recording industry reports that the courts continue to suspend most cases brought to them; recidivism is not taken into account in most courts. Since the 2003 amendments, it appears that judges are now more likely to authorize the destruction of seized pirated products even before the final resolution of the case.

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 1998-2004							
Actions	RECORDING INDUSTRY 1988 (1999) [2000] {2001} -2002- *2003* 2004	MOTION PICTURE INDUSTRY 1988 (1999) [2000] {2001} -2002- *2003* 3Q OF 2004	BUSINESS SOFTWARE I & GAME SOFTWARE INDUSTRIES 1988 (1999) [2000] {2001} -2002- *2003* 2004	TOTAL 1988 (1999) [2000] {2001} -2002- *2003* 2004			
NUMBER OF COMPLAINTS FILED WITH POLICE	530 (154) [153] {188} -206- *190* 113	1,320 (832) [1,957] {1,750} 1,825 – *2,995* 2,286	34 (118) [134] {273} -253- *351* 668	1,884 (1,104) [2,244] {2,211} -2,284- *3,536* 3,067			
Number of raids conducted	680 (777) [1,011] {621} -870- *1,018* 936	2,381 (1,671) [1,535] {1,354} 1,640 – *2,995* 1,280	34 (118) [134] {273} -253- *175* 626	3,095 (2,566) [2,680] {2,248} -2,763- *4,188* 2,842			
Number of Pirate Copies Seized	2.85 million (1.40 million) [3.22 million] {2.37 million} -3.78 million- *5,686,253*	243,581 (212,063) [220,878] {225,785} -253,805 VHS, 56,037 blank OD- *254,230 VHS and 134,417 CD-R* 196,147 VHS; 65,953 blank OD; 98,819 CDR; and 7,801 DVD-R)	NA (NA) [212,898] {351,944} -355,156- *Business software- 574,341 Game software- 845,977* Business software 352,457; Game software- 861,637	+3.09 million (1.61 million) [3.65 million] {3.3 million} -4.4 million- *7.5 million* 5.3 million+			

BRAZIL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 1998-2004							
Actions	RECORDING INDUSTRY 1988 (1999) [2000] {2001} -2002- *2003* 2004	MOTION PICTURE INDUSTRY 1988 (1999) [2000] {2001} -2002- *2003* 3Q OF 2004	BUSINESS SOFTWARE I & GAME SOFTWARE INDUSTRIES 1988 (1999) [2000] {2001} -2002- *2003* 2004	TOTAL 1988 (1999) [2000] {2001} -2002- *2003* 2004			
NUMBER OF CASES SUSPENDED OR DISMISSED	NA (18) [28] {39} -40- *29* 96	148 (235) [146] {87} -144- *23* 397	0 (0) [0] {0} -0- *0* 0	+148 (253) [174] {126} -184- *52* 493			
Number of DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	5 (3) [11] {7} -11- *8* 17	1 (0) [2] {13} -13- *14* 15	0 (1) [0] {0} -0- *0* 0	6 (4) [13] {20} -24- *22* 32			
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* 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* Minimum 1 year, maximum 3 years, all given probation — community services probation	None (2 years' probation plus fine <\$600) [None] {None} -None- *None* None	Minimal (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%* 1.82%	0.04% (0%) [0.13%] {0.96%} -0.79%- *0.47%* 0.85%	0% (0.85%) [0%] {0%} -0%- *0%* 0%	0.19% (0.16%) [0.49%] {0.89%} -0.87%- *0.53%* 1.1%			

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. In 2003-2004, BSA and ESA undertook concurrent local anti-piracy actions in Brazil, and the only difference between the two industries' reports involves the amount of software products seized. NA = Not Available.

Brazilian border measures remain ineffective.

The copyright industries have long recommended that controls at the major transshipment points be strengthened. Border enforcement will clearly be enhanced if Brazilian authorities can better coordinate with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. 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. Nevertheless, human resources to monitor the border continue to be scarce. Industry investigators have observed that at times only three people were available to control the "Friendship" bridge, where thousands of people and vehicles go across on a daily basis.

The Brazil tax agency (Brazil's Internal Revenue Service equivalent) and the Federal Highway Police held joint successful operations at the tri-border area in 2004, seizing a record total of 3.5 million blank CD-Rs and 191,000 DVD-Rs. Nevertheless, these seizures represent a tiny fraction of blank ODs which enter Brazil annually and are turned into pirated goods. By way of example, 12 million blank CD-Rs were seized from a warehouse run by an organized crime boss when he was arrested for money laundering and conspiracy to bribe a congressional official. Federal authorities say that they lack both the resources and personnel to conduct the background intelligence and raids needed to address the audio visual piracy problem coming from the tri-border area.

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.

In September 2004, the Justice Ministry's Anti-Piracy Council announced a new measure prohibiting the shipment of blank optical discs into Brazil through the Paranagua and Santos ports if those shipments were marked for transit through Paraguay and then to be return to Brazil. For example, there was one seizure of 1.2 million blank CDRS in Santos.

Also in Fall 2004, the Federal Highway Police began to enforce federal highway regulations against contraband trafficking, usually involving buses transporting contraband merchants (*sacoleiros*) from Paraguay. Heavy fines and/or seizure of the bus can result. About 385 buses have been seized for contraband and, and many others fined. In addition, over 7,000 people have been summoned for potential criminal investigations. Nevertheless, these actions have not yet made a noticeable impact on the extent of pirate product available in the Brazilian marketplace, and are unlikely to do so until greater law enforcement coordination is achieved with Paraguayan law enforcement officials, and pirates and/or those involved in smuggling face greater risks than the occasional loss of their inventory.

Also in September 2004, the copyright industries' anti-piracy groups held a large handson training session for more than 100 Brazilian customs, federal police, civil police and internal revenue officers involved in enforcement at Foz do Iguaçu, a key port of entry at the border with Paraguay.

Furthermore, the software industry is concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice.

Good damage awards have been issued in civil copyright cases, but lengthy delays and high bond requirements exist.

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 4 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 2004, 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 and audiovisual works. 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.

Criminal Code Amendments 2003

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, 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. 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).

However, the business software industry has expressed concern over these 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.

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¹³ 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\$92) 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\$1,845), the highest amount MPA has seen.

The 2003 amendments also codify 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. 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. The amendment law is helpful in three ways: (1) 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 copyright owners' cases; (2) police are more inclined to view piracy as a serious crime worth their time; and (3) suspects apprehended by police are now held until released by a judge, costing the suspect at least time, a bond and perhaps attorney fees.

Anti-Piracy Bills Presented by the CPI

As a result of its investigation, the CPI drafted and presented to Congress five antipiracy bills, two of which implicate interests of the copyright industries: (1) modifications to the criminal code and the criminal procedural code (including Article 184 of the criminal code); and (2) modification to the Software Law to increase penalties. The amendments were introduced in the lower house of Congress in June 2004 and now await a committee ruling to determine their constitutionality.

Bill Number 3964-04 proposes to amend Articles 184 and 186 of the criminal code and also some provisions of the criminal procedure code which would increase sentencing, from a minimum of two years, to two years and two months. This change is significant because the higher jail time sanction will remove alternative and lesser sanctions such as community service.

The CPI also presented a bill to modify the 1998 Software Law, proposing an increase in penalties from confinement from one to four years and fine to confinement from two years and two months to four years and a fine. This bill also details additional actions involving computer programs which would subject defendants to sanctions.

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. 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.

Prices on Blank Media

To make it easier to intercept mislabeled blank media—a key raw material for the manufacture of pirate products, it is critical that the Brazilian government adopt a minimum declared price for blank media that corresponds to its real market price. Despite many efforts

by the recording industry that include providing reference prices from other countries—including Paraguay, which has adopted a minimum declared price for blank media, and minimum manufacturing costs for CD-Rs—Brazilian authorities have not yet established such a minimum price. We hope that they will do so shortly.

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" (*Contribuicão de Intervencão no Dominio Economico*) 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT BULGARIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Bulgaria be placed on the Priority Watch List for 2005.

Overview of Key Problems: Optical media piracy is back in Bulgaria — and it is getting worse. 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 to clamp down on it. Pirated CDs of all types of copyrighted materials, and an increasing number of illegal DVDs, are easily available in all major cities. Problems with both the growing local production and the importation of pirated optical disc (OD) media abound. Bulgaria's OD plant licensing system is failing to prevent a resurgence of pirate OD production and export. Efforts have been underway for years to implement a new optical media licensing system. But the legislation currently pending is completely inadequate, and government officials have consistently rebuffed the expertise offered and proposed amendments advocated by several copyright industry sectors to strengthen the legislative proposal.

On the enforcement front, cooperation between right holder organizations and police authorities are generally improved, though problems such as pre-raid leaks remain. The real enforcement bottlenecks, however, are the prosecutors and the courts, who in practice consistently fail to treat copyright offenses as serious crimes. Unjustified delays permeate the process. Cases simply fail to progress; the few that do reach final judgment do not produce deterrent sentences; and the whole system lacks transparency. Outmoded and cumbersome proof requirements, including demands for expert opinions on infringement that only one government office is allowed to provide, typify the obstacles to effective judicial enforcement of copyright.

Actions Which the Bulgarian Government Should Take in 2005

Law Reform

- Enact the new optical disc law as a top priority, after incorporating all amendments submitted by the copyright industry in 2003-04;
- Increase criminal and administrative sanctions for copyright infringement to deterrent levels:
- Amend the criminal procedural code to streamline prosecutions and facilitate right holder participation;
- Fill gaps in the copyright law;
- Criminalize possession of pirate products for commercial purposes:
- Ban street sales of cultural and copyrighted products nationwide.

Enforcement

- Vigorously enforce the current OD plant licensing regime, and the new OD regulatory system once it is enacted into law.
- Work with copyright industries to implement a coordinated anti-piracy strategy, make anti-piracy efforts a priority for law enforcement, and step up actions against crime syndicates involved in piracy;
- Increase ex officio enforcement actions against retail piracy, and in support of local decrees banning street sales of copyrighted products;
- 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;
- Give tax authorities the power to seize infringing copyrighted products and impose administrative sanctions (fines);
- Ensure that seized pirated goods are destroyed, not returned to the market.

BULGARIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ¹											
INDUSTRY	2004		2003		2002		2001		2000		
	Loss	Level									
Motion Pictures	4.0	35%	4.0	25%	3.0	20%	3.0	20%	3.0	25%	
Records & Music	6.5	75%	7.0	80%	7.2	83%	3.0	65%	NA	NA	
Business Software ²	16.0	71%	16.0	71%	6.2	68%	8.3	75%	8.1	78%	
Entertainment Software	NA	50%	NA	NA	21.9	91%	NA	84%	NA	NA	
Books	NA	NA	0.3	NA	0.3	NA	0.3	NA	NA	NA	
TOTALS	26.5		27.3		38.6		14.6		8.1		

Bulgaria appeared on the USTR Special 301 Watch List in 2004, after a five-year absence. The <u>Priority Watch List</u> ranking is requested because the piracy situation has deteriorated, while the Bulgarian government continues to defer the needed enforcement and law reform steps to tackle it. ³

Bulgaria presently has three bilateral 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

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Bulgaria, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$26 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

³ For more details on Bulgaria's Special 301 history, see Appendix D (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) as well as Appendix E (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission. Previous IIPA Special 301 filings on Bulgaria are posted at http://www.iipa.com/countryreports.html.

obligations for Bulgaria to adopt. Second, in 1994, a Bilateral Investment Treaty (BIT) between the U.S. and Bulgaria took effect. This BIT is important as it provides a broad provision on national treatment. Third, in letters exchanged between the U.S. and Bulgaria in April 1995, Bulgaria made a number of commitments, notably 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 addition, Bulgaria is a beneficiary country under the Generalized System of Preferences (GSP) trade program.⁴

COPYRIGHT PIRACY IN BULGARIA

Sound Recordings

The piracy of U.S. sound recordings and music remains unacceptably high in Bulgaria, with around 70% of all foreign sound recordings sold being illegal copies. There is a huge and fast growing pirate CD-R market. Considering the number of CD-R and DVD-R plants in Bulgaria, the likelihood of blank CD-R production moving straight into the pirate chain of unauthorized burning and distribution remains very high. Streets and markets in Sofia (such as the Slaveikov Square market), and in other major cities, are full of pirated CD-R music, DVD-R music and film. For example, a Bulgarian press article at the end of 2004 reported on pirate vendors located "next to the Ministry of Interior and the Sofia municipality," selling pirate music discs for 3-5 leva (US\$2-3).⁵ 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. Estimated trade losses to U.S. companies due to recording piracy in Bulgaria, not including the devastating effects of sharply growing Internet-piracy, is placed at \$6.5 million in 2004.

Entertainment Software

The entertainment software industry reports a continuing problem of piracy at Internet cafés, with only 40% of the 3,000-4,000 cafés licensed. Criminal syndicates appear to be in control of a number of Internet cafés where either pirated or unlicensed entertainment software is in use. 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. However, there has been increased police activity against unlicensed cafes. Pirate entertainment software products remain readily available at retail stores and in market stalls and kiosks. Organized criminal groups tied to the Russian criminal syndicates control distribution and sale of pirate products at informal street markets. 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, Ukraine, or Turkey, or from as far away as

⁴ During 2003, \$41.9 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 9.5% of its total exports to the U.S. During the first 11 months of 2004, \$36.7 million worth of Bulgarian goods (or 7.7% 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 2% drop from the same period in 2003.

⁵ Alexandrov, "Pirate Disc are Sold Just Next to the Ministry of Interior and the Sofia Municipality," Sega, 28 December 2004.

Malaysia. Piracy of cartridge-based entertainment software products is also of concern with pirate and counterfeit product still shipping into Bulgaria from China through the United Arab Emirates. The Entertainment Software Association (ESA) estimates a 50% piracy rate for their sector in Bulgaria.

Audiovisual

The Motion Picture Association of America (MPAA) reports that the most significant problem the 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 in the market, with pirates increasingly choosing to make their own discs rather than run the risk of having their shipments detained by customs. These locally produced discs are distributed by street vendors, mail order, and Internet auctions. In 2004, the local anti-piracy organization, BullACT, seized 10,863 CD-Rs, 4,292 DVD-Rs and 128,157 DVDs containing unauthorized films. Pirate DVDs from Russia are also found in the local market with Bulgarian and Russian subtitles. Although several successful seizures along the border have led to the dismantling of one network that used Bulgaria as a transshipment point for pirate DVDs, factory-replicated discs are still being imported from Russia, Ukraine and China for export to other European markets (some Chinese imports typically contain only Chinese, Spanish and French subtitles). In addition, Internet cafés 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 cafés also serve as centers to rip and copy DVDs and to trade film files. It is estimated that Bulgaria currently has around 3,000-4,000 cafés 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 2004, reflecting an increased video piracy level of 35%.

Business Software

Piracy of business software remains pervasive throughout Bulgaria, and criminal enforcement overall remains inadequate, with strong efforts of the enforcement agencies undermined by shortcomings in prosecution and punishment. The Business Software Alliance (BSA) reports that there is widespread use of unlicensed software in the corporate sector (enduser 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.

Internet piracy has become a major threat to legitimate software businesses in Bulgaria. The introduction of high-speed cable Internet created a favorable environment for a substantial increase in illegal online distribution and use of computer programs, including operating systems and a wide variety of business software applications. These pirate products are accessed via Internet clubs and cafés, as well as through more than 200 so-called local area networks (LANs) in neighborhoods across the country. LAN members pay a monthly subscription free for access to a local server storing unlicensed software and other information resources. Through these

various channels, unlicensed online use and unauthorized software downloads are increasingly replacing the sales of legal, licensed business software in Bulgaria.

Illegal CD-ROMs, both silver and gold, containing a full range of different business software applications remain readily available. 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 software applications and entertainment software or single company counterfeit programs. Illegal custom-made gold CD-ROMs with various business software applications are still offered for sale in the local market. BSA estimates the piracy rate for business software at 71%, inflicting losses to U.S. companies estimated at \$16 million in 2004.

Despite the troubling problems outlined above, there have been some positive steps taken. BSA strongly commends the steps taken by the Bulgarian government to ensure legal software use throughout the state administration. The government has adhered to its commitment to legalizing the desktop software in use in the state agencies and throughout the educational system, and in this way has sent an extremely positive message to the private sector.

Books

The Association of American Publishers (AAP) reports that American books, especially popular fiction and textbooks, continue to be pirated in Bulgaria.

Optical Disc Piracy in Bulgaria

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). Although finished pirated discs are still being imported into Bulgaria from Russia and elsewhere, domestic pirate production is a more serious problem. Indeed, mounting evidence throughout 2004 shows that Bulgaria has once again become a major producer and exporter of pirate optical disc products.

Local plant capacity. The number of optical media plants and production lines in Bulgaria far exceeds legitimate demand, and continues to rise. There are now eight plants operating in Bulgaria: CHSL, Media Plant, TOT 2000, Euro Silver Group, and Crystal Ton (all in Sofia); Media Sys and Optical Storage (both in Stara Zagora); and Silver First (in 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). The eight operational plants have a total of twelve production lines, giving a likely operational capacity of some 55 million discs per year. If the four non-operational lines are included, the potential production capacity totals some 71 million units per annum. The legitimate demand for optical discs in Bulgaria (all formats) is far below 10 million copies per annum. Incredibly, given this degree of persistent over-capacity, ground-breaking for yet another DVD plant, near Voivodino in the Plovdiv region, was announced in July 2004. When this plant becomes operational, the glut of production capacity will worsen, and it can be expected that more of this capacity will be devoted to pirate production, unless the government takes immediate and decisive action.

OPTICAL DISC PLANTS IN BULGARIA	DESCRIPTION
OPERATIONAL PLANTS (8)	
CHSL	Sofia-based. Has one licensed production line, with an annual capacity of about 4 million discs.
MEDIA PLANT	This plant in Sofia has one licensed production line with a capacity of 4 million CD 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' location, though equipment was sold to Media Plant and relocated with new equipment to new premises in Sofia. Annual capacity 4 million disks.
EURO SILVER GROUP	Located in Sofia, two production lines, with both CD-R and DVD-R production capability. No visits to the facility have been permitted so machinery and production capacity unverified. A production capacity figure of approximately 8 million units 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. Production capacity of around 15 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 5 million CDs or blank CD-Rs annually.
CRYSTAL TONE 2	This is a Sofia-based CD production line, understood to have received its operating license in January 2005, with an annual capacity of about 4 million units.
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 is also 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 55 million discs per year for the existing eight plants (a potential of 71 million units per year, if the non-operational lines are included)
Source: IFPI, February 2005	

Pirate production in Bulgaria. Bulgarian government officials assert that the bulk of optical disc 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, predominantly on CD-Rs. It is estimated that around 70% of all optical disc piracy in Bulgaria involves illegally burned CD-Rs.

Two major seizures of pirate DVDs in the course of export were made at Bulgarian borders in April 2004. Forensic evidence shows that the bulk of the 240,000 DVDs seized were produced at a licensed plant within Bulgaria. Similar evidence implicates at least one other plant in large-scale production of pirate music CDs. Detailed complaints regarding both plants were submitted to Bulgarian authorities in September 2004, but aside from one inspection of one plant, there have been no consequences, and production continues at both plants.

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 follow-up. Large-scale burning activity of CD-Rs continues in underground workshops, and it has to be assumed that this takes place with the full knowledge and cooperation 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 link between organized crime elements and OD piracy is blatant and undeniable. There have been highly publicized "turf wars" among various organized syndicates. 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.

Bulgaria's anti-organized crime agency openly acknowledges the involvement of organized criminal groups in the pirate distribution business.⁶ The former deputy director of the National Service for Combating Organized Crime (NSCOC) has publicly referred to "a chain of corruption [that] supports the trade with pirate CDs." 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 the copyright sector endorses these actions, they fail to address the core of the problem: organized and highly dangerous criminal groups involved in all forms of copyright theft. Furthermore, even on their own terms, these steps are ineffective. Although the city government of Sofia introduced strict regulation of street sales of copyright product more than a year ago, and ordinances banning street sales were issued in 2004 in Bourgas and Plovdiv, two hotbeds of retail piracy, there has been little meaningful enforcement (for instance, enforcement was carried out only during normal office hours), and the Sofia ban has now been suspended by a court after a complaint from pirate retailers; its future is in doubt. The street sale ban should be imposed nationwide and vigorously enforced.

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 organized to better coordinate and direct Bulgaria's anti-piracy enforcement efforts. It is currently headed by the Director of the Copyright Department in the Ministry of Culture and includes representatives of several ministries and of various law enforcement agencies, including the Customs Service, National Police, National

International Intellectual Property Alliance

⁶ "There is a danger that Bulgaria may be put on the black list," Noshten Trud, January 26-27, 2004.

⁷ "Bulgaria in a pirates' list again? This must not happen," *Dneven Trud*, April 14, 2004.

Service for Combating Organized Crime (NSCOC), and other agencies. Such an effort cannot be successful without input from private sector anti-piracy organizations, but the Council rarely invites such participation.

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. As described in more detail below, 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. 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 plant licensing requirements. 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. Regrettably, communication between the Licensing Commission and interested private industry is poor; licenses are issued without consultation, and industry is often not informed of new licensed production 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 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, and seizures and destruction 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 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 it wishes, since effectively only the production of non-coded discs 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 readily 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, in 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 their output. 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 never learned whether this matter was ever fully investigated. 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.
- Enforcement agencies were not empowered to deal satisfactorily with the plant management's lack of cooperation and obstruction concerning production records, etc.
- The inability of enforcement agencies to monitor production of blank media—at any of the plants in the country—is fuelling the huge domestic and regional CD-R/DVD-R problem.

Improved cooperation from police, but significant problems remain. Several entertainment software companies enjoy positive relationships with law enforcement agents who are assisting on the significant problems with piracy in Internet cafés. However, little to no enforcement action is 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.

However, some police districts remain ineffective in their anti-piracy actions. Some police refuse to focus their enforcement efforts on larger targets and only agree to raid small companies, computer game clubs or Internet cafés. There are some signs of a shift of focus to larger targets. However, the recording industry reports that pre-raid leaks remain very common. Slow and ineffective criminal procedures, 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.

The motion picture industry reports that BullACT engages in a high level of activities and enjoys excellent cooperation from the law enforcement authorities. Police also raided an Internet Service Provider near Sofia in November that was hosting a server specializing in downloadable films (some 600 titles were available) and software, a welcome instance of enforcement action against Internet-based piracy. In 2004, BullACT, in cooperation with local law enforcement, conducted 531 investigations and 371 raids. Besides the seizures of pirate audio-visual product noted above, these raids netted over 18,000 CDs containing unauthorized musical works, and more than 52,000 CD-Rs of illegal entertainment software. These raids have had a positive impact, but it has been diluted by the lack of follow-up in terms of prosecutions and deterrent sentencing. In short, optical disc piracy problems are growing worse, despite these law enforcement efforts.

The recording industry reports that, in 2004, the competent authorities in Bulgaria carried out 1,472 checks at over 3,699 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 348,373 pirate CDs, CD-Rs and MCs (including also DVDs and DVD-Rs). 182 of those raids were carried out together with BAMP (representing right holders). 160,541 optical discs and tapes with music, films, entertainment and business software were seized in these joint actions.

BSA also continues to report good cooperation with the IPR section of the National Services to Combat Organized Crime, the economic police departments in most regions, and with the General Tax Directorate. The business software industry's enforcement activities have been focused on companies using illegal software in their daily business (end-user piracy); distribution of unlicensed software by system builders (hard disk loading/HDL piracy); and Internet-based piracy. The ongoing good cooperation between the police and the BSA still gives hope that Bulgaria will make further progress in the fight against software crimes, start prioritizing larger targets, and improve the collection and preservation of valuable evidence revealed during raids.

In 2004, based upon BSA criminal filings, ten major end-user raids and six reseller (HDL and CDR) raids were conducted by the police, resulting in seizure of a total of 103 PCs allegedly loaded with unlicensed business software. However, in many instances, prosecution of software cases has been delayed by the inability of the Ministry of Culture's software experts to prepare their expert reports in a timely manner (see discussion below).

In 2002, the Ministry of Interior launched a program in which the police started issuing protocols of warning to legal entities suspected of using unlicensed software. Over the course of the past two years this program has produced notable results in raising awareness; many companies have legalized their software assets. In 2004 alone, 1,383 police protocols of warning and instruction were issued to corporate end-users.

BSA also reports that as a consequence of a joint initiative by the IP industries, 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.

Prosecutions, court procedures and judicial sentencing remain ineffective. This is a continuing bottleneck in pursuing criminal copyright infringement cases, and the track record of courts and prosecutors remains highly disappointing. As a result, the impact of enforcement efforts is undercut by the lack of deterrent impact from prosecution and sentencing.

There are unwarranted delays in moving a case from the police, through the magistrate investigator, and on through the prosecutor's office to the courts. The relatively short time frames set out in the Penal Proceedings Code are often ignored due to the inexperience of investigators, competing priorities, heavy workload, and/or corruption. While these delays persist, seized pirate product may deteriorate (creating evidentiary problems if seized materials are no longer in their original condition) and caseloads can become unmanageable.

Additional problems and delays are caused by the need for expert reports in criminal proceedings. After the initial "check" stage of criminal proceedings, the next stage (preliminary investigation/decision to prosecute phase) 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.

Once cases arrive in court, other obstacles loom. Bulgarian courts continue to demand excessive and cumbersome proof of rights ownership and chain of title in music piracy cases, even when evidence of infringement is blatant. Courts are slow to issue injunctive orders and fail to impose deterrent penalties in criminal cases or sufficient damages in civil infringement matters. Court cases can still take up to three years to complete. 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 deterrent effect.

All these features reflect a lack of recognition of the seriousness of intellectual property crimes. According to official information from the Ministry of the Interior, only 3 persons were convicted for copyright crimes under Article 172a of the Criminal Code in 2004, a sharp drop from the 17 reported sentenced 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, but suspended sentences appear to be the norm. For example, there is no information showing 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.

BSA reports that, despite active enforcement by police, the Bulgarian prosecutors and judges continue to undermine software infringement prosecutions. Regional prosecutors, who supervised the work of police and magistrate investigators, delay proceedings by filing inaccurate motions with no legal basis. But an even greater impediment is that prosecutors, as a general principle, refuse to prosecute software crimes or consider them serious offenses. There is no registry of prosecutors specialized in prosecuting IP and digital crimes, cases which clearly require specific knowledge, skills and experience. The prosecutors working on software crimes are often in charge of all classes of economic offenses and devote very little time to IPR matters. Those prosecutors that attend specialized training in the field subsequently do not appear in the court room. As a matter of practice, one prosecutor is in charge of the preliminary investigation of a software case; a different prosecutor brings the indictment to court and pleads during the court hearings. Furthermore, the same prosecutor rarely appears at two consecutive court hearings. Since prosecutors in charge change frequently and seemingly without reason, they lack knowledge of the facts and evidence in the case. This results in poorly drafted indictments, weak or unsubstantiated arguments, unpersuasive pleadings and a significant number of abandoned or lost cases.

Not only are public prosecutors reluctant to seek support and expertise from the right holders, but in many instances when BSA contacts the Prosecutor's Office it is denied any information about the case. The formal reason for this attitude is the fact that software crimes are prosecuted *ex officio* in Bulgaria, and as an injured party, the right holder may join the case as a plaintiff only if a civil claim for damage recovery has been filed. Under recent amendments to the Penal Proceedings Code, such a claim can be filed only at the first court hearing; thus right holders are excluded from the whole preliminary investigation stage. The private sector has repeatedly offered much needed training for investigations and prosecutions, but the Prosecutor's Office is still reluctant to accept it.

Neither civil nor criminal courts accept BSA member companies' standard powers of attorney, Instead, they demand additional, superfluous documents verifying the good standing of the right holder company and the chain of authorization. On formal, procedural grounds, courts refuse to hear software cases or accept right holders' civil claims within criminal trials. Criminal courts also reject the right holders' civil claims on the specious ground that hearings on the civil claim will complicate the court investigation of the case. When a civil claim is lodged, criminal courts often approve plea bargains between the prosecutor and the defense attorney without fulfilling legal requirements to satisfy the civil claim and award damages to the right holder. Criminal courts often reschedule hearings for no good reason.

As a result of all these impediments, in 2004 **only one** software piracy case was completed with a verdict; two other cases resulted in guilty pleas. Compared with the size of the damages to the right holders, the low fines imposed on the offenders are clearly not deterrent sanctions.

The following chart summarizes available data regarding criminal copyright prosecutions in Bulgaria in 2004:

CRIMINAL COPYRIGHT ENFORCEMEN	IT STATISTICS IN 2004								
BULGARIA									
Actions	MOTION PICTURES	Business Software							
NUMBER OF RAIDS CONDUCTED	371	16							
LED BY POLICE	365								
LED BY CUSTOMS	6								
NUMBER OF CASES COMMENCED	80	16							
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	48	3							
ACQUITTALS AND DISMISSALS	0								
NUMBER OF CASES PENDING	32								
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	0	1							
Suspended Prison Terms	48	1							
MAXIMUM 6 MONTHS		1							
OVER 6 MONTHS									
OVER 1 YEAR									
TOTAL SUSPENDED PRISON TERMS	48	1							
PRISON TERMS SERVED (NOT SUSPENDED)	0	0							
MAXIMUM 6 MONTHS									
OVER 6 MONTHS									
OVER 1 YEAR									
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)									
NUMBER OF CASES RESULTING IN CRIMINAL FINES	48	2							
UP TO \$1,000		2							
\$1,000 TO \$5,000		·							
Over \$5,000		·							
TOTAL AMOUNT OF FINES LEVIED									

Border measures need strengthening. The Bulgarian market is still facing ongoing pirate imports from Russia, Ukraine, Serbia and Montenegro, and other countries, as well as transshipment of pirate CDs from Ukraine and Russia to the Balkans, Greece and Turkey. 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, reflected in a Memorandum of Cooperation and Information Exchange signed with the Customs Agency in July 2003, and there have been some notable seizures at the borders, including the exports of optical disc products mentioned above. However, to the best of BSA's knowledge, there has not been a single seizure of pirate software products at the borders in 2004.

Although the 2000 amendments to the copyright law introduced TRIPS border control measures to the Bulgarian legal system, implementation problems remain. 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 rights holder's application for monitoring the movement of a particular product costs an initial BGN 500 (US\$330) plus an additional monthly fee of BGN 150 (US\$100) for each and every title listed in the application. The applications are not considered promptly, 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 reportedly contains grave discrepancies compared with the TRIPS and the Copyright Law provisions, which makes border control practically unenforceable.8 For instance, TRIPS requires detention of the goods for ten 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 ten 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. The border measures ordinance also fails to provide remedies for transshipment of pirate products. The customs agency is willing to work to improve border control measures, but flaws 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. Further amendments to the copyright law were made in 1994, 1998, 9 2000 and 2002.

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⁸ IIPA does not have the text of this decree on border control measures.

⁹ 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.

¹⁰ 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

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 amendments, which entered into effect on January 1, 2003, contained several improvements, including a requirement for obligatory licensing of CD manufacturers to be outlined by the Council of Ministers¹¹ (see discussion of OD legislation, below).

Despite this progress, the amended law did include several troubling provisions and left significant gaps, including shortfalls in proper implementation of the WIPO treaties. For example:

- The right of "communication to the public" for producers of sound recordings is only a right to "grant permission against compensation" (i.e., 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. 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 "making available right" for sound recordings appears to be implicated only when "an unlimited number of people" may access the recording, instead of encompassing any making available to the public.
- The private copying exception under Article 25 which applies *mutatis mutandis* to sound recording producers is problematic because it does not contain the restriction that the reproduction is for ends that are neither directly or indirectly commercial.
- Fines provided under administrative and criminal sanctions are too low and not deterrent.
- The term of protection for sound recordings remains at only the TRIPS minimum 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 ten-year 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 an exception from the importation and exportation right for amounts of less than commercial quantities.

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. Rights holders 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 (or the legitimate copy), or pre-established damages instead of compensation.

¹¹ 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 (to conform with 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."

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- The ephemeral recording exemption for TV and radio organizations 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.
- Provisions on the legal protection of technological measures are incomplete and do not meet the standards either of Article 6 of the EU Copyright Directive or of the WIPO Internet Treaties.
- Article 97 should be amended to provide administrative remedies against unauthorized public performance or broadcast of sound recordings, and against storage in commercial quantities of products containing copyrighted materials.

In correcting these shortcomings of existing law, Bulgarian legislators should also take the necessary steps to bring their national laws into line with the European Union Directives on copyright, enforcement, and electronic commerce, including provisions on ISP liability.

Optical Disc Regulation

From 1998 till 2003 the control of optical disc production in Bulgaria was subject to Decree 87/96, which included, among other things, the 1996 title verification system. Over the years it became clear that the optical disc licensing system had many loopholes and, in the summer of 2003, the Minister of European Integration finally launched a much-needed initiative to introduce a new comprehensive and strengthened optical disc regulation. A government working group was urgently established and started working on a draft. Unfortunately, the drafting team, headed by the Ministry of Economy, disregarded the bulk of recommendations made by the copyright industries (see below). 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. However, no action has been taken on it since then. The government has failed to push the draft in the parliament, where members of the ruling party within the leading committee have consistently boycotted any possible progress on this issue.

With respect to the draft optical disc law, IFPI/BSA have identified at least four specific areas where reform is essential:

- Most important, 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 would ensure that there is an obligation for SID codes to be etched on all of the relevant replication machinery, molds, etc. In this way, a plant owner can 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.)
- Private sector experts must at all times and unconditionally be permitted to participate in plant inspections.

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¹² 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.

- Additional, enhanced rights and powers 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 polycarbonate imports are being analyzed alongside—and cross-referenced with—declared production levels. It is also important that the resale or movement of imported polycarbonate within Bulgaria be tracked carefully in order to counteract illegal production.

Lacking these amendments, the 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 make it more—not less—likely that local production of piratical optical discs containing copyrighted materials will re-emerge and grow. Enactment of a strong and enforceable OD law in Bulgaria is a top priority for the copyright industries.

Several politicians and OD plant representatives have claimed that an OD regulation is not required, as Bulgaria's plants are not engaged in illegal manufacturing. Major seizures in 2004 and subsequent detailed forensic evidence confirmed that at least two Bulgarian optical disc plants are engaged in illicit production and export of pirate goods and, thus, proved these claims to be wrong. The evidence, and the failure of Bulgarian authorities to proceed against the plants on this evidence, have also clearly demonstrated that the current system is not working effectively. Enactment of an updated and more comprehensive optical disc regulatory system, as described above, and the vigorous implementation of that system, are the only viable long-term solutions to this problem. In the meantime, however, the existing plant licensing regime must be properly enforced. The National Service for Combating Organized Crime (NSCOC) is the key agency in enforcing control over OD manufacturing and as such it must request the Minister of Economy to immediately suspend any licenses issued to OD plants when evidence of infringing activities of these plants is submitted.

Criminal Code

The levels of fines for copyright piracy fall far short of deterrent levels. The fines in the Penal Code have not been increased since 1997, and range from 1000-3000 BGN (US\$650-1950) for a first offense, and 3000-5000 BGN (US\$1950-3250) for a second offense. Administrative fines have also been frozen since 1998 and are comparably paltry. Both must be increased to deterrent levels so that pirates do not treat them as simply a cost of doing business.

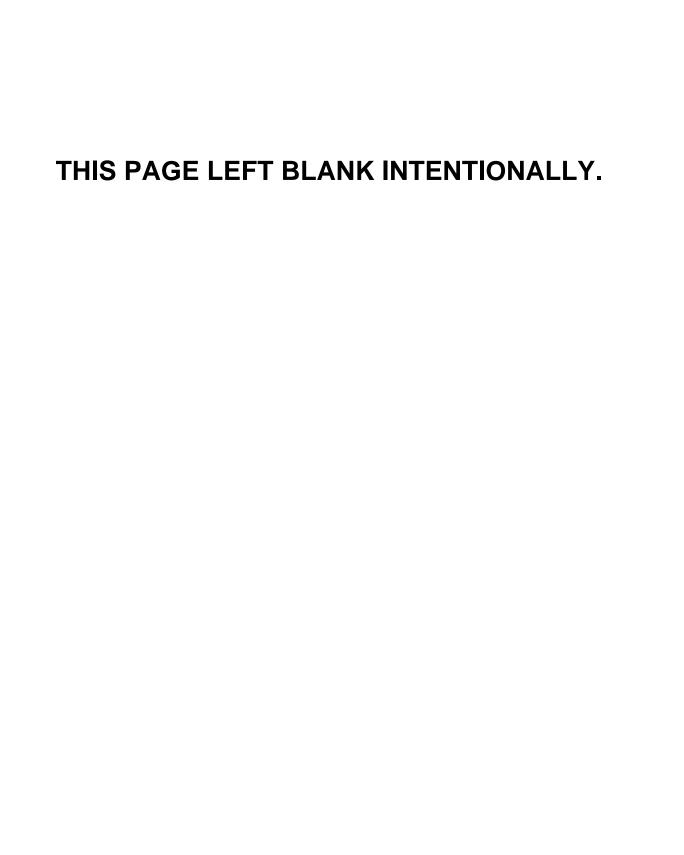
Article 172a of the Penal Code should also be amended to:

- Criminalize possession of commercial quantities of pirate product;
- Provide mandatory minimum imprisonment terms for copyright offenses, so that they cannot be routinely replaced with probation, community service or other non-custodial remedies:
- Provide the formal basis for participation by right holders in criminal trials in the capacity of "injured party."

Additional reforms of the Criminal Procedure Code are needed to address the manifest shortcomings of Bulgaria's current criminal enforcement system. These include:

- Introducing a presumption of rights ownership in criminal infringement cases;
- Allowing rights holders or their organizations to assist in preparing expert opinion reports concerning infringement of their intellectual property rights;
- Providing for criminal liability of managers of entities where IP crimes are committed;
- Re-establishing the option for right holders to file civil claims at any stage of the criminal trial, and the requirement that civil claimants approve the terms of any plea bargain in the criminal case;
- Refining the definition of "injured party" in the criminal trial to cover right holders who have incurred a loss of profit.

Existing procedures also need to be improved to facilitate investigation and prosecution of crimes in the digital environment, specifically the Internet. Courts should also be instructed to accept affidavits from right holders rather than requiring the authentication of large numbers of documents that are often very difficult to obtain.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT CHILE

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Chile be elevated to the Priority Watch List in 2005.

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. The FTA entered into force on January 1, 2004. Some of the copyright law reforms required under the FTA had to be concluded upon date of entry into force, other provisions (including enforcement) are subject to a transition period.

On the legislative front, in early 2004, a new bill aimed at improving anti-piracy measures was introduced to the Chilean Congress. While the goal of such reform is laudable, the bill requires additional improvements, particularly in the area of increasing criminal sanctions to deterrent levels. It does not reflect a comprehensive attempt to fully implement the rest of the Chile FTA enforcement obligations. The bill is currently being reviewed by the Economic Committee in the House of Representatives, and there remain a number of legislative hurdles it must pass before being enacted into law. In addition, future legislative work is needed in order to implement several FTA provisions which are subject to extended transition periods.

With respect to piracy and enforcement, the copyright industries remain very concerned about the lack of improvement. Copyright piracy e involving hard goods continues to be a serious problem, with digital piracy contributing to a dramatic increase in copyright piracy in Chile. Estimated 2004 trade losses due to copyright piracy topped \$106 million. The Chilean enforcement system fails in practice 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, and imports of pirated materials continues. Finally, the civil courts are still relatively slow in issuing relief to rightholders and adequate damages are difficult to achieve in civil cases. Above all, Chile does not have a national antipiracy campaign that aims to combat the damages caused by the violation of intellectual property rights.

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¹ The U.S.-Chile Free Trade Agreement is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

Actions which the Chilean Government Should Take in 2005: The Chilean government should engage in several simultaneous measures to improve copyright protection. In general, the government should publicly declare its will to fight piracy on a national level and announce specific actions in that regard.

Legislative

- Revise the January 2004 proposed anti-piracy bill, which contains several provisions
 which do not address the high levels of effective enforcement in either the FTA or TRIPS.
 The bill is expected to be voted on by the House of Representative's Economic
 Committee sometime in March 2005.
- 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):
 - Increasing the level of criminal sanctions for copyright infringement;
 - Providing an effective civil ex parte search remedy;
 - Establishing statutory damages;
 - Affording express protection of temporary copies; and
 - Adopting provisions on technological protection measures and the enforcement of circumvention of such.
- Adopt appropriate provisions (as agreed to in the U.S.-Chile FTA) to actively regulate the
 acquisition and management of software by government agencies (e.g., by examining
 software on agency computers and relevant software licenses); and
- Implement exclusive importation rights for local copyright holders.

Enforcement

The government of Chile should also take concerted and organized criminal raids. New efforts could include the following:

- The police (carabiñeros) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaiso;
- The police should place more emphasis on investigating pirate manufacturing and distribution centers and operations;
- 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 at international airports and border areas, as well as with finance ministry officials:
- Pursue prosecutions and impose deterrent-level criminal sentences;
- Initiate more raids and actions using organized crime legislation:
- Improve the speed of civil copyright infringement litigation;
- Have customs establish a system to track blank optical media imports and coordinate with rightholders to ensure accurate invoicing;
- Initiate actions against illegal downloaders of music, movies, and software.

CHILE
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004 ²

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	40%	2.0	40%	2.0	40%	2.0	40%	2.0	40%
Records & Music ³	24.8	50%	21.1	40%	14.0	35%	12.2	35%	5.0	30%
Business Software ⁴	41.0	63%	42.0	63%	34.0	51%	46.3	51%	33.1	49%
Entertainment Software ⁵	37.9	70%	NA	NA	NA	NA	NA	NA	41.0	80%
Books	1.0	NA	1.1	NA	1.1	NA	1.1	NA	1.0	NA
TOTALS	106.7		66.2		51.1		61.6		82.1	

COPYRIGHT LAW

The FTA and 2003 reforms: 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, 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.⁶

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

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2004spec301methodology.pdf. For more details on Chile's Special 301 history, see Appendix D (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) of this submission. Previous IIPA Special 301 filings on Chile are posted at http://www.iipa.com/countryreports.html.

³ Estimates for the recording industry are based on a third-party survey in order to improve the accuracy of the statistics.

BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Chile, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at the website http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$68 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁶ 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.

thresholds of obligations found in U.S. bilateral programs, the WTO TRIPS Agreement and the two WIPO Internet treaties.⁷

2004 anti-piracy bill is pending before congress: President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, upon closer review of the proposal, the bill is not satisfactory and has not received the full support of the copyright-based industries.

This anti-piracy bill (Boletín Nº 3461-03) purports to accomplish two major amendments to current law: (1) replacing the section in the current copyright law on infringements, offense and penalties with a new chapter on same; (2) adding modifications to enforcement procedures, including precautionary measures and empowering certain courts. IIPA's analysis of the bill shows the following, in brief:

- Although the bill does incorporate some of the FTA enforcement obligations on criminal penalties, it does not significantly or effectively increase criminal penalties from current levels. For example, levels for minor offenses remain the same but only slight increases in fines are proposed (no increases in jail terms) for the revamped articles on copyright infringement. Several problems are clear. First, the level of proposed fines remains far too low to offer any deterrence. For example, infringers do not even pay the issued fines, and prefer to wait out their cases (some software cases have taken up to six years to be resolved). Second, it remains the case that the drafting formulation remains "fines or jail" for most offenses. In present practice, Chilean judges rarely issue any criminal sentences. For example, minimum sentencing (that is, house arrest) has been applied in the few audiovisual cases, despite good cooperation with police on raids. Industry officials have suggested that jail times should be increased to up to three years in order to constitute a deterrent (this higher level would halt automatic suspensions of sentences).
- On a positive note, the bill does include a fair number of FTA-related civil procedure and provisional measures.
- The bill does not address two issues—technological protection measures and statutory damages.
- Reproduction, absent financial gain, is punished only if the amount of the damages exceeds 150 UTM (approximately U.S. \$7,500).
- The anti-piracy bill fails to address other enforcement-related FTA issues, including:
 - Criminal and civil remedies for encrypted program-carrying satellite signals (Chile FTA Article 17.8).
 - Limitations on ISP liability (such provisions do have a four-year transition), including notice and take down provisions.
 - Judicial authority to impose fines or jail terms on infringers who do not comply with court orders in criminal cases to supply information (Chile FTA Article 17.13

 the bill does appear to afford some civil remedies only).

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⁷ For a historical sense of Chilean copyright efforts over the past decade, please refer to IIPA's 2003 and 2004 Special 301 country reports at http://www.iipa.com/countryreports.html.

 The availability of civil ex parte search remedies (Chile FTA Article 17.15)—a historic problem, especially for the software industry.

The copyright industries have informed the Chilean government of the inadequacies embodied in this bill and the need to reform it. Furthermore, the copyright industries have been pressing for additional amendments to this bill, especially to increase criminal penalties. Currently, the bill is lodged in the House of Representatives' Economic Committee and is expected to be voted on by the committee sometime after the February recess, possibly in March 2005. The bill will then be analyzed by the Constitutional Committee. Once voted on by that committee, and passed, it will move to Senate committees, and, eventually, to the Senate as a whole. As a result, there remain a number of lobbying opportunities to seek modification of this bill.

Additional reform: Reports are also circulating that Chile intends to introduce additional amendments to its copyright law which would be aimed at exceptions and limitations to copyright protection. The copyright industries look forward to reviewing any such proposals and note that any such reform should be compatible with the U.S.-Chile FTA.

COPYRIGHT PIRACY

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.

Music piracy, primarily in the form of pirate CD-Rs, continues to wreak havoc. The recording industry reports that pirate music CD-Rs can be found all around the major cities (mainly Santiago) and in *ferias* around the country. However, the recording industry does not report a great deal of cooperation from the police (*carabiñeros*) in removing many street vendors in Santiago, Concepcion and Valparaiso. The *carabiñeros* require more resources specifically allocated to fight piracy in order to intensify the campaign. Most of the record 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 place locally with CD-R burners. In 2004, the recording industry anti-piracy group (APDIF Chile) assisted police in identifying pirate locations, resulting in the seizures of approximately 250,000 recorded CD-Rs and 533 burners. Although these numbers reflect the goodwill of the police force, it is not sufficient to deter the sale of over 5 million pirate products.

The recording industry ordered a third-party survey (performed by Ipsos) on the impact of Internet music piracy. The results are disturbing, indicating that 19% of the population is engaged in downloading music from the Internet. Most of these people have broadband Internet access from their homes, offices, schools, or at Internet cafés, and either own or use CD burners. More than 60% of those songs downloaded find their way onto a CD-R. Based on this survey, the industry draws a very rough estimate of over 9 million songs being illegally downloaded per year.

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 form of piracy for the business software industry in Chile, according to the Business Software Alliance (BSA). 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.

Optical disc piracy has risen and is the major concern of MPA in Chile. Chile also has the highest level of Internet penetration, on a percentage basis, in all of Latin America—especially in the broadband segment—and there is an increasing incidence of both hard goods sales and downloading via broadband, especially for later conversion to CD-R or DVD-R product for further distribution. Back-to-back duplication of VHS in video stores continues to be common. The country's black market, and the increasing number of street vendors, is 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. The black markets, especially the Bio-Bio market in Santiago, have close links to organized crime and other pirate distribution systems.

Photocopies of medical texts and reference books (usually translations of U.S. titles produced by subsidiaries in Mexico and Chile) continue to plague the book publishing industry, primarily at the university level. Private copy shops are conveniently located near universities, and university-run photocopy facilities on campuses. The publishing industry estimates that 30% of the potential market is being lost through illegal copying. Commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors. In addition, a high VAT is charged on books (18%), which makes books sold in Chile 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.

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, with most pirated products imported from Asia and Paraguay. Internet café piracy is also problematic, with 200 unlicensed cafés in the country.

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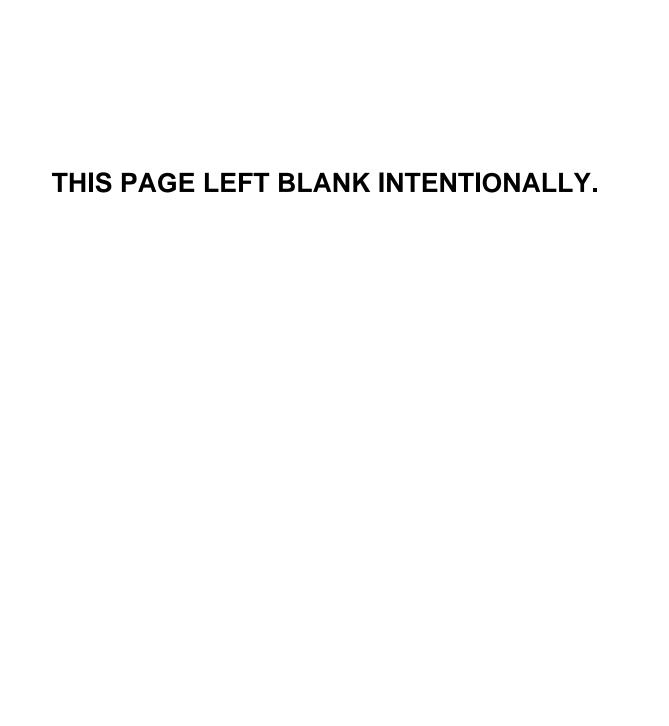
The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. Unfortunately, the FTA also contains a two-year transition period to expressly protect temporary copies; a four-year transition period to implement the enforcement obligations (including 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.

IIPA and its members outline illustrative examples of specific enforcement problems encountered in Chile:

• 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 undercuts 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.

- The police run raids, but prosecutions are rare. Raids carried out by the Federal Civil Police and the Public Ministry can be relatively effective. The record and audiovisual industries have been active in Chile, and report generally good cooperation with police units. However, only a small number of prosecutions are brought. It is very rare indeed for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated.
- Criminal sentences are not deterrent. Although distribution of pirated material is theoretically punishable by incarceration up to 540 days (one and one-half 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 recording industry reports ten sentences issued in 2004 but none carried any type of incarceration.
- 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.
- Lengthy delays in both civil and criminal copyright infringement cases are the norm.
- Border enforcement measures are ineffective. Imports of optical disc piracy coming from across the border remain a serious concern. Iquique continues to be considered a hub of blank cassettes, compact discs, business software applications, and entertainment software products. The latest estimates show that over 40 million blank CD-Rs were probably imported in 2004, which would appear to be far out of proportion with legitimate demand.
- The Chilean government must fully implement government software management. 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 (e.g., inventories of software present on agencies' computers and inventories of software licenses). The Chilean government has not yet fulfilled this commitment.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT COLOMBIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Colombia be elevated to the Priority Watch List in 2005.

Overview of Key Problems: Piracy continues to dominate the Colombian market, adversely affecting legitimate sales, particularly in the music sector. 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. Colombia is also the region's worst book piracy haven, with blatant and open illegal photocopying flourishing in and around university campuses.

Unfortunately, Colombia's enforcement efforts to combat widespread piracy have been inadequate, ineffective and not deterrent. CD-R replication continues to expand and threaten the remaining legitimate music market, such as it is. Despite some raids by the police in Bogotá 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. Paramilitary groups controlling the pirate sale of CDs in some flea markets in Bogotá is a maior new concern. While criminal raids continue at a modest level, one breakdown is that few effective prosecutions for copyright infringement are pursued. Courts do not impose deterrent penalties and cases can last five years or more. With respect to administrative enforcement of cable piracy and signal theft, CNTV's efforts continue to require improvement. With regard to book piracy, universities and schools tacitly, and sometimes actively, encourage illegal commercial-scale photocopying by students and neighboring shops. 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 or developed a policy that would involve all the different agencies that need to take an active part in an effective campaign.

Negotiations for a U.S.-Andean Free Trade Agreement are nearing completion. If Colombia aspires to be an FTA partner with the U.S., it must begin immediately to address the deteriorating situation. Should Colombia fail to act, it will create tremendous uncertainty surrounding its preparedness to take on the obligations of an FTA, and will cast doubt on their reliability as an FTA partner. We hope that this will not be the case.

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Actions Which the Colombian Government Should Take in 2005

- Pressure the Fiscalia General de La Nación (Attorney General) to adopt measures to expedite the prosecution of criminal copyright infringement (e.g., when a person is caught with pirate goods, that person should be accused immediately before the criminal court);
- 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;
- Encourage the office of the Attorney General and the Consejo Superior de la Judicatura to investigate administrative and judicial authorities for negligence and non-application of the law in piracy related matters;
- Engage municipal authorities to clean up flea markets offering pirated product;
- Grant civil ex parte search orders more swiftly (inspectors generally take at least six months from the time a written request is made before orders are carried out, during which time leaks to the target frequently occur);
- Encourage more actions by CNTV, both administratively and in coordination with the criminal authorities, to combat television piracy;
- Encourage CNTV to restrict the grant of licenses to TV communication associations since some of these associations are involved in the theft of TV signals;
- Encourage universities and schools to crack down on illegal photocopying by commercial enterprises in and around campuses, as well as photocopying of entire books by students;
- 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;
- Establish minimum prices for importation of blank media that at least reflect real manufacturing and patent royalty costs;
- Insist that the regulatory agencies (*superintendencias*) and the tax authority (DIAN) 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); and
- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected as Colombia continues FTA negotiations with the U.S. Among other things, the copyright law should include, for example, exclusive making available, rental, importation, and distribution rights for sound recording producers, statutory damages, express protection of temporary copies, and ISP liability along with notice and take down procedures.

COLOMBIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	40.0	75%	40.0	75%	40.0	90%	40.0	90%	40.0	90%
Records & Music	51.6	71%	49.4	70%	56.3	65%	73.0	65%	60.0	60%
Business Software ²	34.0	50%	37.0	53%	21.7	51%	19.5	52%	33.2	53%
Entertainment Software ³	NA	39.0	85%							
Books	6.0	NA	5.4	NA	5.3	NA	5.3	NA	5.0	NA
TOTALS	131.6		131.8		123.3		137.8		177.2	

Ongoing FTA Negotiations

On May 18, 2004, the first round of FTA negotiations began between the U.S. and the Andean region countries Colombia, Peru, and Ecuador. 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 provides 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.

The previous deadline for concluding negotiations, January 2005, has been pushed back to at least March 2005. The sixth round of negotiations concluded in Tucson, Arizona in early December 2004. According to public reports, negotiators were unable to make significant progress on a number of IPR issues, primarily those involving patent matters. Negotiations on copyright and enforcement in the IPR chapter apparently are going well, with indications that negotiations on these issues may be resolved in the early 2005.

Presently, Colombia is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as

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¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Colombia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$61 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

numbers in this report.

3 SA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁴ See Press Release 2004-35, Office of the U.S. Trade Representative, "Peru and Ecuador to Join with Colombia in May 18-19 Launch of FTA Negotiations with the United States," May 3, 2004, available at http://www.ustr.gov/Document_Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 8-19 Launch of FTA Negotiations with the United States.html.

amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA). ⁵ Both programs have standards of intellectual property rights which must be afforded to U.S. copyright owners.

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The recording industry reports that the estimated level of music piracy in Colombia remained constant at the rate of 71% in 2004, with estimated losses due to music piracy placed at \$51.6 million. Although there was an immaterial increase in the value of trade loss estimates in the past year, piracy of music CDs in Colombia continues to increase, mostly due to local CD-R replication, CD-R piracy continues to flourish in Colombia, with pirates primarily copying local repertoire. Most of the blank CD-Rs are brought in to Colombia in containers from the Far East. The industry estimates that over 40 million blank CD-Rs came to Colombia during 2004. Prerecorded 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, Medellin and Cali. Because these vendors move around so much, it is difficult to locate them and get the police to conduct raids in a swift and efficient manner. Most of the record companies in Colombia are operating with minimum staff to keep promoting and selling a limited number of products. In view of the market crisis, for example, Warner Music decided to close its operation. The legitimate music market in Colombia shrunk again by 6.4% in 2004, which represents a total decrease in units of 50% over the last five years.

As concerns about television piracy have decreased, the Motion Picture Association (MPA) reports that there is increasing concern about the continued growth of optical disc piracy in Colombia. Though the country is capable of supporting a legitimate VHS market, the rate of video piracy in the format had been so high that some audiovisual producers simply abandoned the VHS 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 the major cities of Bogotá, Medellin, and Cali (which represent 70% of the total market), 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 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

⁵ During the first 11 months of 2004, \$174.6 million worth of Colombian goods (or 2.6% of Colombia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code (representing a 17.6% increase over the same period in the previous year) and \$3.5 billion worth of Colombian goods entered under the ATPA program (representing a 33.2% 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/2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

that allows signal distribution on a "community, not-for-profit" basis. These pirate systems often use gray market decoders (legal decoders used outside of the territory for which they are licensed) to descramble U.S. signals and then distribute them to their own pirate customer base. With the increased availability of broadband Internet access, and the increased prevalence of Internet cafés, MPA has concerns that illegal Internet downloads and Internet-based hard goods sales of optical media (CD-R and DVD-R) will increasingly become a threat to legitimate sales and distribution. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Colombia are estimated to be \$40 million in 2004.

The publishing industry continues to suffer from widespread piracy, mostly in the form of illegal photocopying of academic textbooks in and around university and school campuses. There is virtually no enforcement against either photocopy shops located outside universities or those operated inside, where individual chapters of textbooks as well as entire books are reproduced without authorization. This phenomenon has increased as students from private universities have migrated to public schools, where photocopying is rampant. Reports also indicated that institutions themselves are sometimes "sponsoring" students or student associations in the sale or distribution of photocopied versions. These photocopied versions, which are obviously able to sell at a fraction of the legitimate price, are even found in some bookstores in major commercial areas. Enforcement against retail establishments dealing in these illegal photocopies is imperative. Publishers also encourage university and school administrations to implement and enforce policies encouraging lecturers, staff, and students to use legitimate materials. Administrations should also ensure that on-campus facilities are used for legitimate copying only. Estimated trade losses due to book piracy were \$6.0 million in 2004.

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. In addition, the Business Software Alliance (BSA) has encountered sophisticated, high-volume software counterfeit production facilities in Bogotá. Estimated losses due to business software piracy amounted to \$34.0 million in 2004, with a 50% piracy level.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (across all platforms) is a growing concern, with pirated products being imported from Southeast Asia.

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The National Anti-Piracy Campaign (*Convenio Nacional*), established by then-President Samper on February 25, 1999, involves a large number of governmental and independent agencies in the fight against piracy. The campaign 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. 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

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.

⁶ 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

crimes involving telecommunications systems (Resolution No. 0-08888 of May 31, 1999). There are several special prosecutors, at least 25 judicial police in Bogotá, and an uncertain number in the provinces. These prosecutors coordinate action with special police forces. This unit continues to perform inspections, bring criminal actions against pirates, and issue expert reports on pirated products.

Criminal raids do occur, but prosecutions are few. MPA reports that some enforcement activity has actually improved in the last three years in Colombia, although there are few results in terms of sentences or reductions in piracy. For example, of the over 60 pending television piracy cases brought in the last several years, there have been only five sentences. 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.

The recording industry reports that the Colombian enforcement authorities still show interest in fighting piracy but good will alone will never contribute to decreasing the high levels of piracy. The industry's anti-piracy group (APDIF Colombia) has been able to prompt the police to carry out a street-level campaign that contributed to cleaning up some high traffic areas in Bogotá. Unfortunately, the authorities do not investigate pirate replication facilities and major distributors, which dilutes the effectiveness of street operations since any seized product is quickly replaced. Of 2,276 raids in 2004, only 200 were directed at labs or warehouses. The result of these actions has been the seizure of approximately 3 million pirated CD-Rs and 1,000 CD burners. Unfortunately, these seizures pale in comparison to the over 17 million units of pirate product sold per year in Colombian flea markets and street stalls. 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.

BSA reports that its business software anti-piracy campaign continues to receive strong support in 2004 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) suspended its support during 2004, explaining that its role is limited to the area of national security. All of these agencies proved critical to BSA's efforts to strengthen anti-piracy enforcement, within and outside Bogotá. In 2004, legal actions were conducted against more than 100 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 Bogotá, Medellin, and Cali. Unfortunately, prosecutions are few and slow. Courts do not impose deterrent penalties and cases can last five years or more. Knowing the glacial pace of prosecution, and that even if found guilty, judges will suspend the sentence or fine, infringers have no incentives to cooperate and resolve their cases.

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 recent 2004 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.⁷

The recording industry states that it takes Colombian courts an average of 45 months to process most cases, before they end up being either suspended or dismissed. Some cases have taken over seven years in the judicial system, a period which far exceeds the normal statute of limitations of five years; as a result, those cases are also dismissed. In 2004, 31 sentences were issued against pirates, but none resulted in jail time.

Border enforcement is weak. Millions of blank CD-Rs enter Colombia for the sole purpose of being used in the creation of pirate music CDs. Some of the shipments are undervalued and in all likelihood include blank CD-Rs manufactured in rogue Taiwanese plants that are not licensed by Phillips and do not pay corresponding patent royalties. The recording industry has received estimates that over 40 million blank CD-Rs have been officially imported during 2004. Without taking into consideration a few more million that are probably being smuggled into the country, it is very doubtful that all of these blank CD-Rs are being used for legitimate purposes. 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. Enforcement at the Colombian borders still needs to be improved in practice, especially given the growth of optical media piracy in the region. According to MPA local counsel, customs authorities are taking some measures to block the entrance of blank digital media in Colombia. However, to obtain good results, interested parties should continue to encourage as well as monitor customs' activities.

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. In violation of Articles 50(1) and 50(2) of the TRIPS Agreement (ex parte authority), inspections take at least six months to be carried out (from the date of the request). During that time, leaks frequently occur, severely hampering enforcement efforts. In fact, BSA's technical expert has even arrived at a given target on the day of the inspection, only to have the target present a certified list of software licenses. Moreover, it is not unusual for software plaintiffs to face such high bond requirements that copyright holders are forced to withdraw the request for provisional measures, another TRIPS violation. Finally, expert fees tend to be very high. Problems with the Colombian courts are inclined to be greatest in cities outside Bogotá, where judges show less understanding of intellectual property

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⁷ 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.

rights, despite educational efforts. Because of the judicial delays in obtaining civil *ex parte* search authority, BSA historically was forced to rely heavily on criminal enforcement.

COPYRIGHT LAW AND RELATED ISSUES

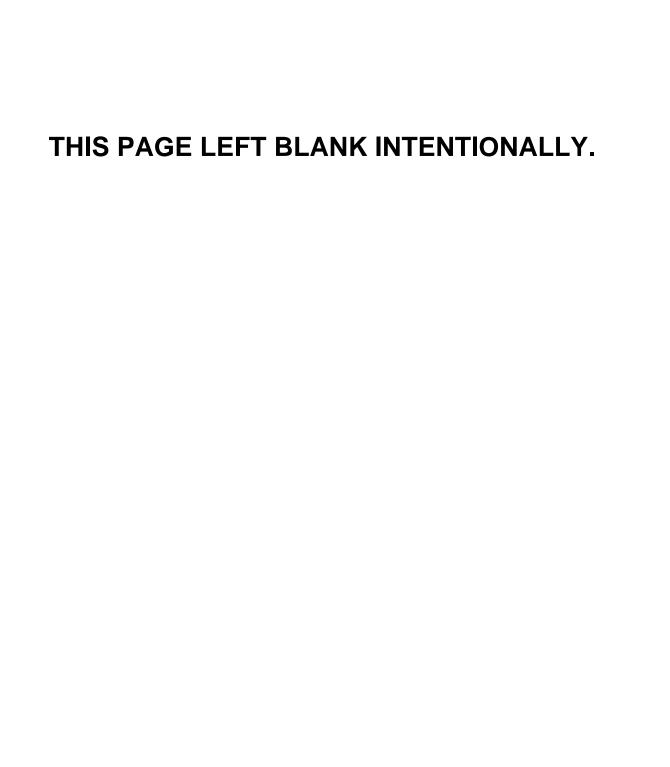
Copyright Law of 1982: Colombia's 1982 copyright law, as amended in 1993 and 1997, and including a 1989 decree on computer programs, is reasonably comprehensive. Amendments to the Colombian law made in 1993 increased the level of criminal penalties for piracy, and expanded police authority to seizing 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 in the form of fines 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 their compliance with copyright laws. 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. Unfortunately, the law is drafted in such a way that the tax authority "may," rather than "must" verify compliance with the copyright law. As a result, supervision by the tax authority of compliance with this provision has virtually disappeared. In fact, when asked why it has failed to enforce the law and conduct audits, the tax authority insists that it lacks the personnel and resources to carry out such audits.

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 of 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, though infringements are only punished with fines. 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.

In January 2005, Law No. 890 took effect and included two amendments to the Colombian criminal code in regard to copyright enforcement. First, Article 14 increased the prison sentences for all crimes in the criminal code (including copyright infringement) by one-third for the minimum sentence, and one-half for the maximum sentence. While copyright infringement previously carried a sentence of two to five years, the new range is now between two years eight months and up to seven and one-half years. Second, Article 5 modified Article 64 of the criminal code, which regulates parole requirements. Under the new amendment, judges may only grant parole if the convict has completed two-thirds of the prison term and shown good behavior. Nonetheless, granting parole will be subject to the full payment of fines imposed and indemnification of the victim.

Furthermore, Law No. 906 (Article 313 of the new Colombian Criminal Procedures Code) was passed on August 31, 2004, published in the *Official Gazette* on September 1, 2004, and effective as of January 1, 2005. This law imposes preventive incarceration in piracy cases where the value of the seized merchandise exceeds 150 times a set salary rate (approximately US\$20,000). IIPA is hopeful that passage of these laws will provide greater deterrents to copyright infringers and give enforcement authorities new tools to combat Colombia's pervasive piracy problem.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

Special 301 Recommendations: IIPA recommends that the Dominican Republic be elevated to the <u>Priority Watch List</u>.

Overview of Key Problems/Challenges: The IIPA and its members have been monitoring the response of the government of the Dominican Republic to its commitments since the March 2004 initialing of the U.S.-Dominican Republic Free Trade Agreement (FTA) and the August 2004 signing of the U.S.-Dominican Republic-Central American FTA (DR-CAFTA). IIPA remains seriously concerned about the slow pace and lack of progress of copyright enforcement reform in the Dominican Republic, especially regarding two key issues identified in the FTA itself: widespread broadcast piracy, and the need for expeditious resolutions of pending criminal copyright infringement cases. Underlying our concern is the questionable commitment of both the prior Mejia administration and the new Fernandez administration toward resolving these issues once and for all. While investigations and raids against broadcasting stations involved with the unauthorized transmission of copyrighted programming were initiated back in 2003 by administrative and criminal enforcement agencies, the ensuing criminal actions taken against certain politically connected stations remain stymied. Criminal trials in key copyright infringement cases involving the music and film industry have been postponed numerous times under an antiquated court system, which permits such delays. The government of the Dominican Republic needs to act swiftly and effectively to significantly reduce the piracy levels. including halting broadcast piracy and improving its prosecutorial and judicial results in criminal copyright cases. Estimated trade losses due to piracy in the Dominican Republic amounted to US\$16.3 million in 2004.

Actions for the Dominican Republic to Take in 2005

- Have the enforcement agencies (including ONDA, INDOTEL and the police—*Fiscalia*) conduct more regular and sustained actions, followed by prompt criminal prosecutions;
- 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 Fiscalía has conducted a raid;
- Dedicate more resources and training to ONDA inspectors, including, but not limited to, more inspectors, more equipment, and expanding 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;
- Assure proper implementation of the new Criminal Procedure Code, which entered into effect in August 2004 (i.e., training of judges, prosecutors and police officers in

intellectual property matters and ex officio authorizations of raids, inspections and closures of illegal activities);

- 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.

	Est	imated Ti (/ and	DOMINI rade Los in million Levels c	ses Du	e to Co S. dolla	pyright ers)	Piracy			
INDUSTRY	2	004	200	03	20	02	20	01	20	00
INDUSTRY	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	2.0	20%	2.0	20%	2.0	60%	2.0	60%	2.0	60%
Records & Music ²	10.3	75%	9.9	65%	6.9	65%	7.7	65%	2.0	80%
Business Software ³	3.0	76%	3.0	76%	3.6	61%	4.0	64%	6.7	68%
Entertainment										
Software ⁴	NA	NA	NA	NA	NA	NA	NA	NA	6.0	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	16.3		15.9		13.5		14.7		17.7	

Copyright and Bilateral Trade Obligations

Free Trade Agreement: IIPA and its members have long supported high-level, bilateral engagement between the U.S. and the Dominican Republic in several ways. IIPA supports the high levels of copyright obligations and enforcement found in the FTAs, like CAFTA. The Central America-Dominican Republic-U.S. Free Trade Agreement (DR-CAFTA) was signed on August 5, 2004, and contains strong provisions on copyright. It also contains provisions in the IPR chapter, and in a side letter, in which the government of the Dominican Republic has made specific commitments to improve broadcast piracy enforcement and resolve copyright infringement cases in the courts in advance of the FTA entering into force.

<u>CAFTA Final Texts/asset upload file934 3935.pdf</u> (see Annex 15.11 on pages 15-32 and 15-33 to find the annex on "Procedures and Remedies Concerning Broadcast or Cable Retransmissions in the Dominican Republic"). The August 4, 2004 Side Letter on IPR Procedures is posted at

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² RIAA reports that in 2003, \$9.9 million represented the estimated sales displacement to the legitimate industry. In 2004, the losses to the legitimate market increased to \$10.3 million with an estimate of 1.53 million pirate CD and cassettes units available in the market.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in the Dominican Republic, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a higher loss estimate (\$5 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

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/2004SPEC301HISTORICALSUMMARY.pdf) of this submission.

The U.S.-DR-CAFTA IPR Chapter text is posted on the USTR website a http://www.ustr.gov/assets/Trade Agreements/Bilateral/DR-CAFTA/DR-

To date, the Dominican Republic government's implementation of the unilateral commitments it made in the DR-CAFTA Side Letter on IPR Procedures and the Annex to the IPR chapter have been very disappointing. For example, the Side Letter on IPR Procedures addresses the twin issues of halting broadcast piracy (including providing a written report on broadcast piracy within 60 days—October 5, 2004—and quarterly thereafter) and expeditiously resolving pending criminal copyright infringement cases. The government missed the October 5 deadline for sharing its broadcast piracy report, and the information it did later provide was cursory. No concerted inspections or actions were taken against broadcast stations suspected of piracy. The Annex to the IPR chapter addresses the application of administrative, civil and criminal procedures and remedies in the case of broadcast or cable transmissions or retransmissions.

GSP and Special 301: The copyright industries have used the Special 301 process since its invention to elevate the importance of copyright issues onto the trade agenda, and we were disappointed that USTR chose to place the Dominican Republic on the <u>Watch List</u> in 2004. In June 1999, the IIPA filed a petition with the U.S. government 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 and effective copyright protection for U.S. copyright owners and to provide equitable and reasonable market access. GSP hearings were held in April 2000 and in October 2003, and IIPA urged that this investigation remain ongoing because the key piracy and enforcement issues had not been adequately resolved. Nevertheless, as the Dominican Republic FTA negotiations were moving forward, USTR terminated the GSP investigation on July 2, 2004.

The Motion Picture Association of America (MPAA) subsequently filed a new petition to USTR on December 13, 2004 to request that the U.S. Government initiate a new GSP IPR investigation against the Dominican Republic. The petition highlighted the continuing broadcast piracy problems faced by the MPAA member companies.

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MPAA reports that broadcast piracy and video piracy remain its key piracy problems in the Dominican Republic. 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, MPAA and its member companies have taken action against television and video piracy in the Dominican

http://www.ustr.gov/assets/Trade Agreements/Bilateral/CAFTA-DR/CAFTA-DR Final Texts/asset upload file15 5851.pdf.

See IIPA's press release on the 2004 Special 301 decisions, May 3, 2004, posted a http://www.iipa.com/pressreleases/2004_May3_Sp_301_plus_chart-rev.pdf.

See IIPA's Pre-GSP Hearing Brief, October 1, 2003, posted a http://www.iipa.com/rbi/2003 Oct30 GSP DomRep.pdf.

During the first 11 months of 2004, \$85.5 million worth of Dominican goods (or 2.1% 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 29.3% increase from the same period in the prior year. During this same period in 2004, \$796 million worth of Dominican goods entered under the CBI, representing a 2.4% increase over the same period in the prior year, and \$1.6 billion worth of Dominican goods entered under the CBTPA, representing a 1.3% decrease over the same period in the prior year.

⁹ See IIPA Letter to the GSP Subcommittee on the Dominican Republic GSP Review, May 20, 2004, posted at http://www.iipa.com/gsp/2004_May20_GSP_DomRep-rev.pdf.

Republic. Since 2003, the Dominican Republic has taken notable and successful action to reduce piracy in both of these areas. There remain, however, some broadcast stations which appear impervious to effective prosecution for piracy. 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. 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 2004.

Piracy of sound recordings and music in the Dominican Republic increased in 2004, with piracy estimated at 75%. The estimated trade loss due to music recording piracy increased to \$10.3 million in 2004. The piracy rate estimate for audiocassettes (still sold in small quantities by independent labels) is 95%, compact discs (CDs) is 25% in retail stores. Street vendors in possession of large inventories of pirate music again plague many major shopping plazas in the tourist areas around the country. In 2003, the Recording Industry Association of America (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); that same year, ADOPROFONO and ONDA seized over 648,000 pirate units from Santo Domingo and Santiago. In 2004, however, the change in government let to a dramatic decrease in the number of operations concerning pirate music. The above organizations combined seized less than 145,000 pieces of product during 2004. Currently the enforcement activities are minimal, with the new government getting off to a slow start in re-initiating the level of enforcement enjoyed during 2003.

The Business Software Alliance (BSA) reports that computer software piracy in the Dominican Republic comprises primarily end-user piracy and hard-disk loading. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to an end user. In some cases, the software is represented as legitimate and the purchasers may be unaware that they are buying illegal software; in other cases, the purchasers are complicit in the piracy. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. Preliminary estimated trade losses to the business software industry are \$3.0 million in 2004, with a piracy level of 76%.

The book publishing industry reports that problems in the Dominican Republic center around illegal photocopying, primarily of English language teaching (ELT) textbooks. Commercial piracy is diminishing as legitimate distributors increase. Estimated trade losses to the publishing industry stayed at approximately \$1.0 million in 2004.

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IIPA and its local colleagues harbored some concern that the summer 2004 elections might result in a slowdown in anti-piracy activities taken by Dominican authorities. At least with respect to broadcast piracy investigations, those concerns became reality, as no known inspections against broadcast stations took place in the months leading up to the August elections.

Broadcast piracy remains widespread: During 2004, broadcast piracy remained a huge problem in the Dominican Republic. For example, Telemicro broadcast recent theatrical releases, including *Shrek*—all without authorization. Canal del Sol changed its programming line-up to include more political programming and fewer films, but the films broadcast all appear

to be pirated. Reports indicate that smaller stations also continue to broadcast films without authorization. After the elections, there was an enforcement lull for some months but activity began to perk up late in the year. Interestingly, in December 2004, Canal del Sol actually stopped transmitting movies for three weeks, but has since resumed broadcasting pirated films. Currently, Telemicro and Digital 15 are the stations which are the most notorious for broadcasting MPA member company films without authorization. In December 2004, INDOTEL and ONDA, the District Attorney and the General Prosecutor indicated their intent to take actions against pirate broadcast stations.

Legal monitoring of four channels (Telemicro, Digital 15, Canal del Sol and Virus) was ordered by a judge at requested of the Santo Domingo District Attorney, in accordance with the formal complaint and legal brief prepared by MPAA. The monitoring list was delivered to the D.A., which now has the legal obligation to apply to the judge for a shutdown order. The D.A. is expected to file against the Virus station first, and then against other stations subsequently (Virus Channel transmitted 2 Fast 2 Furious during the monitoring).

MPAA wishes to highlight the excellent support by the U.S. Embassy Santo Domingo Economic Section for its cooperation and coordination with MPAA legal counsel, and for continuing to pressure the Dominican Republic government to comply with DR-CAFTA broadcast piracy reporting requirements. The importance the embassy placed on IPR issues in 2004 has helped to facilitate MPAA's work in addressing this long-standing television broadcast problem with key government agencies.

Investigations/actions taken by the GODR in broadcast piracy cases:_ In early to mid- 2004, neither ONDA nor INDOTEL took any inspections against broadcast stations. The reason for the lack of activity was not known; perhaps there are political motivations involved or perhaps the authorities were waiting for formal complaints (*denuncia*), even though such formalities are not required. The bottom line is that broadcast piracy—a 20-year problem—remains severe and governmental authorities are not willing to address this problem. Some inspections have been made of the small cable companies, shutting down their operations.

Status of criminal prosecutions against two key broadcasters: Sadly, there has been little progress on the two criminal prosecutions involving broadcast piracy. Inspections of Telemicro (Channel 5) and Canal de Sol (Channel 40) were conducted by administrative agencies in April 2003, and criminal charges were filed in August 2003. Since then, numerous hearings have been held, predominately on defense procedural motions. Finally, in late 2004, judgment was reached in the Telemicro case. Here is a summary of the pending television piracy cases in which MPAA is active:

• In the Telemicro case, the first criminal hearing was scheduled for August 20, 2003 but was postponed. More hearings were held on October 20, 2003, December 16, 2003, March 1, 2004, and April 2, 2004. At the April 2 hearing, the defendants requested that the court impose a bond to continue the case, even though the 2000 Copyright Law expressly exempts copyright holders from paying any bonds. The defendants also requested that the judge rule that provision in the copyright law unconstitutional. The judge rejected the defendant's motion, and the next hearing of this case was scheduled for August 5, 2004. On August 21, 2004, the court sanctioned Telemicro's representative (president Rafael Reynoso), with three months' jail and a fine of 50 times minimum wage (US\$4,915). Unfortunately, the judge did not order the cessation of the transmissions of infringing signals. MPAA had filed an accompanying civil suit, and was awarded US\$11,000. The defendant

- has appealed the decision, and the next hearing of the appeal process will be held on March 1, 2005. Penalties and damages currently are suspended, pending this appeal.
- In the Canal del Sol case, the first hearing was held on October 20, 2003, followed by hearings on December 16, 2003, March 1, 2004, May 10, 2004, and June 11, 2004. On June 11, the judge decided in favor of the rightsholders and the prosecution and allowed the inclusion of the director of Canal del Sol as a named defendant. Another hearing was held on August 5, 2004, and additional suspensions have occurred; the new trial date is April 15, 2005.
- MPAA has filed criminal complaints with the District Attorney against two other stations, Digital 15 and Virus. New criminal complaints against Telemicro and Canal del Sol were filed on December 10, 2004.

Anti-piracy actions against cable and hotel piracy: INDOTEL continues to conduct investigations against cable systems and hotels in the larger tourist cities. Specifically, two cable actions have been taken: Ansonia Visión in the city of Azua, and Telecable Dominicano in Santo Domingo. These inspections resulted in the seizure of equipment used for the illegal transmission of satellite signals. To the best of our knowledge, these inspections have not yet resulted in any fines, closures or license suspensions. Additionally, there have been four actions taken against hotels transmitting unlicensed programming to their guests.

Anti-piracy actions taken against video piracy: MPAA reports that ONDA conducted four inspections against video retailers in the May-July 2004 time period. Three other inspections were done under the new administration of ONDA in the August-December 2004 time period. Results have been disappointing, with little measurable change in the level of video store piracy.

Anti-piracy actions against music piracy: ONDA reported taking actions against music piracy during the last four months of operations. However, the new director has been reluctant to provide information on raids and their successes on a frequent basis. The director has set a quarterly time-table to release information on enforcement initiatives and their successes. To date, the RIAA has not received a report on ONDA operations. In addition, the director has been reluctant to commit to working with ADOPROFONO. In recent meetings, the RIAA recommitted to assisting ADOPROFONO, ONDA the National Police and the *Fiscalía* with training and operations in hopes that the level of enforcement enjoyed in 2003 would again be realized. Since August 2004, ONDA has not reported additional inspections/actions, although at recent meetings they advised seizing over 60,000 counterfeit music CD-Rs since the change in government (ONDA has not provided any supporting documentation).

Anti-piracy actions taken against business software piracy: ONDA and the *Fiscalía* have been conducting inspections against both business software resellers as well as taking *ex officio* actions against business end-users. To date, BSA is satisfied with the level of activity on these fronts. Since the beginning of 2004, ONDAhas performed 26 inspections and the *Fiscalía* has carried out 16 raids (8 raids by the *Fiscalía Distrito Nacional* and another 8 by the *Fiscalía Provincia de Santo Domingo*).

Judicial process in recording cases: The judicial process in the Dominican Republic remains cumbersome. In 2004, 105 criminal cases for copyright infringement of sound recordings filed since 1999 are still pending trial or appeals court hearings. Four criminal judgments were obtained, during the year.

Since 1999, there have been 39 criminal convictions in cases involving music piracy,

including prison sentences, court fines and restitution in the total amount of some US\$104,700. Of these 39 cases, 21 of the convictions (with \$21,700 in total fines) were obtained in 2004. However, almost all of these convictions (34) are on appeal, with no review dates scheduled by the Court of Appeals. There is one piece of good news; in March 2004, a defendant in one of these sound recording cases was actually sentenced by a court to serve three months in jail. The defendant served his time and was released sometime in June 2004. In addition, there have been three cases recently heard by the appellate court in the Dominican Republic; they reaffirmed the sentences and pick-up orders were issued for the defendants. However, with the change in government and a new prosecutor in place, the *Fiscalia* needed to review the cases and reissue the arrest orders. The RIAA understands that the arrest of these individuals is imminent.

Judicial process in audiovisual cases: As of the end of 2004, MPAA reports that they have 21 criminal cases pending before the courts. These include the Telemicro and Canal del Sol broadcast piracy cases as well as several cable piracy cases.

Criminal procedural code amendments: The amendments to the criminal procedural code (adopted in July 2002) entered into effect on September 21, 2004. The criminal cases underway at that time will be adjudicated under the current procedural laws which certainly have not served to expedite criminal cases and prosecutions. The new cases against the TV stations have started under the new code.

A recent action in a trademark case has prompted some concern about the application of ex parte orders to stop infringing activities in copyright cases. On January 31, 2005, a criminal judge in a trademark case declined to issue an ex parte order to cease the illegal manufacturing of the counterfeited materials (pants). The explanation given was that the order to cease the activity would be against the presumption of innocence of the defendant. Nevertheless, a different judge in another case did allow the seizure of infringing products, as such seizures are permitted under the new criminal procedure code. Local counsel believes this January 31 decision is an erroneous application of law in its denial of this ex parte order. The copyright law, the trademark law and the new criminal procedure code all contain provisions that allow the judge to order the cessation of illegal manufacturing activities as well as the seizures of infringing goods and equipment. If this January 31 decision were applied in the broadcast piracy context, serious difficulties in effective enforcement might arise. For example, if the judge does not order the cessation of broadcasting in a TV piracy case, then it is up to the Dominican Republic enforcement agencies (ONDA, INDOTEL and the Fiscalia) to inspect that station and take further action to halt the infringing transmissions. The problem here is that because there is no judicial order, pressure (including political pressure) might adversely affect the agencies' decisions to take enforcement actions or not. Political influence has, sadly, been the determinant of broadcast piracy enforcement in the Dominican Republic for decades. It remains critical that the Dominican Republic courts issue complete orders for cessation of activities as well as seizures of infringing products and equipment, as permitted under current law.

WIPO Internet Treaties: The President has approved the accession of the Dominican Republic to both the WCT and the WPPT. It remains uncertain why there is a delay in completing the delivery of these documents to WIPO in Geneva. IIPA supports swift deposit of these documents.

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. With respect to this constitutional challenge, BSA is still waiting for the Supreme Court's final decision.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT EGYPT

EXECUTIVE SUMMARY

Special 301 Recommendation: We recommend that Egypt remain on the <u>Priority Watch List</u>, and that USTR consider during the year whether the situation in Egypt warrants further review, with respect to implementation of the copyright law, first through passage of regulations, and then through follow-through deterrent enforcement against piracy.

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. Unfortunately, the situation in 2004 worsened, with major organized criminal syndicates strengthening their hold on the retail market, flooding it with piracy. While the copyright law of 2002 contained improvements in substantive protection, issuance of copyright implementing regulations have stalled, and thus, the copyright law has had little to no effect on eradicating piracy in Egypt. The legal vacuum has also left in doubt when purview over business and entertainment software will move to the Ministry of Communications and Information Technology (MCIT) — a badly needed development for those industries. Estimated losses to the U.S. copyright industries in 2004 due to copyright piracy in Egypt were \$72.5 million.

The Egyptian government took a few actions against piracy in 2004, and, for example, the Anti-Piracy Police department in Cairo has recently become more active. However, most actions taken were against small pirate retailers. Copyright owners waited in vain for a raid against the largest criminal pirate operation in Egypt, but no raid was forthcoming in 2004, resulting in that pirate and others returning to the market in full force. The government continues to make progress in legalizing software usage in the public sector.

While the Egyptian government has had hopes for a free trade agreement with the United States, the U.S. government should not enter into such negotiations while Egypt continues to adhere to its closed trade policies, fails to afford adequate market access for U.S. copyright owners, and fails to fully implement and enforce its copyright law.

Actions to be Taken in 2005:

- Enact implementing regulations to the copyright law which cure TRIPS deficiencies, fully implement the WIPO treaties, increase penalties, and provide adequate enforcement measures.
- Complete the move to the MCIT of government responsibilities for enforcement against business and entertainment software piracy.
- Join the WIPO Internet treaties, the WCT and WPPT.
- Take sustained enforcement actions against book piracy, 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. Please also see previous years' reports. 2

E		D TRADE (IN MIL AND LEVE	Losses				ACY			
INDUSTRY	20	04	20	03	20	02	20	01	2000	
INDUSTRI	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	NA	NA	NA	NA	NA	15.0	35%	15.0	35%
Records & Music	7.5	40%	8.0	45%	8.2	41%	9.2	41%	12.0	48%
Business Software⁴	35.0	68%	34.0	69%	12.7	52%	14.5	58%	10.0	56%
Entertainment Software	NA	90%	NA	90%	NA	NA	NA	90%	14.9	94%
Books ⁵	30.0	NA	25.0	NA	28.0	NA	32.0	NA	30.0	NA
TOTALS	72.5		67.0		48.9		70.7		81.9	

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Book Piracy Continues to Thrive

Egypt is home to one of the world's worst book piracy markets. 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 50% or higher, meaning at least half of the approximately 70,000 students in any one year who use English-language materials are using pirated materials. The tender system for supply of textbooks in most universities is unduly bureaucratic and nontransparent. Distributors, who have a chokehold on the market due to the peculiarities of the bureaucratic system, routinely supply only limited numbers of legitimate texts and fill the majority of their orders with their own pirated versions, all at the publishers' official prices. The tender system dictates that the affected publisher's only means of redress is to prosecute the university for buying pirated copies; in turn, the university brings a case against the supplying distributor.

The piracy problem is further illustrated by the continual requests received by publishers for "free" supplementary teaching materials, which are not supported by purchases of genuine text books. The piracy level for medical books is as high as 90%, and the vast portion of the

¹ http://www.iipa.com/pdf/2005SPECIAL301HISTORICALSUMMARY.pdf.

http://www.iipa.com/countryreports.html.

The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁴ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Egypt, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$56 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁵ 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.

market for other professional reference books (such as engineering books) is pirate product.⁶ Although legitimate U.S. publishers provide books at deep discounts (sometimes as deep as 70-80%), piracy of their works continues on a commercial scale. The quality of printing is quite high, making the pirate product in some cases virtually indistinguishable from the legitimate product.

One bright spot reported by publishers is a decrease in piracy of English language teaching (ELT) materials. Publishers and schools have worked together to form a system of "certificates of origin," which has helped to minimize piracy for the ELT market. While IIPA questions the long-term viability of such a system, we hope that it will continue to work effectively.

Piracy remains a serious problem for other industries. The entertainment software industry reports that pirated and counterfeit software is currently found in the market, due to lack of effective enforcement and border controls. 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 or imported from elsewhere in the Middle East and Asia (piracy rates for this product in Egypt are about 60%). These piracy rings are run by large criminal syndicates, and in 2004, they began infiltrating previously legitimate stores with pirate product. These rings employ false documentation claiming they are the authorized sellers in Egypt for legitimate copyright owners' products.

Losses to the business software industry, in addition to 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.

The music industry reports a slight decline in the piracy level in 2004. This is mainly due to a growing number of enforcement actions by the Anti-Piracy Police department in Cairo. The bulk of music piracy of international repertoire in Egypt today is taking place in so-called copyshops, where on-demand compilations are burned on CD-R on the spot from a computer database.

While not rampant due to the lack of broadband penetration, 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" to order (for physical distribution) and downloading of pirate "WAREZ" software from the Internet. IIPA understands that there may be as many as 400 Internet cafés, none of which are using licensed software. The music industry also reports the occurrence of ring-tone piracy on the Internet, where ring-tones and "ring-tunes" are illegally made available for downloading. In 2005, the police computer crime unit in charge of Internet piracy must show greater willingness to tackle all these issues.

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⁶ 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.

COPYRIGHT ENFORCEMENT

Little has changed in enforcement of copyright in Egypt in 2004. In general, enforcement efforts do not deter piracy in Egypt. For example, the publishing industry knows of no actions taken against rampant piracy of academic materials on and around university campuses. For the business software industry, a number of raids were conducted by the Ministry of Interior in 2003 and 2004. However, enforcement against reseller piracy still remains ineffective. Police are content merely to inspect premises, rather than engage in investigations and test purchases. Some actions have been taken against recorded music piracy by the Anti-Piracy Police, especially in the Cairo area, but these raids have focused on small retailers, which have had a minimal effect on overall piracy. Enforcement actions by the Censorship Department continue to be ineffective at fighting piracy. The Egyptian government has touted the progress made against unauthorized satellite retransmissions in Egypt.

The situation could hardly be bleaker for the entertainment software industry. No ex officio actions have been taken against the largest organized pirates in Egypt or any other retail outlets. The entertainment software industry sent out warnings in April 2004, which led to some decrease in piratical activity for a time. However, no actions occurred, and thus the pirates returned in full force.

Egypt's enforcement system has long suffered from the general ineffectiveness of the Ministry of Culture, including, in some cases, evidence of fraudulent endorsement by the MOC of piratical practices. The Ministry of Interior has been one exception, running raids on behalf of the recording industry and the software industry, and in 2004, IIPA was encouraged by the activity of the Anti-Piracy Units ⁷ and the Computer Crime Unit in the Ministry of Interior. However, with annual transfer of the officers in these units, the overall effect on piracy in Egypt is minimal. Egypt must take the cue from other countries that have had more success solving their piracy woes (e.g., UAE), in part by appointing a single effective agency, i.e., the Ministry of Interior, and a competent leader to head the fight against piracy. 8 Since the change in responsibilities over protection of business and entertainment software to the Ministry of Communications and Information Technology has not occurred, IIPA recommends that this be accomplished by executive order immediately.

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.

⁷ In 2003, 26 new Units were created in the Ministry of Interior, for "combating crimes related to 'classified' works" which includes copyright. IIPA has asked, but has not received, lists of officers from these units so that they could be considered for enforcement training.

8 The Business Software Alliance has established a bi-annual training program with the Ministry of Interior for those

officers in the Units.

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. 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 undercut the legitimate price in the market. For the motion picture industry, duties and additional import taxes have been known to represent as much as 87% of the price of the film print, whether duties are computed using the invoice value of the film or a specific duty of 120 Egyptian pounds (US\$20.66) 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) has been levied since 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 (US\$120.54) 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 and the entertainment software industry similarly report high import duties, significantly increasing the price of legitimate products (e.g., imported video game products for play on the console platform), making it even more difficult to compete with pirates. The import duty on finished music CDs is 32% of the total value (cost according to invoice plus freight charges). An extra 10% sales tax is then added to the total value, including import duties. It should, in this context, also be noted that the import duty on blank CD-Rs is a mere 2%. This adds to an environment where legitimate product can simply not compete with pirate product, especially bearing in mind that music piracy in Egypt is predominantly "burned" CD-Rs.

In addition, the Egyptian authorities are considering imposing 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 — right holders must pay a 20% box office tax on non-Arabic language films, while the tax for Arabic-language films is only 5%. In addition, only five prints may be imported for any major U.S. film title imported into Egypt.

On April 24, 2003, Egypt joined the WTO "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

Implementing Regulations Must Be Issued Forthwith

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 should be immediately implemented and enforced 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. 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

It is unconscionable that the Egyptian government has not yet released even a draft of implementing regulations for the copyright law, which was passed more than two-and-a-half years ago. ¹⁰ Further delay is causing serious harm to right holders and sending the wrong message to the public as to the seriousness of the Egyptian government in fighting copyright piracy.

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 2003, almost \$32 million worth of Egyptian goods were imported into the U.S. duty-free, accounting for over 2.8% of its total imports to the U.S. For the first 11 months of 2004, almost \$33.2 million worth of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for 2.76% 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.

Association Agreement with the EU Promises "Effective Means" of Enforcement of IP

On June 1, 2004, the Association Agreement between the European Union (EU) and the Arab Republic of Egypt entered into force. It contains several IPR-related articles, including the obligation to "grant and ensure adequate and effective protection of intellectual property rights in accordance with the prevailing international standards, including effective means of enforcing

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.

¹⁰ IIPA understands that USAID has begun a new program of foreign aid to Egypt to work on copyright law and

¹⁰ IIPA understands that USAID has begun a new program of foreign aid to Egypt to work on copyright law and enforcement. IIPA urges sharing of information on this program so that the most effective legal environment and so that effective enforcement can emerge from their efforts.

such rights." IIPA hopes that this Agreement will help prompt further improvements in Egypt's legal regime, immediate drafting and eventual issuance of strong implementing regulations, and effective enforcement on the ground in Egypt.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 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: Both the domestic copyright-based industry² (one of the largest and most significant in the developing world), and the U.S. and international industry, suffer from high piracy rates and a continuing, debilitating enforcement system. As in 2003, there was only minor progress in combating piracy, though there seems to be a growing recognition, particularly at the state level, that piracy is sapping the creative industries in those states. The hurdles to reducing piracy rates in India have not changed significantly over the years; they 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; an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases, and finally, a lack of real deterrence in the overall enforcement system. CD-R burning (including multi-album compilations of MP3 format music) is assuming a larger percentage of the pirate market, and pirate VCD sales are increasing in Southern India. Unauthorized rental of pre-release pirate or parallel imported DVDs and pirate VCDs has grown into a major problem for the film industry. Imports of pirate CDs, DVDs, entertainment software and other pirate OD product, from Pakistan, Malaysia and other countries, continue substantially unchecked by customs and other enforcement authorities.

There are now 12 OD factories in India, and it is known that at least one, located just outside New Delhi, continues to produce pirate product. India has been pressed for at least three years to adopt an optical disc law like its neighbors in Asia, and, while we reported in 2003 that a drafting process had been completed and the draft law rested with the Ministry of Information & Broadcasting, no action to move it to Parliament has yet been taken. IIPA still has not been able to review this draft and there are recent reports that the government may also be

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¹ For more details on India's Special 301 history, see IIPA's "History" appendix to filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.html.

² A study does in 1005 constructed that the first state of the fi

A study done in 1995 concluded that the copyright industries represented over 5% of GDP. India is also being encouraged by WIPO to do an update of this study, following the new WIPO template for such studies. Software 2003-4 exports alone reached \$12.8 billion in (March ended). http://news.ncmonline.com/news/view article.html?article id=167d1c86c1d28e7607c942fd9891938e. 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. Recently the Indian IT Minister commented that he thought the \$50 billion export target by 2008 could be achieved given the extraordinary growth in 2004. http://www.newkerala.com/news-daily/news/features.php?action=fullnews&id=64856. 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.

considering just adopting amendments in its copyright law, rather than a strict licensing regime, a route that IIPA and its members would oppose.

End-user piracy of business software 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 increased interest by state governments in fighting piracy has resulted in more ex officio actions by police cells in some major cities like New Delhi, Bangalore, Hyderabad and Chennai, and now even in some smaller towns. Pretrial detention of infringers has brought some deterrence, but convictions and deterrent penalties remain rare. While injunctions are issued fairly promptly in some jurisdictions in civil cases, these cases move far too slowly and damages are rarely granted. While the injunctions have offered some deterrence against cable piracy, in particular, this has not been sufficient for other forms of piracy. The Civil Procedure Code was amended in 2003 to speed up decisions but IIPA members report that it is still too early to judge success. India has also engaged in a now four-year, almost totally nontransparent, process of drafting amendments to its copyright law to implement the WIPO "Internet" treaties. We reported in last year's submission that this process had been concluded but neither IIPA nor the U.S. government has been able to review and comment on a draft. Rumors continue to circulate that action may be taken this year, including the ratification of the WIPO treaties. IIPA is concerned, however, that the draft law will not be compatible with the WIPO treaties obligations.

Actions to be Taken by the Indian Government

IIPA recommendations have changed little over the years since few advances in dealing with piracy have 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, modeled on the IIPA "model" provided to India in 2003, 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 in all copyright sectors:
- Work with customs (a) to reduce significant imports of pirate product, particularly from Pakistan and Malaysia, (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film's Indian theatrical run; and (b) investigate and prevent 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, including, in
 particular, setting up IP courts with both civil and criminal jurisdiction;
- Adopt in 2005 amendments to the copyright law that correct deficiencies and properly implement all obligations 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.

	Estima	(in	le Losse millions evels of	of U.S.	dollars)	асу			
INDUSTRY	20	04	20	03	20	02	20	01	20	000
INDUSTRI	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	80.0	60%	77.0	60%	75.0	60%	70.0	60%	47.0	60%
Records & Music	67.3	50%	6.0	40%	6.6	40%	NA	40%	6.0	40%
Business Software 4	220.0	74%	187.0	73%	257.7	70%	256.0	70%	181.6	63%
Entertainment Software ⁵	59.5	86%	113.3	84%	NA	NA	NA	90%	NA	80%
Books	38.0	NA	36.5	NA	36.5	NA	37.0	NA	36.0	NA
TOTALS	464.8		419.8		375.8		363.0		270.6	

COPYRIGHT PIRACY

The fight against high levels of piracy progressed only marginally in India in 2004. CD-R burning has affected all copyright industries. Internet piracy has already hit the music industry, and is now progressing to all other sectors. Continued book, music, video, business software and cable piracy hamper the development of what should be one of the best copyright markets in Asia. Factory piracy remains a problem with the increase in production lines to 35 (from 14 in 2003) and total capacity up from 49 million units annually to over 122 million. This tripling of capacity makes an effective OD law even more urgent. OD imports also continue.

Book piracy: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry, despite significant efforts at enforcement by affected companies and trade associations. many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality cover-to-cover 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 somewhat, particularly in New Delhi, where industry reports good cooperation from the authorities. Cooperation has been severely lacking in other cities and regions, however, especially in Mumbai, where previous efforts by authorities have dissipated, leaving right holders with nothing but a corrupt enforcement system that turns a blind eye to blatant piracy. The Mumbai police crime branch has been totally unwilling to help publishers enforce their rights, instead directing right holders to local police, who have neither the training nor the expertise to be effective in this area. The result is that piracy abounds with little deterrence. For instance, about 50 retailers in and around Churchgate continue to deal openly in pirate goods, with no resistance from law enforcement. Such instances of flagrant violation of the law must be stopped.

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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/2005spec301methodology.pdf.

⁴ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in India, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$367 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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.

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. Moreover, high quality pirated books continue to be exported from India to surrounding countries and all over the world, increasingly using the Internet as a means for distribution and/or order management. Sites operated by Indian companies now offer shipment of pirated books in hard copy to users worldwide, including in the United States. Many operators of these websites are highly organized companies with sophisticated acquisition and distribution systems.

Raids undertaken by publishers have had some effect on organized commercial photocopying, but this activity continues despite enforcement efforts. For instance, copying remains a problem at private educational and research institutions and is on the rise with regard to medical texts. The government should take an active role in combating this problem, starting with a directive to all educational and research institutions that they are to stop use of photocopied versions of books and take appropriate action against on-campus copy shops engaging in illegal activity.

Continuing in 2004 is the unauthorized publication of books in digitized form (including interactive published materials on CD-ROM), all now widely available in the pirate markets. Publishers report, for example, cases where 200-250 best selling medical and technical textbooks are being loaded onto CD-ROMS and being sold for US\$5 or less. Furthermore, the government announced an initiative to digitize textbooks and offer free access to them over the Internet. The government must ensure that appropriate permission is obtained from publishers for the making of all such copies and work with publishers to ensure that copies made as part of this initiative are not diverted to the pirate marketplace.

Unauthorized copies of trade and textbooks began showing up on the Internet in 2003, and this phenomenon took on new proportions in 2004. While the penetration of Internet users in India remains small, the borderless nature of Internet commerce makes this a disturbing 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. Export of these to Asia, the Middle East, Europe and the U.S., both in hard copy form and via the Internet, continued in 2004. Immediate action should be taken to halt this activity.

Video piracy: Pirate VCDs, DVDs, and CD-Rs containing U.S. motion pictures 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). There are still reports that a significant number of 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, while it shifted its operations to legitimate product after an MPA initiated a raid on it in

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⁶ For instance, 18,000 pirate copies of the Harry Potter books were seized in 2002 and early 2003. The then 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 enforcement action 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 However, industry reports some government-led effort to crack down on this activity. In December of 2004, a librarian of a government run medical college was arrested for illegal photocopying and dismissed from his job. An inquiry is ongoing.

2001, then resumed pirate operations. There have been no recent reports of piracy by this factory. 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 them or to 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, and has increasingly been moving into southern India.

In 2004, piracy via unauthorized rental has become rampant. Pirate rental libraries now exist all over India and there is virtually no legitimate rental business.

A hopeful sign has been the renewed attentiveness of the Indian film industry to video piracy. Many press stories emanating from Bangalore, Chennai and the States of Karnataka and Tamil Nadu expressed, for example, the Tamil film industry's concern over increasing piracy and included key statements from State government leaders offering to assist in the fight against piracy. Similar reports were coming from Hyderabad in the state of Andra Pradesh in southern India. Since the state governments are ultimately responsible for enforcing the copyright law, this is a welcome development. MPA is now working closely with local film companies and has entered into an alliance in the State of Kerela for conducting jointly funded anti piracy operations. If this venture is successful, it is hoped that many more local film bodies will join in this fight.

Also in 2004, the Ministry of Information and Broadcasting (MIB) which, we understand, has taken charge of the OD law, has asked all the states to report to it on state anti-piracy actions. IIPA members will be monitoring this welcome move toward better coordination at the national level

Cable piracy: Through consistent enforcement pressure the cable piracy problem has been relatively contained through 2004. 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 were frequently transmiting 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, at least 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 significantly. While cable networks continue to blatantly make unauthorized cablecasts of Indian titles, piracy of MPA member company titles has now been substantially contained through these actions.

⁸ http://www.newindpress.com/NewsItems.asp?ID=IET20040912132927&Title=Southern+News+%2D+Tamil+Nadu&rLink=0;

http://www.newindpress.com/NewsItems.asp?ID=IEA20040912002141&Title=Southern+News+%2D+Andhra+Pradesh&rLink=0;

http://www.ndtv.com/morenews/showmorestory.asp?slug=Video+piracy+robs+TN+film+industry&id=60865.

Music piracy: In 2004, the Indian and international recording industry reported increasing difficulties due to high levels of piracy. The head of the Indian Music Industry (IMI), Mr. V.J. Lazarus, reported in August 2004 that the cassette industry had been virtually "wiped out" by piracy and that the widespread sale of pirated MP3s and the availability of pirate VCDs was causing significant losses to the industry. He reported that the CD business was down 50% in the last one and a half months.9 A July 2004 press story reported that the Punjabi recording industry was in a deep crisis due to piracy and that sales have gone into a steep decline, by about 60 to 70 % over the last two years. Increasingly, VCD piracy had become the culprit. 10 In last year's submission, IIPA reported that the recording industry had declined significantly. For India as a whole, however, this decline has been arrested for 2004, but this may only be temporary. The local music industry is responsible for about 80% of the legitimate music market in India. Pirated CDs containing MP3 files 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). Retail shops in major cities increasingly use CD-R burners to make compilations of music at the request of a customer. Pirated CD-Rs now containing over 200 songs, each in MP3 format, continue to 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. Even though there were a number of *suo moto* raids at the retail level, to IIPA's and BSA's knowledge, there have been no convictions. Furthermore, around 46 retail cases that have been pending for a few years without reaching court are now time barred.

Internet piracy: Internet piracy continues to grow as a problem, and broadband connections are increasing resulting in piracy extending beyond just the music industry. For example, there are new reports of some downloading of entertainment software and sales off auction sites. There is a growing number of pirate sites available in India; many of the servers reside in the U.S. P2P downloads are increasing as broadband penetration grows. A large number of websites continue to make use of Indian-origin repertoire. For the software industry, the growing threat posed by P2P filesharing of computer programs (and other works) remains ominous, with 1,099 P2P infringements of business software being noted between January and September 2004. This number will increase with the growth of broadband penetration. India has adopted a new broadband policy under which it is expected that both government and private sector ISPs will increase the availability of broadband, making the Internet piracy issues more complex.

Piracy of entertainment software: The piracy level is estimated at 86% of the market, with retail outlets and flea markets saturated with pirated products. In addition to continued imports of pirate product from elsewhere in Asia, and particularly Malaysia, it has also been reported that there is now domestic optical disc production of pirated entertainment software products, including "demo games." Demo games are shortened (sample) versions (i.e., two of ten levels of the full game, ten minutes of play time, one of five playable characters made

⁹ http://www.thehindubusinessline.com/2004/10/16/stories/2004101602670300.htm.

¹⁰ http://www.tribuneindia.com/2004/20040713/punjab1.htm#24.

available, etc.) of legitimate soon-to-be-released or already released full versions of a video game that can be downloaded for free from legitimate sites on the Internet. However, pirates are also now downloading these "demo games" and bundling them into compilation discs, thereby putting "demo games" from various entertainment software publishers onto a single disc. These compilations of "demo games" are then sold to the public as "multi-games," deceiving the consumer and creating confusion as well as creating conflicts for the publishers. A pack of 14 of these compilation discs sells for US\$10. When legitimate publishers attempt to market the finished video game product (i.e., the final version of the game, complete with packaging and user manuals, etc.) in India, it is difficult to explain to consumers that they must pay more money for this single game (which may have already been included among the games on the "demo" compilation disc). The consumer is unaware or does not know that the compilation disc merely includes a copy of a demo and is not the real game. Other pirated entertainment software products on optical discs sell for US\$2.

COPYRIGHT ENFORCEMENT

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.

Criminal Enforcement

Criminal enforcement against piracy in India has been rife with frustrations for both the Indian and U.S. copyright industries. In 2003 and 2004, IIPA reported that in the over 15 years that IIPA has been working on Indian issues, there have been no more than 15 convictions 11 for copyright piracy, as far as industry is able to ascertain. This does not yet include BSA's first ever conviction, in 2002, for retail piracy of software, which decision was ultimately reversed on appeal in 2003, and is on further appeal! Noteworthy in 2004, and included in the above figure, was a rare conviction for video and music piracy (1,500 videos plus CDs) in March 2004 in Mumbai, in a case commenced in 1999. The defendant was a retailer who was sentenced to a total of 8 months in jail and a total fine of Rs. 6000 (US\$138) under Articles 63 and 68A of the Copyright Act. This is encouraging and has caused MPA to continue its criminal enforcement program though running more suo moto criminal raids, now not only in the metro cities of Delhi, Chennai, Bangalore and Hyderabad, but also in smaller towns in the States of Kerala, Karnataka, Tamil Nadu, Andhra Pradesh, Punjab, Haryana and West Bengal. Because of increased pressure from the local film industries, the police have been more cooperative, and have asked for training, which MPA has provided. Also encouraging are longer pretrial detentions (given the length of time it takes to complete a criminal case) in Tamil Nadu, using the Goondas Act, which allows such detentions for up to one year.

The music industry obtained 1600 raids in 2004 carried out by the police, with seizures of almost 241,000 pirate audiocassettes (a drop of about 35% from 2003) and over 1,475,903 CDs and CD-Rs (a 100% increase over 2003; the increase was 60% increase between 2003 and 2003), demonstrating that OD piracy is taking over the market in India. Historically, the Indian Music Industry (IMI) has had the greatest success of all copyright industries in getting

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¹¹ 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 three additional convictions under 63B—a welcome development.

raids and seizures, though 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 taking a severe toll. Overall piracy rates (including local repertoire) in the market has increased to 50% and losses have increased as well. The IMI reports that in total 670 convictions were obtained through November 2004 out of 8000 cases initiated since 1997. Of these convictions, 57 resulted in more than minimal jail terms.

Notice and takedown actions against Internet pirates were also conducted by the music industry. The recording industry identified 875 pirate sites during 2004. 211 of these were download sites, 262 do streaming, 32 do music "clips," and 370 link to other sites. The industry took action against 291 of the download and streaming sites through notice and takedown letters to ISPs. 126 of the download and streaming sites remained active in January 2005.

The publishing industry continues to be active in addressing book piracy. Industry-initiated raids continued in 2004 with large seizures in some cases of both pirated print editions and photocopies of medical books, popular fiction and nonfiction and texts of all sorts. However, enforcement becomes non-deterrent after the raids. While over 250 businesses/pirates have been raided since 2000, 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 77 criminal cases have been commenced, progression of cases has been excruciatingly slow. Prosecutors have filed charge sheets in 53 criminal cases but few of these cases have yet progressed beyond the preliminary stage. What is clear is that all these raids have revealed the increasing organization and sophistication with which the book pirates are operating in India. Publishers note that, despite industry training efforts, few *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. 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, out of the total 284 raids conducted in 2004, 249 were *suo moto* (88% of the total). In these raids police seized 185,167 VCDs, 40,336 DVDs, 83,418 CD-Rs, 258 CD-R burners, 21 DVD-R burners and 1,834,157 inlay cards and cover boxes, the majority of which infringed U.S. motion pictures. These increased *suo moto* raids contributed to the seizure of almost 60 percent more pirate optical discs than in 2003.

Central to MPA's criminal program is reducing piracy in Delhi's famed pirate hotspot, Palika Bazaar. Continuing leaks from the police about upcoming raids prompted MPA to go directly to the criminal court where it obtained, in August 2004, a general search and seizure warrant and an order to the police to investigate piracy. This warrant and order resulted in the Delhi police conducting raids in Palika Bazaar and elsewhere, 35 in all, with many arrests. It is hoped that this kind of general court order can be used in other cities.

Owing to a marked and welcome increase in such raids and better co-operation from the police, MPA has now better balanced its use of both the criminal and civil system to combat piracy. For example, MPA reports that in Chennai, in southern India, the police, in the month of July alone, conducted over 35 *suo moto* raids at MPA's request.

In attacking the increase pirate rental business, MPA initiated criminal (and civil) actions in Delhi against one of the largest rental outlets in the country. Repeated pressure by MPA resulted in the bail of the owner being cancelled. A settlement was finally negotiated with the

owner agreeing not to rent any MPA member films and paying a settlement sum of Rs. 500,000 (US\$11,000). This had a deterrent effect on this problem.

MPA has also launched a very successful rewards scheme for identification of CD-R and DVD-R burning facilities. Over Rs. 249,000 (US\$5,711) have been distributed as prize money to the informers for information which resulted in successful raids on CD-R and DVD-R burning labs.

The business software industry reports that there were around 20 known *suo moto* raids conducted by police in 2004 across India targeting the illegal sale of pirate software. Around 16,000 discs containing software with an estimated street value of US\$5.6 million were seized. Given that the cases are prosecuted by the police themselves, it is difficult to keep track of the position of these cases. However, to the best of BSA's knowledge, no cases have resulted in a conviction. The 2003 Hyderabad retail piracy case (filed in 1999), cited in IIPA's 2003 and 2004 submissions in which BSA initially won its first conviction ever for software piracy and then lost on appeal, has now been appealed again. To date there has been no decision on the appeal.

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 each case.

In September 2003, BSA obtained its first *suo moto* Internet raid. It was conducted by the Mumbai police against a pirate selling illicit software through a list (<u>www.list1.150m.com</u>). In this case the charge sheets have now been filed but a court decision is still pending.

Lack of Deterrence, Procedural Burdens, Hurdles, Costs and Delays

Exacerbating the overall non-deterrent 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 Delhi and a few other cities, like Chennai, Mumbai, Bangalore and Hyderabad, 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. 12 The Mumbai police have traditionally refused to emulate the success of suo moto actions, and only after concerted MPA efforts did the police conduct two suo moto actions in December 2004. Hopefully, these actions are the start of a trend of more police-initiated actions. In 2004, the Ministry of Human Resource Development (HRD) asked each state to set up a Nodal office on IPR to coordinate enforcement. The ministry has been conducting training of these Nodal officers.

¹² 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 Bazaar market of Delhi. AAP reports particular problems with the Mumbai police in persuading them to run *suo moto* raids.

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 pirated 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 pirated 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. Even in the case of *suo moto* raids, trial dates are set based upon when the charge sheets are filed and this results in delays of more than two years or more between the date of the raid and the initial trial date, due to huge backlogs in the court system. Thereafter, 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 in the form of countercases being filed by pirate syndicates. Pirates who are raided have formed 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 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. Fortunately, these tactics have not proved a major impediment; MPA has successfully defended itself, and initiated counter actions, which has recently caused a reduction in these complaints.

It is critical that India set up specialized IP courts with both criminal and civil jurisdiction as the only practical way to reduce the huge backlog of court cases and to bring real deterrence to the Indian enforcement system.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004

Actions	Мотюм	Business	Sound	Воок	TOTALS
	PICTURES	SOFTWARE	RECORDINGS	Publishing	
Number of Raids Conducted	284	20*		45	349
Number of VCDs Seized	185,167			0	185,167
NUMBER OF DVDs SEIZED	40,336			0	40,336
Number of CDs/CD-Rs Seized	85,580	6000		0	91,580
NUMBERS OF AUDIOCASSETTES SEIZED				0	0
Number of Books Seized				109,525	109,525
Number of Persons Arrested	284			44	328
Number of Investigations	616			212	828
NUMBER OF VCD LAB/FACTORY RAIDS				0	0
NUMBER OF CASES COMMENCED	284	17**		****	301
Number of Indictments	1				1
NUMBER OF DEFENDANTS CONVICTED (INCLUDING	1			0	1
GUILTY PLEAS)	Į.			O	ı
ACQUITTALS AND DISMISSALS	2				2
Number of Cases Pending	772	45***		44	861
NUMBER OF FACTORY CASES PENDING					
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	1			0	1
SUSPENDED PRISON TERMS					
MAXIMUM 6 MONTHS	1				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				0	0
UP TO \$1,000	1				1
\$1,000 TO \$5,000					
OVER \$5,000					
TOTAL AMOUNT OF FINES LEVIED (IN US\$)				0	0
* "Suo moto" actions in 2004	1		1		

^{* &}quot;Suo moto" actions in 2004.

CIVIL ENFORCEMENT

MPA is still taking civil cases against cable operators, but improvements here have necessitated fewer cases. In IIPA's 2004 report, MPA reported on a series of cases involving unauthorized cable transmission of the movie *Monsoon Wedding*. The system owner appealed the cases to the Supreme Court on the ground that it should not be liable for the acts of its franchisees or distributors. The injunction was upheld by the Supreme Court in a most welcome development and has deterred many large cable networks from transmitting MPA films without a license.

^{**} These cases are all pre-2004 cases.

^{***} These are very old cases which have not reached the court and are now time barred.

^{****} Charge sheets have not been filed in any of these cases but bail hearings were held in 44 cases and arrested defendants spent a total of 90 man-days in custody.

In addition to the continuing efforts to use civil litigation against cable piracy, MPA has also continued its operations against rental libraries and video parlors. In 2003 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. Due to the constant pressure put on this pirate by the MPA (including efforts resulting in cancellation of his bail), the pirate eventually settled the cases and also paid damages in the sum of Rs. 500,000 (US\$11,468).

The BSA has many civil cases still pending in the courts. The process is grindingly slow and as such the problems of yesteryear are still very much the flavor of today. In 2004, BSA filed two civil end user cases. In 2003, it had brought three such actions. 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. During 1999 to 2002, BSA initiated 13 civil actions against corporate end-user pirates. 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. It remains unclear whether the civil damage route will ever create any deterrence to further end user or retail piracy.

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, theoretically at least, be dealt with in a week. A few developments have been observed which are worth noting:

- If the defendant fails to file his Written Statement to the Plaintiff within 30 days of the summons, they have to seek permission which the Plaintiff gets to oppose. If successfully opposed, it leads to expedited proceedings.
- If the defendant fails to file his Written Statement after the maximum 90 day period, then the courts will limit the right to defend the case, thus expediting the proceedings.
- A few courts have started to run back-to-back proceedings for both completion of pleadings and filing of documents along with arguments on interim applications, etc. This will result also in expediting proceedings.
- The judges have appointed commissioners to record evidence and undertake other administrative tasks, allowing the judge to preside at more hearings and attend more oral arguments.

BSA believes that these new amendments should show results in a few years. Meanwhile, IIPA members will be monitoring these developments.

CIVIL COPYRIGHT ENFORCEMENT STA	ATISTICS IN 2004
Actions	BUSINESS SOFTWARE
NUMBER OF CIVIL RAIDS CONDUCTED	2
Post-search Action	
CASES PENDING	14*
CASES DROPPED	
CASES SETTLED OR ADJUDICATED	
VALUE OF LOSS AS DETERMINED BY RIGHTHOLDER (\$USD)	
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	

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.
- 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 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.

- Create a National Anti-Piracy Task Force to take criminal and civil actions against piracy.
 If this is not achievable, provide resources 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:
- Set up specialized fast track IP courts 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 suo moto 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;
- Empower customs to seize, and in particular, destroy, pirated goods. Currently, many seized goods are resold to shops working with the Customs Service. This TRIPSinconsistent practice must stop. Additionally, the customs process continues to be cumbersome;
- Adopt a modern optical disc law;
- Further modernize the copyright law and, in 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. 13

For the last four 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 and governments 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

¹³ See IIPA's 2003 Special 301 country report on India, pages 122-124, available at http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf.

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.

In our 2004 submission IIPA reported that the Core Group had 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; 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 U.S. government to engage immediately with the Government of India on these critical issues before a draft is introduced into the Indian Parliament.

IIPA has recently heard rumors that the Core Group may be considering an amendment to Section 52(1) of the copyright law to make private use an act of fair dealing and not therefore an infringement. This would have potential devastating consequences for Internet enforcement and might extend to camcording a film, for example, in a theater on the grounds that it is a private use. While commercial dealing in the resulting copies would undoubtedly fall outside any such proposed exemption, it would make proving infringement much more difficult.

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 2003, \$2.6 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 20.3% of its total exports to the U.S. During the first 11 months of 2004, \$2.9 billion worth of Indian goods (or 20.6% 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 22% increase over the same period in 2003.

MARKET ACCESS BARRIERS

The government has postponed the Communications Convergence Bill and is now considering revisiting a 1997 draft Broadcast Regulatory Authority Bill that includes the establishment of a Broadcast Regulatory Authority. Local broadcasters are positioning for regulation of foreign broadcasters operations (including content restrictions), and for the provision of a level playing field to allow domestic broadcasters to compete with the alleged unrestricted activities of foreign broadcasters. Both the Broadcast Regulatory Authority Bill and the proposed Broadcast Regulatory Authority will need to be carefully monitored to ensure that provisions from the Convergence Bill of the power to regulate and impose quotas are not included in any Broadcast Regulatory Authority Bill.

The Telecom Regulatory Authority (TRAI) has been given interim responsibility over broadcast and has been extremely active in 2004. While the CAS implementation has been postponed indefinitely due to problems encountered in the implementation process and consumer backlash, a number of other controversial regulations have been issued. In November 2004, TRAI issued a Telecommunication (Broadcasting and Cable Services) Interconnection Regulation. Extensive industry submissions were made on this regulation but despite protest, TRAI maintained the inclusion of the "must provide" and non-exclusivity provisions. These provisions remove the ability of private parties to negotiate standard free market transactions and may undermine the purpose of general anti-competition laws. More recently, TRAI issued a Consultation Paper on the Digitisation of Cable TV. While only a consultation paper, the paper did raise issues of incentives to promote digitization, licensing, competition and a must carry clause. This paper must be monitored closely to ensure that it doesn't also include the controversial provisions of the Interconnectivity Regulation.

Under the Cable TV Networks (Regulation) Act, foreign ownership is limited to 49% of cable systems. For satellite services, the guidelines issued in 2000 place a 20% sectoral cap on platform ownership by foreign companies which limits broadcasters' collective ownership of a satellite platform to not more than 20%. Total direct and indirect foreign ownership (not including non-resident Indian and overseas corporate bodies) also cannot exceed 49%. Such restrictions ignore the fact that significant capital infusions, which may be accessed from international markets, are necessary to further develop the television industry in India.

Entertainment taxes vary widely among Indian states, but the average rate computed on a country wide basis is estimated to be approximately 50%. This constitutes a significant disincentive to much needed cinema construction in India. There is no conformity of entertainment taxes in India. In Tamil Nadu taxes were lowered but remained in place for dubbed films. In the state of Karnataka, in mid 2004, the local industry moved for a 12 week ban on non-Kannada (the local language) films. While having no legal basis, this ban was put in place by the power of the local industry. Despite court rulings against the legality of the ban, fear of repercussions led to compliance. Nevertheless, the term of the ban was gradually reduced from twelve, to seven then to three weeks. Additionally, the local industry was demanding an increase from 40% to 70% of the tax on non-Kannada films, though this was not agreed to by the state government. Furthermore, as a result of sustained pressure, the Karnataka State government waived entertainment taxes on multiplexes and there is now a 100% tax exemption for the first three years followed by a 75% exemption; however, there is a rider of reservation of two screens in the multiplexes for Kannada films.

While taxes relating to production of CDs have been removed, the Revenue and Excise Department maintains an excise tax of 16% on all DVDs and VCDs produced by local legal replicators. Previously the tax had only been applied to masters. This tax puts a heavy burden on replicators, and as a result some have ceased production. The requirement for video certifications to be put on discs also needs to be reviewed as it is not practical for masters and allowance needs to be made, as many masters are used for more than one country. The duty on imported internegatives is also too high and needs to be brought down to prevailing rates.

The censorship requirement of a minimum of three weeks notice for dubbed films is not practical for day and date release films and exemptions should be made for same.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT INDONESIA

Special Statement of Condolence Regarding Recent Events in Indonesia: The copyright industries collectively express our deep sadness over recent events surrounding the devastating *tsunami*, the enormous loss of life, and extend our condolences to the families of those in Indonesia who have lost loved ones, and sympathies to those who have been displaced or have otherwise suffered as a result.

EXECUTIVE SUMMARY

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

Overview of Key Problems/Achievements: Piracy levels in Indonesia are among the highest in the world, at 85-95% range for all industry sectors. Illegal optical disc production continued in 2004, and export piracy broadened. The huge Indonesian market remains dominated by retail piracy of all copyrighted materials, including optical disc piracy (CDs, VCDs, CD-ROMs, and increasingly DVDs) and book piracy. 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 largely ineffective. The audiovisual sector encounters significant barriers to market access, which only exacerbate the piracy problem. Bright spots in 2004 included several large raids against optical disc factories, the first raid by the Police against a well-established company engaged in the unauthorized use of business software (end-user piracy), and support from the Indonesian government to legalized software usage within government ministries. Estimated losses to U.S. right holders due to piracy in Indonesia in 2004 were at least US\$203.6 million.

On October 5, 2004, regulations regarding optical disc production were signed by the outgoing President Megawati Soekarnoputri, which hopefully will lead to more effective enforcement by the administration of the incoming President, Susilo Bambang Yudhoyono, against unauthorized production of optical discs. Nonetheless, the regulation contains some key deficiencies (the regulations were weakened prior to final issuance) which have not been fixed in the implementing decrees that were issued soon thereafter. The government of Indonesia has also missed the deadline to implement protection of technological measures against unlawful "circumvention" and should make this a priority for copyright in 2005. IIPA commends the government of Indonesia for joining the WIPO Performances and Phonograms Treaty (WPPT) effective February 15, 2005, and the copyright law should now be interpreted (or amended if necessary) to afford record producers with legal rights consistent with the WPPT; the copyright law should also extend terms of protection for all works and sound recordings. In 2004, the Ministry of Finance through the Directorate of Customs and Excise indicated plans to

Copyright 2005 International Intellectual Property Alliance

¹ The election in 2004 was a major event of 2004, marking the first time over 250 million Indonesians elected their President by direct mandate.

introduce an "excise tax" on recording media specifically movies and music in optical disc format; IIPA urges the government to cease its plans to roll out this excise tax in early 2005.

Actions to be Taken in 2005:

- Enforce the optical media regulations, including: registering all plants' activities; running frequent inspections of all plants in Indonesia to ensure that they are engaged in legal/authorized activities; seizing suspected infringing materials as well as orders, documents and exemplars from all plants for all titles produced; prosecuting plants and seeking closure of plants engaged in unauthorized activities, including unauthorized production of stampers/masters; taking all necessary steps to ensure that pirate or unauthorized product is not being exported out of Indonesia; and prosecuting owners/managers of plants.
- Ensure the President signs the National Task Force Decree currently awaiting approval from the State Secretariat and strengthens the National Task Force by providing the resources and political will necessary to defeat piracy.
- Carry out sustained enforcement activities against pirate retail outlets, street vendors, distributors, production facilities, and commercial photocopy shops. In particular, the government needs to ensure that sustained, effective enforcement is taken against the retail and distribution outlets in the persistently pirate malls Ratu Plaza and Mangga Dua in Jakarta and that the pirates are successfully prosecuted.
- Effectively enforce the new criminal provisions against corporate end-user piracy of business software, including prosecutions in end-user actions, and continue to improve software asset management in government, while introducing the same for all businesses.
- Improve training and performance of prosecutors and judges in IPR cases, while issuing sentencing guidelines that call for deterrent sentences where time is actually served in custody.
- Allow foreign audiovisual producers to participate directly in importation and distribution of their product, and relax bans on foreign investment in media businesses.
- Amend the copyright law to, among other changes, provide record producers with rights in line with the WPPT, extend duration of copyright protection, etc.
- Implement the copyright law by issuing statutorily-mandated regulations to implement protection of technological protection measures (and consistent with the WCT and WPPT).
- Amend the regulations on optical disc to, among other things: provide centralized licensing of plants; ensure proper use of identification codes, including prohibiting gouging or other alterations of codes; cover stampers/masters; cover exportation of discs, equipment and raw materials.

For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing.² Please also see previous years' reports.³

² http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf.

³ http://www.iipa.com/countryreports.html.

INDONESIA

Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004⁴

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	32.0	92%	29.0	92%	28.0	90%	27.5	90%	25.0	90%
Records & Music	27.6	80%	44.5	87%	92.3	89%	67.9	87%	21.6	56%
Business Software ⁵	112.0	87%	94.0	88%	109.6	89%	63.1	88%	55.7	89%
Entertainment Software	NA	99%								
Books	32.0	NA	30.0	NA	30.0	NA	30.0	NA	32.0	NA
TOTALS	203.6		197.5		259.9		188.5		134.3	

IIPA OPPOSES IMPOSITION OF EXCISE TAX ON "RECORDED MEDIA"

In June 2004, the Directorate of Customs and Excise proposed the introduction of an "excise tax" sticker on recorded optical disc media containing Music and Movies in Optical Disc format. The motives were said to be the reduction of piracy as well as increasing revenue for the customs. 6 The Parliament approved the tax proposal in mid-July 2004. 7 Although the latest government proposal was for a 0% excise tax (i.e., the only obligation would be to affix the stickers onto VCD/DVD products, not to pay for them) in order to counter concerns that this was just another tax against distributors, serious concerns remain that future tax levies will be imposed. However, strong collective opposition from the industry associations has resulted in the excise sticker not being implemented for the moment (October 2004).8 In addition, the Customs department has stated that all revenue that accrued would be channelled back into a fund to fight piracy, but no details have been forthcoming. IIPA is highly skeptical that such excise stickers, which have to be purchased by right holders and distributor of the media, can act to reduce piracy. The tax merely imposes additional costs on legitimate right holders, 9 while failing to stem pirates, who will never pay the tax. In addition, fraudulent/counterfeit stickers have marred the system as to other products currently covered by the tax (e.g., cigarettes), IIPA urges the Indonesian government to cease its plans to roll out this excise tax.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2004spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Indonesia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$157 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁶ Press reports indicate that the Indonesian Customs department expects to increase state revenues by Rp. 98 to 170 billion (approximately U.S.\$11.5 to 18.5 million) each year, with this move based on a sticker price of Rp.750 (US\$0.08).

⁷ Parliament Approves Tariff Plan on Recording Products, Bisnis Indonesia, July 15, 2004.

⁸ Tax on recording media delayed, Bisnis Indonesia, October 20, 2004 (noting the opposition of content groups including Asiri, Asari, AMRI, Asprindo, Asirevi, Apmindo, AIVI and Amari).

⁹ IIPA is uncertain whether the excise tax will be imposed on audiovisual works in addition to the "value-added tax" which is already imposed – Rp. 15,000 or US\$1.63 on most audiovisual titles. If so, this imposes even greater burdens on legitimate producers and importer/distributors by further increasing the disparity in prices between the legitimate and pirate products

IIPA LAUDS PASSAGE OF OPTICAL DISC REGULATIONS

Regulations Must be Implemented Forthwith

On October 5, 2004, outgoing Indonesian President Megawati Soekarnoputri signed the "Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs." With Indonesia fast becoming an export base for pirated optical discs, the successful enforcement of these regulations is crucial to reduce endemically high piracy levels throughout Southeast Asia. IIPA understands that the Ministry of Industry & Trade issued two Ministerial implementing regulations on October 18, 2004. Although Customs has raised some questions regarding the licensing of importation of polycarbonate, the Regulations are expected to come into force on April 5, 2005, following a six month socialization period. Once fully implemented it is imperative that enforcement of the Optical Disc Regulations commence; otherwise, the problem of pirate production of optical discs for export in Indonesia will only grow in 2005 and Indonesia will have wasted this valuable opportunity to demonstrate its commitment to fighting optical disc piracy.

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. These problems results in some of the highest piracy rates in the region and the world (audiovisual piracy levels in 2004 increased to 92%). There are also substantial imports of pirate optical discs that are smuggled in via sea and airports. The complete failure of Indonesia's prosecution system to deal in any way with intellectual property matters seriously compounds the difficulties faced by right holders. In 2004, there were no prosecutions at all. After many years of struggling in the face of rampant piracy, the massive increase in pirate DVDs flooding the market is now threatening the continued existence of the legitimate home video industry.

Optical Disc Production Problem Continues to Worsen

While estimates vary considerably, IIPA understands there are at least 40 plants mass-producing "finished" optical discs (excluding blank CD-R) in Indonesia, with at least 75 production lines (excluding CD-R) for VCDs, DVDs, CDs, and CD-ROMs of all kinds of copyrighted materials. Total annual disc capacity in 2004 (excluding CD-R) was at least 262.5 million discs. Of the 40 plants, 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 they contain the infringing content, and therefore must be covered in laws, optical disc regulations, and be subject to seizure, etc.; see discussion below). Prices of VCD hardware decreased in 2004, making VCDs far more accessible to the general population. On top of increased availability of pirate product locally, production potential exceeded local demand again in 2004, making Indonesia an export base for pirate VCDs. Indications suggest

¹⁰ 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.

that in 2004, VCD factories continued to relocate from Malaysia to Indonesia, mainly in the Jakarta area, but also in Surabaya and Batam.

The latest concern is that up to 20 plants are producing pirate DVDs (mostly DVD9 discs). Although pirate DVD facilities were suspected as having been in place in Indonesia since 2002, it is believed that these facilities delayed production due to their inability to compete with low priced, imported pirate product and the relatively high price of DVD hardware. The continued reduction in the price of pirate DVDs and the availability of cheaper DVD hardware (Rp. 400,000 or US\$43) has more than likely contributed to the establishment and growth of pirate DVD production. In addition, IIPA now believes that Indonesia has become a base for the export of pirate DVDs; recent raids and statements by the Indonesian government support this conclusion. 11 Pirated music CDs from Indonesia have also been intercepted in places like the Philippines. By the end of the of 2004, reports were streaming in from Customs authorities in the Philippines, Australia, Hong Kong, and the United Kingdom of tens of thousands of pirate DVDs being exported from Indonesia. 12 Indeed, statistics from U.K. Customs indicated that by the end of 2004, pirate seizures emanating from Indonesia more than quadrupled over the numbers of copies seized in all of 2003. 13 It is imperative that the optical disc legislation be fully implemented by the new government to stem this tide of piratical activity and eventually drive it out of Indonesia.

Retail Piracy Remains the Norm

Reported piracy levels for nearly all copyright sectors remained among the highest of any major market in the world in 2004. 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 Harco Glodok Market remained the worst hot spots. Indeed, despite repeated attempts by rights holders to close down their pirate motion picture DVD outlets, Ratu Plaza mall (in central Jakarta) appears

¹¹ See Evi Mariani, *Police seize pirated CDs, nab alleged manufacturers*, The Jakarta Post, August 5, 2004. The Jakarta Police confiscated 273,000 pirated video compact discs (VCDs) and audio compact discs (CDs) from three locations, detaining seven suspects. The discs contained music and movies both from local sources, including video clips of Indonesian musicians, Iwan Fals, Ebiet G. Ade, as well as Indonesian movies and TV series, and Indian movies, in addition to international repertoire. The police investigation led them to a medium-scale CD duplicating industry in Tangerang, where the police confiscated 12 machines, including machines to produce blank CDs and DVDs (owned by the company PT Dimension Multi Digital Star). The police reportedly arrested the company's director Ati Susanti, the assistant to the director A Siung and company manager Jenvanter Silalahi. Along with the machines, the police also seized 47,000 pirated VCDs, CDs and DVDs, 11 tons of polycarbonate, a minivan and a computer. In a second operation, the police raided PT Karya Guna Sukses Pratama, also in Tangerang, and confiscated 3,000 pirated VCDs and CDs, six duplicating machines, eight kilograms of polycarbonate and a minivan. The police arrested its director Slamet Wijoyo and commissioner Edy. A third raid was at a warehouse in Pademangan, North Jakarta, where the two companies stocked their production. From the warehouse police confiscated 223,000 pirated discs and a minivan, and detained two other people, Slamet Riyadi, a driver, and Sularso, a packaging worker. These raids cost the pirates an estimated US\$80,000 profit and represent the equivalent of over US\$1.4 million in lost sales to U.S. motion picture companies and their Indonesian licensees, not to mention losses to other industries including the record industry.

¹² Hong Kong customs seized 26,000 DVDs on August 18, 2004 from Indonesia (of which 13,300 were U.S. motion picture titles). On August 23, 2004 two smugglers were intercepted at Davao airport in the Philippines. They were carrying 8,000 pirate optical discs of which over 6,000 were U.S. motion picture titles. On 4 June 2004 Customs at Jakarta International Airport suspended a container of approximately 110,000 pirate ODs (of which 100,000 were computer game DVDs and the remainder U.S. motion picture DVDs)

computer game DVDs and the remainder U.S. motion picture DVDs).

13 A total of 26,567 pirate discs from Indonesia were seized by U.K. Customs in 2003, while a total of 66,087 pirate discs from Indonesia were seized in 2004. Those seizures ranked Indonesia in the top five, behind only Malaysia, Pakistan, China, Hong Kong and Singapore. Many thousands of the seized discs were pirate DVDs of U.S. motion pictures, confirming the suspicion that Indonesia has emerged as a pirate exporter of DVDs.

immune to enforcement. In May 2004, the number of pirate retail outlets in the mall was doubled (to 38), notwithstanding that the mall is located next door to the headquarters of the Indonesian National Police.

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). Prices for pirate product continue to be unbelievably low, for example, in the wholesale market at Harco Glodok, Jakarta, a pirate DVD ran for Rp. 5,000 (US\$0.54) without the box, and Rp. 6,000.00 (US\$0.65) with the box; this compared with around Rp. 20,000 (US\$2.17) in 2003. These low prices are part of a "price war" that has erupted among pirate retailers of DVDs and VCDs. This pricing negatively impacts the legitimate VCD market [new release legitimate VCDs retail at around Rp. 50,000 (US\$5.42) while legitimate DVDs retail at around Rp. 95,000 to 140,000, or US\$10.30 to \$15.18]. 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 their volume of unauthorized copying. A recently announced initiative by the Indonesian Army to offer unauthorized electronic versions of books in Indonesia raises serious questions, and emphasizes the need for Indonesia to adequately implement and enforce its copyright law with respect to digitized works (and to ensure compliance with the WIPO Copyright Treaty).¹⁴

The local recording industry association estimates that seven of every eight sound recordings in the market are pirated. Software piracy in all its forms (business software and entertainment software) remains rampant throughout Indonesia, as pirate product is readily available at retail. Retail computer software pirates are growing bolder, with some even offering long term "membership" and discount packages as well as computer terminals, skilled staff to advise on customers software needs and even issuing receipts for purchases. 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. 15

COPYRIGHT ENFORCEMENT IN INDONESIA

IIPA recognizes that the Indonesian election and security concerns related to terrorism posed hurdles to smooth enforcement operations and diverted Indonesian government resources from the piracy problem in the first part of 2004. At the end of 2004, the tsunami

¹⁴ The Indonesian Army Headquarters has reportedly decided to scan books without permission or regard to any royalty structure. The Army needs to comply with the law and seek licenses in order to engage in the activity it is planning.

15 Cable piracy refers to unauthorized reception and retransmission of broadcasts using illegal decoders in Indonesia.

disaster necessarily diverted attention to relief efforts during the initial aftermath. On top of such external hurdles to enforcement, there continue to be irregularities in raids, such as leaks to raid targets. 16 Police will rarely act on an ex officio basis, 17 meaning right holders must instigate nearly all criminal actions, requiring investments of substantial time and resources. The raids that are run rarely lead to effective prosecutions, and almost never result in convictions of pirates or imposition of deterrent sentences; the court system remains ineffective. Events surrounding the coming into force of the copyright law in 2002 provide an example of the government's ineffectiveness in eradicating piracy. The nationwide coverage of a press conference in July 2003 announcing the new law resulted in an immediate reduction in the number of retail outlets selling pirate movies, but, lacking follow-up action, a month later most retail outlets had reopened, selling pirate movies again.

Enforcement coordination has been marred by ineffectiveness. The IPR Task Force announced in early 2003 under the Chairmanship of the Director General of IPR, and designed to be a national coordinating body for the enforcement of copyright, has been totally ineffective due to the fact that the head of the task force lacks authority over the police and other government departments, and because of inadequate funding by the government. In May 2004, President Megawati directed the creation of a "National Task Force" under the Ministry of Trade that would report directly to the President. The draft Decree awaits approval from the State Secretariat and Presidential signature for implementation. IIPA urges the President to sign this important Decree.

Retail Raids, Factory Raids, and the First-Ever End-User Raid in 2004, and Steps to Uncover Internet Piracy (Distribution)

Notwithstanding a difficult enforcement environment in Indonesia, 2004 brought some hopeful signs that the Indonesian government wishes to tackle the piracy problem. IIPA notes some enforcement activity by the Indonesian authorities in 2004. For example, IIPA understands police actions included at least 3 factory raids and 13 retail actions against VCD/DVD pirates resulting in seizures of approximately over 400,000 discs. Of the retail actions, however, seven resulted in no seizures and there were no prosecutions at all. However, the Police ran their first-ever raid against a well-established company found to be engaging in the unauthorized use of business software (end-user piracy). Further, the business software community received support from the government to legalize software usage within government ministries.

The factory raids reveal a high level of sophistication among the pirate operations. 18 For example, on January 25, 2005, the Polda Metro Jaya (Jakarta City Police) executed a midnight raid on a new pirate optical disc factory, making a number of arrests, seizing 78 stampers and 35,000 discs, and sealing the production machines on site. The Police were, as of late January 2005, still in the process of investigating the crimes, including interrogation of the factory owner.

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¹⁶ When a raid on the notorious retail mall Ratu Plaza was conducted on August 19, 2004, officers arrived to find 31

of 38 stores closed, indicating that they were tipped off well in advance of the raid.

17 On the rare occasions when the Police do act on their own, it is often a public relations exercise directed against the production and distribution of pornographic material.

18 Pirate factories increasingly run their machinery at night to avoid detection, often producing genuine stock during

normal working hours. Another recent trend with pirate factories is the installation of high-powered shredding/crushing machines to destroy valuable evidence in a very short amount of time. In a jurisdiction where very little is committed to paper and almost nothing to computer, the VCDs/DVDs and packaging seized often constitute the only evidence of crime.

On December 29, 2004, a raiding party comprising 25 officers from the Department of Copyright PPNS (Penyidik Pegawai Negeri Sipil, Civil Service Investigation Office), accompanied by the new Indonesian Minister of Legislation and Human Rights Hamid Awaluddin, raided a DVD factory in Jakarta, the first-ever raid of its kind. The raid resulted in the seizure of approximately 10,000 pirate DVDs, almost all of which were of U.S. motion pictures, three production machines, almost 20 tons of polycarbonate and other raw materials, including resin, 175 printing plaques (or acetates), a data machine and computer, a printing machine, 31 stampers and 4 molds. As of the end of January 2005, the Department of Copyright was still gathering evidence to be submitted to the police and prosecution authorities. There are concerns the defendants are taking steps to interfere with the course of justice and IIPA will continue to monitor progress of this important action carefully. It is noteworthy that Minister Awaluddin was present at the raided premises for over an hour, personally searching the building for store rooms and other evidence and briefly interviewing the owner Pak Budi Ayung, who arrived at the factory during the raid. The Minister expressed shock at how technologically advanced the plant was and at the high production capacity, and confirmed his commitment to eradicating pirate optical disc production in Indonesia. IIPA commends the Minister for his participation in the raid and his continued support to eradicate piracy in Indonesia.

In a significant development, on September 28, 2004, a raid was carried out by the police against a well-established company engaged in end-user piracy (the unauthorized use of business software in a business setting). The raid in Jakarta marked the first time the new copyright law provision criminalizing end-user piracy was employed. During the raid, 97 of the 130 computers were found to contain unlicensed software, to the value of around US\$445,000, primarily belonging to Autodesk and Microsoft. IIPA understands that the company involved may undergo a full audit and subsequently legalize its unlicensed software.

In March 2004 the Indonesian government held a Summit on IPR. The aim of the summit was to raise IPR awareness among government agencies and to emphasize the need for the government agencies to lead by example and use only legal software. The audience numbered around 150 government representatives from various agencies. In a related development, on August 12, 2004, the Minister of Communications and Information sent a letter to all government departments referring to the copyright law and asking all government offices to use only legal software. ¹⁹

Another significant (and disheartening) development in 2004 was the uncovering of "Internet" based piracy. Online piracy of digitized files (like P2P piracy) has yet to emerge in Indonesia, but the first signs of an emerging Internet-based pirate market were discovered in early 2004, in the form of websites offering "burned" CD-Rs for sale. Two such websites were found in 2004. The Cyber Crimes Police (Cyber-crimes Unit of the Indonesian National Police) are acting against one website based on a formal complaint filed by the Motion Picture Association and are investigating the second. The websites do not offer downloads but do deliver for sale or rent pirate DVDs of American movies. Efforts to persuade the police to take enforcement action against these two websites are continuing.

ourselves").

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Indonesia plans to eliminate pirated software in government offices, March 23, 2004, at http://story.news.yahoo.com/news?tmpl=story&cid=1510&ncid=1510&e=3&u=/afp/20040323/tc_afp/indonesia it software piracy 040323052915 (in which J.B. Kristiadi, Secretary to the Minister of Information explained that representatives of government institutions have agreed to take an inventory of pirated software in government offices and negotiate with legal vendors; Kristiadi said, "[i]t would be ironic if we break the law we made

Even with the raids described above, the Indonesian court system, long a weak link in the nation's copyright enforcement chain, continues to be relatively ineffective in handling copyright cases, although there were some convictions in 2004. Following numerous retail raids in 2002, 2003 and 2004, only three retailers received convictions in 2003. 20 In 2004, acting on complaints made by the Business Software Alliance, the police conducted retail raids in April on 12 shops in three famous shopping malls (Harco, Ratu Plaza in February and Manga Dua). Significant seizures of pirate software were made (7,200 discs in Harco/Ratu Plaza\Ratu Plaza and 10,300 discs in Manga Dua). Of significance in the Harco Mall and Manga Dua raids was that cases against six of the store owners reached judgment in December 2004 at the West and Central Jakarta District Court with the storeowners being found guilty. The sentence was imprisonment of one year, suspended for two years, so hardly a deterrent.²¹ The Ratu Plaza raid case was dropped altogether.²² In all three cases, there was some corruption although ultimately attempts by defendants to influence the cases failed.

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, direct 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.²³

The previous Megawati government had promised a more enlightened approach to intellectual property rights reform than the Wahid administration, and 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.²⁴ The Directorate General of Film Art and Cultural values under

²⁰ The convictions, meted out in mid-2003 were: (1) Henry Lunardi, who received 6 months' imprisonment and whose appeal for presidential clemency failed; (2) Roosely Effenly, who has appealed her 6-month imprisonment and USD300 fine to the Appeal Court; (3) Freddy Malinton and Andi Mulyono, both of whom appealed their 6-month sentence and USD300 fine to the Appeal Court. In each of these cases it is not known whether the defendants in fact served their punishment. There were no prosecutions in 2004 arising from raids carried in that year or previously statistics which are symptomatic of the overall lack of effectiveness in the enforcement system.

Moreover, the storeowners verbally accepted the decision rendered by the Panel of Judges. The acceptance by the storeowners to the decision means that the decision became valid and binding.

22 The reason given was that during the raid the police accidentally seized "free ware" software. The infringers were

aware of this and as such the Police feared being sued by the infringer.

²³ President Habibie reaffirmed the ban through a Decree in July 1988, 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 houses operators, film 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.

24 Under the law, only local Indonesian companies would be permitted to operate a "Film Business" or a "Film Busin Professional Service." No provisions exist for foreign investment. Another provision of the 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 law also specifies that only national film companies would be permitted to make film commercials, that imported films

the Ministry of Tourism now overlooks film matters and has commissioned the government advisory board on Film Issues, the BP2N, to prepare a draft amendment to the Film Law. Local industry groups and the Motion Picture Association have made submissions and the first concept drafts are in circulation. The draft of the Film Law has yet to be finalized or submitted to the Parliament for debate, BP2N is likely to restart discussions in early 2005, obtain additional inputs from the film and related industries and with approval from the Ministry forward the final draft to Parliament for debate sometime in 2005. We understand BP2N are awaiting budget approval for this purpose. BP2N may not consider foreign film or related associations in their discussions. This is unfortunate as a number of key issues concerning the Film Law are highly relevant to foreign interests. For example, the Film Law is expected to consider an Independent Film Commission made up of local members, possible import and screening quotas, higher entertainment taxes on film admissions to imported films, possible requirements that all prints be made locally, and possible restrictions on foreign direct investment in the film industry.

Also, the Law of the Republic of Indonesia Number 32 Year 2002 Regarding Broadcasting (which came into force in February 2003)²⁵ bans the broadcast of virtually all foreign programming in Indonesia.²⁶ This law's validity has been challenged in Court by interest groups and TV associations and a decision is pending. The Independent Regulatory Commission (KPI) created by the new Broadcast Law has now been installed and has completed and issued several draft Presidential implementing regulations required to implement the Broadcast law.

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. IIPA hopes the new Administration will take a more market-opening stance to the audiovisual and other entertainment industries which stand to invest and participate in the Indonesian marketplace.

Regarding another barrier that had hindered the U.S. motion picture industry, the Ministry of Information had established an annual import quota for foreign films, set at 160. However, with the abolishment of this Ministry, there is currently no enforcement of the quota and any 100% Indonesian owned company may import 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 required that all films be subtitled in Bahasa Indonesian.

25 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.

26 When implemented, the law will require that private broadcasting institutions 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 paytelevision, (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.

COPYRIGHT LAW AND RELATED ISSUES

Two positive developments occurred in 2004: the regulations related to optical disc piracy were signed by the President on October 5, 2004 (and on October 18, 2004, two implementing ministerial decrees providing further details in support of the optical disc regulations were completed); and Indonesia joined the WIPO Performances and Phonograms Treaty (WPPT). Copyright owners now await full implementation/enforcement of the optical disc regulations, and full implementation of the copyright law (through regulations outlawing the unlawful circumvention of technological protection measures used by right owners, term extension, confirming the rights that must be afforded to sound recording producers under the WPPT, etc.). In addition, IIPA supports proposed cybercrime legislation, and urges passage of such legislation in line with the COE Cybercrime Convention.

Comments on the Optical Disc Regulation

Indonesia's "Government Regulation No. 29 of 2004 Concerning High Technology Production Facilities for Optical Discs" was signed by President Megawati on October 5, 2004. Immediate implementation of optical disc controls is crucial to curtail the massive and growing problem of unauthorized production and export of pirate optical discs. IIPA has not has a chance to review the two regulations but looks forward to having a chance to do so. Some remaining problems with the Regulation are as follows:

- There is no centralized licensing of prerecorded or blank optical discs: Article 28 of the law refers to the requirement that OD production facilities comply with "all required permits" but the requirement to obtain a permit as a condition to produce discs has been deleted from the Regulation. The draft Regulation established [in Articles 6(1), (2), and 7] that any person/entity engaged in the manufacture of prerecorded or blank optical discs must obtain a production permit, which is renewable every three years. This is missing from the Regulation finally passed! It appears to be replaced by a "registration" mechanism for those possessing machinery and equipment (Article 12) and a reporting requirement as to production activities (Articles 13 et seq.). Failure to register is punishable by a revocation or suspension of the "Optical Disc business license," but nowhere else in the law is the procedure for obtaining such a license present. This is a serious gap.
- The regulation requires imported pre-recorded discs to be marked with identification code: The requirement in Article 5 for imported pre-recorded optical discs to be marked with identification code from the country of origin of the discs violates GATT/WTO rules and could have other negative ramifications.
- The regulation does not require use of appropriate identification code on blank discs: Use of "mould code" is not expressly made mandatory as to blank discs in Article 4. The law refers to SID Code now but we are unsure whether the Philips/IFPI code will be used. Article 4 states that the codes used shall be codes that are accredited and accepted internationally, so we assume that this may suggest the use of Philips/IFPI code.
- The regulation does not adequately cover stampers and masters: Stampers and masters are defined into the Regulation (and there is a SID Code requirement), but there is no licensing (or even registration under Article 12) requirement for the production of stampers and masters, and there is no requirement for identification code to be applied to

stampers or masters produced in Indonesia (only required for "stampers" imported into Indonesia, per Article 6).

- The regulation does not expressly cover exports of discs, equipment and raw materials: There are two key provisions regarding approvals for commercial activities with respect to discs, equipment and raw materials. Article 10 provides an "Approval" Mechanism for "purchase" of "production Machinery and Facilities and Raw Materials." This is a positive check on transfer of the key materials used to pirate discs, and includes stampers and masters which is positive. Article 11 provides various controls on the importation of discs, equipment and raw materials. These provisions should 1) be expanded to cover export; 2) be limited so they do not curtail importation of optical discs; and 3) be GATT-compatible with regard to importation in other respects.
- The regulation does not expressly prohibit unlawful uses/manipulation of identification code: There are no prohibitions on the unlawful manipulation of identification code (e.g., the making, possessing or adapting a mould without the appropriate identification code; the altering, gouging or scouring of an identification code on or from a mould or any disc).
- The regulation does not expressly authorize forcible entry in an inspection.
- The regulation does not require the government to keep records of "permits" and raids run: There is no government record-keeping requirement, such as a maintenance of a register of registrations, import (or export) approvals, and identification codes granted, available for inspection. Also, there is no maintenance of a record of all inspection actions, available for inspection.
- The regulation does not provide for plant closure.
- The regulation does not expressly impose corporate liability on individuals.
- The regulation provides for a transition of a lengthy six months.

Indonesia Joins the WPPT

IIPA is pleased to note that Indonesia acceded to the WIPO Performances and Phonograms Treaty (WPPT) effective February 15, 2005, ²⁷ curing the anomaly that existed since 1997, when it was one of the first countries to join the WIPO Copyright Treaty (WCT) but failed to join the companion treaty. This accession raises the hopes that Indonesia will fulfill its obligations to protect sound recordings adequately in the digital environment. The copyright law should be amended to provide sound recording producers with exclusive rights they will need to do business in Indonesia in the digital environment, including the right to make their works available and communicate their works to the public.

²⁷ WPPT Notification No. 50, WIPO Performances and Phonograms Treaty Ratification by the Republic of Indonesia, November 15, 2004, at http://www.wipo.int.

Full Implementation of the Copyright Law Awaited

Copyright law in Indonesia is governed under the 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 law imposes maximum criminal penalties on copyright infringers of up to seven years in prison and a fine of up to IDR5 billion (US\$542,000). The 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 Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

While the law resulted in many improvements over the previous copyright regime in Indonesia, and while Indonesia's accession to the WPPT should set the way for Indonesia to afford sound recordings and performances proper protection under the law, including in the digital environment, there are some shortcomings which need to be addressed. 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, to 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.²⁸

In addition, while draft implementing regulations related to "rights management information" (RMI) were released in 2004 (May 2004-dated revised draft "Regulations Regarding the Management Information of Author Rights"). 29 implementing regulations regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law) are badly needed.30

²⁸ 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.

29 The 2004 proposed RMI Regulations focus solely on RMI, thus implementing the RMI provision in the Copyright

Law (Article 25). The stated "purposes" of RMI in the new draft include "Maintain[ing] the access control and the using of Work" as well as "Managling] every access, the using, and integration of protected Work." The clear references to TPMs in the April 2003 (e.g., the "production or importation for sale or rental of every instrument that is specially made or adapted to do the violation in order to avoid or restrict the multiplication of Creation or to reduce the quality of the multiplication products" was deemed to be a violation under the April 2003 draft) were removed from the 2004 draft. Essentially, Article 4(1) of the draft Regulations identify two infringements of "The Management Information of Author Rights": "Destroy[ing] or chang[ing] The Management Information of Author Rights without any permission from the Author"; or "Distribut[ing], import[ing] to distribut[e], announc[ing], or communicat[ing] to the society upon a certain Work, or multiplication result that the Management Information of Author Rights has been changed or eliminated without any rights."

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." We are unaware of any articles that deal with TPMs in the Patent Law.

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.³¹
- 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.³²
- **Overly-broad exceptions:** Certain exceptions in the new Copyright Law may be overly broad, which would violate Indonesia's international obligations.³³
- 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.³⁴ Article 24 should be amended.

³¹ 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.)

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 made 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 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.

33 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 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.

• 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. Recently, the Ministry of Finance indicated that steps were being taken to revamp the existing customs law

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, the Ministry of Communications and Information (KOMINFO) has prepared a draft bill on "Electronic Information and Transactions" that has been submitted through the State Secretariat to the Parliament for debate. This bill focuses mainly on electronic transactions and digital signatures. Members of the initial drafting team who were unhappy with the GOI's draft have broken away and submitted to the Parliament a draft bill on "Criminal Action in Information Technology." The Parliament has yet to take up either of these bills for debate. The GOI in recognition of the need for a comprehensive CyberCrime law has recently commenced drafting a new cybercrime law based on academic inputs as well as international standards. No working draft is available yet and the indicated time frame for a draft to be available is around May 2005. This government draft will replace the existing cybercrime draft in the parliament. Motion picture industry representatives have made submissions based on available drafts and continue to track these bills, which include some intellectual property aspects relating to domain names.

In a related development, in February 2003, a "cybercrime task force" was established in Indonesia. It is reported that the KOMINFO, in cooperation with the Association of Internet Service Providers (APJII) and the Police, decided to form the 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 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; this approach would also comport with the Asia-Pacific Economic Cooperation (APEC) 2004 Minister's Statement to "[enact] domestic legislation consistent with the provisions of international legal instruments, including the Convention on Cybercrime (2001)."

³⁴ 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 (an 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.

³⁵ Cybercrime Task Force To Be Established in Indonesia, Asia in Focus, Feb. 25, 2003.

See http://www.apecsec.org.sg/content/apec/ministerial statements/annual ministerial/2004 16th apec ministerial.html ("Ministers took note of work undertaken by the Telecommunications and Information Working Group [TEL] regarding Cyber Security and Cyber Crime within the scope of securing telecommunications through the exchange of experiences and good practices. They agreed to strengthen their respective economies' ability to combat cybercrime by enacting domestic legislation consistent with the provisions of international legal instruments, including the Convention on Cybercrime (2001) and relevant United Nations General Assembly Resolutions; increasing

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 2003, nearly \$1.35 billion worth of Indonesian goods (or 14.25% of Indonesia's total imports to the U.S.) entered the U.S. under the duty-free GSP Code. During the first 11 months of 2004, \$1.2 billion worth of Indonesian goods (or 11.9% 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.

cooperation among economies' Computer Emergency Response Teams (CERTs), law enforcement, and the public and private sectors; training SMEs in network security; and increasing law enforcement capacity-building.")

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT KUWAIT

EXECUTIVE SUMMARY

Special 301 Recommendation: Kuwait should remain on the <u>Priority Watch List</u>.

Overview of Key Problems in 2004: Only one in twenty (5%) U.S. motion picture videos sold in Kuwait is legitimate; the rest are pirated. The entertainment software industry experiences similarly devastating piracy, with business software and recorded music not far behind. Retail piracy as well as pirate optical disc distribution centers and duplication sites continue to be the primary concern of legitimate copyright owners in Kuwait. Other problems include end-user piracy (which is a major concern, particularly for the business software industry) and more recently, Internet piracy. Websites with clear links to Kuwait, including 6arab.com, are illegally distributing thousands of Arabic music tracks worldwide. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Kuwait were at least \$45 million.

In 2004, the Kuwaiti government (primarily the Ministry of Commerce and the Public Department of Customs) began making overtures to industry to identify more targets, indicating an increased awareness that the piracy situation will need to be resolved in order for Kuwait to achieve its trade objectives with the United States, namely, removal from the Priority Watch List and the eventual commencement of negotiations toward an FTA. While the copyright industries are heartened that certain entities within the government of Kuwait have apparently decided they need to take concerted action to curtail piracy, the steps taken thus far at the retail level have been far from what is needed to reduce piracy levels for most industries. For example, IIPA and its members/affiliates supplied the government of Kuwait with at least 55 retail targets. Some of these targets have recently been raided — a promising sign. IIPA remains unconvinced, however, that the Ministry of Information (under the leadership of Ghanas Al Adwani) is capable or willing to exert the kind of sustained effort required to defeat piracy for most copyright owners in Kuwait (with book piracy being an exception). Raiding small retail targets once is not a formula for beating back entrenched piracy in Kuwait. In addition, such actions do nothing to eliminate the key distribution and duplication centers of pirate optical discs, to stop end-user piracy of business software. Internet piracy, or other piracy phenomena.

On a positive note, IIPA commends the cooperation of Kuwaiti authorities in fighting book piracy and supporting the publishing industry in legalizing universities' adoption policies. IIPA also commends actions by the Public Department of Customs (under the Ministry of Finance), which have been very effective even in the face of growing imports from Pakistan and Malaysia, as well as many recent raids taken by Ministry of Commerce officials, and actions taken by the Ministry of Information against cable piracy.

Copyright 2005 International Intellectual Property Alliance

2005 Special 301: Kuwait

¹ IIPA notes that the policy/legal section of the MOI, headed by Sheikha Rasha Al-Sabbah, has been very helpful. The MOI has other good personnel but ill-suited leadership that disrupts real progress.

Challenges for 2005:

- Greater prioritization and devotion of resources by the Ministry of Information, leading to sustained and repetitive raiding against chief targets, including retail, end-user, and where found through investigation, perpetrators of Internet piracy.
- Establishment of a specialized IPR unit within the Kuwait police force.
- Greater prioritization of IP crime within the Ministry of Interior to ensure systematic involvement of the Police, and provision of ex officio authority, especially against sources of piracy.
- Issuance of public declarations at the highest level of the Kuwaiti government that piracy will not be tolerated in Kuwait.
- Sustained raids, which are publicized in order to achieve a deterrent effect.
- Prosecution of infringers (including distributors, resellers, end-users, dealers in unauthorized "smart cards," producers, etc.), and imposition of deterrent sentences, including jail times (not suspended but actually served) and severe fines.
- Amendment of the copyright law to bring it into line with the TRIPS Agreement, establishing
 an adequate legal framework for electronic commerce by protecting copyright in the digital
 environment, establishing deterrent penalties including minimum mandatory sentencing
 (including deterrent fines, closure, and imprisonment, with increased penalties for recidivists),
 and join the WIPO "Internet" treaties.

For more details on Kuwait's Special 301 history, see IIPA's "History" appendix to this filing.² Please also see previous years' country reports.³

KUWAIT Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁴											
INDUSTRY	2004		2003		2002		2001		2000		
	Loss	Level									
Motion Pictures	12.0	95%	12.0	95%	10.0	95%	9.0	85%	8.0	85%	
Records & Music	8.0	65%	3.0	55%	3.4	64%		70%	3.0	70%	
Business Software ⁵	24.0	68%	24.0	68%	4.7	73%	4.5	76%	6.6	80%	
Entertainment Software ⁶	NA	NA	NA	95%	NA	NA	NA	85%	NA	NA	
Books	1.0	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA	
TOTALS	45.0		41.5		20.6		16.0		20.1		

² http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf.

http://www.iipa.com/countryreports.html.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at http://www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Kuwait, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$40 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁶ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

COPYRIGHT PIRACY

Kuwait Remains Primarily a Pirate Market for Most Industry Sectors

Piracy continues to thrive in Kuwait, as hundreds of thousands of pirate optical discs (DVDs, VCDs, CDs, CD-ROMs, "burned" CD-Rs, and, increasingly, DVD-Rs) of movies, music, business software, and entertainment software are openly sold in retail stores, on the streets, and in the sougs each month. Imports continue from South (mainly Pakistan) and Southeast Asia. Distributors operate with impunity, supplying retail stores and street vendors alike. Increasingly, domestic piracy ventures are "burning-to-order" at storefronts, or "burning" content onto recordable discs and distributing those to street vendors. Retail stores continue to maintain large stocks of pirate product (often sold not in the open but "under the counter" or by retrieving pirate titles off-site). Large numbers of street vendors openly display and sell pirate discs ("burned" CD-Rs and, increasingly, burned DVD-Rs). These products often involve uncensored, unreleased titles (i.e., pre-theatrical release date and/or pre-video release date). Pirate DVDs in particular have been entering the country from Asia, including Pakistan, in large quantities since 1998. 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. Pirated entertainment software products, on all platforms (i.e., console, PC and cartridge-based games) continue to be imported from Asia. Pirates even blatantly use entertainment software publisher brands and trademarks in their advertising.

A relatively new but troubling phenomenon in Kuwait is Internet piracy. Several websites operate in Kuwait which offer to "burn" pirate content for sale. More nefarious is direct peer-to-peer downloading of pirate copies of music and other copyrighted materials. As of February 2005, there were several websites with links to Kuwait illegally distributing thousands of Arabic music tracks worldwide. Of these, a site called "6arab.com" is the most notorious. The site owner is a Kuwaiti national, and while using evasive techniques such as employing servers in several different locations, there is no question but that he could be brought into court in Kuwait for copyright piracy, and that there are undoubtedly instances of illegal upload or download from Kuwait. This illegal distribution inflicts substantial financial damage on the legitimate recording industry (including legitimate licensees from the Middle East like afaqchat.com) and seriously affects investment in developing markets and new repertoire in the Middle East. The Kuwaiti government has not done enough to shut this piracy down.

Other major 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, nearly one in eight cable TV subscribers (especially in the Asian neighborhoods) receives unauthorized transmissions of TV broadcasts, including unauthorized broadcasts of some of the latest U.S. motion picture titles ("cable piracy"). Internet café piracy has also become a problem, with café owners installing unlicensed or pirated entertainment software onto café computers. There are now approximately 300 Internet cafés in the country.

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⁷ For the entertainment software industry, pirate copies of Nintendo's GameBoy Advance® games are all apparently imported from Asia.

In stark contrast to some of the other industry sectors, book publishers report much 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. While isolated incidents of photocopying still take place in universities and require continued monitoring, the tendering system in the universities under the direction of the Ministry of Higher Education works to prevent any significant supply of pirated or illegally photocopied textbooks in Kuwait. The publishing industry compliments the Kuwaiti authorities on this success, which serves as a model for the region.

COPYRIGHT ENFORCEMENT

The story of Kuwait copyright enforcement in 2004 is a tale of three ministries (or more). Industry continues to receive good cooperation from the Public Department of Customs (Ministry of Finance) intercepting pirated shipments at the borders, many coming from either Pakistan or Southeast Asia. The Ministry of Commerce and Industry stepped up efforts in late November/early December 2004 with some impressive raids. On the other hand, the Ministry of Information enforcement unit remains sorely lacking in its ability and perhaps its will to stamp out piracy, taking only sparse enforcement actions in 2004, notwithstanding the copyright industries' repeated and detailed requests, including detailed information with exact names and locations of suspected pirates (IIPA provided at least 42 suspect targets, and IFPI provided another 13 targets, in October 2004). The Ministry of Interior (the police) and even Customs remain unable to take *ex officio* action necessary to defeat piracy in Kuwait; the increased presence of locally produced pirate CD-Rs highlights the greater need for the police to become involved.

In fact, Kuwait should establish a specialized IPR unit within the police in order to have a permanently operational law enforcement body with trained officers that can carry out immediate raids as and when information about piracy becomes available. Such a unit could mirror a similar unit within Customs and become the focal point of industry training and assistance. Finally, Kuwait needs to demonstrate that it is willing to deal with Internet piracy in Kuwait, by working actively to shut down Kuwaiti-run websites offering pirated materials for sale or unauthorized download, and working to hold liable those responsible. These websites pose a very serious danger to legitimate right holders that must be dealt with through the takedown of the offending sites. IIPA remains cautiously optimistic that overtures made by the Kuwaiti government to industry indicate that the government has made the decision to solve the piracy problem, but is experiencing problems trying to implement its new-found policy. It remains the case that only sustained inspections, investigations, and raids, i.e., multiple raids against the same targets within a short period of time, will significantly reduce piracy in Kuwait. Such raids must in turn be followed with the prosecution of, and where appropriate the imposition of sufficiently deterrent penalties against the offending parties.

It is critical that Kuwaiti law enforcement officials inform right holders of the status and results of raids, i.e., informing right holders of the type and quantity of products seized, whether the offending parties have been arrested and whether proceedings have been instituted against those arrested. While the increase in frequency of raids is a promising development, this raiding activity must be sustained and also proceed to prosecution as otherwise there will be no gains made against reducing the prevalence of pirated products in the market.

Ministry of Information and Lack of *Ex officio* Police Action Remain Major Choke Points

The Ministry of Information (MOI) has taken very little action against the street vendors, retailers, distributors, importers and illegal duplication facilities that continue to feed the pirate industry. Ministry of Information actions taken in 2004 were limited to small shops, and were not sustained. After dozens of potential raid sites were supplied by various industries, and then again by IIPA (in October 2004), very few actions have resulted (for example, in October 2004, the MOI informed a local industry group that only one of six suspected targets given to MOI was found to be engaged in piracy, resulting in the seizure of 1,200 pirate VHS cassettes/DVDs, and that the other shops were found to be clean; repeat investigations need to be run to truly weed out piratical activities). In addition, MOI officials appear unwilling (or unable) to raid beyond the retail shop, despite the fact that detailed information about the exact location and modus operandi of the pirate storage facilities has been made available to the MOI. Pirates in Kuwait have become savvier in recent years, and often keep "clean shops" (i.e., shops that do not contain the evidence of piracy) and store pirated materials offsite from the shop. It is imperative that the MOI officials take steps to uncover pirated materials being stored near the shops. It is also very important that the MOI takes action against end user piracy.

Police Not Systematically Involved in Copyright Enforcement

The police only become involved in copyright enforcement at the request of the Ministry of Information. However, in order to establish an effective IP protection regime in the country, the police need to be more systematically involved in copyright enforcement, as only they have the resources and the expertise to investigate the complete piracy chain to the source of piracy. Police involvement is crucial because of the need for investigations into the entire supply and distribution chain of pirates,⁹ their availability 24 hours a day, 7 days a week,¹⁰ and the stronger message that such involvement sends to the pirates (involvement of the police has also proven to be successful in other countries).¹¹

Kuwaiti Customs Continues to Cooperate

Given the MOI's lack of sustained enforcement actions, the copyright industries continued to rely in 2004 on the Public Department of Customs under the Ministry of Finance for

⁸ For example, on May 2, 2004, a list of 15 targets (six video retail shops, four entertainment software shops and five business software shops) was submitted to MOI by a copyright owner alliance in Kuwait, along with the evidence of pirate product purchased in each of the shops. Unfortunately, the MOI was only able to confirm copyright infringement in 2 of the 15 targets (one entertainment software and one business software shop with minimal seizures).

The police are well equipped to lead anti-piracy operations and weed out the supporting distribution network. For example, where CDs are being illegally smuggled into Kuwait, centrally stored in warehouses and then distributed to smaller caches that are used to replenish street vendors, the MOI is not the best equipped (or even empowered) to investigate the complete piracy chain leading to subsequent raids, arrests, etc. against the up or down chain. The police, on the other hand, have the expertise to conduct interviews with street vendors, investigate, obtain intelligence, arrest other affiliated parties, operate undercover, and only the police have the authority to conduct raids in homes and warehouses that are suspected of containing illegally copyrighted material.

10 In IIPA's members' experience, only the police have scheduled 24-hour patrols throughout all of Kuwait. The MOI

In IIPA's members' experience, only the police have scheduled 24-hour patrols throughout all of Kuwait. The MOI does not have the resources (even if they have the authority) to dedicate to constant street patrols in all parts of the Kingdom.

¹¹ In IIPA's experience, police involvement in battling piracy immediately sends a strong deterrent message to pirates. The United Arab Emirates is a good example of a country in which police involvement directly created a deterrent in the market, driving out piracy and bringing piracy rates down to some of the lowest in the Middle East.

enforcement against copyright piracy. Customs commenced a dedicated IPR unit in 2004, and has already participated in training with industry. Several key actions occurred in 2004, including a major operation in April against importers resulting in a seizure of about 100,000 pirate discs, a raid in May resulting in seizure of about 21,000 CDs and DVDs (movies/games and music) and the arrest of three persons, and another raid in May against a retail outlet and its separate storage areas resulting in the seizure of 17,500 pirate DVDs and in the arrest of a number of Asian immigrants. As recently as October 2004, there was a seizure of a shipment of pirated entertainment software for the console platform imported from Malaysia. In a raid of major significance in December 2004 (based on an industry tip), Kuwaiti Customs uncovered the first "multi DVD-R" burner facility in the Middle East. In that last raid, five DVD-R duplication towers, each with six high speed burners (a total of 30 DVD-R burners) were seized. It is believed that six employees operated those burners, churning out huge quantities of pirate music, movie, games and software discs per week to supply to local retailers; at the facility, large quantities of discs and color copies and prints of the labels were found in storage, ready for distribution.

Ministry of Commerce Shows Improvement in Late 2004

Also as a result of MOI inaction, industry has sought, and received, support from the Ministry of Commerce and Industry in 2004. In raids concluded by MOC against 30 targets in the first half of 2004, seizures of over 40,000 pirate/counterfeit CDs resulted. In late 2004, two series of raids by MOC occurred in Kuwait City. On November 30, MOC claims to have conducted a first series of raids was conducted against 12 shops located in the Hawalli area, and on December 5, a second series of raids was conducted against 18 shops located in the Al-Wataniah market. Overall, MOC claims that the raids resulted in the seizure of 193,000 pirate items, including pirate discs, VHS cassettes and music cassettes, 6 computers, 30 VCRs, 2 DVD burners, 12 catalogues showing hundreds of inlays of available titles, 4,000 inlays, and the arrest of at least 30 individuals, mostly from Asia. Our latest information is that MOC officials are completing internal procedures, after which time MOC has asserted that most of the defendants will be prosecuted criminally. However, private sector representatives have not been invited to participate in the follow-up to these raids. The correctness of this information can, therefore, not been confirmed. This indicates that the enforcement system in Kuwait should be made more transparent.

Some Progress Against Cable Piracy

The Ministry of Information has taken aggressive action against cable pirates. Since 2001, over 15 cable pirate operations have been raided and all supporting dishes, decoder boxes, and cables have been seized. These cases were transferred to the public prosecutor for criminal action, but no deterrent penalties have been imposed in these cases.

Interministerial Task Force Remains a Non-Factor

An Interministerial Task Force was created in late 2000, and certain activities since then have aimed to increase enforcement coordination and coordination with the private sector (e.g., the Kuwait government/Private Corporation Workshop in mid-2002), but this structure has had no positive coordinating or long-term impact on piracy or enforcement activities in Kuwait. Such an anti-piracy task force should consist of key representatives from all requisite sectors of the

¹² The scope of piracy in Kuwait is increasingly international. In 2004, seized pirated goods originated from Indonesia, Malaysia, and Pakistan.

government charged with IPR enforcement (Finance/Customs, Ministry of Information, Ministry of Commerce and Industry, Ministry of the Interior/Police, etc.). The task force should operate under a centralized plan which provides for responsibilities, objectives, and time frames. The task force should routinely meet with rights holders to address specific needs and to ensure that an effective IPR regime prevails in the country.

It is particularly important, given IIPA's and its members' increasing awareness, that the Ministry of Information has obstructed efforts to achieve greater enforcement in Kuwait, that pressure be brought to bear on all the Ministries to bring MOI into the fold on the issue of strong copyright enforcement. Even with Kuwait poised to pass an improved law (see discussion below), IIPA believes that the reality of enforcement through the MOI will not be enhanced without greater pressure on the establishment of a meaningful interministerial process in Kuwait.

IIPA understands that the Ministry of Information has created a special internal committee whose main objectives will be to set up practical mechanisms for officials of the MOI concerning the raids to be conducted and the targets they should achieve monthly, amending the existing law, and making progress in the Trade and Investment Framework Agreement with the United States. IIPA hopes that this mechanism can lead to real progress in eradicating piracy in Kuwait.

One example of a specific need is that of systematic involvement of Customs and Police, including providing them with the ability to act *ex officio*. We seek confirmation that Customs can make seizures on an *ex officio* basis without MOI personnel present; we understand this may be being done for one industry but not others. The street vendor pirates have so aggressively established themselves in the market that legitimate distributors cannot compete; the police need to become involved in copyright enforcement against street vendors or with investigations against sources of piracy. Another consistent need is for deterrent sentencing, including imprisonment in appropriate cases. The task force should advocate strengthening the laws to include minimum mandatory sentencing, including mandatory imprisonment for recidivists, and should ensure that the courts routinely issue deterrent sentences by following such mandatory minima.

MINISTRY OF EDUCATION POLICIES A SUCCESS

The Ministry of Education deserves praise for continued enforcement, administration and oversight of a highly transparent tendering system for book adoptions at the university level. The processes applied in Kuwait are a model for the region, ensuring adoption and use on campus of legitimate textbooks and fair competition among genuine publishers for university contracts. In addition, Ministry and university policies are effective in preventing the type of rampant photocopying so often found in university settings throughout the globe. The publishing industry commends these efforts and encourages the continued monitoring and encouragement of these effective de facto anti-piracy measures.

MARKET ACCESS BARRIERS

The Ministry of Information's fee for "censorship" certificates is too high, at KD20 (US\$68.50) per title. 13 These fees make it more difficult (than it already is due to overwhelming

¹³ In the absence of strong copyright protection/enforcement, local licensees and distributors of audiovisual works must resort to seeking limited anti-piracy protection by asking that MOI verify copyright authorization before giving approval for a title.

piracy) for legitimate licensees to compete with pirates. 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 Ministry of Information should lower or eliminate entirely the fee it imposes on each satellite receiver imported into Kuwait (the current fee, KD100 or US\$342, is 100 times more expensive than that in other Gulf countries, which generally charge the equivalent of US\$3.30). The high fee impairs the development of the legitimate "pay TV" industry.

COPYRIGHT LAW AND RELATED ISSUES

IIPA has reviewed the 2004 draft copyright law being considered by the government of Kuwait ("Draft Law"), that we understand would replace Kuwait Decree No. 66 (1999) (effective February 9, 2000). IIPA is pleased that the government of Kuwait plans to enact a new law, since the 1999 Decree was TRIPS-deficient in some ways, and contained other problems/ ambiguities.¹⁴ IIPA's preliminary conclusion is that the Draft Law would resolve many but not all of the TRIPS deficiencies we previously identified from the 1999 Decree. The Draft Law would also partially implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), but may not implement all aspects of these treaties adequately.

¹⁴ See complete analysis in 2003 Special 301 Report for Kuwait, at the website 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 TRIPScompatible 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 world "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.
- 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
- 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.

For example, we conclude that the Draft Law would insufficiently protect against the unlawful circumvention of technological protection measures.¹⁵

IIPA understands from the Kuwaiti government that it has reviewed our comments and plans to revisit the draft and make necessary changes in order to comply with all related international conventions and treaties, including TRIPS, the WCT and the WPPT. IIPA is very pleased to have been able to provide this guidance.

Improvements Over 1999 Decree

- Increased criminal penalties: The Draft Law would result in an increase in criminal penalties and fines and the introduction of new mandatory minimum fines, although, as discussed below, there remain no mandatory minimum prison sentences, even in cases of recidivism, and the penalties and fines, while above the levels in the 1999 Decree, remain non-deterrent.¹⁶
- Exclusive communication to the public/making available rights: The Draft Law would result in the addition of a WCT-compatible exclusive "communication to the public" right which includes the "making available right" for works, and in the inclusion of a WPPT-compatible exclusive right of "making available" for producers of sound recordings and WPPT-compatible rights for performers (performers receive a "communication to the public" right and a separate "making available" right). Broadcasts or other communications to the public of sound recordings, however, are not dealt with in the Draft Law; adequate rights for producers of sound recordings should be provided (see below).
- Rental and distribution rights: The Draft Law would result in the addition of TRIPS- and WCT/WPPT-compatible "rental" rights for sound recordings, computer programs (and audiovisual works), and WCT/WPPT-compatible rights of "distribution" for works, sound recordings, and performers.
- Omissions of restrictive provisions, easing restrictions on ability of right holders to freely contract: The Draft Law would result in the removal of certain provisions from the 1999 Decree that provided overly broad moral rights (from Article 5), and the removal of certain provisions that imposed unreasonable restrictions on the ability of right holders to freely contract (Article 31 of the 1999 Decree was carried forward into the Draft Law as Article 16).

¹⁵ It should be noted as background that Kuwait, while an original member of the WTO, has joined neither the Berne Convention nor the Geneva (phonograms) Convention. 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). As part of President Bush's announced proposal for creating a creating a Middle East Free Trade Area, the TIFA may lead to negotiations toward a Free Trade Agreement. The IPR chapter of an FTA with Kuwait would need to: (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.

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16 Based on the current Decree 64/1999 (Article 42), pirates could receive a sentence of up to one year imprisonment, or a fine of up to KD500 (US\$1,500), or both. Because of such non-deterrent penalties, the Ministry of Commerce and Industry has therefore had to resort to seeking prosecution of pirates under the Trademark Law, to obtain fines of between KD500 (US\$1,712.80) and KD3,000 KD (US\$10,277).

- **Temporary reproductions:** While not providing explicit protection for temporary copies, protection for which is vital in the digital environment, the addition in Article 25 of the Draft Law of a relatively narrow exception for certain temporary copies occurring in network transmissions between third parties by an intermediary suggests that the drafters intend to protect temporary copies. A minor revision can provide for express protection of temporary copies under the reproduction right in the Draft Law, and further narrowing of the exception in Article 25 will be needed to ensure that Kuwait's law complies with TRIPS and the well-established Berne three-part test for exceptions.
- Ex parte relief and provisional measures: Article 45 adds the possibility of ex parte civil searches and provisional relief that comes closer to meeting Kuwait's TRIPS obligations. Nonetheless, the law must be further refined to avoid violating TRIPS, especially with regard to undue burdens or costs, time limits and delays. In addition, such relief must be "available" in practice in addition to being part of the law on the books.
- "Circumvention" of technological protection measures: Article 51(c) and (d) add a new violation for the trafficking in devices that circumvent, and the act of circumventing, technological protection measures used by copyright owners to protect their works. The provisions do not, however, fully meet the requirements of the WCT and WPPT. Some minor changes could improve these provisions enormously. See discussion below.
- **Rights management information:** Article 51(e) and (f) would protect rights management information (another feature of the WCT and WPPT).
- Confiscation/destruction provisions: Article 51 includes a new provision on the confiscation/destruction of infringing goods and tools and implements used in the infringement that comes closer to meeting the prevailing TRIPS standards (TRIPS Articles 46 and 61).
- **Civil compensation:** Article 51 provides for civil compensation for damages, although there is no specification as to the measure of damages (i.e., whether they include lost profits), whether statutory damages are available, or whether attorney's fees or costs can be recouped. The sparse nature of the provision leaves it open to interpretation that would be incompatible with TRIPS, and should be further revised prior to passage to make it more comprehensive. See discussion below.
- **Customs provisions added:** Articles 52-53 provide for Customs to stop shipments suspected of containing infringing goods, and would bring Kuwait's law closer to compliance with TRIPS. Nonetheless, these provisions may need to be amended somewhat, particularly to ensure that the requirement to provide sufficient information about each infringing product and the "fee" to be paid not unreasonably deter the authorities from acting against piratical imports/exports. *Ex officio* enforcement authority should also be added for Customs to be able to adequately carry out its job.
- **Point of attachment:** Article 68 provides for clear point of attachment for works, sound recordings, and performers on the basis of international treaties to which Kuwait is party (TRIPS). However, nowhere is point of attachment also provided for other copyright owners (e.g., by way of transfer of rights).

Substantive Law Deficiencies/Issues

- **Reproduction right:** 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. Temporary copies must be protected to fully comply with the major copyright treaties and to effectuate protection for the digital age. ¹⁷ Unfortunately, nowhere in the Draft Law is "reproduction" properly defined, so the reproduction right found in Article 5(a) of the Draft Law, while setting out the kinds of fixations that are covered, is technology-specific and fails to provide expressly for protection of temporary copies. Because of a lack of a definition as to works, performers are left with a skeletal right to "copy their fixed performance" and producers of sound recordings with an undefined right to "copy their sound recordings" (Articles 37 and 38 respectively). Defining reproduction as "the direct or indirect, temporary or permanent reproduction, by any means and in any form, in whole or in part, of a work, sound recording or performance fixed in a sound recording including any permanent or temporary storage of the work in electronic form" would resolve the problem.
- Treatment of sound recordings (exclusive right of communication to the public/making available/broadcast): Article 38 of the Draft Law includes a WPPT-compatible exclusive right of "making available" for producers of sound recordings, but producers of sound recordings are not given exclusive rights with respect to the broadcasting and communication to the public of sound recordings. Producers of sound recordings should be granted exclusive rights to control the dissemination of their products over the Internet, including an exclusive broadcast and communication to the public right including all forms of wire and wireless transmissions. Such rights are necessary to permit sound recording producers to effectively fight piracy and develop new business models for consumers.
- Circumvention of technological protection measures: The Draft Law provides some protection (both criminal and civil) against the act [Article 51 (d)] of circumvention of, and the trafficking in devices that circumvent [Article 51(c)], technological protection measures. Unfortunately, the Draft Law does not provide WCT- or WPPT-compatible protection, including the following noted deficiencies:
 - Protection should extend to technological protection measures that control access to works, as well as those that control the exercise of exclusive rights subject to copyright protection. The Draft Law apparently limits the TPMs covered to those "used to prevent infringement on copyright or neighboring rights." This deficiency could be cured by adding the phrase "used to control access to a work or object of neighboring rights, or" before the phrase "used to prevent infringement on copyright or neighboring rights."
 - o Protection should extend to circumvention services in addition to devices in Article 51(c).
 - Coverage should extend to component parts of circumvention devices (at present the Draft Law only covers "equipment, method, specially made or designed tool").

¹⁷ As WIPO has explained, this agreed statement states the obvious: the concept of reproduction, under Article 9(1) of the Berne Convention extends to reproduction "in any manner or form"; therefore, a reproduction may not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor may it be excluded from the concept of reproduction just because it is of a temporary or transient nature.

- There is no definition of technological protection measures (we propose that technological protection measures be defined as "any technology, device, or component that, in the normal course of its operation, controls access to a protected work or sound recording, or protects any copyright or neighboring rights").
- The Draft Law imposes a knowledge requirement as to the trafficking in devices, and a "bad intent" requirement as to acts of circumvention, which result in inadequate coverage. The *mens rea* standards should be removed, and as to devices/services, objective criteria should be set forth for determining whether a device or service has an improper purpose.¹⁸
- The Draft Law does not, but should, provide that it shall not be required "that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications or computing product provide for a response to any particular technological measure," so long as such product does not otherwise violate the anticircumvention provisions.
- Certain exclusive rights not expressly provided for: The Draft Law does not expressly provide in Article 5(c) for "rebroadcast" rights or retransmission rights, as provided for under Article 11bis of the Berne Convention (and incorporated by reference into the TRIPS Agreement). The Kuwaiti government should confirm that retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet shall be unlawful without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal; if the current draft does not contain such coverage, language should be added to do so.
- Computer programs (Article 1): Article 1 protects computer programs "whether in source code or [object code]." We consider this to be an outmoded definition which should be modernized. It would be better to amend this provision to protect "computer programs as literary works, and regardless of the mode or form of expression of the computer program." In addition, leaving computer programs as a separate category of work permits ambiguity as to whether the intent of the drafters is to comply with TRIPS Article 10.1.
- Exceptions to protection: The Draft Law (Chapter 6 as to works, and Article 41 as to
 producers of sound recordings and performances) contains many exceptions to protection,
 some of which may not comport with TRIPS/Berne Convention standards. The wellestablished Berne three-step test (or its variants in Article 13 of TRIPS, Article 10 of the
 WCT and Article 16 of the WPPT) should be adopted expressly for all exceptions in the Draft

¹⁸ For example, the device or service should be deemed to be illegal if it:

[•] is promoted, advertised or marketed for the purpose of circumvention of a technological protection measure,

has only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or

[•] is primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

¹⁹ Protecting computer programs as literary works is a TRIPS requirement, as well as a requirement of the WCT and WPPT. Article 10.1 of TRIPS states "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention." Article 4 of the WCT clarifies that "[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention," and that "[s]uch protection applies to computer programs, whatever may be the mode of their expression." In addition, the Agreed Statement concerning Article 4 states "[t]he scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement." The most natural and clearest approach, therefore, is to protect computer programs explicitly as literary works.

Law (Chapter 6 as to works, and Article 41 as to producers of sound recordings and performances).²⁰ Included in the specific exceptions that are of concern are the following:

- Article 24 provides for a broad private copy exception. Such an exception, to survive scrutiny under the three-step test, and in light of technological developments, must derive from a legal source, be made by the person (not a third party) availing him or herself of the exception, be limited to analog form, be made strictly for private and personal uses, and be limited to uses not resulting in profit or other financial gain. In addition, in other countries, a proviso is always found limiting such copies to those that pass the Berne three-step test. The Kuwaiti law must add the three-step test. Lacking all of these safeguards, the exception should be deleted.
- Article 25 provides for an exception for certain temporary reproductions. As noted above, this exception appears to confirm that temporary copies are in general covered under the reproduction right in the Draft Law, which is a positive development, although such coverage should be made explicit. However, it appears that the exception proposed in Article 25 is too broad to pass muster under the three-part test. We propose the following redlines to the current draft text to make it palatable under international treaty standards:

<u>A transient</u> copy may be made of a work without the permission of the author if all of the following conditions are met:

The copy has to be <u>merely incidental and an integral part of a transmission in a network between third parties by an intermediary, or within the context of an operation that allows the digitally stored <u>legal copy of a</u> work to be viewed.</u>

The copying, transmission and viewing needs to be carried out by person who is authorized to do so, from the right owner or by law; and,

The copying needs to be undertaken within the normal context of operation of used equipment, whereas the copy shall be deleted automatically without the possibility of <u>using</u> said copy for any reason other than what is mentioned in the two paragraphs above.

- Article 30 appears to impinge on the exclusive "communication" right in Article 5 as to the works concerned.
- Article 31, Clause 2, appears to be an attempt to provide an exception for decompilation of a computer program for purposes of providing interoperability, but the exception as drafted is over broad and in violation of TRIPS and Berne (as, for example, it would impinge on the exclusive adaptation and translation rights, as well as the right to

²⁰ Thus, a chapeau should be added preceding Article 24, namely, "The limitations or exceptions to exclusive rights set forth in Articles 24 through 35 shall be confined to certain 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." In addition, a proviso should be added to Article 41 after the phrase "without the permission of the right holder" as follows: "provided, such activities are confined to certain special cases that do not conflict with a normal exploitation of the performance or sound recording and do not unreasonably prejudice the legitimate interests of the performer or the producer of sound recordings."

produce derivative works). The EU Computer Programs Directive is instructive as to how Kuwait might consider redrafting Article 31 to bring it into compliance with international standards.²¹

- Article 32 would impinge on the exclusive public performance right (cf. Berne Convention Article 11 as to dramatic and musical works) and is Berne- and TRIPS-incompatible (e.g., it would permit performances of a play without permission and without compensation to the right holder, even if an admission fee is charged).
- Article 33 provides what we believe may be a faulty translation of the Berne Article 11bis(3) "ephemeral recordings" exception. This should be clarified and confirmed. The provision appears to be broader than that permitted by the Berne Convention since it does not seem to include the two conditions prescribed in Berne Article 11bis(3) for the archival exception: neither not speaks of "official archives," nor of "exceptional documentary character." Thus, it appears the provision would also need to be amended in order to pass muster under the Berne Convention/TRIPS.
- The Article 34 and 35 compulsory licenses are Berne- and TRIPS-incompatible, and Article 34 also fails to satisfy the Berne Appendix with regard to reproductions and translations. Article 34 must be curtailed to meet the stringent requirements of Berne and TRIPS, and the word "publish" must be deleted. Article 35, which appears to grant the Kuwaiti government a perpetual compulsory license in Kuwaiti works not published by the heirs, is extremely prejudicial to the interests of Kuwaiti authors and should be deleted.
- Article 41 would allow, without authorization or payment to the relevant right holders, the "copy[ing] for the purposes of scientific research" any performance, sound recording, or broadcast. This blanket exemption is overly broad, goes well beyond what would be permissible under the Berne three-step test, e.g., as applied to sound recordings and performances in the WPPT, and must be deleted or much more narrowly tailored to pass muster under international treaties. Article 41 also would allow, without authorization or

1. The authorization of the right holder shall not be required where reproduction of the code and translation of its form . . . 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.

²¹ Specifically, Article 6 of the EU Computer Programs Directive provides as follows:

payment to the relevant right holders, the "use in scientific activities within educational institutions" of any performance, sound recording, or broadcast. This blanket exemption to copyright is similarly over broad and should be deleted, unless it can be much more narrowly tailored to meet international standards.

- Article 54 is TRIPS-incompatible and must be revised prior to passage. Perhaps inadvertently, the article would as currently formulated permit acts regarding importation of infringing and pirated copies of copyrighted materials. For example, Clause 1 provides an exception as to importation of pirated copies. It must be revised, or better yet, deleted. Even if the exceptions in Article 54 were revised so that it is clear the exception only applies to legal copies of copyrighted materials, any exception as to importation of personal copies must be limited to the physical person bringing a single copy of any work/sound recording/broadcast for strictly personal and non-commercial purposes. In addition, and more importantly, no exception of this sort should be provided unless an exclusive importation right is afforded to copyright owners in works and sound recordings. Otherwise, these exceptions are unacceptably broad.
- **Term extension (Articles 30 and 31):** The Draft Law retains term of protection that is life plus 50 years for most works (audiovisual works are protected 50 years from publication or completion if not published within 50 years of completion), and 50 years from publication for sound recordings (or from fixation if not published within 50 years of fixation). Kuwait should follow the modern trend (more than 70 countries have or have committed to greater than TRIPS minimum terms), which is to protect works for life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.
- Moral rights (Article 4): Article 4 of the Draft Law contains a long list of moral rights, some of which go beyond those found in Article 6bis of the Berne Convention. For example, the right to "prohibit any distortion or other amendments to the work" goes beyond what is provided for in the Berne Convention and represents at its core an impingement upon the exclusive adaptation right, i.e., if the adaptation right has been transferred, the right holder should have the ability to "amend" a work without regard to the moral rights, unless, as the Berne Convention provides, the amendment constitutes a "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." The Draft Law tests the bounds between the moral right and the exclusive right, and in our view, goes beyond what is permissible to be consistent with the Berne Convention and TRIPS. Similarly, the moral right to "withdraw" the work from circulation, even when copyright has been transferred, so long as there are "serious and legitimate reasons," goes beyond the Berne Convention, and could impinge on exclusive rights guaranteed to a copyright owner under Berne and TRIPS. This provision should be deleted. Finally, it there is a provision allowing for the State to "administer" moral rights in case there are no heirs; this provision should also be deleted, and instead, moral rights should be transferable after the death of the author and should have no longer duration than that for economic rights.²²
- Co-authorship, authorship in collective works, audiovisual works: Provisions on co-authorship, authorship in collective works, and provisions on rights in audiovisual works stemming from the 1999 Decree are unduly complicated and confusing, and fail to take into account the most efficient business practices and distribution models that help copyright owners to fully enjoy their rights. For example:

²² There is an analogous provision as to moral rights of performers in Article 36(2), which likewise should be deleted.

- Article 7, Clause 2, which restricts the ability of a joint author to exercise exclusive rights without the consent of all the other joint authors, constitutes an undue impingement of a joint author's rights.
- Articles 9-12 create confusing and complicated provisions with relation to the authorship/ownership of audiovisual works, casting doubt on the ownership and exclusive rights of producers of audiovisual works. Article 9 lists five authors of films (plus the author of pre-existing work) who are considered "partners" (which we believe means "co-authors"). Article 10 gives these authors the "collective right to display" the work, but in Article 12, the "producer" is made the "representative" of the "partners" "... with regard to the exploitation rights in the work, unless otherwise agreed in writing." This complicated formula should be simplified by providing a rebuttable presumption of transfer of rights of the authors and the performers to the producer. Alternatively, Articles 9-12 can be deleted, and Article 13 (collective works) can be made expressly applicable to films, which would have an effect similar to a presumption of transfer to the producer.
- Parallel import protection: The Draft Law does not, but should, provide an exclusive right to authorize or prohibit the importation into Kuwait of copies of works, sound recordings, and performances fixed in sound recordings, even where such copies were made with the authorization of the author, performer, or producer of the phonogram (i.e., parallel import protection). In order to confirm such protection, Article 54 also needs to be amended to ensure that the border measure exception applies only to goods imported into Kuwait with the authorization of the right holder that they be distributed in Kuwait (see comments above regarding these exceptions).
- Point of attachment for non-natural author copyright owners: Since the Draft Law
 defines "author" as a natural person, Article 68 (international application) needs to be
 amended to provide point of attachment for right holders, since authors are able freely to
 assign their financial rights under the Draft Law. Otherwise, the point of attachment
 provisions will be deficient.
- National treatment: Kuwait must protect all WTO members' works/performances/sound recordings in accordance with the principal of national treatment (i.e., must protect WTO members' works on a par with the level of protection afforded to Kuwaiti works/performances/sound recordings). Given that the 1999 Decree contained material reciprocity in both the law and explanatory notes, this is an issue of concern that must be resolved in the Draft Law to ensure that Kuwait complies with TRIPS.
- Government legalization of software and other copyrighted works/sound recordings: Nothing in the Draft Law addresses the need to provide that all government agencies must use legitimate software and adequately manage government software usage. IIPA is interested to know if such implementation exists in other laws, regulations or decrees; otherwise, provisions should be added to the Draft Law to address this need.
- Protection of encrypted program-carrying satellite signals: The Draft Law does
 not, but should, make it a criminal offense to manufacture, assemble, modify, import, export,
 sell, lease or otherwise distribute a tangible or intangible device or system, knowing or
 having reason to know that the device or system is primarily of assistance in decoding an
 encrypted program-carrying satellite signal without the authorization of the lawful distributor

of such signal; or willfully to receive or further distribute an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.

- Collective management (Article 59): It should be confirmed that the phrase
 "associations or companies" referred to in Article 59 of the Draft Law refers to associations
 or companies that engage in the voluntary collective management of rights, and that the
 provisions of Article 59 only apply when right holders have voluntarily entrusted such
 associations and companies with collective management responsibilities.
- **Folklore:** Article 61 requires further thought and refinement to make it workable in Kuwait. The current draft does not make it clear that folklore is drawn from the existing public domain, so that protection will in no way impinge upon existing copyright protection. It is also probable that protection as described in Article 61 as currently drafted would result in a usurpation of copyright largely from Kuwaiti authors. It is at least necessary to narrow the definition to ensure that creations (i.e., works derived from folklore) are not subject to folklore protection but are protected under copyright. If such subject matter is unprotectable (i.e., lacks originality), it should not be protectable as folklore. It is also unclear how ownership by the Kuwaiti government will help Kuwaiti authors and artists.
- Right of publicity (Article 62): Clause 1 of Article 62 appears to establish a right of publicity (like the one found in U.S. trademark law); its appearance in the Draft law is misplaced. Clause 2 of Article 62, on the other hand, amounts to an overly broad exception to copyright protection, namely, it impinges on a copyright owner's ability to prohibit an individual from using his/her likeness, since the presumption, absent an agreement to the contrary, is that the individual has the ability to use the creation without the authorization of the right holder. This constitutes an overly broad exception to protection which must be deleted or curtailed.

Concerns Regarding Enforcement Provisions

- Criminal penalties, while improved over 1999 Decree, are still too low: Article 51 provides for some improvements over the 1999 Decree, for example:
 - The Draft Law provides for minimum fines and/or prison sentences (minimum US\$1,705 and/or three months in prison).
 - The maximum fines and prison sentences for first-time offenders are doubled from the 1999 Decree (maximum US\$6,820 and/or one year in prison).
 - Both minimum and maximum fines and prison terms are doubled for recidivists (up to US\$13,640 fine and two years in prison).
 - Nonetheless, the penalties remain far too low, and as such, will not provide a deterrent to further infringements as required by TRIPS. There is no minimum imprisonment, even for recidivists. The maximum sentence of two years in prison pales by comparison with other jurisdictions (e.g., the United Kingdom has a maximum prison sentence of 10 years, while France's maximum sentence is 5 years). The minimum fine is at least ten times too low to provide a deterrent (minimum fines should be at least KD5,000 or

US\$17,128, while maximum fines should be at least KD20,000 or US\$68,512). First-time offenders should be made subject to mandatory imprisonment (suggested one month) and shop-closure (suggested two weeks); recidivists should be subject to mandatory three-month imprisonment and shop closure of one month; third-time offenders should have their trade licenses revoked and be subject to maximum fines and imprisonment. TRIPS Article 61 requires the availability (and imposition) of "monetary fines sufficient to provide a deterrent." Again, maximum fines, even for recidivists, will not on their face deter a highly lucrative pirate in the Kuwaiti market. With regard to specific offenses, the knowledge requirement in Article 51(b) is somewhat confusing; it should be clarified that the knowledge requirement relates to the "offering" to infringe [not infringement itself, since Article 51(b) may only result in the predicate but separate act to the act of infringement].

- Seizure, forfeiture, destruction in criminal cases and ex officio action in criminal cases: The Draft Law should ensure that judges may order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offense, any assets traceable to the infringing activity, and any documentary evidence relevant to the offense. The Draft Law should also ensure that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order. In addition, judges must be able to order the forfeiture of any assets traceable to the infringing activity and, except in exceptional cases, order the forfeiture and destruction of all counterfeit or pirated goods, and, at least with respect to willful copyright or related rights piracy, materials and implements that have been used in the creation of the infringing goods. The Draft Law should ensure that such forfeiture and destruction shall occur without compensation of any kind to the defendant. Finally, the Draft Law should ensure that authorities (including the Police, Customs, or the MOI) may initiate legal action ex officio, without the need for a formal complaint by a private party or right holder.
- Criminalizing end-user piracy of software or other copyrighted materials: Article 51 does not expressly criminalize the unauthorized use of software or other copyrighted materials in a business setting. Such "end-user" piracy accounts for the majority of damage to the software community and is a rising problem for all copyright owners. Unauthorized use of copyrighted materials is a form of piracy on a commercial scale, and as such, must be criminalized in Kuwait for Kuwait to comply with Article 61 of TRIPS. The Kuwaiti government has indicated that Article 51 criminalizes "any/all forms of unauthorized use of any copyrighted material in a business or commercial scale, including unauthorized use of software." IIPA is pleased that end-user piracy is criminalized in Kuwait. It would still be better to expressly provide such.
- Civil remedies not adequately spelled out—compensatory damages and statutory damages, etc.: 23 Article 51 provides, "The right holder whose right, as specified by the Law, was subjected to infringement has the right to ask for adequate compensation." This general provision on compensatory damages may not be enough to satisfy TRIPS. TRIPS requires that an infringer pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement and any profits of the infringer that are attributable to the infringement that are not taken into account in computing such damages. The injury to the right holder should be based upon the value of the

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²³ The Kuwaiti government has indicated that compensatory damages are regulated under the general principles of the Kuwaiti civil law and are not detailed in the draft law.

infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods. In addition, since many copyright infringements are difficult to calculate or quantify, Kuwait should establish a system of "statutory" or pre-established damages which shall be available upon the election of the right holder. As TRIPS calls for deterrent remedies, mere compensatory damages may not be sufficient. To balance the general cost of enforcement programs and the chances of bringing successful actions against serial, large-scale infringers, aggravated damages should be available, either explicitly or in the determination of statutory damages. Finally, costs and attorney's fees should be able to be recovered by a right holder. These remedies are not expressly available in the Draft Law.

- Provision allowing "custodian" to "re-publish, exhibit, manufacture or derive copies of the work" after a provisional order has been carried out must be deleted: Article 46, Clause 2, would allow a custodian to "re-publish, exhibit, manufacture or derive copies of the work" pending agreement of "all the parties" to a provisional order. This provision not only impinges on several exclusive rights of the copyright owner, in violation of international treaties, but also is subject to abuse since it appears to permit an infringer to hold up an administrative order, while allowing the infringing goods to be sold off or otherwise used in violation of copyright, by such "custodian." This provision must be deleted.
- Border measures—goods in transit and parallel imports: Article 54 should be amended to ensure that pirated goods are covered, even when in transit (consistent with the EC Customs Regulation). In addition, as noted, the third clause should confirm that the exception to the application of border measures should only apply when the goods in question were imported into Kuwait with the authorization of the right holder to further distribute them in Kuwait. Finally, the border measures in the Draft Law must provide that the requirement to provide "sufficient information" will not unreasonably deter recourse to the procedures (i.e., suspension of the release of the suspected pirated goods into the channels of commerce), and that any security deposit or equivalent assurance will not unreasonably deter recourse to the procedures.
- Unreasonable time limits: Article 45 (provisional measures) imposes a time limit of 15 days for filing a legal action following an investigation/raid, which, while longer than the 8 days provided for in the 1999 Decree, remains too short. Article 50(6) provides that a judicial authority shall determine the time limits, but in the absence of judicially determined time limits, the time limit should be a minimum of 20 working days or 31 calendar days, whichever is longer.
- **Presumptions of ownership and subsistence of copyright:** The Berne Convention requires a presumption as to authorship of works [Berne Article 15(1)], which is provided for in Article 6(2) [but the Draft Law does not contain a Berne-compatible presumption with respect to cinematographic works; see Berne Article 15(2)]. The Draft Law should also provide for presumptions as to ownership and subsistence of copyright for works, performances and sound recordings.²⁵

²⁴ The Kuwaiti government asserts that the "purpose behind appointing a custodian who will be allowed to republish, exhibit, manufacture or derive copies of the work is to protect and benefit from such works and guarantee its continuance."

continuance."

25 The Draft Law should include the presumption that, in the absence of proof to the contrary, the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or

- Information on those connected with infringement: The Draft Law should include the proviso that, in civil judicial proceedings, the judicial authorities may order the infringer to provide any information that the infringer possesses regarding any person(s) or entities involved in any aspect of the infringement and regarding the means of production or the distribution channel of such products, including the identification of third parties that are involved in the production and distribution of the infringing goods or services and their channels of distribution, and to provide this information to the right holder.
- Criminalization of piracy for "no direct or indirect motivation of financial gain" ("Net Act"/Not-For-Profit): Article 61 of the TRIPS Agreement requires the criminalization of copyright piracy on a commercial scale. Since piratical acts (such as those occurring over the Internet) can cause devastating commercial harm regardless of any profit motive, it is recognized that TRIPS requires criminalization even of acts that may not have a motive of financial gain. Kuwait should therefore provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain shall be considered willful copyright piracy on a commercial scale.
- Service provider liability: The Draft Law contains no provisions governing the key issue of the liability of service providers that are involved in the hosting and transmission of infringing material over their facilities. If Kuwait is to consider this issue, it could include provisions that establish the basic functional equivalent of the concepts and provisions embodied in U.S. law (as found in Section 512 of the DMCA). Ensuring that secondary liability will apply to service providers involved in the hosting and transmission of infringing material over their facilities will provide the proper incentive for cooperation among service providers that is essential to making the Internet safe for the transmission of protected copyright products. An effective "notice and takedown" system modeled after the statutory system contained in the U.S. law is an essential element of any such set of provisions.

phonogram in the usual manner, is the designated right holder in such work, performance or phonogram, and that, in the absence of proof to the contrary, the copyright or neighboring right subsists in such subject matter.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT LEBANON

EXECUTIVE SUMMARY

Special 301 Recommendation: Lebanon should remain on the Priority Watch List.

Overview of Key Problems: In late 2004, Lebanon took some steps toward controlling and reducing piracy in certain sectors. In November, a significant police raid was carried out against three warehouses located in a dangerous suburb of Beirut called Sabra, yielding over 100,000 pirate optical discs worth over US\$2 million. As a result, and for the first time in Lebanon's anti-piracy history, the owners of the three warehouses, including a notorious pirate were arrested, put in jail, and denied bail. They have been kept in jail for over two months. A week later, a sweep was conducted on an exhibition filled with pirate vendors. Unfortunately, these latter raids failed to result in permanent closure — indeed, the pirates were back in business as usual less than one week after the raids. In 2004, the Lebanese government cooperated with the Business Software Alliance and other right holders in conducting several raids against pirate end-users and resellers. IIPA hopes that the recent spate of raids marks the beginning of a crackdown in domestic piracy and piracy coming in at the borders, to finally create a healthy commercial environment for the copyright sector in Lebanon. Estimated losses to the U.S. copyright industries in 2004 due to copyright piracy in Lebanon were \$31 million, with piracy rates at 70% or above for all industries reporting such statistics.

While the aforementioned raids signify a new willingness of the Lebanese government to take more serious action against the most egregious forms of piracy in Lebanon, they have not benefited all industries equally. Despite some actions brought by some content owners and local broadcasters in 2003, cable piracy continues to harm the Lebanese market for U.S. right holders in audiovisual materials, as between 600 to 700 pirate cable operators continue to serve some 80% of Lebanon's households. Retail piracy of optical discs (CDs, VCDs, DVDs, CD-ROMs, "burned" CD-Rs, etc.) continues in Lebanon. Some pirated discs are known to be 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 China, and a source country for locally burned pirate CD-Rs, which are being smuggled into Lebanon. 1 Book piracy remains serious, including increasingly widespread photocopying of academic materials in and around university campuses as well as production for export of pirated scientific, medical and technical materials to other countries in the Middle East and the Gulf. Lebanon's 1999 copyright law provides the necessary tools to fight piracy, including cable piracy, but remains deficient with international norms in certain respects.

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¹ One industry indicates that some quantities of pirate discs are coming from Syria.

Lebanon's failure to adequately protect copyright has a detrimental effect on the local economy.² And 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 underway (after initial hearings in October 2003).3

Actions to be Taken in 2005:

Enforcement

- Continue raiding the major pirates in the country, run redundant raids to empty the shelves, and, importantly, ensure shop closures; take enforcement actions against problems such as book piracy, where little action has been taken to date.
- Raid pirate retail stores and street vendors on an ex officio basis and prosecute persons found to be involved in such activities without the need for private sector complaints.
- Instruct law enforcement officials to seize and always immediately remove all clearly infringing materials during raids.
- Seize, secure, and eventually destroy all pirated materials, as well as equipment used in the course of the infringing activity, such as computers, CD burning machines, printing presses and photocopy machines; even items not specifically listed in a complaint should be seized if they evidence piratical behavior.
- Criminally investigate and prosecute all persons found to be involved in piracy activities;
- Address priority piracy cases and hand down deterrent sentences, taking into account that the majority of those involved are operating as part of a criminal organization.
- Close down all unlicensed "community cable" television stations in Lebanon.
- Close down the one known optical disc plant, pending verification that it is engaged in legitimate activities.
- Instruct Customs authorities to take ex officio action to interdict and seize pirate product entering the country.

Coordination

- Form, as a matter of priority, a specialized IPR Unit within 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.
- Increase manpower from 10 personnel (4 MOET, and 6 Consumer Protection) to 20 dedicated IPR officers, and 120 additional officers from the Consumer Protection division who would be available for copyright infringement/piracy matters.
- Engage in public education activities, including issuance of statements from the Prime Minister's office that copyright infringement and piracy will not be tolerated in Lebanon.
- Create an enforcement reporting mechanism for all ministries, customs, the Prosecutor's Office, etc., so that raids do not go without adequate follow up.
- Improve the efficiency of the court system, through the streamlining of IPR cases, creation of specialized courts, or other equivalent methods.

International Intellectual Property Alliance

² It is telling that Showtime, a major cable corporation, recently chose Dubai (over Beirut) as the site for its new regional headquarters, leading to the construction of a multi-million dollar center and the creation of 400 new jobs. according to the company's regional manager. Lina Abi Abdallah, She noted, "Lebanon has a lot to offer but it was

not chosen because of its relaxed attitude towards copyright infringement."

The goods that would be affected on the way into the United States from Lebanon should GSP benefits be removed are staples of the Lebanese economy.

Legislative

- 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. ⁴ Please also see previous years' reports. ⁵

LEBANON Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁶											
	20	04	20	03	20	2002		2001		2000	
	Loss	Level									
Motion Pictures	10.0	80%	10.0	80%	8.0	80%	8.0	80%	8.0	60%	
Records & Music ⁷	3.0	70%	2.5	70%	2.0	65%	2.0	65%	2.0	68%	
Business Software ⁸	15.0	75%	14.0	74%	3.5	74%	1.1	79%	1.3	83%	
Entertainment Software	NA	75%	NA	80%	NA	NA	NA	NA	1.5	96%	
Books	3.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA	
TOTALS	31.0		28.5		15.5		13.1		14.8		

COPYRIGHT PIRACY

Cable Piracy Continues to Decimate Audiovisual Market

Cable piracy (80% piracy level for U.S. content) continues to devastate the theatrical, video, and television markets for U.S. copyrighted materials. There remain between 600 to 700 cable operators that serve some 80% of Lebanon's households 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. The theatrical market continues to suffer, as films are frequently retransmitted by these pirate cable operators prior to their theatrical release or legitimate broadcast by television stations in Lebanon. The legitimate video market has been almost entirely destroyed by the various forms

⁴ http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf.

⁵ http://www.iipa.com/countryreports.html.

The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at http://www.iipa.com/pdf/2005spec301methodology.pdf.

⁷ Loss figures for sound recordings represent U.S. losses only.

⁸ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Lebanon, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$22 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁹ Each pirate cable operator retransmits an average of 100 different television channels to their estimated 460,000 subscribers. Included among those channels is a minimum of four movie channels that engage in unauthorized broadcasts of motion pictures 24 hours a day.

of piracy in Lebanon. Local broadcast television stations have canceled long-standing licenses with copyright owners because they cannot compete with the pirates.

Optical Disc and Traditional Piracy Continue to Harm Local Market

Retail piracy of CDs, VCDs, DVDs, CD-ROMs of business and entertainment software. sound recordings, 10 and published materials remains blatant, leaving piracy levels for these products at 70% or above. 11 Lebanon has become a producer of pirated materials and an exporter of piracy. One 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 on-demand "burning" of CD-Rs of music and other copyrighted materials in copy-shops. Some of the CD-Rs are sourced back to Syria¹² and the Palestinian territories, while most imported optical discs come into Lebanon from Asia (mainly Southeast Asia and China), 13 Ukraine, or elsewhere in Eastern Europe.

Book piracy is unfortunately on the increase in Lebanon. Illegal photocopying in and around university campuses is on the rise and threatens to spiral out of control if action is not taken soon. Two universities 14 have recognized the illegal nature of copyright piracy and have taken active measures to nominally crack down on illegal photocopying by students, even reprimanding some students found using illegal copies. IIPA commends these universities for their stance. Despite these efforts, however, illegal photocopying, especially in commercial establishments near the campuses, remains a serious problem even for these two universities, as major commercial photocopying enterprises are situated in order to serve these institutions with illegal copies of books. Other universities have taken little or no action to even discourage use of photocopied materials on campus. 15 Enforcement and education officials should work together to target the massive illegal photocopying taking place in and around these institutions. 16 In addition to commercial photocopying, the publishing industry is being hurt by offset print piracy, especially in the scientific, technical and medical sectors. Not only are these books produced for domestic consumption, but pirate materials flow out of Lebanon into Jordan, Saudi Arabia and the United Arab Emirates, among other countries.

Internet Piracy

IIPA has become aware of online services like www.Musicoffers.lb or "Millennium Songs," offering illegal music compilations for sale in Lebanon via the Internet or e-mail. The

¹⁰ The bulk of piracy activity in Lebanon is taking place in copy shops, where thousands of illegal on-demand compilations are being made daily.

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.
¹² 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 "military roads" between Syria and Lebanon. There are no real Customs checkpoints at these roads.

13 We are also aware that CD-Rs "burned" with "MP3" music data files are being imported from Malaysia.

¹⁴ American University of Beirut and Lebanese American University in Beirut and Byblos.

¹⁵ Most universities in Lebanon are affected by this problem, but an illustrative list of institutions for which enforcement is overdue includes Notre Dame University, Haigazian University, Balamand University and Lebanese

¹⁶ One case, brought against the well-known Ghali Copy Center in Hamra, has been pending (now on appeal) for two years, while the business continues to operate.

Lebanese government has been regularly alerted to the existence of these illegal services, but has taken no action regarding these sites to date. Piracy at Internet cafés is also of concern to entertainment software publishers. There are about 500 Internet cafés in the country, only 30% of which are licensed.

COPYRIGHT ENFORCEMENT

IIPA was given the opportunity this year to correspond directly with the Ministry of Economy and Trade, providing a non-exhaustive list of some locations/services suspected of engaging in copyright infringement of various kinds. The list included over 400 potential targets. As noted above, several raids were carried out in the end of 2004; nonetheless, many more raids against a more diverse list of targets will need to be run to eradicate piracy in Lebanon. Inspections, investigations, and raids must be sustained, i.e., multiple raids against the same targets, immediately followed by aggressive prosecution, in order to effectively reduce piracy levels in Lebanon. Piracy levels in Lebanon cannot be successfully brought down without criminal prosecutions resulting in deterrent levels of fines/imprisonment at the end of the day.

Overall, the level of activity by the Ministry of Economy and Trade (MOET) increased in 2004. While sporadic at times, the enforcement efforts of the Ministry in the past year represent a greater commitment to enforcement of the law. For example, in January 2005, the Intellectual Property Protection Office at the MOET confiscated tens of copies of CDs containing pirated software and filed reports against the offenders. These raids were the result of a field tour conducted by an office of local computer system builders. Also, the MOET has increased its cooperation with copyright holders. ¹⁷

Warehouse Raid Largest of Its Kind; Proof Will Come in Court Results

As noted, in late 2004, Lebanese authorities ran several raids raising hopes that the government had finally made the commitment long sought to eradicate piracy from Lebanon. The first took place on November 25, 2004, in which more than 15 armed policemen accompanied by industry representatives stormed three warehouses in one of the most dangerous areas of Beirut (Sabra & Chatila), and confiscated an estimated 100,000 pirate DVDs, computer programs, music CDs, and computer games. The confiscated materials filled three vans. One of the warehouses raided belonged to the infamous "Fneish" family. The retail value of the confiscated products was about US\$2 million. It is worthy of note that on January 10, 2005, a local court refused the warehouse owners' application to be released on bail. As of February 5, 2005, the three pirates were still in custody. Some DVDs seized in the raids were found to have the same labeling and spelling mistakes as discs found in the UK and South Africa, and were believed to be sourced from as far away as China. IIPA looks to the Lebanese authorities to follow up on these raids with swift prosecutions leading to deterrent criminal sentences. It should be noted in this context that the Fneish family has been involved in piracy activities for many years. The damage its illegal activities have inflicted on the copyright sector in Lebanon over the last years runs in the dozens of millions of dollars. Such blatant organized criminal activity can only be stopped if the perpetrators are severely punished with unsuspended prison sentences in combination with massive fines.

¹⁷ The MOET signed a Memorandum of Understanding with a software company, in which both parties agreed to work jointly on increasing IP awareness in the country. The MOET has also collaborated with the Business Software Alliance to increase the efficiency of the BSA hotline aimed at identifying software pirates in Lebanon.

Set of Retail Raids Not Effective Without Repeat Visits

Another set of raids, this time by the Ministry of Economy and Trade, took place as a result of repeated private sector complaints beginning on December 1, 2004 against pirates at the "Futuroscope Exhibition," continuing one day later at ExpoBeirut. In the first action, two major outlets were raided (other outlets immediately closed when the raid was launched), vielding seizures of hundreds of pirated CDs and DVDs. The raids took place in a very tense and threatening context, and some of the pirates tried to use their contacts to get the Minister to call off the raid. Unfortunately, IIPA understands that, apart from the stand "Compugraphics," the other stands at the expositions were back selling pirated materials again by December 4, just three days after the first raids. Two weeks later, the exhibitions were raided again, yielding seizures of a number of pirate CDs and DVDs (about 1,000), but, again, not resulting in the removal and/or definitive closure of the pirate stands. These actions by the Ministry of Economy and Trade were a welcome development and more effective than what we have seen in the past, but they will remain without a lasting effect if the raids are not carried out more thoroughly and the selling points found to be involved in pirate activity are not completely emptied, closed down and definitively sealed so that they cannot be reopened. In addition, as a result of such raids, all the perpetrators involved should be subject to immediate criminal investigation and prosecution. Other raids were run in late 2004 against 50 software retail outlets, yielding some seizures. 18 but no computer hard discs or CD burners.

Cable Piracy Actions Lead to No Cases, No Results

After years of frustration trying to resolve the massive cable piracy problem, in Lebanon, in 2004, a criminal complaint was filed against all cable pirates with the office of the Chief Public Prosecutor. The complaint was referred to the police for investigation. The police questioned over 400 cable pirates, nearly all of whom confessed that they were engaged in unauthorized transmissions of copyrighted materials. Those admitting their actions signed an undertaking before the police to stop pirating. However, instead of seeking indictments and referring the cases to trial court, the Chief Public Prosecutor thereafter shelved the complaint. In early February 2005, a new criminal complaint was filed with the Chief Public Prosecutor against these 400 admitted cable pirates, and the Prosecutor has referred the new complaint to the central detective agency for investigation. It is hoped that this new complaint will result in the arrest of a number of cable pirates.

In late 2004, IIPA understood that the Ministry of Economy and Trade (MOET) would be making a public announcement in which it would give cable pirates a two month amnesty to legitimize their activity, or cease transmission, and that after the passage of the two month period, MOET would start cracking down on pirates on the basis of complaints filed with it. Cable operators, in turn, were to launch a publicity campaign to announce the availability of an affordable alternative to the cable pirates. However, the MOET seems to have reneged on its commitment after the formation of a new cabinet. This is a very disappointing development.

Courts Have Failed to Deter, Adequately Compensate for, Piracy

The Lebanese courts continue to have difficulties meting out justice against even blatant copyright pirates. 19 An important first step in 2005 toward judicial reform would be the

¹⁸ In the December raids, 300 pirated cassettes, 15,000 CDs and 7,000 DVDs were seized.

¹⁹ IIPA has noted in previous reports detailed instances of prosecutorial error in preparing piracy cases which have doomed straightforward piracy cases to failure (e.g., the prosecutors filed the cases in the wrong court).

establishment of a specialized group of prosecutors to work with the IPR unit or other enforcement officers (e.g., Customs), trained in copyright, to handle all copyright cases, and the development of a cadre of judges who have received specialized training in copyright and who could be regularly assigned to hear such cases.

Due to various problems in the judicial system, no results were obtained via the courts in 2004 that had any noticeable effect on piracy in Lebanon.²⁰ The criminal justice system did show some promise in 2003, as 41 defendants were convicted and sentenced for cable piracy in the first such criminal convictions in the country's history. 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 most egregious defendants, hardly a deterrent.²¹ Most other 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 enjoyment and exercise of rights.

In late 2004, the court of appeals of Beirut reversed a conviction handed down by the trial court against Jammal Trust Bank, a local bank which was adjudged, on the basis of a court-appointed expert, to be using unlicensed software. The court of appeals reached its decision, ruling that the use of the software by the bank did not result in any commercial benefits to the bank. This decision is very troublesome, and shows the lack of familiarity of the judge with the problem of piracy and its implications.

As copyright owners in motion pictures and television broadcasting have not been able to seek redress for copyright violations through the courts against blatant cable pirates, beginning in 2003, they pursued a new approach, working with satellite broadcasters to pursue actions based on those channels' broadcasting rights. In August 2003, a judge in Beirut issued the first ever injunction against seven cable pirates, based on the broadcasting right. ²² It remains to be seen whether the judicial system can be used effectively to enforce such orders. As another new strategy, in 2004, U.S. motion picture industry representatives assisted local licensees in bringing civil cases against infringing DVD distributors on the basis of the commercial agency law. This remedy is not available for all right holders, however, and is not a substitute for concerted *ex officio* action by the public authorities.

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²⁰ Civil copyright cases brought against pirates in Lebanon have never led to deterrent results. In 2002, while one conviction resulted in a one-month jail sentence – the first jail sentence ever in Lebanon for copyright piracy – the sentence has never been served. In addition, most fines are non-deterrent. Meanwhile, civil cases languish, and those decided have led to laughably low damages. For example, in some cases, no damages were awarded for harm done in the past, and were only awarded prospectively for infringements occurring in the future! 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.

²¹ The total awards to the two right holders, US\$160,000 for one and US\$20,000 for the other, were relatively

The total awards to the two right holders, US\$160,000 for one and US\$20,000 for the other, were relatively substantial for copyright cases decided in Lebanon. The court also ordered the confiscation of equipment and directed that details of the convictions be published in two local newspapers. This constituted the first time a Lebanese court has penalized cable pirates. The decision has been appealed by the pirates, and the case is still pending before the court of appeals.

The two petitioners in the case were 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.

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, ²³ 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). ²⁴ The government of Lebanon should be encouraged to fully implement these important treaties, and accede to them as soon as possible.

Unfortunately, the law remains deficient with respect to international standards in several respects, ²⁵ 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 concern 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 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).

²³ Lebanon is a member of the Berne Convention (Rome [1928] Act) and the Rome Convention. Lebanon should accede to the Berne Convention (Paris 1971 Act), and should join the Geneva (phonograms) Convention in order to provide clearer protection to international sound recordings; Lebanon should also join the WIPO "Internet" treaties, the WCT and WPPT.

²⁴ For example, the law should prohibit circumvention of technological protection measures used by copyright owners

²⁴ 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.

²⁵ A more detailed discussion of remaining deficiencies in Lebanon's copyright law can be found in the 2003 Special

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.

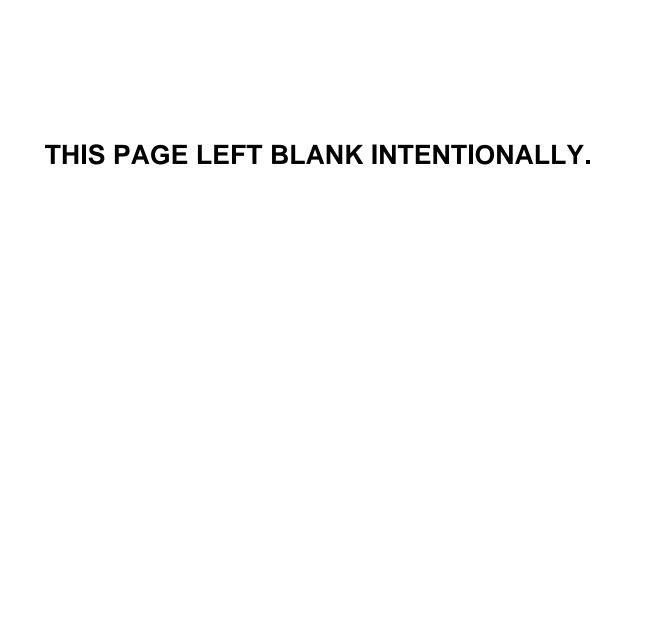
- There are certain other overly broad exceptions to protection (e.g., Article 32).
- Most significantly, since the deterrent penalties provided on the books are not carried out in practice, Lebanon's legal framework at present pays only lip-service to the severe problem of piracy. Each of the items noted would arise in the WTO accession process, and Lebanon must take measures to address these deficiencies.

Because Lebanon has emerged as a 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 to successfully 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 United States, 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.

Lebanon must 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 2003, Lebanon imported almost \$29.9 million worth of products into the United States without duty, or more than 31.8% of its total imports into the U.S. In the first 11 months of 2004, Lebanon imported more than \$31.1 million worth of products into the United States without duty, or a staggering 45% of its total imports into the U.S.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT PHILIPPINES

EXECUTIVE SUMMARY

Special 301 Recommendation: The Philippines should remain on the <u>Priority Watch List</u>, but an <u>out-of-cycle review</u> should be conducted in 2005 to evaluate whether the actions listed below have been taken and, if so, consideration should be given to moving the Philippines to the Watch List. Recent actions taken by the Philippines with regard to piracy in some sectors, including the issuance of the Implementing Rules and Regulations for the Optical Media Act, are recognized as potentially important steps for improving copyright protection in the Philippines. Implementation of these IRRs in practice is vital, with adequate resources devoted by the government of the Philippines to eradicate optical disc piracy. Positive actions in the coming months can be considered favorably in the <u>out-of-cycle review</u>, especially if combined with effective action against piracy in other sectors and settings, such as illegal photocopying of books, end user piracy of business software, and piracy of videogames in Internet cafés.

Overview of Key Achievements/Problems: Several signs emerged in late 2004 and in January 2005 that the Philippines had taken steps that, if sustained and expanded, will hopefully eradicate optical disc piracy from its shores. These include the single largest seizure of optical discs (over US\$8 million worth of pirated discs) occurring in December 2004. The Optical Media Act (OMA) provides the Optical Media Board (OMB) with the authority to eradicate unauthorized production of optical discs. The Implementing Rules and Regulations (IRRs), which were just issued in January 2005, must now be fully enforced with adequate resources devoted to eradicate optical disc piracy in the Philippines. The Congress must adequately fund the OMB and devote sufficient resources to wipe out piracy in the Philippines. IIPA supports the OMB's effort to complete the eradication of optical disc piracy, including cutting off imports from Malaysia, Thailand, China, Hong Kong, and Taiwan, which still harm the domestic market. Despite these achievements, serious problems remain in the Philippines. Book piracy, principally in the form of rampant illegal commercial photocopying, continues to plague the publishing industry. Broadcast piracy, end-user piracy of business software, and piracy occurring on the Internet (including in Internet cafés, where the majority of entertainment software used is illegal) deal serious harm to copyright owners. The government continues to experience difficulties finding the right balance in establishing coordinating roles for various agencies, leaving enforcement efforts to suffer for much of 2004. 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. Estimated losses to the U.S. copyright industries in 2004 due to copyright piracy in the Philippines were US\$139 million.

Copyright 2005 International Intellectual Property Alliance

2005 Special 301: Philippines

Actions to be Taken in 2005:

- Continue sustained enforcement raids against pirate optical disc production facilities, seizing and destroying, dismantling and impounding illegal goods and equipment.
- Shore up flood of imports of pirated optical discs being smuggled into the Philippines (training and closer liaison with the Bureau of Customs and Philippine Postal Service is key).
- Identify and act against storage centers of pirated product and retail outlets engaged in piracy, whether reproduction, distribution, burn to order, etc.
- Raid pirate book reprint facilities and photocopy shops, cable pirates, and businesses or Internet cafés using unauthorized software.
- Identify syndicates responsible for supply of the local pirate market, whether based in the Philippines or abroad.
- Increase detection of illegal activities, whether coming into the Philippines, or already present, including copyright infringement, tax evasion, fraudulent declarations, and other illegal activities.
- Monitor progress toward prosecutions in order to deter piracy effectively and to clear backlogs of investigations and court cases.
- Ensure that expert judges handle copyright cases (consider reinstating a specialized IP court).
- Ensure that the new "Optical Media Board" (OMB) is fully funded by the Congress and that the new OD law is implemented aggressively.
- Designate a particular government agency or body to tackle the book piracy problem.
- Pass draft copyright law amendments (S.B. 1704 and H.B. 3182) to implement the WIPO "Internet" treaties fully, and pass cybercrime legislation with coverage of all copyrighted materials.
- Formally 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.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports on the Philippines at http://www.iipa.com/countryreports.html.

PHILIPPINES

Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	33.0	85%	33.0	89%	30.0	80%	28.0	80%	25.0	70%
Records & Music ²	20.0	40%	22.2	40%	20.9	40%	23.9	36%	1.4	33%
Business Software ³	38.0	70%	33.0	72%	25.0	68%	19.9	63%	21.8	61%
Entertainment Software⁴	NA	90%	NA	95%	NA	NA	NA	99%	41.0	98%
Books	48.0	NA	45.0	NA	45.0	NA	44.0	NA	44.0	NA
TOTALS	139.0		133.2		120.9		115.8		133.2	

COPYRIGHT PIRACY

Piratical Imports of Optical Media Harm the Philippine Retail Market

Imports of pirated optical discs 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) from Southeast Asia, e.g., Malaysia,⁵ Indonesia (increasing dramatically in 2004), Thailand, China, Hong Kong, and Taiwan,⁶ continue to harm the local market in the Philippines for copyrighted materials. The prices of piratical product are so low as to ruin the legitimate market.⁷ Exacerbating the problem was a lull in enforcement in 2004 due to the transition between the dismantling of the Videogram Regulatory Board (VRB) and the establishment of the Optical

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

² Losses to the U.S. recording industry calculated beginning from 2001 are represented by estimated displaced sales

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.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in the Philippines, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$55 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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 Optical Media Board (OMB) Chair Edu Manzano has stated that upwards of 85% of pirated materials, mostly pirate

⁵ Optical Media Board (OMB) Chair Edu Manzano has stated that upwards of 85% of pirated materials, mostly pirate DVDs, coming into the country come from Malaysia. See Marinal R. Cruz, OMB chief says fewer pirated DVDS sourced from Malaysia, Inquirer News Service, July 19, 2004

⁶ The motion picture industry reports that most pirate movies have traditionally come from China, Taiwan and in particular Malaysia, but that in 2004, there was a definite increase in pirate DVDs being imported from Indonesia, particularly through Davao.

⁷ Pirated VCDs and DVDs were being sold for 25 to 70 pesos (US\$0.45 to \$1.25) apiece and are rented out for a mere 5 pesos (9 cents). See Luz Baquioro, Copyright Piracy Decimates the Domestic Market in the Philippines, August 24, 2004, at http://straitstimes.asia1.com.sg/asia/story/ 0,4386,268780,00.html (reporting that legitimate Manila video shops have had to resort to slashing prices to fight piracy, noting that piracy has forced scores of video stores to fold in recent years; legitimate rental prices have fallen to 15 pesos – US\$0.27 for a VCD and 30 pesos – US\$0.54 for a DVD. Retail prices of VCDs start at 95 pesos – US\$1.70, while those for DVDs range from 395 to 700 pesos – US\$7.20 to 12.75). It is also reported that a pirate copy of Adobe Acrobat sells for 80 pesos (US\$1.45).

Media Board (OMB).⁸ Low prices of hardware for playing discs including DVDs (roughly US\$53), imported primarily from China and Taiwan, further encourage piracy. Pirate "burned" CD-Rs appeared in larger numbers in 2004, many of which were "burned to order" by small retail shops or otherwise produced in the Philippines.

Book Piracy in the Philippines Remains a Serious Concern

Book piracy in the Philippines is endemic, including illegal photocopying of entire books, pirate offset printing, and increasingly, books "burned" on CD-R. Primary targets include university textbooks, technical books, and professional medical books. Photocopying takes place most often in commercial establishments surrounding universities or in street stalls concentrated on a single street or small group of streets. Photocopy shops also operate on campuses and in hospitals and medical and nursing schools, often in highly organized fashion, selling door to door to doctors' offices and medical establishments. These shops avoid stockpiles of infringing goods by copying on a "print to order" basis, complicating investigations and enforcement actions.

On the print piracy side, the now-defunct Presidential Decree No. 1203 continues to present some minimal difficulty (with pirates reprinting books claiming this exemption, which was repealed in 1997), but action by the Intellectual Property Office has helped to diminish the effect of this phenomenon, at least in Metro Manila. The Intellectual Property Office is to be commended for its efforts in this regard, and IIPA encourages further monitoring to ensure that bookstore shelves stay clear of these illegal editions. IIPA also believes that the Philippine government must stand ready to take raids against booksellers or printers who continue to abuse this provision.

Books burned on CD-R can be found in street stalls all over Metro Manila, and even in some shopping malls. Pirates burn hundreds of reference titles or textbooks in professional fields and technical fields onto a single CD and sell the CD for about US\$1.00. Popular fiction and non-fiction books are available as well. These CDs are generally available in retail stores in malls or in the same stalls selling illegal photocopies. Again, IIPA requests that the Philippine government designate a government agency to coordinate action against all of these forms of book piracy and take assertive enforcement measures in the next few months.

Broadcast Piracy Further Threatens Audiovisual Market

The motion picture industry suffers from the unauthorized transmission of motion pictures on hundreds of cable systems in the country, damaging the legitimate theatrical and video markets. Although cable systems outside Manila are regulated, there was still a proliferation of infringing transmissions in 2004, including transmissions of newly-released

⁸ *Id.* Mr. Joey Singian, the General Manager of VideoCity, a major video store, noted, 'For a few months, piracy was not addressed as much as it used to be and pirates took advantage of that." Mr. Rhiz de Leon, chief operations officer of ACA Franchise Group, which owns video chain ACA Video, noted that while raids in the Muslim Barter Trade Centre in downtown Manila or in the capital's swank Greenhills district often hit the headlines, "... the vendors usually reopen a couple of hours after the raids ... it is a never ending problem."

⁹ The "university belt" in Metro Manila is especially well known, and publishers have discovered that most cities contain a street rife with photocopy shops. An example would be Lower Bonifacio Street in Baguio City, a university town in the Province of Benguet, north of Manila.

¹⁰ For example, a market survey was conducted in late 2004 in Baguio, in which it was discovered that most photocopy centers outside the university do not have entire photocopied editions available for ready sale but will photocopy on demand, although publishers found that a shop receiving an order for an entire book would sometimes make a few extra copies of it in anticipation of future orders.

motion pictures repeated several times a day. The National Telecommunications Commission (NTC) is supposed to monitor the operations of licensed and non-licensed cable TV operators, but other than issuing the occasional warning letter, NTC has been totally ineffective 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 have consistently insist that they have no jurisdiction over copyright violations or 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.

Another problem in the Philippines for the audiovisual sector is the continued theft of satellite signals of home entertainment channels.

Broadband Has Brought Internet Piracy to the Philippines

With the increased availability of broadband both in homes and Internet cafés in the Philippines in 2004, copyright owners have become increasingly concerned that illegal Internet downloads and Internet-based hard good sales of "burned" CD-Rs and DVD-Rs will become more of a threat to legitimate sales and distribution in the Philippines. Roughly 1,500 Internet cafés are in operation in the Philippines, and virtually all of these establishments profit from unauthorized exploitation of the most popular entertainment software titles.

Optical Disc Production: Number of Plants Increased in 2004

In addition to the problem of mass importation of pirate discs into the Philippines, IIPA remains concerned about optical disc overproduction in the Philippines, as optical disc plants continue to migrate to the Philippines in increasing numbers. International groups from Malaysia, Macau and Indonesia are suspected of having local investments in these operations. Through the implementation of the Optical Media Act, which has yet to occur, it is expected that the Optical Media Board (OMB) will provide detailed and accurate statistics on the number of plants and lines operating in the country. Without those, IIPA guesses that there were at the end of 2004 as many as 16 optical disc factories in the Philippines, and reported the existence of 26 production lines in 2004, with an estimated overall production capacity of 91 million discs per year. IIPA believes covert production facilities, often protected by law enforcement and local government officials, remain in existence both in remote areas of Luzon and within the major cities.

IIPA's concern expressed in the 2004 report that production would shift to pirate DVD appears to have become a reality in 2004. IIPA understands that a number of licenses for DVD replication were knowingly issued by associated officials within the then Video Regulatory Board at the beginning of 2004, when the OMB was in a state of flux. Most of the new "licensed" facilities have not yet begun production, but it is clear that the Philippines will have a significant export problem if these plants are not examined to ensure they are legal.

Finally, "burning" content onto CD-Rs (and to a lesser extent DVD-Rs) became more prevalent in 2004. The increase in CD-R piracy can be attributed in part to the low costs of

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¹¹ The Optical Media Board reportedly knows of 11 lines in operation, but may not have a grasp on the true total, since the OD Implementing Regulations were just passed and the OMB does not plan to start issuing production licenses until early 2005.

producing CD-R pirate product and the fact that the retailers are involved in home production. The problem is most severe in Manila, but has spread to the provinces as well, mainly Cebu.

End-User Piracy Harms Software Right Holders

End-user software piracy remains the most serious threat to the business software industry in the Philippines. Although the National Bureau of Investigations (NBI) has conducted many successful end user actions on behalf of the Business Software Alliance, they have sometimes run into difficulties. In one case in September 2004, in a case involving a reseller loading computer hard discs with unlicensed software, the Supreme Court issued a favorable decision in denying a motion to quash a warrant, clarifying two important points concerning the validity of search warrants. Specifically, the court found that there was probable cause to issue/carry out a search warrant in an end user case based on witness testimony, and that the warrant, while not successful as a "general warrant," was severable, and therefore, while defective, could survive challenge. The software industry views this decision as precedent-setting and a major victory, in that it will benefit other right holders fighting warrant quashal motions.

COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004											
PHILIPPINES											
ACTIONS	Motion Pictures	Business Software	Воокѕ								
NUMBER OF RAIDS CONDUCTED	524	1	10								
Number of VCDs seized	1,293,181	0	500								
Number of DVDs seized	404,283	0	0								
Number of CD-Rs seized		0	125								
Number of investigations	777	1									
NUMBER OF VCD LAB/FACTORY RAIDS		0	2								
NUMBER OF CASES COMMENCED BY NBI		1									
NUMBER OF CASES COMMENCED BY POLICE	107	0									
NUMBER OF INDICTMENTS		0	0								
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)		0	0								
ACQUITTALS AND DISMISSALS		0	0								
NUMBER OF CASES PENDING		8	0								
NUMBER OF FACTORY CASES PENDING		0	0								
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		0	0								
SUSPENDED PRISON TERMS			0								
MAXIMUM 6 MONTHS		0	0								
OVER 6 MONTHS		0	0								
OVER 1 YEAR		0	0								

¹² In one end user raid in March 2004 against a call center based inside Clark Special Economic Zone (CSEZ), managed by Clark Development Corporation (CDC), CDC apparently did not permit the National Bureau of Investigation (NBI) officers from taking seized computers out of the CSEZ and, as such, a sample of the computers using infringing software were placed in the offices of the CDC. Subsequently, the search warrant was quashed, in part because they were not duly executed and no criminal action had been filed.

¹³ See Microsoft Corp. v. Maxicorp, Inc. (G.R. No. 140946). Specifically, the court noted that a partial defect in a search warrant does not render the entire search warrant invalid. According to the Supreme Court, no provision of law exists to nullify the entire warrant. A partially defective warrant remains valid as to the items specifically described in the warrant. A search warrant is severable and the items not sufficiently described may be cut off without destroying the whole warrant.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 PHILIPPINES										
ACTIONS	Motion Pictures	Business Software	Воокѕ							
TOTAL SUSPENDED PRISON TERMS			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			0							
UP TO \$1,000		0	0							
\$1,000 TO \$5,000		0	0							
Over \$5,000		0	0							
TOTAL AMOUNT OF FINES LEVIED (IN US\$)		0	0							

Some Steps Taken to Eradicate Pirate Imports, But Problem Remains Severe

Perhaps one of the most severe problems facing the Philippines today is the Government's apparent inability to prevent massive smuggling of piratical imports at the borders. Even government officials recognize that cracking the piratical importation problem will be a serious challenge. The administrative structure within the government has also proved to be somewhat cumbersome. Customs Administrative Order No. 6-2002 (September 23, 2002) implemented Customs-related provisions of the TRIPS Agreement (Articles 51-60), and expressly provided that a good "which constitutes a piratical copy or likeness of any work, whether published or unpublished on which copyright subsists" may not be imported into the Philippines. By virtue of the Order, an "Intellectual Property Unit" within the Bureau of Customs (BOC) was supposed to have been formed, but as of January 2005, BOC was still in the process of submitting to the Philippine Department of Finance a work plan for the Unit. In the meantime, the Commissioner of Customs established an interim intellectual property unit with the following interim functions:

- To handle all applications for recording intellectual property rights and product or products covered therein.
- To receive requests for "issuance of alert" or "hold orders" addressed to the Commissioner of Customs, and to record similar requests addressed to the District Collector of Customs in ports outside of Manila.
- To investigate and, in case of seizure, prosecute intellectual property rights violations in the appropriate forfeiture proceedings.
- To gather and manage data relating to intellectual property enforcement and run, in coordination with the BOC's Management Information Systems and Technology Group, the intellectual property database.

¹⁴ Larger shipments are of great concern, but many shipments into the Philippines come in "tubes" or stacks of 50-60 discs. through airports and piers.

discs, through airports and piers.

15 Government officials have cited corruption in Customs, leaks in enforcement (leaks to raid suspects, etc.) as ongoing difficulties with enforcement at the border.

- To coordinate all BOC activities relating to IPR matters; and to draw up, in coordination with the BOC's Human Resource Management Division, an appropriate training program on intellectual property rights border control enforcement.
- To act as the liaison office of the BOC for the IPO and other agencies of government control with intellectual property enforcement.

The BOC is also required¹⁶ 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 various Orders 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. These Orders must be fully implemented as soon as possible.

Notwithstanding the lack of a firm administrative structure, the BOC has begun to conduct some seizures at the airport (international airport in Manila) and major seaports. ¹⁷ Yet, pirate product continues to enter the country in significant quantities (some reportedly with the collusion of officials). One positive development is that OMB has claimed to have created a "choke point" through which product cannot be imported, including from Malaysia (it is estimated that 85% of all pirated materials coming into the Philippines come from Malaysia). ¹⁸ Time will tell whether, in 2005, the OMB working with BOC can tackle what is now the most serious piracy issue facing the Philippines.

Some Steps Taken to Tackle Retail Piracy, Book Piracy, But...

Philippine authorities continued to take hundreds of actions against downstream activity, namely, pirate optical disc distribution and retail activity; however, the replacement of the VRB by the OMB resulted in a drop-off in activity in 2004. The raids by OMB were largely non-deterrent, as stores closed due to raids often reopened the following day; over 500,000 optical discs were seized in raids during October alone (and as noted below, OMB carried out a huge bust in December), but while these raids are clearly evidence of OMB's successes in 2004 fighting piracy, unfortunately these statistics also indicate the massive scope of the piracy

¹⁶ Under Customs Administrative Order No. 19-2003 dated 12 September 2003, pursuant to Customs Administrative Order No. 6-2002, Section II-E.

¹⁷ In one joint action by OMB and industry representatives, a Merpati Airlines (Indonesia) flight from Manado, Indonesia to Davao City in the Philippines was intercepted. Two male passengers, both Philippine nationals, were arrested by Customs Police and charged with smuggling offenses for transporting over 8,000 optical discs, labels and packaging in their check-in luggage. It is suspected that local authorities were involved in the illicit trade, which is why enforcement agents from outside Davao were brought in. An inspection of the suspects' passports revealed that one of the men had made 16 recent journeys between Manado and Davao City. Initial inspection of the discs indicated that they were manufactured in Indonesia both for local sale and for export to Manila. The seizure represented over US\$160,000 in value; the product in this case would normally be destroyed following legal proceedings.

¹⁸ See Marinal R. Cruz, *OMB chief says fewer pirated DVDS sourced from Malaysia*, Inquirer News Service, July 19, 2004 (in which OMB Chair Edu Manzano noted, "They are now having a hard time bringing in (bootleg) DVDs ... [i]n fact, some people I know have been complaining they are now unable to buy DVD copies of *Spider Man 2* and *Shrek 2*. Manzano also noted that pirates are increasingly attempting to smuggle bootleg materials into the country through Singapore and Hong Kong, "[b]ut the OMB now has access to information that enables us to be on site when these smuggled goods arrive")

smuggled goods arrive"). ¹⁹ Examples of raids in 2004 included the following: OMB Chief Edu Manzano led raids on two malls in Parañaque and Makati on July 17, 2004, based on industry information, yielding about 100 sacks of pirated materials. Pirated discs were also seized in actions at Subic Bay port in early July 2004.

problem. Nonetheless, IIPA is heartened by the statements and actions from OMB indicating its resolve to solve the piracy problem — namely, that it will not stop until piracy is eradicated.²⁰ Seizures of pirated optical disc in 2004 increased significantly compared to previous years, as some two million units were seized.

There are several notorious malls in the Philippines engaged in unrelenting retail piracy. One is in the upscale "Virra Mall" in Greenhills, San Juan, which is owned by the Ortigas Co. & Limited Partnerships. It has taken years to make headway into shutting down piracy operations in malls such as Virra, but finally, in August/September, raiding began. According to an article in October 2004 in the *Manila Times*, an announcement was made that Virra Mall Shopping Center would "undergo a major facelift" (undoubtedly with the proceeds from piracy), and the high profile Virra Mall closed at the end of 2004 (although reportedly, stalls set up near the site of the mall continued to sell pirate product, particularly entertainment software and popular books burned on CD-Rs). While the reasons given were ostensibly due to a refit of the mall, considerable pressure was placed on the mall to stop piracy activities in the mall and in informal discussions the mall owners said there would be no more pirate sales allowed in the mall on reopening. It is hoped that this is in fact the case. ²¹ Other legal pressures are apparently also being applied against the Ortigas group. Naturally, as a result of these actions, the pirates are migrating, and care must be taken to ensure they don't obtain footholds in new malls.

The publishing industry received some support from the National Bureau of Investigation (NBI), resulting in several raids being carried out (e.g., in May 2004, two medical photocopy establishments were raided, resulting in criminal complaints; in July, twelve photocopy shop targets were raided in the Recto area of Manila). In addition, the Philippine government took some steps to discourage companies continuing to reprint and/or sell books under Presidential Decree 1203, which was rescinded in 1997. Several of those companies have reportedly now cleared their shelves of "1203" product — a very encouraging sign. IIPA commends the Intellectual Property Office (IPO) for this work and requests continued follow-up with the entities remaining on the list provided by the publishers.

... Little Done to Combat Pirate Production or End-User Piracy

As noted, the number of optical disc production facilities in 2004 increased, notwithstanding that several raids were conducted against replication factories. Further, the raids against replicators have not to date had a deterrent effect, as evidenced by one raid in November in which replicating equipment was seized for the second time. Unfortunately, some production continues in an open and notorious manner, e.g., one of the main pirates

²⁰ OMB Chairman Edu Manzano has stated publicly that the OMB's fight against pirates would continue until the parates had been 'eradicated.'

Anthony Vargas, *Virra Mall booting out movie, music pirates*, October 20, 2004, at http://www.manilatimes.net/national/2004/oct/20/yehey/metro/20041020met11.html (in which Rex Drilon, Ortigas' chief operating officer, is quoted as saying "Virra Mall would be renovated and reformed to rid the bad image that it had acquired in the past year" due to piracy of optical discs).

²² For example, one raid in August resulted in shutting down a licensed replicating facility, which at the time of the inspection was found to be producing unlicensed material; seized in the operation were 1,600 discs of infringing audio product, two replicating machines, an offset printing machine and 20 bags of polycarbonate. Nine stampers were also taken in for verification.

²³ On November 3, OMB officials, in cooperation with the MPA and National Bureau of Investigation, conducted simultaneous raids throughout Manila City, resulting in seizures of more than 30,000 optical discs estimated to be worth PHP7.5 million (around US\$136,600). The operation also resulted in the discovery replicating machines that were supposedly seized by the OMB during raids in 2001. The machines were found operating and in the possession of Optic Replicators, Inc., a licensed replicating plant.

"burning" content onto CD-Rs operates just one floor above the residence of the director of the NBI. Such open piracy should not be tolerated and IIPA hopes to hear that this situation has been resolved. Regarding end-user piracy of business software, only a couple of known criminal raids were conducted by the NBI in 2004, with no convictions in the courts.²⁴

Courts Backlogged, Processes Delayed, Marred by Problems, Including Issuance of Non-Deterrent Results

In 2004, courts made no real progress to bring about deterrent judicial enforcement against copyright piracy in the Philippines. There was one known conviction for copyright piracy, against a book supply owner who had been selling illegal photocopies of medical books at a medical convention. This individual was sentenced to one year imprisonment and a fine of 50,000 pesos (US\$911) for each of ten counts in violation of Section 174 of the Intellectual Property Code. There are apparently cases against factories, but disappointingly, one criminal case brought against a factory was dismissed in 2004. In many cases, right holders have noted various problems, including loss of evidence, or irregularities regarding obtaining and executing search warrants, seizing evidence and related documents, and being able to preserve and use such evidence in judicial proceedings.

In 2004, it continues to be the case that most piracy cases are referred to regional prosecutors, who have little experience dealing with copyright cases (much less than the Department of Justice prosecutors). While the Department of Justice's IP Task Force was reinstated in Metro Manila, this division is charged only with pre-raid and raid procedures. Postraid, the prosecution of the case must take place in the defendant's resident jurisdiction. Thus, if the raid is outside Metro Manila, the regional prosecutors must take the case because the IP Task Force has not been given enough resources to be able to be active outside Metro Manila. In addition, the DOJ has imposed filing fees for IPR violation complaints of 5,000 pesos (US\$91) per complaint. Some right holders find this fee unfair, as it is much higher than fees for other types of criminal complaints.

In addition, 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.²⁷ 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.

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

²⁴ See, e.g., Erwin Lemuel G. Oliva, *Police raid local firms using pirated software*, INQ.net, July 14, 2004, at http://www.inq7.net/inf/2004/jul/15/text/inf 1-1-p.htm (describing another raid on several undisclosed local firms in Pasig and Mandaluyong allegedly using illegal software, reportedly resulting in seizures of about 5.5 million pesos' (US\$100,200) worth of unlicensed engineering and architectural design software AutoCad. "These were large engineering and consulting firms," added Sosa. More raids are expected to be conducted over the next few months, the police agent said.

²⁵ This case had been pending in the court system, with innumerable delays, for nearly four years.

²⁶ See Republic Act No. 9279 and its Implementing Rules and Regulations, or the Act Granting Additional Compensation in the Form of Special Allowance for Members of the National Prosecution Service and State Counsels of the DOJ and Department, Circular No. 42 dated September 14, 2004.

Counsels of the DOJ and Department, Circular No. 42 dated September 14, 2004. ²⁷ In the meantime, witnesses move, evidence risks deterioration or loss, and defendants continue to operate at a profit.

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." ²⁸ 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 three cases with the prosecutions department and 13 active criminal cases in court, including one case on appeal.

Enforcement Coordination and Responsibilities Remain Confused and Under-funded

A continuing source of problems in the Philippines is the disorganized approach to copyright enforcement. ²⁹ For example, there are some ongoing "turf" battles which merely stifle enforcement energies and lead to confusion. IIPA has supported the Optical Media Act, the disbanding of the Video Regulatory Board (VRB), and the creation of a new Optical Media Board (OMB), with the understanding that the new organization would have the confidence of the government, the mandate, and the funding necessary to carry out anti-piracy activities effectively. Unfortunately, during 2004, the implementing regulations for the Optical Media Act formally giving the OMB the authority it needs were not issued (although they have been as of February 2005), and the OMB still has not been given the funding it needs (as the VRB had been given) to ensure ongoing effectiveness. Adequate funding by the Congress must be achieved as soon as possible, or the piracy situation in the Philippines threatens to spiral out of control.

Part and parcel of the turf battle mentioned is the question of what role the Intellectual Property Office (IPO) should play in intellectual property enforcement. After the 2004 election, discussion began to surround the question of which agency should coordinate IP enforcement, and the question of whether the move of IPO from the Office of the President (where it was placed in 2001 under Executive Order No. 39 of Oct. 6, 2001) back to the Department of Trade and Industry. The 2001 move was intended to bring about greater coordination of enforcement (as the Philippine National Police and the National Bureau of Investigation are both under the Office of the President). It is clear that the move did not have the intended effect. The move back to DTI has been touted by President Gloria Macapagal-Arroyo as necessary to achieve "better coordination" in the government's efforts to combat rampant piracy particularly in video

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²⁸ The Regional Trial Court, Branch 24 in Manila has also been designated as an additional Special Commercial Court.

Court.

29 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). *Intellectual property rights tie-up forged*, Business World, June 19, 2003. IP-REAP was 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. However, IIPA knows of no coordinating functions IP-REAP has taken up in 2004, remaining an organization in name only.

³⁰ But see Friena P. Guerrer, *IPO joins the National Law Enforcement Coordinating Committee (Nalecc)*, BusinessWorld 11, February 19, 2004.

and audio discs and computer software.³¹ IIPA considers these moves as principally window-dressing and as unnecessarily bureaucratic maneuvering; the fact remains that the IPO remains without funding and motivation.

IIPA believes that it is the OMB that must be properly authorized and funded, and that only then can a dedicated and centralized IPR intelligence unit within the OMB be established. Such a unit would coordinate contributions from the Bureau of Customs, National Bureau of Investigations, Anti Organised Crime Commission and OMB personnel, liaising with industry bodies to conduct proactive and reactive anti-piracy operations against key piracy problems in the Philippines — pirate importation of optical discs, pirate optical disc production (prerecorded and burned), pirate retail (including book piracy), cable piracy, end-user piracy, Internet piracy, etc.

Confusion also reigns as to the appropriate body charged with coordinating enforcement against book pirates and commercial photocopy operations. While IPO has been helpful on some fronts, they make it clear that they are not charged with enforcement. Despite industry requests, there has been no effort to move toward coordination of book piracy enforcement efforts. The NBI has been helpful in carrying out raids, but no agency has taken ownership of the issue and no OMB-type body exists for this type of coordination and action. The Philippine government should designate a particular agency responsible for this coordination effort.

Another area of confusion has arisen out of attempts to obtain enforcement against unauthorized broadcast of U.S. right holders' movies and television programming in the Philippines. Right holders had understood that the National Telecommunications Commission (NTC) had the authority to revoke licenses of those broadcasters engaged in unauthorized transmission of copyrighted content. However, NTC had continually informed right holders that IPO has such authority, sending right holders into a state of confusion as to how to enforce their rights. Earlier in 2004, right holders were finally informed by IPO's Emma Francisco that, as one of several "cost-cutting" measures, a new Information and Communications Technology Ministry would be formed by way of Executive Order, including the NTC, the Telecommunications Office and other Ministries, possibly even including the IPO. Only at that point will authority for complaints about broadcast piracy be placed squarely within NTC. IIPA has recently learned that NTC is now undertaking investigations to verify complaints initiated by right holders, and has even sent a number of cease and desist letters (copied to the respective complainants) to broadcasters found to be in contravention of the regulations issued by the NTC (following a Circular instructing NTC to handle such complaints). Despite assurances from the NTC in October 2004 that guidelines would be finished soon and published on its website, the quidelines remain in the draft stage. Some right holders who have filed complaints of infringement with the NTC have received no feedback and further enquiries are met with answers that the complaint has been lost. Accordingly, extensive follow-up is required from right holders; yet, there is neither a receipt nor a notification by the NTC that the complaint has been received or that any action has been taken. Meanwhile, infringements remain ongoing despite these specific complaints.

³¹ IPO to return to DTI?, BusinessWorld, August 5, 2004.

Campaign Launched in November 2004 to Fight Piracy, Highlight Harms of Piracy to Local Economy³²

In November 2004, the OMB launched a new campaign to fight piracy in the Philippines, also issuing a "state of the Philippines" report. In a press briefing, OMB Chairman Edu Manzano said piracy harms the local movie, video, and music industry tremendously (the Philippine film industry used to be vibrant, producing 240 films per year, but in 2004 that number has dropped to a mere 40 films per year), and deprives the Philippine economy of millions of pesos in legitimate revenues; he also indicated that because of piracy, the Philippine movie industry loses in excess of 3 billion pesos (US\$54.7 million) in income every year.³³ The press briefing followed a warning published in the papers directed at "bazaar organizers," saying that if 'they knowingly allow sale and distribution of pirated optical media then they may be held criminally liable for violations of the Optical Media Act and the Intellectual Property Code.'

This series of raids that accompanied these announcements culminated after two months with one of the largest raids ever carried out in the Philippines. On December 8, 2004, the OMB seized 635,000 pirated DVDs and VCDs in a raid on a Quiapo shopping mall/residential building notorious for the sale of pirated movies and music.³⁴ Reportedly, more than 1,000 sacks of discs were collected, with an estimated "street value" of 476,250,000 pesos (US\$8.7 million). Over 300 security officers from the Police Special Action Force and the SWAT Team supported the OMB team in the raid. Search and seizure warrants were served to the owners of the 80 stalls suspected to peddling pirated goods. Even locked stalls had their padlocks cut off with bolt croppers, grinding discs and acetylene torches and were swept clean of pirated goods. Most of the seized DVDs were a mix of new and old titles that forensic evidence indicates were manufactured in Malaysia. Tens of thousands of audio CDs and hardcore pornography were also seized. Three 8-wheel trucks overflowed with the confiscated discs, as well as televisions, DVD players and disc burners used in the manufacture and sale of the pirated discs, prompting the OMB to get additional vehicles to move the goods to the OMB headquarters.

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

³² Not insignificantly, the Philippine government appears to recognize the detrimental effect piracy has played in the development of the Philippine economy A study by University of the Philippines School of Economics professor Ramon Clarete found a "high negative correlation" between investments in software development, and information technology (IT) in general, and estimates of intellectual property rights theft for the four years to December 2002. IT investment quadrupled in 2000 when the piracy rate posted a seven percentage-point decline to 70 percent in 1999, according to the study, which was released in September 2004. "Similarly, investments in 2001 climbed by 38.2 percent when piracy rates dropped by nine percentage points in 2000," Clarete's paper said. Data for the study was culled from the Philippine trade department's Board of Investments, as well as from the Business Software Alliance. See Piracy robs software investments: study, September 24, 2004, at http://www.sunstar.com.ph/static/net/ 2004/09/24/piracy.robs.software. investments.study.(11.45.a.m.).html.

33 Manzano also indicated that from July to November, OMB had seized "more than a million pirated optical discs."

³⁴ See Manila Bulletin, December 19, 2004.

provision allowing up to 40% foreign investment in cable systems that do not produce their own programs or content.³⁵ 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 remained stalled in 2004.³⁶

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 program only. Restricting advertisement placement will tend to reduce the utility of advertising, leading to a reduction in advertising-based revenue and further impeding the development of the television industry in the Philippines.

COPYRIGHT LAW AND RELATED LEGISLATION

Implementing Regulations Issued in January 2005 Must Be Fully Enforced

In late January 2005, Implementing Rules and Regulations (IRRs) to the "Act Regulating Optical Media, Reorganizing for This Purpose the Videogram Regulatory Board, Providing Penalties Therefor, and for Other Purposes" (February 9, 2004) were finally issued by the Philippine government. IIPA congratulates the Philippine Government for this action to provide the OMB with authority to enforce against piratical optical disc/magnetic media production.

The Act and Implementing Rules and Regulations (IRRs) should 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.³⁷ The law should immediately be employed by the Philippine government to eradicate unauthorized optical disc production there. While IIPA has not reviewed the IRRs as finally issued, the draft IRRs IIPA had reviewed achieved the following positive results:

- Covered the burning of content onto recordable discs such as CD-Rs and DVD-Rs.³⁸
- Confirmed that one must obtain a license as a "condition precedent" for the "release of any
 optical media, manufacturing equipment, parts and accessories, and materials intended for
 use in mastering and/or manufacturing optical media, from customs or economic zones
 exercising independent customs laws" [Title II, Rule 2, Section 4(b)].

³⁵ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

³⁶ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

The Act also closely tracks the "Effective Practices Regarding Optical Disc Production" paper that was endorsed by Asia-Pacific Economic Cooperation (APEC) Ministers at the APEC Ministerial in Bangkok in late 2003.

The term "duplication" is defined to include "burning," and "optical media" is defined to include duplicated discs.

³⁸ The term "duplication" is defined to include "burning," and "optical media" is defined to include duplicated discs. Therefore, it appears that any person who engages in "burning" of content onto a recordable disc must register under Title II, Rule 1, Section 1(e) of the IRRs. It is also made a condition [in Title II, Rule 2, Section 7(g)] of an optical disc production license that a licensee "shall not engage in the . . . duplication . . . of any optical media containing intellectual property, except with authority or consent of the owner thereof, or his duly authorized representative." This is helpful to ensure that a licensee that does engage in "burning" of content onto a recordable disc on the side is bound by the license not to breach intellectual property rights.

- Made the "offenses" from the Optical Media Act administrative offenses as well, and therefore subject to administrative closure and the imposition of administrative fines.
- Clarified that certain activities (not expressly covered in the Optical Media Act), e.g., to
 "deface, remove, erase, [or] obliterate" SID Code from an optical disc, are to be punished
 through administrative sanctions. The IRRs also made some important adjustments to
 ensure that wrongful activities are covered under the statutory scheme (e.g., the IRRs clarify
 that producing discs in a location other than that endorsed on the license is included in the
 offense of "engaging in the . . . [illegal] activity without the necessary registration or license").

A number of concerns remained in the draft IRRs that IIPA had reviewed previously, as outlined below.

- Definitions of "Manufacture" and "Optical Media" Must Expressly Include Blank Media: An effective optical disc law must require licensing of the production of all types of "optical media," whether filled with content, blank, or recordable. The coverage in the draft IRRs was ambiguous, since the definitions of "manufacture" and "optical media" in the Act as well as in the draft IRRs refer to content being stored ("manufacture" means "the act or business of producing optical media or devices containing sounds and/or images, or software code …"; "optical media" means "a storage medium or device in which information, including sounds and or images or software code, has been stored"). The definition of "optical media" refers to "Schedule C," however, which includes blank recordable media, so the question remains whether one needs a license to produce blank or recordable media. The addition of the phrase "or capable of containing" to the definition of "manufacture" (after the word "devices"), 40 and the phrase "or is capable of being stored" to the definition of "optical media" (after the phrase "has been stored"), 41 would resolve these ambiguities.
- Informational Requirements for Licenses Should be Set Forth in Detail: While the Optical Media Act sets forth the license requirements, it does not address the minimum informational requirements for: an application for a license to produce optical discs; the license document; an application for importation, exportation, acquisition, sale or distribution of optical media, or for the mastering, manufacture or replication of optical media (Section 13); an application for importation, exportation, acquisition, sale, distribution, possession or operation of manufacturing equipment, parts and accessories used or intended for use in the mastering, manufacture or replication of optical media (Section 13); or an application for the importation, exportation, acquisition, sale, distribution or possession of manufacturing materials used or intended to be used for the mastering, manufacture or replication of optical media (Section 13). It is essential that these omissions be dealt with since, for

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³⁹ Schedule C includes "CD-R" but does not, for example, include "DVD-R" and "DVD-RW." IIPA proposes changes in the draft IRRs to include these media as well as those currently listed.

⁴⁰ The new definition would read (emphasis added to additional language):

Manufacture – the act or business of producing optical media or devices containing *or capable of containing* sounds and/or images, or software code, including any work protected in Part IV of the IP Code, by mastering and/or replication. In relation to equipment, "manufacture" shall refer to the assembly or integration of various components into any equipment useful for the mastering, manufacture and/or replication of optical media.

⁴¹ The new definition would read (emphasis added to additional language):

Optical Media – a storage medium or device in which information, including sounds and or images or software code, has been stored *or is capable of being stored*, either by mastering and/or replication or duplication, which may be accessed and read using a lens scanning mechanism employing a high intensity light source such as laser or any such other means as may be developed in the future. The term shall include, but not be limited to those listed in Schedule C.

- example, the question of whether a license should be issued or renewed depends on the information required [for example, under Title II, Rule 3, Section 1(a) of the draft IRRs].
- Record-Keeping Requirements Should be Set Forth in Detail: Section 7(b) of Title II, Rule 2 of the draft IRRs provided for records to be kept by a licensee for five years, which included records involving "all activities" of the plant as well as "samples of media" as required by the OMB. This provision would be strengthened by a more elaborate list of the kinds of records that must be kept.
- Licensees Should be Required to Verify Rights to Qualify for "Good-Faith" Defense When Rendering Service of Replicating Discs: Section 19(b)(2) of the Optical Media Act contains a "good faith" defense to a licensee that "renders the service [of duplication, mastering, manufacture or replication of optical medial to any person, in respect of any intellectual property, who does not have the consent by the owner of the intellectual property or his representatives or assigns." Namely, the licensee can avail itself of the defense and therefore apparently escape liability entirely if he/she "notifies the OMB in writing of such transaction within five (5) working days from receipt of the job order, furnishing to the OMB all material information thereof." Title IV, Rule 1, Section 1(d) of the draft IRRs deemed that anyone "who, being licensed to engage in the duplication, mastering, manufacture or replication of optical media, knowingly renders the service to any person, in respect of any intellectual property, who does not have the consent by the owner of the intellectual property or his representatives or assigns" commits an administrative offense. However, the good faith defense from Section 19(b)(2) of the Act is repeated practically verbatim. In order to qualify for the defense, the onus should be on the licensee to prove that it has the rights to engage in the activities undertaken. The IRRs should set forth requirements to "verify" rights in order to qualify for the defense and the particulars of kinds of information that should be provided. These requirements should be adopted by the Philippine government to close a potentially gaping loophole in the law. These requirements should apply both to the administrative offense set out in Section 1(d) of Title IV, Rule 1 of the draft IRRs, but also should be made applicable to Section 19(b)(2) of the Act.
- Definition of "Manufacturing Material" Should be Broadened and Made Technology-Neutral: The definition of "manufacturing material" is too technology-specific, and thereby may be overly narrow or become obsolete. The current definition covers materials that are "suitable for" the manufacture of optical discs, and in the Schedule defines "suitability" as "a melt flow index (MFI) which shall be determined by the OMB," and initially defines a suitable substance as one that has a "melt flow index" of "not less than 45 grams per ten (10) minutes at 300 degrees Celsius and 1.2 kilogram." This definition is unnecessarily technology-specific, should be deleted, and the words "capable of being used to manufacture optical discs" should be substituted in place of "suitable for the manufacture of optical discs."

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⁴² There are already numerous examples of manufacturing materials, like SANDS, and some new technologies (like blue ray technology) that would make the current definition of "manufacturing material" in the IRRs obsolete. See, e.g., Richard Shim and Matt Loney, Sony develops 25GB paper disc, http://news.zdnet.co.uk/0,39020330,39152273,00.htm. Therefore, the language at the end of the definition, "Suitability shall be measured by a melt flow index (MFI) which shall be determined by the OMB. Unless otherwise determined, polycarbonate or polycarbonate substitutes with MFI of not less than 45 grams per ten (10) minutes at 300 degrees Celsius and 1.2 kilogram shall be considered as suitable as manufacturing material, for purposes of these Rules," should be deleted.

- Dual System of Registrations and Licenses Creates Some Inconsistencies: The Optical Media Act requires those who engage in certain activities to "register with, and secure the appropriate licenses from the OMB." The draft IRRs confirmed that a dual system for registration and licensure would be established, and it appears that this may create some inconsistencies. For example, the length of "registration" is potentially unlimited (lasting "as long as the registrant shall apply for" and "continue to renew"), with lapse only possible one year after failure to renew. Licenses are valid for "three years" and are renewable.
- Grounds for Suspension Should be Broader than Grounds for "Cancellation": The draft IRRs did not appear to distinguish between "suspension" and cancellation in Title II, Rule 4 (indeed, they appear to reproduce entirely the provision from the Optical Media Act, Section 16). The IRRs should be slightly amended to distinguish between "suspension" which should occur when there is a reasonable suspicion that a breach of the license or an offense has been committed, and "cancellation" which can be a stricter standard (i.e., cancellation might be warranted only upon a final conviction or upon a finding by the competent authority that an administrative offense occurred). The reasoning behind this distinction is that "suspension" is intended to stop all suspected illegal activity until it can be determined that the license should be cancelled or reinstated (if no illegal activity is finally found). The current section of the IRRs makes no distinction (especially Section 1(b) through (d) should provide for some leeway for "suspension" when any of the conditions in those subparagraphs is suspected of being present).

We note finally that the Act and IRRs need to be implemented in a GATT-compatible way. For example, any licenses with respect to the importation of optical media, etc. must be automatic.

IIPA Lauds Introduction of "Act Amending Certain Provisions Of Republic Act No. 8293" (Copyright Act)

In November 2004, Congressman Joey Sarte Salceda introduced Bill No. 3308, "An Act Amending Certain Provisions of Republic Act No. 8293 Entitled 'An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing For Its Powers and Functions and For Other Purposes" into the Philippine House of Representatives. This Bill, if finally passed, would make the Philippines' copyright law one of the most modern in the world. The Bill would, among positive achievements, fully implement of the WCT and WPPT (which the Philippines acceded to on October 4, 2002). IIPA strongly supports swift passage of Bill 3308. Similar measures should be considered for photocopy shops in and around universities.

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), 43 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)]. 44 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.

IIPA Lauds DTI Purisima's Directive to Landlords

IIPA understands that in December 2004, Department of Trade and Industry (DTI) Secretary Cesar A. V. Purisima ordered mall owners to include a clause in lessees' contracts requiring them to prohibit the sale of pirated copies of copyrighted product on their premises, and to impose penalties on violators. Apparently "SM Supermalls" and "Greenhills Shopping Center" (where the notorious Virra Mall is located) have both vowed to abide by the directive. This kind of directive, which can pave the way for imposing liability on pirates as well as placing responsibility on landlords for their tenants' actions, is a highly laudable step, and IIPA looks forward to seeing how this directive will be carried out in 2005 against any malls/landlords that choose to ignore it.

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⁴³ Republic Act. No. 8792 (2000).

⁴⁴ 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).

Generalized System of Preferences

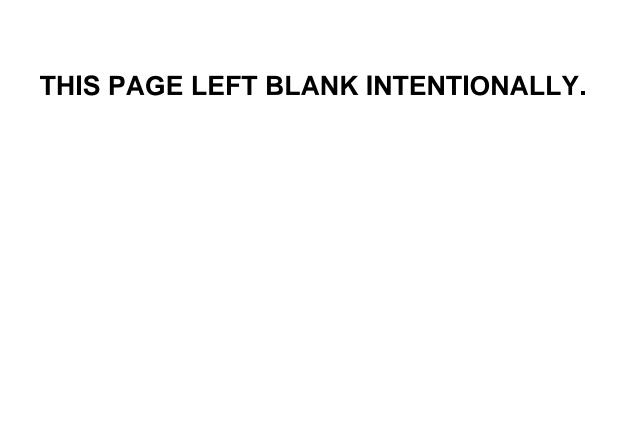
The Philippines currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the Philippines meet certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." In 2003, \$894.7 million worth of Philippine goods were imported to the United States duty-free under the GSP program, accounting for 8.9% of its total imports to the U.S. For the first 11 months of 2004, \$890.5 million worth of Philippine goods (or 10.5% of the Philippines' total exports to the U.S. from January to November) entered the U.S. duty-free under the GSP program. 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. The Philippine government has recognized the significance of the GSP program to its economy and the need to improve its IPR record in order to claim eligibility under the program.

The Philippines Should Not Introduce Holograms

IIPA understands that some discussion has begun regarding the introduction of a "hologram" which would be required to be placed on copyrighted materials in the Philippines. The government has apparently stated its purpose to generate revenue (and not as an anti-piracy device). In IIPA's experience, hologram programs put into place do not function well as an anti-piracy device. The reasons are:

- Holograms are overly costly, increasing costs to copyright owners and making it easier for pirates to do business.
- Applying for holograms places an additional burden on right holders who are trying to do legitimate business.
- Pirates have found ways to circumvent the system, either by producing false holograms, or obtaining holograms by showing fraudulent documentation/licenses.
- Increasingly, copyrighted materials are not appropriate carriers for holograms (i.e., shrinkwrap makes placement of holograms unwieldy, "original equipment manufacture" practices dictate pre-loading of copyrighted materials, meaning there is no physical good to place a hologram, etc.)

⁴⁵ Felepe F. Salvosa II, *Continued inclusion in watchlist puts trade privilege at risk - DTI US may withdraw duty-free status for RP exports*, BusinessWorld Manila, May 17, 2004, at http://www.bworld.com.ph/current/TheEconomy/ecostory2.html (in which Trade Secretary Cesar A.V. Purisima warned citizens that "the Philippines is in danger of losing its trade privileges with the United States if it continues to remain in the latter's watchlist of intellectual property rights (IPR) violators").



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT PEOPLE'S REPUBLIC OF CHINA (PRC)

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that USTR immediately request consultations with China in the World Trade Organization, and that it place China on the Priority Watch List pending an out-of-cycle review to be concluded by July 31, at which time further appropriate multilateral and bilateral action, including the possible establishment of a dispute settlement panel in the WTO, will be determined.

On February 9, 2005, IIPA submitted its comments¹ to USTR on China's progress in implementing the commitments it undertook under the Joint Commission on Commerce and Trade (JCCT), its WTO commitments and its 1995 and 1996 bilateral agreements and action plans to provide adequate and effective protection and enforcement for U.S. copyrighted products. These comments were part of the out-of-cycle (OCR) review process announced by USTR on May 3, 2004² and for which industry comments were sought by Federal Register Notice on December 14, 2004.3 In that OCR submission, IIPA summarized the views of the copyright industries on what progress had been made since the JCCT meetings concluded. Below, we summarize IIPA and its members' findings and our conclusions:

- Piracy levels have not been "significantly reduced" they still are around 90% in all sectors. China's actions in 2004 (and to date in 2005) have not produced substantial progress toward a significant reduction in copyright infringement levels, as promised by Vice Premier Wu Yi at the JCCT. China has not met its WTO TRIPS commitment to provide effective enforcement, and particularly criminal enforcement against piracy "on a commercial scale," nor its continuing bilateral obligations reflected in the 1995-1996 bilateral agreements and action plans. On October 12, 2004, IIPA submitted its comments in connection with the TPSC's request for industry views on China's compliance with its WTO commitments and concluded that China is not living up to its international obligations, in particular by failing to amend its criminal law to bring it into compliance with Article 61 of the TRIPS Agreement, and by its failure to translate those commitments into effective, deterrent enforcement in practice.⁴
- The recently-amended Supreme People's Court's "Judicial Interpretations" (hereinafter "JIs") leave unanswered questions about China's political will to bring criminal prosecutions and impose deterrent penalties. The new Jls make only minimal decreases in the monetary thresholds and continue to be calculated at pirate prices, but the new 1000/3000/5000 copy threshold may be helpful if implemented to

See http://www.iipa.com/rbc/2005/CHINA%202005 Feb9 PRC OCR Submission.pdf.

² See http://www.ustr.gov/Document Library/Press Releases/2004/May/ Special 301 Report Finds Continued Progress But Significant Improvements Needed.html.

³ See http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-27373.pdf.

⁴ See http://www.iipa.com/rbi/2004 Oct12 IIPA CHINA WTO TPSC Submission-rev.pdf.

bring more criminal cases against manufacturers and distributors. Online infringements that meet the thresholds are criminalized but the ability to use the new rule in practice has yet to be tested. Importing and exporting of pirate products are criminal, but not directly; liability is only under the rule governing "accomplices" — at significantly lower criminal penalties. End user software piracy appears not to have been criminalized. The rules were weakened with respect to repeat offenders. Industry is very concerned that the apparently grudging minor changes will not result in significantly more criminal cases with deterrent penalties and thus piracy levels will not be markedly affected. To the best of our knowledge, no criminal cases have yet been brought under the new Jls, so it is premature to assess whether they will make a real difference in practice in reducing piracy levels. In addition, the first line of implementation of this new interpretation will be the police (the Ministry of Public Security/Public Security Bureau or PSB). enforcement will not become a reality if there is inadequate attention, investment and training by the PSB. However, police resources for this purpose have not been increased nor, to the best of our knowledge, were they involved in drafting the Jls. More importantly, that part of the PSB reportedly directly responsible for copyright enforcement has been uninterested in bringing criminal cases against copyright piracy and has so informed the U.S. Government. There needs to be a mandate for the PSB to treat criminal investigation and enforcement of IPR offenses as a top priority. Finally, criminal enforcement of copyright piracy continues to be burdened by the fact that Articles 217 and 218 of China's criminal code requires a demonstration that piracy is occurring for the purpose of making a profit, something very difficult to demonstrate, particularly in the online environment. TRIPS requires criminalization of "copyright piracy on a commercial scale" — not just piracy for the purpose of making a profit.

• However, raiding activity has increased for most sectors. As a result of Vice Premier Wu Yi's leadership at the JCCT and, in August 2004, in forming the National IPR Protection Working Group (which she heads as Group Leader) and the National IPR Protection Office (NIPO), a one year national anti-piracy campaign was kicked off in September 2004. These actions, and prior actions taken immediately following the JCCT meeting, have given rise to increased raiding activity (though almost entirely at the administrative level), to higher seizures of pirate product, and what would appear, at this early stage, to be better coordination of administrative enforcement in the regions. Nevertheless, despite Wu Yi's singular efforts, IIPA members report no meaningful decrease in the national piracy rates, which still are estimated to be around 90% in all copyright sectors.

Actions to be Taken by the Chinese Government

To redeem its JCCT commitments and to meet its TRIPS obligations, the Chinese authorities must take the following further steps immediately and through July 31, 2005:

- Commence criminal prosecutions using both the monetary and new copy thresholds and carry these forward promptly to impose deterrent penalties. The Economic Crime Division of the PSB should be made responsible for all criminal copyright enforcement and be provided sufficient resources and training to very substantially increase criminal enforcement under the new Jls.
- Under the leadership of Vice Premier Wu Yi, constitute a single interagency authority at the national and provincial/local levels to undertake administrative enforcement against piracy of <u>all</u> works. This authority would have the responsibilities similar to those formerly exercised by the National Anti-Pornography and Piracy Working Group

(NAPPWC)⁵ for audiovisual works and would have the full authority to administer fines and to refer cases to the Ministry of Public Security and the Supreme People's Procuratorate for criminal prosecution, under referral guidelines that are equal to or better than the Jls. Such authority must have the full backing of the Party Central Committee and the State Council. Far greater resources must be provided to this enforcement authority. All administrative enforcement, and enforcement by Customs at the border, must be significantly strengthened.⁶

- Issue a final set of comprehensive and transparent regulations governing enforcement on the Internet, including the liability of Internet Service Providers, which follow the recommendations made in this submission, and including effective "notice and takedown" mechanisms and without unreasonable administrative evidentiary burdens. Establish within this single interagency authority described above special units (at the national, provincial and local levels), whose purpose is to enforce the law and these new regulations against piracy on the Internet.
- Amend the Criminal Law to comply with the TRIPS Article 61 requirement to make criminal all acts of "copyright piracy on a commercial scale." These must include infringing acts not currently covered, such as end user software piracy and Internet offenses conducted without a profit motive.
- Amend the new Jls to ensure that sound recordings are fully covered.
- Significantly increase administrative penalties/remedies, including shop closures, and monetary fines and impose them at deterrent levels.
- Fully implement China's WTO market access commitments and begin now to liberalize its market access rules and overall business climate to permit effective operations by all copyright industries.
- Permit private companies and trade associations to undertake anti-piracy investigations on the same basis as local companies and trade associations.

By the end of 2005, China must

- Through amended copyright legislation or regulations, correct the deficiencies in China's implementation of the WCT and WPPT, and ratify the two treaties.
- Significantly ease evidentiary burdens in civil cases, including establishing a presumption with respect to subsistence and ownership of copyright and, ideally, permitting use of a U.S. copyright certificate, and ensure that evidentiary requirements are consistently applied by judges and are available in a transparent manner to litigants.

Each of the measures noted above is necessary to strengthen China's intellectual property enforcement regime. The true test, however, is the impact of China's actions and policies on U.S. sales and exports of copyrighted works. A piracy rate hovering around 90 percent has denied the U.S. copyright industries and our national economy what should have been a long-standing trade surplus in American music, movies, books and software. It is essential that China rectify this imbalance between its widespread use of U.S. copyrighted works and its negligible trade in legitimate products. It is not enough for China to introduce new copyright laws or to temporarily escalate enforcement activity, if such actions do nothing to increase sales of

⁵ Due to the re-organization of the functions of the NAPPWC in 2005, that body will now only focus on major pornography/piracy cases. NAPPWC's coordination function has been withdrawn and provincial offices are to be closed down early in 2005.

⁶ In the area of trademark enforcement undertaken by one ESA member company and involving handheld and cartridge based games, the new JIs are unclear on whether the authorities are able to seize components and parts that make up the counterfeit products. This is essential and must be clarified.

legitimate U.S. products or halt the production and use of illegal copies. Similarly, intellectual property reforms are of little value to U.S. right holders if China persists in maintaining and erecting other trade barriers that limit or foreclose access to the Chinese market. If markets for U.S copyrighted products are closed or market access severely restricted, intellectual property rights are of limited value. IIPA thus recommends that USTR also measure China's progress according to additional benchmarks that signify meaningful gains and opportunities for U.S. copyright owners. IIPA looks forward to working with USTR on developing these additional benchmarks.

PEOPLE'S REPUBLIC OF CHINA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁷											
INDUSTRY	20	04	2003		200	2002		2001		2000	
	Loss	Level									
Motion Pictures	280.0	95%	178.0	95%	168.0	91%	160.0	88%	120.0	90%	
Records & Music ⁸	202.9	85%	286.0	90%	48.0	90%	47.0	90%	70.0	93%	
Business Software ⁹	1465.0	90%	1787.0	92%	1637.3	92%	1140.2	92%	765.1	94%	
Entertainment											
Software ¹⁰	510.0	NA	568.2	96%	NA	96%	455.0	92%	NA	99%	
Books	50.0	NA	40.0	NA	40.0	NA	130.0	NA	130.0	NA	
TOTALS	2507.9		2859.2		1893.3		1932.5		1085.1		

THE STATE OF COPYRIGHT PIRACY AND ENFORCEMENT IN CHINA

Piracy Continues at Unacceptably High Levels Despite China's JCCT and Other International and Bilateral Commitments

Several of IIPA's members have undertaken surveys of the market since the summer of 2004 in an effort to measure progress in reducing piracy levels. These surveys, which were provided to USTR on a business confidential basis, provided a detailed review of piracy at the retail level and provided data on seizures from destination countries of pirate DVDs. Other data provided to USTR covered enforcement actions in which either those industries were involved or for which the data was provided by the Chinese government. Because of the lack of transparency in the administrative and criminal enforcement system and the inability to compile meaningful statistics directly, as opposed to relying on Chinese government information (which

consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$3.82 billion) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

of this report.

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⁷ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.
www.iipa.com/pdf/2005spec301methodology.pdf.
https://www.iipa.com/pdf/2005spec301methodology.pdf.
www.iipa.com/pdf/2005spec301methodology.pdf.
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www.iipa.com/pdf/2005spec301methodology.pdf.

and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology.

BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in China, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications

¹⁰ ESA's reported dollar figures are preliminary and 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

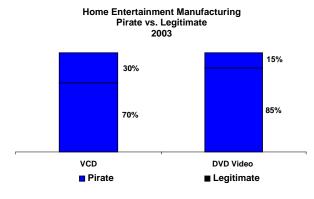
is rarely sufficiently granular to draw meaningful conclusions), the data presented in these surveys and in this submission are incomplete at best. While certain selected information is available, like, in some cases, what shops, distribution centers or factories were raided (and such data was provided, where available, to USTR), a meaningful picture of the scope of the piracy problem must be drawn from the gross statistics available primarily from the Chinese government, supplemented by industry-generated statistics. What follows, first, is a description of the current, updated, piracy situation facing the copyright industries in China and, second, 2004 enforcement information that is available to those industries.

Piracy in the home video and the audiovisual market generally: MPA reports that, in 2004, China Customs claimed to have seized approximately 79.6 million optical discs which were intended to be smuggled into China. At the same time, the NAPPWC reported seizing a staggering 165 million discs during this same period in the domestic market. These numbers (a total of over 244 million pirate discs in 2004) exceed any data that IIPA has seen from prior years and is indicative of the continuing vast scope of the piracy problem. In 2003, NAPPWC seizures were down to 64 million disks (reportedly due primarily to complications of the SARS epidemic), compared to the 78.8 million discs seized in all of 2002. This also serves as evidence of stepped up enforcement which most IIPA members have reported following the JCCT announcements. However, based on these new market surveys (which are only a partial look at best), the percentage of pirate product available in the marketplace continues to support the piracy level estimates we provide in this submission.

In 2004 there were reportedly 83 licensed plants in China, with 765 operating production lines. This is up from 71 plants and 569 lines reported for 2003. 152 of these lines are dedicated to producing DVDs. Total capacity, excluding the production of blank CD-Rs, is now 2.67 billion units annually — a staggering figure when viewed in conjunction with the prevailing 90% piracy rates. These above numbers do not count underground plants, whose locations have increasingly been dispersed to more rural areas in China. Reports emanate from China regularly about raids on such plants, but we are unable to ascertain, in almost all cases, the disposition of any enforcement actions against their owners. Because industry is forbidden from conducting investigations, only Chinese authorities have any ability to identify and raid these underground factories.

¹¹ In evaluating these seizure statistics provided by Chinese authorities, it must be kept in mind that (a) seizures of pirate product involving U.S. copyrighted material is not broken out, (b) it is not known how many of the discs seized contained pornographic or otherwise politically unacceptable material or involved legal violations other than copyright piracy. The lack of transparency makes it difficult therefore to ascertain a true picture of the anti-piracy enforcement situation in China.

China is one of the leading global manufacturers of pirate product. *Understanding and Solutions* estimates that in 2003, 69% of the VCD and 85% of the DVD discs manufactured in China were pirate product.



Source: Understanding & Solutions

The impact of piracy on the film market is pronounced. *Informa Media* reports that admissions and national box office takings have suffered as a direct result of piracy. Part of the problem is that pirate product is priced much lower than cinema tickets. According to market experts, the average cost of a pirate VCD is \$0.60 to \$1.20 and \$2.00 to \$2.50 for a pirate DVD, 12 compared to \$4.00 to \$5.00, the average cost of a movie ticket in Beijing. Further, optical disc versions of recent foreign hits often are available in the pirate market long before theatrical, let alone home video, release in China. Pirate videos of *Harry Potter and the Prisoner of Azkaban, Van Helsing and The Day After Tomorrow* — with Chinese subtitles — were on sale within one week of their U.S. and UK release, reportedly for \$1.00 per copy.

Another measure of the level of piracy is the sale of VCD and DVD players. The VCD and DVD player dominate the Chinese home entertainment market. In 2003, *Screen Digest* estimated that 84.4 million, or 24% of television households had a VCD player, whereas 26.4 million, or 8% of television households had a DVD player. The DVD player has recently seen explosive growth in China. Between 2000 and 2002, the number of DVD households grew by 23.4 million, or 867%.

At the same time the number of legitimate DVD discs sold to consumers in China grew at a much slower pace. In fact, in 2003 the number of DVD discs sold to consumers was a mere 0.3 per DVD household. This is inconsistent with the trends seen in Hong Kong, a similar market, which is dominated by the VCD player. In 2003, the average DVD household in Hong Kong made 4.3 DVD disc purchases. Clearly, economic circumstances influence buying patterns of consumers, but the discrepancy between these two markets is in large part due to the piracy epidemic within China. It is unlikely that Chinese consumers are investing in DVD players only to leave them gathering dust in their living rooms; more likely is that consumers are investing in pirate film collections.

Export piracy: MPA has also been experiencing a marked increase in exports of DVDs from China to the U.S., the UK and other countries and has provided USTR with charts

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¹² Motion Picture Association, April 2004.

¹³ Informa Media Group, "Global Film: Exhibition & Distribution", 2003.

showing destination countries and some information on the Customs seizures themselves. ¹⁴ Exports have been steadily increasing over the last three years and show no signs of abating. In addition, exports of pirated music sound recordings have been found in several Southeast Asian countries. It is the hope that the new anti-piracy campaign announced in August 2004 will reduce this problem, which, as we know, slowed to a mere trickle in 1996-97 following the Chinese government's decision to avoid U.S. government trade retaliation by shutting down the export trade in pirate video and audio product. (Exports of very high quality counterfeit software continued throughout this period, however.)

Internet piracy: With respect to Internet piracy generally, it continues to grow rapidly in China and the problem is discussed in the sections devoted to each industry sector. In 2003, we reported that 78 million people were then on line (up from 58 million users in 2002 and 33.7 million in 2001). In 2004, that number has jumped to 94 million, making China the <u>largest user</u> of Internet facilities in the world.

Specifically, for audiovisual works, this piracy, which is also increasing, involves the sale of "hard goods" (VCDs and DVDs—all formats) as well as the illegal streaming of films. As discussed below, MPA's attempts to enforce against piracy have significantly increased but with only some success. As detailed in the enforcement section, in 2004, MPA sent out 3,905 cease and desist letters. As the majority of these were sent to P2P targets it is not possible to determine the compliance rate. Where cease and desist letters were sent to other than P2P targets (mostly streaming sites), the compliance rate was a very disappointing 17%.

Broadcast, Cable and Public Performance Piracy: Other types of audiovisual 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.

Piracy in the Market for Sound Recordings: As IIPA reported last year and as is reflected in the submissions made by RIAA during the OCR pendency, the crisis in the local and international music industry continues for a fifth year in a row. Losses, under the new methodology begun in last year's submission which counts displaced sales are estimated at \$202.9, a decrease from an estimated \$289 million in 2003. The estimated national piracy rate is 85%, down from 90% in 2003. OD piracy continues at a high level and cassette piracy remains a significant factor in the marketplace. The recording industry is looking to the new enforcement campaign to deal with piracy by factories, both licensed and underground, and piracy at the retail level which remains at massive levels, though the increased raiding in 2004 has had some impact on losses and the piracy rate.

Internet Piracy: Internet piracy was a significant concern for the recording industry in 2003, and, as predicted in last year's submission, the situation has worsened in 2004. Websites in China such as www.9sky.com and www.ehinaMP3.com are giving away or offering links to thousands of pirated songs. (The new JIs do not criminalize non-profit, free Internet transmission, and it is unclear if the inclusion of advertising as indicative of "for-profit" activity will cover music files on a multi-content Internet site). RIAA estimates there are thousands of active websites hosting infringing MP3 files, and that some of these have thousands of infringing files. The industry is also concerned that international online pirate syndicates are using China-

¹⁴ MPA reports that there is evidence of Chinese DVD exports to Australia, Belgium, Hong Kong, Japan, Sweden, the U.K. (185,000 disks seized from January-September 2004), UAE and the U.S.

based servers to hide their infringing files. One such example is www.boxup.com, which offers songs to paying members (and therefore, if the thresholds are met, should be subject to criminal prosecution under the new Jls). Also overseas pirate sites have been offering their services in China. Taiwan's Kuro is one such example. We understand that Kuro now has a server in China.

The record industry has approached NCAC and the Beijing Copyright Bureau to assist with administrative enforcement. They were told that they must await formal issuance of the new NCAC regulations. ¹⁵ While enforcement assistance is welcome, low administrative penalties issued in other piracy cases do not bode well for deterrent enforcement against Internet piracy. It is unclear whether the new regulations will cover P2P services, like Kuro, now under indictment in Taiwan.

Piracy in the market for entertainment software products: The market for PC games, console games, and games played on handheld devices is continuing to grow in China. It is the market for online gaming, however, where the growth has been significant in the last few years. Piracy rates are still extremely high for the industry. A number of entertainment software publishers have entered the market and Sony and Nintendo entered the market in 2003 and 2004, respectively. Given these levels of piracy, they do so at considerable risk.

Internet piracy has also become a significant problem, more so than illegal factory OD production. In 2004, there were an estimated 200,000 Internet cafés in China with 100-300 computers at each location with about 60% of the patrons playing games. Typically, these cafés purchase one legitimate copy, or use a pirated copy and load it on each computer. Customers are also generally permitted to download games from warez sites and even to burn their own CD-Rs on the premises. The industry is seeking to license these cafes but this process, given the nature of the marketplace, is inevitably slow, absent real enforcement. Although the government has taken actions against several Internet cafes, such actions have been focused on ensuring that the cafés do not allow "unhealthy information to be spread through the Internet" and requiring that cafés install blocking software for pornographic sites and materials, and other similar sites. There are also other significant restrictions on Internet cafés such as keeping them a specific distance from schools 16 and these regulations are vigorously enforced. However, the government regulations do not address piracy specifically and no enforcement actions have been taken to ensure that the cafes use only legitimate or licensed entertainment software products. China must include copyright provisions in the business licenses it issues to Internet cafes for as Internet and online gaming continues to grow, the cafés are likely to be the primary means for Internet access for much of the Chinese population.

Furthermore, as the market for entertainment software (particularly online gaming) continues to grow, the Chinese government must also ensure that the law and regulations are adequate to take aggressive action against all types of online piracy. The Chinese video game market is likely to be dominated by online gaming; it is essential that the appropriate legal framework be in place to provide copyright owners as well as law enforcement agencies with the necessary tools to protect copyrighted works in the online environment. A particular problem for entertainment software publishers is the existence of offline or pirate servers in

¹⁵ The latest draft of the NCAC Internet regulations appears to require notices "in writing" and would not permit email notifications. If this pertains in the final regulations, the compliance rate of ISPs is likely to drop markedly. The draft regulations are discussed in detail below.

¹⁶ Some news reports noted that the government would also begin imposing restrictions against the use of entertainment software products in Internet cafés. However, the restrictions do not appear to have been imposed though news accounts have been scarce.

China. These unauthorized servers operate sites which emulate a publisher's online game and thereby divert traffic and potential subscribers from the legitimate site. ESA member companies have attempted to contact Chinese ISPs to request that access to such sites be disabled, but to no avail. Unfortunately, existing Chinese law and regulations has not yet clearly addressed this problem. ¹⁷ Neither do there yet seem to be any legal incentives to encourage ISPs to cooperate with right holders in expeditiously disabling these unauthorized or pirate servers.

The manufacturing and assembly of cartridge-based handheld games also continues to be a massive problem in China. Counterfeit Nintendo products continue to be produced in mass quantities in China, and exported throughout Asia, Latin America, the Middle East and Europe. Until the factories engaged in assembling counterfeit cartridge-based products are closed permanently, and significant fines and jail sentences imposed, it will remain difficult to stem the massive production of counterfeit video games in the country. The new JIs now set copy thresholds for initiating criminal actions in the area of trademarks, but they do not appear to address the situation involving a seizure of vast quantities of component parts, which is the prevailing scenario in actions involving cartridge-based games. During a raid, administrative authorities may seize hundreds of the component parts waiting to be assembled into the final counterfeit cartridge game in a factory — that is, the printer circuit boards (PCB) which contain the video game software, the plastic cartridges which will house the PCBs, as well as the labels and instruction manuals to accompany the final pirated product. It seems the case that notwithstanding the seizure of hundreds of these component parts, as they have not yet been assembled into the final product, i.e., what may constitute a "copy," the JI thresholds may be interpreted as not applying. This would present a serious impediment to pursuing criminal actions against pirates engaged in the manufacture of thousands of counterfeit cartridge games. It is unclear how law enforcement authorities will thus treat instances where they find hundreds of these component parts during a raid, but which have not yet been assembled into the finished counterfeit video game cartridge. Nintendo is concerned that this seeming gap may actually make it easier for pirates to elude seizures and arrest, as fully assembled products will be immediately removed from the factories and transported (under cover of night) to various locations, thus leaving no finished product on the premises.

Piracy in the market for business software: Unauthorized use of software in enterprises in China causes the vast majority of piracy losses faced by the business software industry. Losses also occur in the retail market, including the loading of pirate software on the hard disks of computers as part of the sale of computers. The market is also characterized by huge exports, on a global basis, of high-quality counterfeit software packages. The software industry has struggled for years to persuade NCAC to devote sufficient resources to raiding/auditing enterprises that use unauthorized software. There have been some recently successful administrative actions against end-users (see enforcement discussion) and, as part of the new anti-piracy campaign following the JCCT, the authorities in many of the major cities have announced plans to increase enforcement against software piracy and some have even referenced end-user piracy. However, enforcement remains spotty and resources are still woefully inadequate at the national and local copyright administrations and bureaus. The new JIs did clarify that fake (end-user) licenses fall within the scope of "without permission of the copyright owner." However, the industry's most important priority — to persuade the SPC to amend its JIs to make end-user piracy a criminal offense under TRIPS — was apparently not met.

¹⁷ The draft Internet regulations, discussed below, do not address the problem of pirate servers located outside China.

To significantly reduce the piracy levels for business software, the government, through the existing authorities — the new National IPR Protection Working Group, 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 enforce the law more vigorously against enterprise end-user piracy. Actual enforcement should be placed under the authority of the new interagency mechanism described above, and enforcement actions should be followed up by the allocation of sufficient resources and their employment in the vastly increased administrative raiding of enterprises using unauthorized software. Without these actions, there is no possibility, in the view of the software industry, of significantly reducing the world's highest piracy rate — 92% of the market!

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. The most recent was a circular issued by the State Council on the use of legal software by local governments. In the circular, government agencies at the provincial level are requested to legalize their software by the end of 2004, and government at lower levels are to accomplish software legalization by the end of 2005. Some progress has been made but the problem persists, 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, including the agencies that have legalized their software use and the amount of public procurements of software resulting from such legalization efforts. Following government legalization, the Chinese government should also issue a decree for the use of legal software in state-owned enterprises since there is no practical way to carry out enforcement and deterrence.

As part of the government legalization effort as well as to implement the 2002 Government Procurement Law, MOF and MII drafted Implementing Methods for Governmental Procurement of Software. The Methods describe new government procurement practices in software that are unique to China and that bear little relation to the principles of the WTO Government Procurement Agreement (GPA), whose goal is to ensure non-discriminatory, procompetitive, merit-based and technology-neutral procurement of goods and services so that governments can acquire the best goods to meet their needs for the best value. The regulation would effectively prevent U.S. software companies from selling software products and services to the Chinese government. When viewed in the context of China's 92% software piracy rate, this discriminatory measure would effectively close China's largest software market to U.S. competition. The U.S. software industry has already lost billions of dollars in export revenue due to rampant piracy and counterfeiting in China; a ban against government procurement of U.S. software would eliminate the industry's best opportunity to expand exports to China and set a dangerous precedent for China's procurement policies in other major economic sectors. Addressing this problem is a very high priority for the U.S. software industry.

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. However, this problem is unlikely to be brought under any semblance of control without aggressive criminal enforcement.

Piracy of books and journals: Previous IIPA Special 301 submissions detailed the successful effort of the Chinese government, in cooperation with the publishing industry, in dealing with the formerly rampant problem of print journals piracy. While these significant improvements are for the most part continuing in 2004, publishers are starting to see increased photocopying of print journals, in part as a result of the lack of sufficient government funding for legitimate journals purchasing by universities. The Chinese government should monitor use of print journals closely to ensure that its successes of prior years are not eroded.

Problems abound for other published materials as well. Illegal commercial photocopying has, for the first time, become the chosen mode of book piracy in China, at least with respect to academic materials. While photocopying had previously taken second place to print piracy in China, decreasing costs of photocopy paper and other necessary materials have resulted in a sharp increase in photocopying in 2004. This photocopying takes place primarily on university campuses, as well as 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.

Despite the rise in photocopying, traditional reprint piracy continues to remain a major problem in China, particularly of higher education textbooks and trade bestsellers. Popular books such as Bill Clinton's *My Life* and J.K. Rowling's latest Harry Potter® book, *Harry Potter and the Order of the Phoenix*, were heavily pirated. The Chinese government needs to take action against hard goods piracy of books with the same vigor with which it tackled journals piracy in 2001.

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. 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.

Translation piracy also 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.

Internet piracy: Publishers have noticed alarming increases in electronic journals piracy over the past year. University gateways are routinely left open for illegal access by unauthorized users, and file-sharing among users is on the rise. 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. This problem extends to databases containing other types of published data as well. The Chinese government should take steps to ensure that commercial or institutional users are abiding by their license agreements.

Furthermore, piracy over the Internet is increasingly affecting not only journals, but also academic textbooks and bestsellers, with several websites offering hundreds of scanned published titles for download. Bestsellers are, of course, distributed over peer to peer networks

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¹⁸ 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/2003/2003SPEC301PRC.pdf.

¹⁹ Id.

with impunity. This phenomenon is likely to grow during 2005 unless the government is able to take steps to ensure effective measures are available to rights holders to defend their materials.

Enforcement: Raiding and seizures have increased for most copyright sectors; administrative penalties remain too low to provide a deterrent; criminal enforcement under Articles 217 and 218 has not yet begun; and, consequently, piracy levels have not yet declined.

Vice-Premier Wu Yi's commitment to "significantly reduce piracy levels" will not be met by the time of this submission. Indeed, overall piracy rates have remained virtually constant from 2003 to 2004.

China does not presently 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). To meet this obligation, IIPA recommends that China implement a system in which the Party Central Committee and the State Council ensure that the enforcement authorities (a) cooperate more closely with affected industries (including permitting U.S. associations to undertake investigations in China); (b) significantly increase transparency (c) give Vice Premier Wu Yi even greater and "publicly announced" authority to intervene at all levels, to organize an effective interagency enforcement authority throughout the country, and to coordinate the nationwide enforcement effort; (d) significantly increase administrative penalties and actually impose them at deterrent levels, including closing retail stores that deal in pirated goods; (e) amend the Criminal Law to increase criminal penalties and cover all types of "commercial-scale" infringements; and (f) use the new Judicial Interpretations to their fullest to prosecute — publicly — significantly more infringers under Article 217 and 218, not just for pornography, "illegal business operations" or smuggling. None of these objectives has as yet been met.

In the following sections, we report on what we know about the level of enforcement in the administrative, criminal and civil enforcement system in China in 2004.

Administrative enforcement

As noted above, NAPPWC appears to have been the most effective administrative enforcement mechanism in China, with a continued large number of raids, seizures and detentions. With the change of the functions of NAPPWC in 2005, it is essential that a similar authority be created to take over the responsibilities of nation-wide coordination of anti-piracy operations and that its jurisdiction be extended to cover enforcement in all copyright sectors, including computer software. It is also critical that this new authority NOT be charged with dealing with pornography, but only piracy, and that it be mandated to have an effective and transparent reporting system. If pornography is included, it will never be known whether the authorities are enforcing for that crime or for IPR violations.

With respect to existing administrative enforcement, NCAC's title verification program continues to work well for only one industry—the motion picture industry—with, in the year 2004,

²⁰ It must be noted, however, that the primary mandate of the NAPPWC is to rid the market of pornography or other material deemed by the government to be politically or socially unhealthy.

a total of 2,881 title verification requests submitted by MPA, and 146 titles challenged by MPA and I.F.T.A. found to have been unauthorized.

Even with the myriad cases handled by NAPPWC, ²¹ 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 vastly increased 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; ²² 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.
- 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 effectively to deal with the all-important problem of corporate end-user software piracy.

The software industry: As a result of the increased attention to enforcement in the second half of 2004, BSA reports an end-user raid on a design and engineering company which resulted in the detention of four persons and the seizure of 24 computers. This is among the first such actions that has resulted in the detention of an employee from a company engaged in unauthorized use of business software. In October 2004 in Shenzhen in Guangdong Province, six shops engaged in selling pirated software were raided and the software confiscated. In Shangxi Province, two design companies using unauthorized copies of AutoCAD and 3DMAX were raided in October by the Xi'an AIC, the Xi'an Press and Publications Bureau and the Xi'an PSB. Twenty-four copies were seized and the offenders were fined a paltry RMB 2000 (US\$242). BSA also notes that the NCAC took very seriously the administrative enforcement of two major CD-replicators (Beijing, Tianjin), and pro-actively did PR to generate awareness and

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²¹ MPA does confirm, however, that most of these cases involved pornographic material with only a small number limited to purely pirate product. Nevertheless, the interagency body reported the "arrest" of 6,912 offenders and the seizure of 11 illegal production lines (5 DVD lines and six VCD lines). Two OD factories were also penalized. In one of these cases where MPA has information (reported in the text below), the licensed factory was in Hunan and, in July 2004, was fined RMB80,000 (US\$9,660) by GAPP related to copyright infringement. This fine, for an OD factory, is clearly not a deterrent.

²² Fines can be up to three times the value of the pirated goods measured at pirate prices, but fines as actually imposed are woefully low.

deterrence. These two cases were included among the top ten 2004 IPR infringement cases published by the State Council Office of Intellectual Property Protection.

The entertainment software industry: A number of ESA member companies are active in the Chinese market, with a few engaged in domestic enforcement either through local counsel or its own in-country anti-piracy program. In particular, Nintendo has undertaken a significant number of administrative actions 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 copyright cases for Nintendo, available penalties are as low, or lower, than those imposed for copyright infringement. 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 factories. Raids against the 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.

The motion picture industry: MPA's separate submission reports in detail on the joint administrative raids in which it was involved in 2004. These joint raids represent only a fraction of the total raids conducted by NAPPWC and by local authorities without notice to the affected association or company. In 2004, 573 joint raids against retail shops were conducted in Shanghai, Beijing, Shenzhen and Guangzhou. MPA is encouraged to report that 145 of these shops, principally in Beijing, were closed after the raids — 510 shops were fined; the average range was from RMB1,000-RMB5000 (US\$121-US\$604). A very few fines exceed this and it is encouraging that one shop named "The 74th Store of Yongshengshiji AV Center," located in Congwen District of Beijing, was fined RMB50,000 (US\$6,041). The average fines remain notoriously low, however, and are hardly a deterrent.

Other information on the level of administrative fines is spotty. The General Administration of Press and Publications (GAPP) ran a raid against a licensed VCD factory on July 27, 2004. The factory had seven lines and reportedly produced very significant quantities of pirate product from 1998 to 2004. The factory was ordered to cease operation from July to September 2004 and was fined only RMB80,000 (US\$9,666). Temporary closures and fines of this level will not deter factory-level piracy. However, MPA was pleased to have at least received notification of the action. We hope this bodes well for greater transparency in the future.

The statistics reported below by MPA for administrative cases come from the Chinese authorities. It cannot be confirmed as covering only U.S. pirate movies but may involve other product. It also cannot be confirmed that the fines levied were just for copyright piracy; they could cover pornography or other legal violations beyond copyright piracy.

The recording industry: In its business confidential submission to USTR, RIAA/IFPI noted the lack of transparency that pervades China's administrative enforcement system and reported on isolated actions taken by local and provincial enforcement authorities against factories, distribution centers, retail establishments and street vendors. The recording industry rarely receives information on the level of penalties imposed following those raids, and where information is made available, it is generally distressing. In one raid in Shenyang conducted by the local AIC for example, where over 3000 pirate music CDs were seized, the industry learned that the fine imposed was only RMB30,000 (US\$3,625) or a little over US\$1.00 per pirate CD!

Better information is available from the authorities in Shanghai (the Shanghai Culture Inspection Team), where transparency is somewhat improved. After looking at the data put together from Shanghai, RIAA estimates that the fines ran from about RMB500 to RMB5000 per incident (US\$60-US\$604). However, of the total number of cases, 90% resulted in warnings; only 10% in fines. The authorities also closed approximately 19 warehouses in 2004, but these were only facilities where more than 10,000 copies of pirate product were found. This is a clear example of the non-deterrent nature of the administrative process and Shanghai is far better than other provinces/cities.

The book publishing industry: U.S. book publishers have heard of isolated instances of action taken by enforcement authorities against book pirates, but almost entirely on behalf of Chinese companies. Publishers are working with local authorities to increase government administrative activity on behalf of U.S. companies and will be monitoring the degree of cooperation more closely during 2005, though the lack of transparency in the system is a major hurdle.

Administrative Copyright Enforcement Statistics for 2004 PEOPLE'S REPUBLIC OF CHINA								
ACTIONS	Motion Pictures	Business Software	Totals					
NUMBER OF RAIDS/SEARCHES CONDUCTED	1,153	12	1,165					
NUMBER OF ADMINISTRATIVE CASES BROUGHT BY AGENCY	914	12	926					
NUMBER OF DEFENDANTS FOUND LIABLE (INCLUDING ADMISSIONS/PLEAS OF GUILT)	894 (20 cases pending)	9 (2 cases pending)	903					
RATIO OF CONVICTIONS TO THE NUMBER OF RAIDS CONDUCTED	77.5% 75% (894/1,153) (9/12)		78% (903/1,165)					
RATIO OF CONVICTIONS TO THE NUMBER OF CASES BROUGHT	100%	75%						
NUMBER OF CASES RESULTING IN ADMINISTRATIVE FINES	798	0	798					
TOTAL AMOUNT OF FINES LEVIED								
RMB\$0-1,000 (UP TO US\$120)	209	0	209					
RMB1,001-5,000 (UP TO US\$604)	264	0	264					
RMB5,001-10,000 (UP TO US\$1208)	188	0	188					
RMB10,000 AND ABOVE (ABOVE US\$1208)	137	0	137					
TOTAL AMOUNT OF FINES ORDERED IN HOW MANY CASES (E.G., \$XXX IN Y CASES)	RMB\$4 million (US\$483,284) in 798 cases	US\$174,735 in 9 cases						

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 periodically under other laws such as those dealing with pornography, smuggling 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 for "piracy" with deterrent penalties.

IIPA and its members hope that that process begun last April with Vice Premier Wu Yi's announcements, and, in particular, the recent amendment to the SPC Judicial Interpretations will mark the beginning of an initiative and not its highpoint. Further discussion on the new JIs is set out below.

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 rarely to publicly announce a jail term or deterrent fine for piracy per se. This must change.

The recording and motion picture industry: RIAA has reported in their business confidential submission to USTR that it has no knowledge of any criminal "piracy" prosecution involving its product. MPA, on the other hand, last year reported some statistics it was able to unearth. It reported last year that in 2002, 19 criminal cases had been 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. It reported that, in 2003, 30 cases were filed in Beijing and Shanghai, with again, 80% in Beijing. However, it also reported that, to the best of its knowledge, only three 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/pornography cases brought under Article 225 of the Criminal Law. Jail terms were, however, significant in most of these cases (though the Chinese have traditionally treated pornography very seriously) 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.

In July 2004, the Chinese government announced a major raid conducted by the Economic Crime Investigation Division (criminal copyright enforcement, as noted earlier, is normally undertaken by the less-efficient Social Order Division)²³ of the MPS, assisted by the Shanghai PSB and the U.S. Department of Justice and U.S. Customs. Over 210,000 DVDs were seized in the raid and six people were arrested, including two U.S. citizens. 20,000 of the DVDs were to be sold in the U.S. and the rest were to be transmitted via the Internet to 25 countries. These six defendants were prosecuted under the "operating without a license" provisions in Article 225 of the Criminal Code.

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.²⁴

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²³ In fact, a senior official in the Social Order Division of the PSB told a visiting US Government delegation during 2004 that copyright piracy was an offense generally committed in the rural regions of China and not warranting criminal prosecutions.

criminal prosecutions.

24 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 two 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 (\$48,329)]. In addition to the prison terms, three lines were removed, and the GAPP 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.

Bringing criminal cases was not only an obligation in the U.S.-China 1995 Memorandum of Understanding and [Enforcement and Market Access] Action Plan, but is a clear TRIPS requirement. China's JCCT obligations include a commitment that China will "subject a greater range of IPR violations to criminal investigation and criminal penalties," and that criminal sanctions will be applied "to the import, export, storage and distribution of pirated and counterfeit products" and that criminal sanctions will also apply to on-line piracy. China is not now in compliance with either that bilateral agreement, TRIPS or its JCCT commitments. As discussed below, industry is skeptical whether the lowered thresholds and other amendments to the JIs will be implemented in such a way to result in the commencement of many significant criminal prosecutions, though we fervently hope that we are wrong. This is the only way, in industry's view, that "piracy levels can be significantly reduced" in China, as promised by the Vice Premier.

Other copyright industries: 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 to bring those cases. Below MPA and BSA report the criminal cases they have been told about, but again, it is likely that, in the case of audiovisual product, few or no such cases were prosecuted for "piracy," but under other provisions, such as operating an unlicensed business under Article 225 or for pornography. Until the authorities commence accurate and granular reporting of these statistics, it will be very difficult to evaluate progress in the enforcement system.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 PEOPLE'S REPUBLIC OF CHINA								
ACTIONS	MOTION PICTURES	Business Software						
NUMBER OF RAIDS CONDUCTED	42	2						
Number of VCDs seized	15,172,549	2500						
Number of DVDs seized	22,221,488							
Number of CD-Rs/DVD-Rs seized	27,157							
Number of investigations	50	2						
NUMBER OF VCD LAB/FACTORY RAIDS	8							
Number of cases commenced	34	1						
Number of indictments	30	1						
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	48	1						
ACQUITTALS AND DISMISSALS	2							
Number of cases pending	13	1						
NUMBER OF FACTORY CASES PENDING	0							
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	21							
SUSPENDED PRISON TERMS								
MAXIMUM 6 MONTHS	5							
OVER 6 MONTHS	1							
OVER 1 YEAR	6							
TOTAL SUSPENDED PRISON TERMS	101 MONTHS							
PRISON TERMS SERVED (NOT SUSPENDED)								

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 PEOPLE'S REPUBLIC OF CHINA							
ACTIONS	Motion Pictures	Business Software					
MAXIMUM 6 MONTHS	3	1					
OVER 6 MONTHS	14						
OVER 1 YEAR	25						
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	42						
NUMBER OF CASES RESULTING IN CRIMINAL FINES							
UP TO \$1,000	2	1					
\$1,000 TO \$5,000	6						
Over \$5,000	10						
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	313,020	362					

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: The recording industry has brought over 235 cases against factories since 2002 and many others (through 2004, 202 cases) against retailers and Internet pirates. Ninety-one of the factory cases remain pending. Total damages/settlement amounts in all these civil cases brought by the recording industry amounted to US\$1.9 million. While there may be some limited deterrence associated with these amounts, it is clear that China can not rely upon civil actions to significantly improve the business climate, and that criminal actions are sorely needed. It must also be noted that the industry rarely is made whole for the damages they sustain in these civil cases. In only a few cases do the record companies even recoup their litigation costs (awards average 30% of actual litigation costs). The largest award/settlement in this range of cases was RMB600,000-800,000 (US\$72,493-US\$96,657). These judgments/settlements were against factories suspected of producing millions of units of pirate music CDs at profits which far exceed these meager damages—thus demonstrating that engaging in large scale production of pirate materials, even when you get caught, is presently a rational business decision in China.

As noted above, the recording industry continues to face massive Internet piracy in China but has been required to fight this problem through cease and desist letters to ISPs and, where necessary, civil litigation. More than 2000 cease and desist letters were sent in 2004, with a compliance rate of 75%, a significant improvement over the 30% in 2003. The industry has now completed 17 civil Internet cases. A recent case was won against www.tyfo.com, one of China's most popular pirate websites. Damages awarded were RMB 370,000 (\$45,000) which, while significant, is low given the damage done. In summary, while these cases have been successful, monetary damages have been very low and hardly a deterrent to further infringements. The maximum received in an Internet case was approximately RMB170,000 for 15 songs (US\$1,370 per song) in the case against www.tj.cn, awarded by the Tianjin No. 1 Intermediate Court. 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. Moreover, the industry is very concerned about the new draft Internet regulations, which if adopted, would severely threaten this compliance rate. 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.

The motion picture industry: The motion picture industry also embarked on a civil litigation program in 2002, with a total of ten civil cases having been brought under the recent Copyright Act amendments, all of them successful. Four cases against factories were settled. Six cases against three retailers in Shanghai resulted in a damages in favor of the plaintiffs based on statutory damages of up to RMB500,000 (US\$60,410) available under Article 48 of the 2001 amendments to the Copyright Act. However, evidentiary requirements remain burdensome and unnecessary. Further amendments to the Copyright Act should establish a presumption with respect to subsistence and ownership of copyright and permit, for example, a U.S. copyright certificate to be used.

In 2004, MPA has issued 4,055 cease and desist letters to ISPs in China, primarily for P2P piracy. This was an almost ninefold increase over 2003. However, the compliance rate was, as noted earlier, only 17%. The new "Interpretations" in combination with NCAC's soon-to-be completed Internet regulations, plus an easing of the burdens to followup with civil cases with significant, and deterrent, damages, must change this result. Any civil enforcement strategy must also be accompanied by aggressive use of China's administrative enforcement machinery, under the new Jls criminal enforcement.

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 under Article 48 up to a maximum of RMB500,000 (US\$60,410) where the "actual losses suffered by the holder of the right or the profit earned by the infringing party cannot be determined."

The software industry: 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. Until this year, very few cases have been brought and concluded. However, 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 six 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\$6,041). 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 (US\$180,023). In the two recent cases, the courts supported almost all the claims made by right holders. In one case the damages were RMB378,200 (US\$45,695) — the decision is on appeal — and in the other

RMB290,900 (US\$35,147). While this is a major victory for the software industry, 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. BSA also remains concerned 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.

Also of significance is a decision in the summer of 2004 in the Shenyang Intermediate People's Court which ruled against end users of unauthorized software. The case involved Chinese software (RIP2.1). The court made use of the presumption in the 2001 copyright amendments to require the defendants to show that their use was legal. The eight defendants were unable to do so and damages of RMB100,000 (\$12,082) were imposed.

The book and journal publishing industry: 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.

U.S. publishers have brought a number of civil cases in the past year, but have been hampered in some important cases by non-transparent and onerous evidentiary burdens. The industry has a number of civil cases pending and will be monitoring the progress of these in the coming months.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 PEOPLE'S REPUBLIC OF CHINA								
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	Book Publishing	Totals				
NUMBER OF CIVIL RAIDS CONDUCTED	0	0	0	0				
Post-search action	0	0	0	0				
CASES PENDING	0	0	0	0				
CASES DROPPED	0	0	0	0				
CASES SETTLED OR ADJUDICATED	2	2	0	4				
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)	0	0	0	0				
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	US\$30,000	US\$82,860	0	US\$112,860				

Statutory Law and Regulations: The New Judicial Interpretations, the Criminal Law, the 2001 Copyright Amendments, and the Draft Internet Regulations

The new Supreme People's Court judicial interpretations

On December 21, the Supreme People's Court issued its long-awaited, and promised, amendment to its Judicial Interpretations of the Chinese Criminal Law. IIPA has reviewed these amendments and comments on them as follow:

- As a fundamental matter, whether the new Judicial Interpretations are positive or not will
 depend entirely on the political will of the Chinese authorities to use them aggressively
 to bring criminal cases and to impose deterrent penalties on pirates. In IIPA's view, this
 is a necessary condition for China to redeem its JCCT commitment to "significantly
 reduce piracy levels."
- Even though some of the thresholds were reduced, and some significantly, it remains to be seen whether, given that the Chinese, for inexplicable and unjustifiable reasons, chose to retain measuring the thresholds at pirate prices, there will be any difference in the number of cases **in practice**.
- If the JIs, as they came out in the end, are any measure of the government's ultimate political will to use the criminal process to reduce piracy, then we cannot be very optimistic since the improvements were so minimal.
- The new "copy" thresholds do hold some promise, particularly if requirements to prove sales are unnecessary. However, 1,000/3,000 copies (individuals/units for the lower penalties where jail time is not mandatory and fines are set by the judge and not in the Jls) and 5,000/15,000 copies (individuals/units for the mandatory three year minimum jail term) still place a heavy burden on enforcement authorities and will only result, it would seem, in the possibility of prosecuting the very biggest pirates — not much different than under the previous Jls. We note that the 1000 copy threshold (for individuals, not units) is double the threshold for prosecuting for illegal business operations under Article 225. We also note that in an apparent inadvertent drafting error, sound recordings are not covered in the copy threshold provisions. Finally, the copy thresholds apparently do not apply to Article 218 offenses involving only "sales." We understand that the SPC has taken the position that "sales" is not the equivalent of "distribution" and that the latter implies some connection with the entire supply chain, beginning with manufacture. This must be clarified since it may result in excluding from possible criminal prosecution owners of warehouses where large seizures have been made, where there is no evidence of the owner being involved in production and where the monetary thresholds have not been met.
- The Chinese government took the exact opposite approach from that suggested by the copyright industries and the U.S. government: they kept "profits" as the main test, with "business volume" as a secondary test at a higher threshold. Only when the pirate price is "unknown" can we apparently measure the threshold by the legitimate price. China is still the only country in the world that uses pirate "profits" as a criterion for what is criminal and what is not. Some benefit may come from the new ability to aggregate income amounts over multiple raids, however.
- They also inexplicably failed to abolish the individual/unit distinction; most sophisticated pirates will now have an even greater incentive to operate only as a "unit" to avoid the lowered "individual" thresholds.

- It is positive that the act of importing and exporting has been added to the Jls, but, again, importers and exporters will not be held liable for direct infringement under Article 217 or 218 but only be held liable as "accomplices" under Article 27 of the Criminal Law. This Article is written in such a manner as seemingly to "encourage" judges to impose the most minimal penalties.
- Specific reference to Internet offenses is also good but it will be even more difficult to provide proof that the thresholds have been met than would be the case with physical piracy. Again, in what is likely an inadvertent drafting error, sound recordings are not covered!
- End-user software piracy "could" be covered as a crime, but BSA reports that all indications are that the intention is NOT to cover it a huge deficiency. It is also unclear how hard-disk loading piracy of software in the wholesale and retail channels can be adequately covered by the new JIs, given the excessively high copy thresholds.
- It is unclear why the provisions on repeat infringers was removed entirely, rather than strengthened by applying the higher, rather than the lower, tier of statutory penalties.

As noted earlier, it is critical that the PSB be given the resources necessary to implement the new JIs and that the Economic Crimes Division be put fully in charge of criminal copyright enforcement.

Section 217 and 218 of the Criminal Code criminalizing copyright piracy must be amended to comply with TRIPS.

The JIs, as proposed by IIPA, were not amended to rectify the critical TRIPS incompatibilities in Article 217 and 218 of the Criminal Code. IIPA has noted in prior submissions that the criminal piracy articles of Chinese law are <u>deficient on their face</u>, 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 (including 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 and other offenses that are without "profit motive" but that have impact on right holders "on a commercial scale"; (5) eliminate distinctions between crimes of entities and individuals; and (6) increase the level of penalties overall.

The 2001 Copyright Amendments must be further amended to bring the law into compliance with TRIPS and 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. 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

²⁵ 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).

fixed by the December 2001 regulations governing computer software or the regulations to the Copyright Law, which became effective on September 15, 2002. The following are the key deficiencies in the 2001 amendments that still need to be corrected:

- The most glaring deficiency is that criminal liability is not affected and there are apparently no plans to amend the Criminal Code. As noted, the current Criminal Code articles on copyright violate the TRIPS Agreement.
- While the Law [Article 47(6)] provides anti-circumvention protection, it does not fully implement the WIPO treaties obligation, in that it: (1) does not expressly prohibit the manufacture or trade in circumvention devices, components, services, etc.; (2) does not define "technical protection measures" to clearly cover both "copy-controls" and "access controls"; (3) does not make clear that copyright exceptions are not available as defenses to circumvention violations; (4) does not expressly include component parts of circumvention technologies (assuming devices are covered); (5) imposes an "intent" requirement as to acts (and business/trade if such activities are covered), which might make proving a violation difficult; and (6) does not provide for criminal penalties for circumvention violations (since the copyright law only deals with civil and administrative remedies).
- While the law protects against "intentionally deleting or altering the electronic rights management system of the rights to a work, sound recording or video recording" without consent of the right holder [Article 47(7)], this protection may not fully satisfy WIPO treaties requirements and requires further elaboration. For example, the law does not expressly cover "distribution, importation for distribution, broadcast or communication to the public" of works or other subject matter knowing that RMI has been removed or altered without authority, as required by the WIPO treaties, nor does it define "electronic rights management system" in a broad, technology-neutral manner.
- Temporary copies are not expressly protected as required by Berne, TRIPS and the WIPO treaties. As with the copyright law prior to amendment, protection of temporary copies of works and other subject matter under the 2001 copyright law remains unclear. According to an earlier (February 2001) draft amendment of Article 10, "reproduction" as applied to works was to include copying "by digital or non-digital means." The phrase "by digital or non-digital means" was removed from the final version of Article 10(5) prior to passage. Article 10(5) also fails (as did the definition of "reproduction" in Article 52 of the old law, which was deleted, and Article 5(1) of the 1991 Implementing Regulations) to specify that reproductions of works "in any manner or form" are protected. Addition of either of these phrases might have indicated China's intent to broadly cover all reproductions, including temporary reproductions, in line with the Berne Convention, TRIPS and the Agreed Statement of the WIPO Copyright Treaty. 26 As it stands, the

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

Dr. Mihály Ficsor, who was Secretary of the WIPO Diplomatic Conference in December 1996, has stated that the term "storage" naturally encompasses temporary and transient reproductions. Ficsor notes that "the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction in any manner or form," must not be restricted just because a reproduction is in digital form, through storage in electronic memory, and just because a reproduction is of a temporary nature." Mihály Ficsor, Copyright for the Digital Era: The WIPO "Internet" Treaties, Colum.-VLA J.L. & Arts (1998), at 8. See also, Mihály Ficsor, The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation (2002).

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²⁶ The agreed statement to Article 1 of the WIPO Copyright Treaty provides,

current Article 10(5) description of the reproduction right includes "one or more copies of a work by printing, photocopying, copying, lithographing, sound recording, video recording with or without sound, duplicating a photographic work, etc." Objects of neighboring rights (Articles 37, 41 and 44) mention "reproduction" (e.g., Article 41 provides sound recording and video recording producers a "reproduction" right), but the Article 10(5) description is not expressly applied *mutatis mutandis*. It should also be noted that the Article 41 reproduction right for sound recording producers does not expressly extend to indirect reproductions, as required by TRIPS (Article 14.2) and the WPPT (Article 11). China has apparently conceded in the TRM process in Geneva that its law does not encompass temporary copies.

- A new compulsory license (Article 23) permits the compilation of "[p]ortions of a published work, a short work in words or music, or a single piece of artwork or photographic work" into elementary and high school (so-called "el-hi") textbooks, and "State Plan" textbooks (which we are still trying to determine would not include university textbooks, which would cause even greater concern for U.S. publishers); in addition, sound recordings, video recordings, performances, and broadcasts apparently are subject to this compulsory license. IIPA hopes that the Chinese government will confirm that this compulsory license provision will not be read to apply to foreign works and other subject matter since it would violate the Berne Convention and TRIPS if it did. It would also violate the International Treaty regulations referenced above (which implemented the 1992 U.S.-China Memorandum of Understanding [MOU]), even if it were further confirmed that it only applies to foreign printed materials used in elementary or high school "textbooks" (hard copies). The significant damage to publishers would be further exacerbated if "State Plan" were to encompass university textbooks and/or if "textbook" includes forms other than "printed" forms (e.g., digital forms or multimedia). regulations must be framed to exclude foreign works or to limit their scope in a manner consistent with the Berne Appendix.
- The provisions on collecting societies leave unclear whether this provision extends to the creation of anti-piracy organizations which can "enforce" the rights of their members in the association's name. This change is sorely needed in China, particularly for the benefit of foreign right holders, and other laws or regulations which inhibit the formation of such organizations should also be amended or repealed. Regulations did not clarify this point.
- The treatment of works and sound recordings used in broadcasting continues to remain woefully deficient and out of date. While Article 46 spells out that broadcasters must obtain permission to broadcast "unpublished" works (e.g., an exclusive right), Article 47 provides a mere "right of remuneration" for the broadcast of all other works, with the sole exception of cinematographic and "videographic" works. Such a broad compulsory license (not even limited to noncommercial broadcasting) is not found in any other law, to IIPA's knowledge. Furthermore, the broadcast of sound recordings is not even subject to a right of remuneration by virtue of Article 41 and Article 43. Record producers should not only enjoy full exclusive rights for both performances and broadcasts in line with modern trends, and this treatment appears to conflict with the "Regulations Relating to the Implementation of International Treaties" promulgated in 1992. Article 12 extends these rights to foreign cinematographic works and Article 18 applies that Article 12 applies to sound recordings. The authorities, though asked, did not clarify this contradiction in the Implementing Regulations to the Copyright Law discussed below. Provisions should be added to ensure that certain uses of sound recordings that are the equivalent of interactive transmissions in economic effect should be given an exclusive right. An exclusive importation right should also be added.

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

Deficiencies also occur in the enforcement area:

- Administrative fines need to be substantially increased. The equivalent of injunctive relief must be provided and clarified.
- 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 around 90%. Criminal remedies must be extended to include violations of the TPMs and RMI provisions in order to comply with the WIPO treaties obligations.

IIPA also urges China to ratify the WIPO "Internet" treaties by the end of 2005.

The Supreme People's Court's Internet Interpretations and the NCAC's Draft Internet Interpretations

The Supreme People's Court issued its "Interpretations of Laws on Solving Online Copyright Disputes," with effect from December 20, 2000.²⁷ These were amended at the end of 2003.²⁸ As announced at the JCCT, NCAC and MII were to issue Internet-related regulations by the end of 2004. A draft was released in April 2004 and another in November 2004.²⁹ These regulations deal entirely with the liability of Internet Service Providers and with the details of "notice and takedown," and, we understand, are being issued pursuant to Article 58 of the 2001 copyright law amendments pursuant to which the State Council reserves to itself the task of issuing regulations on the "right to transmit via information networks."

Clarification is necessary on how these draft regulations interrelate with the current 2003 "Interpretations" of the Supreme People's Court.

With respect to the 2003 amended SPC "Interpretations," they are deficient or unclear in several respects:

 Article 3 remains problematic. It appears to provide a loophole for the reprinting, extracting or editing of works, once they have appeared on the Internet with permission and remuneration. While the copyright owner can give notice that it does not want its work used further, this "quasi compulsory license" is unworkable in practice. Copyright owners should not have to undertake these notification burdens when they are granted exclusive rights under the Conventions.

²⁷ "Interpretations of the Supreme People's Court on Laws for Trying Cases Involving Internet Copyright Disputes" (Adopted at the 1144th session of the Judicial Committee of the Supreme People's Court on Nov. 22, 2000).
²⁸ Decision on Revising "Interpretation of the applicable law and some other matters for hearing computer network

²⁰ Decision on Revising "Interpretation of the applicable law and some other matters for hearing computer network copyright-related disputes by the Supreme People's Court" by the Supreme People's Court (Adopted by the Trial Committee of the Supreme People's Court at No. 1302 meeting on Dec. 23, 2003).

²⁹ Administrative Measures on Copyright under the Environment of the Internet (Draft), April 2004. Administrative

Administrative Measures on Copyright under the Environment of the Internet (Draft), April 2004. Administrative Protection Measures on the Right of Communication through the Information Network (Draft), National Copyright Administration of China; Ministry of Information Industry, November 2004. English translations on file at IIPA.

- Many of the provisions of the "Interpretations" overlap with the NCAC draft regulations
 discussed below but it is unclear, for example, whether the notice requirements set forth
 in the NCAC regulations would also apply in the context of a civil infringement case
 brought before the courts. There are also inconsistencies. Article 6 seems to imply that
 the ISP must provide the "author" with information identifying the infringer. This is not
 part of the NCAC regulations.
- Article 5 makes ISPs fully liable where they are "aware" of the infringement, either before
 notice from the right holder or after receiving notice and failing to take down the
 infringing site. Is this a more liberal test than in the NCAC draft regulations? The ISP
 must also have "adequate evidence" of infringement. What constitutes "adequate
 evidence" of infringement? Will it be the same as the onerous requirements for an
 administrative action? All this must be clarified. The "Interpretations" also do not
 apparently require an "immediate" takedown as provided in the draft NCAC regulations.

The NCAC draft regulations, revised and issued in November 2004, continue to be inadequate in dealing with the realities of infringement on the Internet and must be further redrafted. Below are a few of the deficiencies:

- It is important that ISPs that are in a position to control content not be subject to any limitations on liability. The current language in Article 2 should be clarified to this effect.
- The requirements in draft Article 8 on the content of the notice are unworkable. Articles 5, 7, 8 and 10 imply that only the "copyright owner" can supply the notice, and not an authorized representative of the owner, such as a trade association. This change must be made. Article 8 then continues to list the requirements for a valid notice. The Article requires that the "copyright owner" supply an "ownership certificate of copyright." This is followed by four other documentary requirements. These are unclear and far too onerous to be practical. All that should be required, as in the DMCA and the U.S. FTAs, is a statement that the copyright owner has a good faith belief that the material is infringing and that the statement in the notice is accurate. There is also no provision which allows the right holder to "substantially" comply with the notice requirement. Indeed, Article 10 permits the ISP to ignore the notice if it is literally "without any of the content prescribed in Article 8."
- A fundamental flaw in the draft regulations is the requirement in Article 10 that all notices be made "in written form." Virtually all notices globally are accomplished via *electronic* communications (e.g., email). This provision would seem not to permit this, making the provision wholly impractical and unworkable. It would severely reduce the already low compliance rates for takedowns in China.
- The prior draft was fortunately changed to require the ISP to "immediately" take down the infringing content upon receiving notice, but the complex notice requirements and the "writing" requirement may vitiate this positive feature.
- Article 7 allows the ISP to "put back" the alleged infringing materials upon receiving a
 counter-notification. However, no notice to the copyright owner of such action is
 required. Clearly the copyright owner needs to be advised of the putback notice and
 given time to take further action. This is in the DMCA and FTAs and an essential part of
 an effective notice and takedown system. Interestingly, Article 7 says "may" which

seems to indicate the "put back" is not mandatory. But this is still a poor substitute for notifying the copyright owner.

- The knowledge requirement in Article 11 is too strict. Under the DMCA and the FTAs, an ISP is liable if it "knows" or if it is "aware of facts or circumstances from which infringing activity is apparent" (DMCA, Article 512). That needs to be a feature of these regulations. It is very difficult to prove actual knowledge but easier to show facts from which the ISP should have known that the material being transmitted was infringing.
- There is no clear right in NCA to order the equivalent of injunctive relief, just the right to fine, and then only three times "income" (which as we know is virtually impossible to prove). Thus, the maximum fine will realistically be only "up to RMB100,000." This is hardly an effective deterrent to mass infringements. Also, administrative fines can only be imposed if the infringing conduct "impairs the social and public interest" as a condition. NCA has not done well by the software industry using this language. It should be eliminated. Finally, the right to seek injunctions from a civil court must be clarified and preserved. This raises again the critical question of the interrelationship of these regulations with the SPC "Interpretations."
- There is nothing in the revised draft regulations requiring the ISP to disclose the identity
 of the infringer, except to NCA directly. In turn, there is no requirement that NCA
 disclose that identity to the right holder enabling the bringing of a civil or criminal case.
 An effective and expeditious notification system is a critical element to effective Internet
 enforcement.
- Finally, Article 4 paragraph 2 defines where an infringement occurs as the place where
 the server is located. If this is literally the rule, then ISPs have no obligation to take
 down infringing material emanating from servers in Taiwan or the U.S. or any other
 country. Moreover, servers can be moved virtually instantaneously. Administrative
 agency jurisdiction should never depend on the location of the server. Again, such a
 system is simply unworkable.

The Urgent Need for Improved Market Access

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: Hard goods versions of entertainment software titles must go through an approval process at the GAPP. It is believed online versions of games will need to go through an approval process at the Chinese Ministry of Culture before distribution is allowed. The rules and regulations are not transparent at this time.

For hard goods, in many instances, the approval process takes several weeks to several months to complete. Given the prevalence of piracy, it is important that any content review process be undertaken in as expeditious a manner as possible. Protracted content reviews result in considerable delay before a newly released video game title is approved for release in

the Chinese market. In the meantime, pirated versions of these games are sold openly well before the legitimate versions have been approved for release to the retail market. Such a delay affords pirates with a virtually exclusive period of distribution for newly released titles. The Chinese government should enforce these regulations and clamp down on pirates who distribute games that are not approved by GAPP for sale in the country.

There is also concern that this review process may now be bifurcated between these two agencies. It would be extremely helpful to the industry for this review function to be lodged with only one agency. Already, there are video games, which though distributed through physical optical disc media, also have an online component. Having to undergo two separate content review processes before two different agencies would be burdensome to entertainment software publishers, adding not only additional costs but also further delay in releasing new product into the market. Further, transparency in the review process would help game companies in preparing games for the market.

In addition, there are other investment and ownership restrictions that must be abolished.

Book and journal publishing: In IIPA's 2004 submission, we detailed some of the existing barriers for the U.S. publishing industry. China was required to eliminate some of these barriers by December 11, 2004, in accordance with its WTO commitments. Under the agreement, 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. While it appears that China has fulfilled many of these commitments with its 2004 Foreign Trade Law, which went into effect on July 1, this law has produced as many questions as answers, and the U.S. publishing industry awaits clarification on a number of issues, including how the Foreign Trade Law provisions interact with other laws and regulations pertaining to the publishing industry as well as those restricting foreign investment generally.

In addition to the questions that remain regarding trading rights and distribution, other activities essential to effective publishing in China remain off limits to foreign publishing entities. These include the right to publish (including editorial and manufacturing work) 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. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials prepared specifically for the Chinese market. These restrictions also create delays in distribution of legitimate product in the Chinese market, opening the door for pirate supply of the market. China's WTO commitments as to these activities must be clarified, and existing regulations prohibiting these activities should be repealed.

Finally, restrictions and high fees related to access to foreign servers result in high costs to publishers of electronic materials (such as academic and professional journals) in making their products available in China, resulting in fewer, lower quality options available to Chinese scholars and students.

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 its WTO obligations 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. The monopoly import structure is the main tool by which these quotas are imposed and enforced. China must begin immediately to dismantle all these archaic, protectionist and discriminatory restrictions. Note that SARFT has previously informally tied any increase in the number of foreign films imported into China to the expansion of the domestic industry.

Monopoly on film imports and film distribution: China Film continues to hold a state enforced monopoly on the import of foreign films. China Film also held the monopoly on the distribution of foreign films until Huaxia Distribution was authorized by SARFT to be the second distributor of imported films in August 2002. Huaxia is a stock corporation with investment from over 20 share holders, the largest of which is SARFT, with over 20%, then China Film, Shanghai Film Group and Changchun Film Group, each with about 10%. SARFT requires that the distribution of all foreign films brought into China that are revenue sharing be distributed equally by the Government's mandated foreign film distribution duopoly. Foreign studios or other distributors cannot directly distribute revenue sharing foreign films. 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: "The Interim Regulations for Foreign Investment in Theaters" effective on Jan 1, 2004 restricts foreign ownership of cinemas to no more than 49% but provides for 75% in the "pilot cities" of Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing. Foreigners are not permitted to operate cinemas. For the growth and health of the industry, foreigners should be allowed to wholly own and independently operate cinemas.

Broadcast quota: Under SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective on 23 October 2004, the broadcast of foreign film and television drama is restricted to no more than 25% of total air time each day and is not permitted to be broadcast during prime time between 7:00 PM and 10:00 PM on any forms of television broadcast other than pay television without SARFT approval. A channel's other foreign television programming (news, documentary, talk shows, travel etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming must follow the same censorship procedure as general programming and cannot exceed 40% of total animation programming delivered by each station on a quarterly basis. Since new regulations on the animation industry became effective in April 2004, only producers of domestic animation programming can import foreign animation programming and can only import the same proportion of foreign animation programming as they produce domestically. The quota on air time 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 three-star hotels and above and in 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 under CCTV, the government acquisition arm, must approve all importation of foreign programming under the guidance of SARFT. The "Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises" effective on 28 November 2004 sets out that:

- Foreign companies can hold up to 49% stakes in production ventures, which must have initial capital of at least US\$2 million (or US\$1 million in the case of animation companies). Local partners can be private, but must be existing holders of a production license.
- Foreign partners must be "specialized radio or TV ventures", a requirement aimed at ensuring the liberalization brings in expertise that will help the industry although an indirect role for non-media investors may be possible.
- The joint ventures must also have a unique logo a provision intended to ensure they are not used to promote the brand of foreign parents.
- Ventures must use "Chinese themes" in two-thirds of programs the government will ensure that foreign-invested TV ventures produce original content rather than adapt their overseas programs for mainland audiences.

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. 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; duties on theatrical films were 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. The National

Copyright Administration of China will publish regulations on the use of copyright material on the net in early 2005. SARFT also claim governance of certain censorship rights on the Internet.

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.

Business software industry: The software industry's ability to increase exports to China — and recoup billions of dollars in piracy-related losses — is severely limited by China's failure to take the steps necessary to create a fair and level playing field for U.S. software developers and other IT companies. As noted in USTR's 2004 Report to Congress on China's WTO Compliance, "China's implementation of its WTO commitments has lagged in many areas of U.S. competitive advantage, particularly where innovation or technology play a key role." Of particular concern to BSA is China's pending software procurement regulation (described above), which would effectively prevent U.S. software companies from selling software products and services to the Chinese government.

The Chinese government procurement market represents one of the most significant growth opportunities for the U.S. software industry, which derives more than half of its revenues from exports. The Chinese government sector is the primary purchaser of software in the world's largest emerging market for IT products. According to a recent study conducted by IDC, the Chinese market will continue to grow at a compound annual rate of 25.8 percent, making it a \$5.1 billion market by 2007. This explosive demand for software and other IT products will be fueled in significant part by government IT procurements.

IIPA is thus deeply concerned about China's plan to close its government procurement market to U.S. software products and services. The U.S. software industry has already lost billions of dollars in export revenue due to China's ongoing failure to address rampant domestic piracy and massive counterfeiting; a ban against government procurement of U.S. software would eliminate the U.S. software industry's most meaningful opportunity to expand exports to China, and would set a dangerous precedent for China's procurement policies in other major economic sectors.

These are not theoretical concerns; U.S. software companies are already experiencing the harmful effects of China's restrictive procurement policy in the marketplace. According to media reports, U.S. companies are being excluded from government procurement deals in several provinces as a direct result of the government procurement law. Thus, China's decision to close or greatly restrict its government procurement market to much of the world's best software products is already translating into losses in export revenues.

China's proposed domestic software preference reflects a troubling trend toward protectionism in the technology sector, which has resulted in a number of industrial policies designed to promote the use of domestic content and/or extract technology and intellectual property from foreign rightholders. If left unchecked, these discriminatory industrial policies would significantly limit imports of U.S. software products into the Chinese market. China's JCCT commitments to legalize government software use and combat software piracy would therefore be of very limited value.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT SOUTH KOREA

EXECUTIVE SUMMARY¹

Special 301 Recommendation: IIPA recommends that South Korea remain on the Priority Watch List for 2005.

Overview of Key Achievements/Problems: Korea leads the world in broadband penetration, and its citizens are among the most Internet-savvy in the world; yet its marketplace in every kind of copyrighted work is plagued by excessive levels of piracy, especially online, and much of its legal infrastructure is outmoded for a world of e-commerce in copyrighted materials. Korea modernized its laws in 2003, but big gaps remain. Its digital economy is at the cutting edge, but its legal system lags behind world standards in substantive and enforcement fields ranging from scope of exclusive rights to treatment of temporary copies, from copyright terms to technological protection measures. In 2004, Korea implemented long-overdue reforms to address resurgent piracy of audio-visual materials based on false licensing documentation, and acceded to the WIPO Copyright Treaty, but it made no progress in driving down piracy rates for audio-visual material; it fell farther behind in its fight against book piracy; entertainment software piracy increased; and the Korean recorded music marketplace continued its virtual collapse at the hands of pirates. Progress was made against piracy of business software applications by corporate and institutional end-users; these enforcement efforts should be sustained. Korea put in place in 2004 an inter-ministerial "master plan" for addressing many of these issues, but its effectiveness remains unproven and must be demonstrated in 2005. Anachronistic screen quotas still constrain access of U.S. movie producers and distributors to the Korean market.

Actions to be Taken in 2005

- Revise Copyright Act to: (1) give producers clear control over all digital dissemination of their sound recordings; (2) ensure that all sound recordings released in the past 50 years enjoy a full, TRIPS-compliant term of protection, and extend copyright terms for works and sound recordings to reflect global trends; (3) fully comply with WIPO Treaties standards on technological protection measures; (4) clarify liability of online service providers; (5) recognize a robust reproduction right, encompassing temporary copies and narrowing the private copying exception in the digital realm; (6) eliminate or substantially tighten recent expansions to library exceptions; (7) bring enforcement provisions up to TRIPS standards.
- Make similar changes to the Computer Programs Protection Act, as applicable.
- Continue and increase enforcement efforts against audio-visual, entertainment software, and book piracy, including imposition of deterrent penalties against pirates.
- Step up enforcement against online piracy of all categories of copyrighted materials.

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¹ For more details on Korea's Special 301 history, see IIPA's "History" appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.html.

- Make continued progress and improve transparency in enforcement against end-user business software piracy, and ensure that government at all levels uses only legal, licensed software.
- Significantly reduce screen quotas and dismantle other market access barriers to the film industry.

SOUTH KOREA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ²										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	40.0	20%	40.0	20%	27.0	25%	25.0	25%	20.0	20%
Records & Music	2.3	16%	3.5	20%	6.9	20%	4.0	14%	7.0	19%
Business Software ³	263.0	46%	275.0	48%	285.9	50%	100.4	48%	177.2	56%
Entertainment Software ⁴	349.0	43%	248.4	36%	381.0	36%	487.7	63%	157.0	90%
Books	42.0	NA	38.0	NA	36.0	NA	35.0	NA	39.0	NA
TOTALS	696.3		604.9		736.8		652.1		400.2	

DIGITAL AND ONLINE PIRACY CONTINUE TO PLAGUE THE KOREAN MARKET.

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.⁵ 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, audio-visual materials, and books. Broadband access, unknown in Korea until 1998, is now enjoyed by some 75% of Korean households, more than triple the comparable figure in the United States.⁶ According to the OECD, as of December 2003 there were more than 23 broadband subscribers per 100 inhabitants in Korea, nearly double the broadband penetration rate of any other OECD country.⁷ In addition, the number of Koreans with wireless Internet access probably exceeds the number with fixed line access, ⁸ and the Korean government predicts that 39.5 million Koreans—of a total population of 48.5 million—will carry

2005 Special 301: South Korea

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at http://www.iipa.com/pdf/2005spec301methodology.pdf.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in South Korea, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$462 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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 National Computerization Agency, Ministry of Information and Communication, *White Paper Internet Korea 2003*, at 25.

⁶ Lewis, "Broadband Wonderland," *Fortune*, Sept. 20, 2004.

⁷ "Broadband Access in OECD countries per 100 inhabitants," December 2003, at http://www.oecd.org/document/31/0,2340,en 2649 34225 32248351 1 1 1 1,00.html, viewed 1/30/05. The U.S figure was 9.8 compared to Korea's 23.2

⁸ White Paper Internet Korea 2003, supra, at 27.

broadband-enabled handsets by 2008.⁹ Furthermore, as a rule Koreans use their Internet access to consume copyrighted materials far more avidly than most other Internet users. For example, while 20-30% of online Americans use the Internet for games and entertainment, almost 80% of Korean Internet users report online consumption of audio and video, almost 53% play games on line, and 41% are engaged in file transfer.¹⁰

Based on these statistics, Korea should be leading the way as an online marketplace for materials protected by copyright. Unfortunately, the reality is otherwise. Most 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 eight million subscribers before it was temporarily shut down, roughly one-sixth of the entire Korean population. 11 The problem is not confined to music: 58% of South Korean Internet users have reportedly downloaded movies, even though legitimate sources for such downloads are currently extremely limited. 12 The entertainment software industry is plaqued with online piracy and unauthorized downloading of its most popular titles. Reports are beginning to surface of significant unauthorized trading of books online. In short, 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. Piracy is becoming firmly embedded in Korea's digital economy. The government must respond. If it cannot do so more effectively than it has 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

Recording Industry

The experience of the recording industry may be instructive. Digital piracy has decimated the market for legitimate recorded music, with sales dropping from \$288 million to \$162 million between 2001 and 2003. A further fall of at least 20% is estimated for 2004. Pirate CD-Rs and other unauthorized hard goods may be partly to blame for this catastrophic situation, but the principal engine of the downward spiral is clearly Internet piracy, which has made infringing music ubiquitously available.

Cyberspace has become the main locus of the piracy problem plaguing the music industry in Korea. 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, and which

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⁹ Lewis, "Broadband Wonderland," supra.

¹⁰ 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%.

¹¹ Russell, "High-Speed Internet Has Advantages for Korea," *Billboard*, Aug. 2, 2003, at AP-1.

¹² Anthony Leong, "Behind the Boom," *Weekly Variety*, October 4-10, 2004, at A1, A4.

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 Russell, "South Korea Split," Billboard, December 18, 2004, at 41.

now charges listeners for its service).¹⁵ In 2004, the recording industry sent over 600 cease and desist notices to sites offering infringing music files. Many of the sites that make infringing MP3 recordings available for download and/or 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 recording industry investigators have even discovered a number of sites located on the servers of Korean colleges and public institutions. Similarly, although the Korean market for music services delivered to mobile phones is now estimated to be larger than the market for recordings in CD format, most of this spending goes to unlicensed providers. The first legitimate music download subscription service did not roll out in the Korean market until November 2004.¹⁶

Government enforcement efforts and existing legislation 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 lacked the resources and the legal tools to take effective action. In February 2005, the MOCT transferred this online enforcement function to the Copyright Deliberation and Conciliation Committee (CDCC), where a Joint Agency for the enforcement of online piracy of music, games, videos and publications has been set up. The CDCC is a semi-official research and mediation center and hitherto has never had any enforcement functions. Unless the CDCC is provided with the necessary expertise and resources to undertake this function, online enforcement efforts in the Korean market will remain ineffective.

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. In January 2005, this dismissal was upheld by an appellate court, which ruled on the merits that the Soribada providers were not guilty of aiding and abetting copyright infringement. More encouragingly, on January 27, 2005 a Seoul trial court found a representative of Bugs Music guilty of criminal copyright infringement for operating an unlicensed music streaming service that, at its peak, boasted 14 million subscribers, more than one-fourth of the entire population of South Korea.¹⁷

On the civil side, on January 12, 2005, the High Court in Suwon upheld an injunction against Soribada granted to the recording industry in July 2002. Two weeks later, a three-year civil litigation against Soribada culminated in a court order that the service operators pay 19 million Won (US\$18,500) in damages. This was a welcome verdict but hardly a deterrent penalty for the proven dissemination to potentially millions of users of 5000 unlicensed musical compositions over a two-year period. Most frustratingly, despite these judgments, Soribada continues to operate unabated, and in early 2005 began to charge fees for its services.

The estimated 2004 piracy rate in Korea of 16%, and the estimate of \$2.3 million in trade losses to the U.S. recording industry, present only a small part of the piracy picture. These estimates from the Recording Industry Association of America (RIAA) do not include losses due to online piracy, since the estimation methodology currently in use does not capture these losses. The decline in dollar losses since 2002 reflects the shrinking of the entire recorded music sector in Korea. Indeed, Internet piracy is so rampant in Korea that it has even limited the sales of *pirate* product in CD format!

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¹⁵ 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).

Russell, "South Korea Split," supra.

¹⁷ Korea Herald, Economy section, Jan. 27, 2005; Seo Jee-yeon, "Online Music Provider Denied Access to Latest Scores," *The Korea Times*, October 2, 2003.

Entertainment Software

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 and online game play. 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 illegally downloaded, including for use in "burn-to-order" operations, usually carried out by small businesses, using CD-R writers. 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 has increased, primarily due to imports of counterfeit and pirate Game Boy products from China, with piracy rates in this format at about 99% in South Korea. The unauthorized use of entertainment software by some Internet cafés (called "PC baanngs") remains a problem, although in 2004 some ESA member companies succeeded in entering into licensing agreements with many of the 20,000 or so Internet cafés in the country.

Finally, while there is a growing legitimate market for online gaming in Korea, there is also significant non-licensed activity relating to online games. This includes a growing population of so-called "offline servers," which host pirate sites that emulate a publisher's online game site, and thereby divert traffic and potential subscribers from the legitimate site. Industry investigators identified 57,000 incidents of online entertainment software piracy in 2004, which were addressed in about 6800 notices of infringement; unfortunately, only 5-10% of these resulted in takedown of the infringing material. Overall, the Entertainment Software Association (ESA) estimates the value of pirate product in the market (valued at pirate retail prices) at \$349 million, based on an estimated piracy rate of 43%. 18

Audio-Visual Sector

The motion picture industry is also adversely affected by the proliferation of online piracy, especially as carried out through file sharing. In 2004, MPAA identified over 7700 Korean online sites engaged in audio-visual piracy, a 30% increase over 2003. In the offline environment, 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 in the aggregate these dispersed operations are big enough to compete directly with legitimate duplicators. 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-Rs are increasingly distributed through less conventional channels. Of particular concern are mobile vendors, which sometimes advertise with fliers, and then make home deliveries. Itinerant street vendors continue to congregate in hot spots in Seoul such as the Yong Sang Electronics Market, and are also found in other cities such as Pusan and Taegu. These vendors typically have only catalogs and empty cases on display, thus making enforcement more difficult. As more vendors appear on the streets, the price of pirate DVD-Rs

¹⁸ This piracy rate figure is a composite across multiple formats for entertainment software.

is falling to as little as US\$4 per disc. Although enforcement efforts against street vendors have been stepped up, they have had little impact, and authorities still 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, the majority of 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 audio-visual 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 and devote greater resources to enforcement. 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. Korean authorities should also review the criminal prohibitions that may be currently applicable to illicit camcording, and, as needed, clarify and strengthen them in order to stamp out the practice. ¹⁹

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 undercut the ability to distribute these videos through commercial channels. However, in March 2004, the Korean government determined that such showings in government-run centers violate the Unfair Elections Practices Act, and enforced this ruling for the first time in Taegu City in January, 2005. Korean authorities should continue these enforcement efforts and take further actions to ensure that these uncompensated public performances of copyrighted audiovisual materials do not unreasonably conflict with normal commercial exploitation.

In sum, 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 2004 are estimated by the Motion Picture Association of America (MPAA) at \$40 million, with a video piracy rate estimated at 20%.

During 2004, the long-anticipated legal and regulatory changes were finally put into place to enable the Korea Media Rating Board (KMRB) to deny rating classifications (and thus, access to the Korean audio-visual market) to audio-visual products whose submission was premised on false licensing documentation. So far the new system, designed to fill a gap which

¹⁹ Camcording piracy is use of a video camera to illicitly record a movie at a movie theater, usually at the time of or just before or after its theatrical release. The recording made by camcorder pirates becomes the master for illegal optical disc copies that then supply the pirate market—both online and offline—in Korea or overseas. A single instance of illicit camcording of a film can thus undermine the prospects for recouping the investment made in its production. Deterrent criminal penalties must be available to punish such acts.

the Korean government unilaterally opened in 2001, is functioning effectively with regard to feature films in home video formats. However, the ability and willingness of KMRB to revoke ratings improperly issued to fraudulent applicants under the old system remains untested. Furthermore, beginning in October 2004, KMRB also sought to apply the new system to imported music videos. This extension of the new system was never anticipated by U.S. producers (or by the U.S. government), is not congruent with the characteristics of the music video marketplace, and has created unjustified delays in the entry of U.S. music videos in the Korean market. KMRB should act immediately to confine the application of the new system to the market segment for which it was initially intended.

Business Software

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. BSA estimates the rate of business software piracy in Korea at 46%, accounting for losses of \$263 million to U.S. companies.

Although Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years, 2004 was a year of continued forward progress. Korean authorities began to use the police powers recently provided to the Standing Inspection Team (SIT) of the Ministry of Information and Communications (MOIC). This is 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 its inspection activities. It is also important that SIT maintain its current practice of conducting inspections without advance notice and that it make its subsequent reporting process more transparent and consistent.

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 2004, 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. Enforcement officers also need to be better trained about software licensing practices, and to conduct more careful investigations, so that major violations can be better detected, documented and ultimately punished.

End user piracy is increasingly being reported in the offices of governmental entities in Korea. These institutions are not subject to the normal raiding and enforcement process, however, making it all the more important that the Korean government make it a higher priority to ensure through other means that government agencies at all levels use only legal, licensed software.

A recent decision of the Program Deliberation and Mediation Committee (PDMC) affiliated with MOIC gives rise to concern. Software streaming technology is being marketed in Korea as a way to evade quantitative restrictions in software licenses. When PDMC was asked to give its opinion on the legality of marketing such technology, and of its use by end users, for this purpose, it went much further and indicated that the refusal of a software copyright holder to adopt a "concurrent use" licensing policy was an unfair or abusive contracting practice. This aspect of the PDMC's decision, while not legally binding, has caused considerable confusion in the marketplace, which MOIC should take steps to dispel. Licensing terms for computer software, including whether to require one software license for each PC or to license on the basis of the number of concurrent users, should be left to the marketplace, without interference from government or quasi-governmental entities. MOIC should make this clear through a public statement clarifying the government's position.

Books

The digitization of the South Korean economy and society has also affected the persistent problem of book piracy. Cell phones with high-resolution cameras and considerable digital storage capacity are common in Korea, and are being used by university students inside bookstores to copy up to 100-200 pages of textbooks rather than purchase them. 20 Commercial piracy is beginning to shift from high-volume photocopying operations to scanned versions of texts that are used to generate new pirate copies on demand. However, the typical scenario of Korean book piracy today remains a scientific, technical or medical text that is reprinted in a counterfeit version, or a college textbook subject to massive unauthorized photocopying and binding on or near a college campus. All too often, Korean police and prosecutors react to such cases with indifference, and very few cases appear even to reach the stage of active prosecution, much less to result in the imposition of deterrent sentences.

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 over the past two years, pirate copy shops were found in active operation within the campuses of Korea University (Science and Engineering Campus); AJOU University in Suwon City; Sung Kyun Kwan University, also in Suwon City; In-Ha University in Inchon; and Kyung-Hee University in Yongin 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 have included many that textbook publishers had already heavily discounted for the Korean market.

The universities named (and others where pirate photocopying is rampant) do little to stop or even to discourage these illegal activities. Generally, university administrators show no interest at all in stopping on-campus infringements, and police are often reluctant to enter due to fear of violent reactions from student demonstrators. The Association of American Publishers (AAP) reports some cooperation with on-campus raids in 2004, which is a positive sign, but much more enforcement activity is needed on campuses to effectively combat the pervasive problems there. Student unions openly endorse pirate copy shops; threaten adverse evaluations of tenure-seeking 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

²⁰ Kim and Lim, "Cell phone users using their cameras to copy textbooks," *Joong-ang Ilbo*, August 12, 2004.

copy shops have formed networks to share intelligence about enforcement activities and circulate instructional materials on avoiding detection. We commend the Ministry of Education for its March 2004 letter urging universities to crack down on these activities, but clearly follow-up is needed to make this initiative effective, including the imposition of consequences on universities that continue to tolerate this illegal behavior.

Recently, some pirate copy shops have claimed the right to make copies of textbooks because they hold licenses issued by the 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 should make the limits of the KRTRC licenses clear to enforcement authorities and copyshop operators alike, so that these baseless assertions can no longer impede enforcement against book pirates.

Besides rampant and worsening photocopying piracy, print piracy remains a serious threat to the Korean book publishing market. Pirated editions of U.S. scientific, technical and medical works, reference books and encyclopedias appear in university bookshops in the Seoul area within a few months of their authorized publication, and are routinely sold door-to-door. These versions, printed on a press and appearing in full color, are often quite difficult to distinguish from the originals, indicating a highly organized and sophisticated piracy process. The problem is even worse outside Seoul.

Even when book pirates are arrested, prosecuted, and convicted, the Korean judicial system is all too often unable to deliver deterrent sentencing. If any jail terms are imposed in book piracy cases, they are routinely suspended.²¹ No effort is made to supervise the activities of convicted pirates; they 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.

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\$2900) for disobedience of such an order. 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. 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, giving them limited funding and personnel for the task. The KRTRC, in turn, conducts raids targeting only titles produced by local publishers, and sometimes sends warning letters to University officials; it takes little action on behalf of foreign publishers. In March 2004, for the first time, raids on illegal photocopy shops were jointly conducted by KRTRC with representatives of foreign publishers on or around 16 university campuses. AAP hopes this cooperation can continue and expand. However, KRTRC does not consult foreign publishers in the process of planning raids. With virtually no input as to the choice of targets, foreign publishers derive little benefit merely from being allowed to be present when a target dealing mostly in Korean titles is raided. In any

²¹ In one recent case, a defendant who operated a photocopying establishment and warehouse from which 5100 infringing copies of books were seized was sentenced to eight months in jail, but the sentence was suspended and the defendant placed on two years' probation. Thus it is unlikely that this defendant will actually be required to serve any jail time.

case, MOCT should not rely solely upon KRTRC for enforcement, given the conflicting interest of that organization in maintaining good relations with its licensees.

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. The losses to U.S. publishers inflicted by book piracy in the Korean market continued to increase in 2004, and are estimated by AAP at \$42 million.

LAW REFORM: KOREA'S LEGAL TOOLS MUST BE BROUGHT INTO THE 21st CENTURY

On May 3, 2004, the South Korean government issued a "Master Plan for IPR Protection," with the stated goal of providing more "coordinated direction for overall IPR policy." The Master Plan outlined 15 tasks for improving intellectual property law and enforcement within Korea, as well as better protection for Korean works in export markets, and assigned various tasks to specific ministries. The Master Plan document identifies many, though not all, of the critical issues that South Korea must address in order to bring its laws into step with the transformed environment of ubiquitous broadband access described above. It also formally recognizes that strengthened IPR protection is needed to enhance Korean competitiveness in value-added industries, including "film, music and software games," and that to advance this goal, Korea must in some cases raise its levels of protection above those demanded by applicable international treaties.

The Master Plan holds out the promise of a coordinated, efficient approach to the challenge facing Korea: to modernize its 20th century copyright legal regime to reflect the 21st century realities of its markets and its society. However, its effectiveness remains to be demonstrated. IIPA urges the U.S. government to encourage the overall coordinated approach reflected in the Master Plan; to press for prompt action by the Korean government on key issues identified in it; and to monitor closely Korea's success in tackling the problems outlined therein.

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. 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. The IPR Master Plan calls for amendments to both these statutes. We understand that the Ministry of Culture and Tourism (MOCT) is preparing a draft revision of the CAK that may address a wide range of issues, while the scope of anticipated amendments to the CPPA being prepared by the Ministry of Information and Communication (MOIC) may be more restricted.

CAK Amendments

IIPA believes that revision of the CAK should include substantial reform in the following priority areas:

1. <u>Exclusive rights of sound recording producers</u>

Korea has amended the CAK (effective January 2005) to extend to producers of sound recordings the right to control the making available of their recordings through means such as posting copies on websites for downloading on demand. But the extent to which the law addresses the numerous other methods by which sound recordings may be digitally disseminated to the public remains unclear. Korean authorities should ensure that these other means, such as webcasting, streaming, and digital broadcasting, are clearly brought within the scope of the producer's exclusive rights.

On January 18, MOCT posted on its website a set of "Q&A Regarding Data Transmission over the Internet," which IIPA has reviewed in an unofficial translation. This document includes some encouraging interpretations of the amended law, including the statement that "regardless of the format or methods, any unauthorized use of music files on the Internet constitutes an illegal act," and specifying that "real-time transmission of music files through webcasting is illegal" unless authorized by the right holder. While this interpretation by MOCT is commendable, it still falls short of according to sound recording producers the broad exclusive rights over digital communications that are necessary in order to reclaim the Korean music market from piracy.

There must be a clear recognition in the law that transmissions themselves have become a normal form of delivery of recorded music, regardless of whether they are reproduced by the consumer, or disseminated via the Internet. Delivery of music to the consumer through a variety of means, capable of being listened to or captured by a wide variety of devices, is the emerging pattern for the marketing of recorded music, and it is essential that the record company have exclusive rights over all forms of communications that will reach the listening public. In addition, even to the extent that ownership of a copy remains important in the marketplace, it becomes increasingly difficult to predict the specific form of communication and programming most likely to lead to unauthorized copying. All digital transmissions will compete on relatively equal footing for place on the personal copier's recordable media, so all forms of the digital transmission of recorded music should require the authorization of the copyright owner, regardless of the nature of the communicating entity. This includes not only webcasting and all forms of online streaming, as the MOCT Q&A document seems to recognize, but also digital broadcasting.

Only with broader exclusive rights can investment in the creation of original recordings be sustained in the Korean market. The economics of the recording industry in Korea today make it impossible to increase or even maintain investments. The major recording companies, including Korean companies, are seeing the physical market for recorded music in Korea deteriorate rapidly, while their rights in the digital domain of the Internet and Wireless platforms are not being recognized and protected by law. That scenario cannot continue if Korea wishes to preserve a thriving and creative music industry.

Additionally, the rights accorded to producers must be made available in a non-discriminatory way, regardless of nationality. Discrimination against foreign producers in the current system of equitable remuneration for conventional analog broadcast of sound recordings [under Art. 68(1) of the CAK] must also be ended. MOCT has already taken actions in this area that worry U.S. record labels. It has designated as the collective management agency for the 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).

One aspect of the MOCT Q&A document makes for shocking reading: the assertion that the 50-year term of protection for sound recordings under the CAK applies only to recordings made after July 1, 1994. MOCT asserts that shorter terms apply to earlier recordings, to the extent that recordings that predate 1975 are treated by the Q&A document as having fallen into the public domain in Korea.²² Such an interpretation of the CAK is totally inconsistent with Korea's obligations under TRIPS Arts. 14.5 and 14.6 to provide a full 50-year term to all recordings from WTO member countries, and flies in the face of that government's repeated assertions to its U.S. counterparts that Korea is in full compliance with these obligations. This aspect of the MOCT posting must be corrected immediately, and all necessary steps taken to confirm Korean compliance with its TRIPS obligations in this regard.²³

In short, Korea should clearly establish by law the producer's exclusive right to control online dissemination of sound recordings, free of any requirement for compulsory licensing or collective management; should step up enforcement efforts against Korea's pervasive online music piracy; and should immediately confirm that it accords all sound recordings the full 50year term of protection demanded by the TRIPS Agreement. Only then 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.

2. Extension of copyright term

In line with the international trend exemplified by recent enactments in the European Union and the United States, and even more recently in jurisdictions such as Singapore and Australia, Korea should extend the term of copyright protection for works and sound recordings to the life of the author plus 70 years, or 95 years from date of first publication where the author is a legal entity, or in the case of the neighboring rights of a sound recording producer.²⁴ As with temporary copies (discussed below), Korean law is isolated on this issue, and provides less protection than do most other OECD member countries.²⁵

Differences in the duration of copyright protection, especially differences among major markets for creative materials, inevitably create stresses and distortions of trade in works and other subject matter of protection. Under the CAK, these materials all enter the public domain in Korea 20 years or more before doing so in most other major markets. This situation gives

²² Specifically, the answer to question 6 in the MOCT document reads in part (in unofficial translation), "phonograms, issued or performed before June 30, 1987, whose copyright holder is an association or a legal entity, and for which 30 years have past since the publication or performance, can be made available for free usage." If a 1974 recording is protected for only 30 years, then it is now in the public domain in Korea. The answer also asserts that the term of protection for sound recordings fixed between July 1, 1987 and June 30, 1994 is 20 years from fixation.

³³ A companion posting on the MOCT website, entitled "Supplementary Announcement Regarding Implementation of the Revised Copyright Act," also contains a troubling contradiction: while asserting that unauthorized uploading to music or video file sharing websites was an illegal infringement of the reproduction right even before the recent amendments to the CAK, the document states that "even for such websites, there will be educational guidance periods before launching law enforcement activities." Such a lack of urgency to tackle even high-priority targets does not bode well for the success of the fight against Korea's pervasive online piracy problem.

²⁴ Of course, as discussed in the preceding subsection, confirming Korea's compliance with its current treaty obligations regarding term of protection of sound recordings is an even more urgent requirement.

In this regard we note that Japan recently extended the term of protection for certain works by 20 years.

incentives for the unauthorized exploitation of these materials in Korea and their illicit importation into other markets where they remain under copyright protection. The situation worsens as more and more countries extend their terms of copyright protection beyond what is provided in Korea.

Today, works such as literary texts and musical compositions whose authors died in the 1950s and 1960s, and films and sound recordings first released in those decades, include many extremely valuable properties with enduring cultural significance. In the digital networked environment created by the Internet, a single act of making available can result in the immediate dissemination of a work or sound recordings in many countries simultaneously. It is very easy to carry out unauthorized worldwide dissemination online of materials that are in the public domain in the country in which the exploitation originates, but that remain protected in the countries from which the materials may be accessed and then re-disseminated. We can be sure that such dissemination will become even easier in the future, thanks to technological advances. It is obvious that this situation undermines legitimate global trade in copyrighted materials, and could place Korea in an isolated and unsound position as the source of these trade distortions. It is also evident that this risk increases the longer Korea delays in harmonizing its terms of protection with those of other major markets. Korea could virtually eliminate this risk by extending terms of protection to life of the author plus 70 years, or 95 years after publication.

For all the reasons just stated, the need for an increase in the term of protection is just as compelling for the objects of neighboring rights as it is for works. Korea should give serious consideration to harmonizing the term of protection for sound recordings with the terms that apply in the United States, i.e., in the case of a sound recording whose term of protection is not measured by the life of a person, a term of 95 years from first publication or 120 years from creation.

The heirs and successors of Korean authors and composers would be the beneficiaries of term extension for works. Longer terms of protections for sound recordings would also increase incentives for the compilation, preservation and dissemination of these cultural products throughout the Korean market, and in the growing overseas market for Korean works and recordings.²⁶

3. <u>Technological protection measures</u>

Technological measures such as encryption and scrambling are increasingly important means used by copyright owners to control access to their works and to prevent or discourage copyright infringements. The importance of legal protection for these measures is highlighted in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA applauds Korea's accession to the WCT in 2004, and urges it to join the WPPT as soon as possible. However, although the CAK contains provisions regarding technological protection measures (TPMs), these fall short of full compliance with the WCT and WPPT in some critical respects, including:

whose authors died before 1957. 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.

²⁶ 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). 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 prior to 1957, and to other works from WTO member countries

- A. <u>Coverage of access controls</u>. Technologies such as encryption or password controls that are used to manage access to a work are not clearly covered by the definition appearing in Article 2-20 of the CAK. These critical tools need to have clear legal protection against circumvention.
- B. Act of circumvention. The CAK currently does not currently outlaw the act of circumventing a TPM, although it does prohibit [in Art. 92(2)] certain acts of trafficking in circumvention devices or services. A party who strips off protection and leaves a work "in the clear" for others to copy should not escape liability.

4. Responsibilities of Internet service providers

A. Liability. Article 77 of the CAK limits the liability of an Internet service provider (ISP) when it takes certain steps to prevent or stop infringements that are taking place on its network or on a server that it hosts. However, nothing in the CAK clearly spells out the extent to which an ISP who does *not* take such steps is liable for these infringements. In other words, the basis for indirect liability of ISPs for copyright infringement needs to be spelled out, perhaps in the form of an amendment to Article 92.

To provide the appropriate incentives for cooperation in the detection and elimination of online piracy, it should also be made clear that—

- In all cases, including cases in which liability is "exempted" under Article 77, the courts retain the authority to issue appropriate injunctions;
- No liability limitations should apply to a case in which the ISP has the right and ability to control infringing activities on its network and in which it derives a direct financial benefit from such activities:
- Any liability limitations are inapplicable when the infringement is carried out by an employee or agent of the ISP, or by any other affiliated party, or when the ISP has any other direct involvement in the infringement;
- The provision should not be applicable to an ISP who refuses to cooperate in combating online piracy, such as by refusing to terminate the accounts of subscribers or customers who repeatedly use the system to commit infringements.
- B. Notice and takedown. Article 77-2 of the CAK provides authorization for a notice and takedown system, which is spelled out in more detail in a separate Enforcement Decree. This decree approaches notice and takedown in a way that may be too complex and formalistic to meet the reality of pervasive online piracy in Korea. 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. Some early indications are encouraging; MPAA reports close to 100% compliance with its takedown notices. However, fewer than half of the takedown notices sent on behalf of the recording industry were favorably responded to, and, as noted above, compliance levels for notices sent by the entertainment industry were even lower. IIPA urges that developments in this area be closely monitored in the year ahead.

C. Access to information on infringers. In order to facilitate enforcement, ISPs should make available to right holders complete contact information regarding ISP subscribers or other customers who commit infringements online. A speedy and simple procedure for obtaining such information would also reduce the number of legal claims brought against ISPs for their participation, since it would enable right holders to pursue the primary infringer directly. Such a procedure should be added to the CAK.

5. Reproduction right

A. Temporary copies

In order to meet the international standards embodied in Article 9.1 of the TRIPS Agreement [incorporating Article 9(1) of the Berne Convention] and referenced in footnote 1 of the WCT and footnote 9 of the WPPT, the reproduction right accorded to works and sound recordings 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. 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.

B. Private copying

The private copy exceptions in Articles 27 and 71 of the CAK should be re-examined in light of the growth of digital technologies. The market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. We are encouraged by recent Korean court decisions in the Soribada litigation (referenced above) that appear to deny the shelter of these provisions to copying in the context of illicit peer-to-peer file-swapping services; such rulings should be codified. The broader concern is whether, in the digital environment, the CAK private use exception any longer satisfies the requirements of Berne, TRIPS, and the WCT/WPPT. The exception should be made inapplicable to digital copying to the extent that it exceeds the three-step test for permissible exceptions as enshrined in these agreements. In this regard, it is an encouraging sign that bipartisan legislation was recently introduced in the National Assembly to narrow the scope of the Article 27 exception.

6. Library exceptions

Article 28(2)-(5) of the CAK as amended allows libraries to digitize and to transmit to other libraries throughout the country any material in their collection that was published more than five years ago and that is not otherwise available in a digital format. IIPA questions whether this provision, which undermines the development of a legitimate Korean market for new digital versions of these slightly older works, is compatible with the three-step test in Article 13 of TRIPS for permissible limitations on exclusive rights. Many of the works most clearly targeted by these exceptions—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. Revised Article 28 could cripple those markets.

While the only sure way to achieve compatibility with international standards may be to repeal these provisions altogether, at a minimum they should be substantially revised to—

- Make the implementation of technological safeguards a meaningful pre-condition for exercise of the Article 28 exceptions;
- Extend the five-year waiting period to ten years, apply it to library digitization for on-site access (Article 28(2)) as well as to networking with other libraries (Article 28(3)), and clarify that the ten-year clock starts running when the material is first published in Korea, not first publication anywhere in the world;
- Require that libraries provide notice to publishers of their intention to subject a specific work to the Article 28 exception, so that publishers can choose whether to make a digital version available in the market instead;
- Provide a more robust compensation mechanism and clarify other ambiguous features of the law.

7. Enforcement and Remedies

Several provisions of the CAK should be amended to bring Korea's enforcement regime against copyright infringement up to international standards, including the following:

- Korea is obligated under Articles 41 and 45 of TRIPS to make available fully compensatory
 and deterrent damages in its civil enforcement system. To aid in fulfilling this obligation,
 Korea should give right holders the option to choose pre-set statutory damages at a level
 sufficient to achieve the deterrence objective.
- Current law and practice in Korea does not make ex parte civil relief available to right holders on a basis expeditious enough to satisfy TRIPS Articles 41 and 50. Amendments should be adopted to make this essential enforcement tool available promptly.

CPPA Amendments

The most recent amendments to the CPPA took effect on July 1, 2003. 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 2005.

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, and the offering of services that circumvent a TPM should be explicitly outlawed.

Despite the incremental progress toward improvement of the CPPA, significant gaps remain. One of the most critical involves Korea's continued failure to provide specifically for the copyright owner's control over temporary copying of a computer program. Unless the copyright owner's right to control the making of these temporary copies is clearly spelled out, the economic value of the copyright in a computer program will be sharply diminished. 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:

- 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.

Other Laws

Besides the CAK and CPPA, other sector-specific laws have long played an important—and in some sectors, a predominant – role in anti-piracy efforts in Korea. In this regard, IIPA notes with interest the recent draft legislation for a Music Industry Promotion Act, intended to supplant to some extent the current Sound Recordings, Video Software, and Game Products Act. The intent of the draft legislation appears to be to regulate the music industry both offline and online. New legislation has the potential to help in fighting music piracy both on the Internet and off it. IIPA will review this initiative with that goal foremost in mind.

MARKET ACCESS: SCREEN QUOTAS AND OTHER BARRIERS MUST BE ADDRESSED

For nearly 40 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 significantly reduced now.

When this issue was first 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 now claim a solid majority of box office receipts in the marketplace—58.3% of box office revenue during the first half of 2004, representing 62% of admissions during that period, 27 with a reported 57% market share for the entire year. This far exceeds the 40% box office share that Korean officials informally indicated that domestic films must achieve before the screen quota could be relaxed. The time to begin sharply reducing the screen quota is now, so that U.S. motion picture producers will 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.

The Korean film censorship process acts as an additional market access impediment. While local films are censored within 2-3 days after submission, foreign titles typically take 10-15 days or more, and appear to be subjected to stricter censorship standards. Although the Ministry of Culture acknowledged in 2003 that the discrepancy is "not appropriate," it has not yet taken any steps to rectify it.

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²⁷ Anthony Leong, "Behind the Boom," *Weekly Variety*, October 4-10, 2004 at A1; see id. at A8 ("Market Share Breakdown" graphic, attributed to Korean Film Council).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT THAILAND

Special Statement of Condolence Regarding Recent Events in Thailand: The copyright industries collectively express our deep sadness over recent events surrounding the devastating *tsunami*, and the enormous loss of life, and extend our condolences to the families of those in Thailand who have lost loved ones, and sympathies to those who have been displaced or have otherwise suffered as a result.

EXECUTIVE SUMMARY

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

Overview of Key Achievements/Problems: Thailand is in the midst of negotiations with the U.S. for a Free Trade Agreement, while continuing to face serious copyright piracy challenges. The number of optical disc plants and lines continued to grow in 2004. As of February 2005, the Royal Thai Government still had not passed an optical disc regulation, and the legislation being considered contains numerous deficiencies. Book piracy in Thailand thrives, as neither the Royal Thai Government nor the universities will take a stand and ensure use of legitimate textbooks; in addition, recent court cases confirm that Thailand's exceptions to protection dealing with educational uses of works violate international norms. Other piracy problems abound, including cartridge-based videogame piracy (including participation in organized rings from China and Taiwan, assembling pirate cartridge-based videogames for export); business software end-user piracy (Thailand holds the dubious distinction of making the top twenty pirating countries in 2003, at an 80% piracy rate); cable piracy; and Internet piracy, including 1.5 million Internet subscribers apparently engaged in peer-to-peer (P2P) downloading of copyrighted content. In addition to ongoing plant overproduction of pirated optical discs, organized "burning" of pirate content onto CD-Rs has become a major issue, and unauthorized public performances of motion pictures and television programs can be found virtually anywhere in Thailand.

Notwithstanding the rather bleak piracy picture, the Thai authorities, with significant fanfare and cooperation from right holders, began making some strides in enforcement toward the end of 2004. Several large raids in November and December 2004, as part of a new campaign called "Operation Eradicate" yielded seizures of pirated discs in the millions, as well as significant amounts of optical disc production equipment. Whether action of this nature will be sustained over a much longer term and whether these raid results will translate into deterrent sentences against the owners of the plants remains unknown. For example, in the past, in the retail markets, the Thai Police shut down most stalls in notorious pirate malls like Panthip Plaza and elsewhere in late June 2004 (apparently to coincide with the commencement of FTA negotiations with the U.S. on June 28); however, the stalls were permitted to reopen in full force just one month later in July. The Royal Thai Government created lists of "red spot" targets and "yellow spot" targets in an effort to prioritize retail enforcement—a positive step if these are eventually targeted and piracy is eliminated. Meanwhile, however, Thailand remains without an

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effective optical disc law. Nine cases arising from factory raids (some dating back over six years) remain pending. The optical disc law must give the courts adequate legal tools to effectively drive pirate optical disc production out of Thailand. Finally, it is imperative that the Royal Thai Government recognize the links between organized piracy and organized crime, and take steps to ensure that copyright piracy is a predicate offense in organized crime statutes (e.g., the draft amendments to the anti-money laundering statute).

Actions to be Taken in 2005

- Continue optical disc factory raids throughout the country, prosecuting owners and seizing equipment, to drive pirate optical disc production out of Thailand.
- Initiate investigations into organized criminal syndicates involved in piracy operations.
- Clean up street markets and malls throughout the country and keep them clean, with raids and seizures followed by arrests, prosecutions, and shop closures.
- Strengthen border enforcement to intercept the flow of pirate products into, out of, and transshipped through Thailand (e.g., from Cambodia and Burma).
- Run campaign to visit target companies and other entities such as Internet cafés suspected of using unlicensed software.
- Amend the law to narrow the exception "loophole" as to published materials.
- Run educational and media campaigns on university campuses, emphasizing the vital need for policies ensuring use of legitimate materials by students and faculty.
- Fully enforce the new optical disc law (once in force) against piratical and unauthorized (e.g., unlicensed) activity; in addition, begin preparing amendments to further strengthen the regime.

The IPR chapter of any U.S.-Thai FTA Agreement should be TRIPS-plus, include obligations which would meet the requirements of implementing the WIPO Internet Treaties, the WCT and WPPT; include modern and effective enforcement provisions to eradicate all forms of piracy, including digital and Internet piracy, and contain specific commitments with regard to combating optical disc piracy through regulations on production and strict enforcement.

For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing, 2 as well as the previous years' country reports.3

¹ Most are pending at the Supreme Court. In some instances the defendant has fled and the courts have issued arrest warrants which remain outstanding. http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf.

³ http://www.iipa.com/countryreports.html.

THAILAND

Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004⁴

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	30.0	60%	28.0	60%	26.0	70%	24.0	65%	24.0	60%
Records & Music	24.9	45%	26.8	41%	30.0	42%	16.6	45%	15.6	45%
Business Software ⁵	90.0	78%	84.0	80%	57.3	77%	32.6	77%	42.7	79%
Entertainment Software ⁶	NA	76%	NA	82%	47.3	86%	29.1	93%	130.5	98%
Books	30.0	NA	28.0	NA	28.0	NA	28.0	NA	33.0	NA
TOTALS	174.9		166.8		188.6		130.3		245.8	

COPYRIGHT PIRACY IN AND FROM THAILAND

Optical Disc Pirate Production Increased in 2004; Some Imports Noted

Pirate production of optical discs in major plants (CDs, VCDs, DVDs, CD-ROMs) and home-grown "burning" of CD-Rs and DVD-Rs remains a major hurdle to the growth of legitimate copyright industries in Thailand. There are now 40 known plants in Thailand, with upward of 157 optical disc production lines. The conservative estimated capacity for production stands at 549.5 million discs per year in the plants alone, greatly exceeding any rational legitimate domestic demand. 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 generally produce any format, including audio CD, VCD, or

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⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Thailand, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$141 million) that was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁶ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁷ Piracy has had a devastating effect on local Thai entertainment companies in addition to foreign right holders. For example, the second largest entertainment company, R.S. Promotion PCL had to cut its revenue estimates in mid-2004 by 50% in part due to piracy. See Thai music firm R.S. to cut '04 revenues estimate, Reuters News English, July 13, 2004. As another example of the potential of local industry due to copyright, motion picture companies have long maintained Thai offices and employed Thai 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 Thai 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 annually. All of these positive economic benefits are jeopardized by piracy. See Bamrung Amnatcharoenrit, Foreign Movie Makers Set to Increase Spending, Bangkok Post, January 8, 2003.

⁸ These numbers are up from 39 registered plants, 126 replication lines (116 operational) with a potential annual capacity of 441 million discs reported in IIPA's 2004 Special 301 report. In that report, IIPA estimated legitimate domestic demand to be at least 60 million discs. Industry groups also believe there may be underground plants located in the country.

⁹ See, e.g., Subin Khuenkaew, *Plant Churns Out Sex Films*, Bangkok Post, January 30, 2005, at http://www.bangkokpost.com/ 300105_News/30Jan2005_news16.php (reporting that, according to a Thai official, a large factory making pirated CDs, VCDs and DVDs with U.S. copyrighted films, music and other content, in addition

DVD, by employing kits to change formats (even from a blank CD-R or DVD-R line). ¹⁰ 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). Pirated optical discs manufactured in Thailand have shown up in Italy, Germany, Sweden, South Africa, the United Kingdom, Belgium, and the United States. In addition to plant production there is increasing evidence of a massive cottage industry of "burning" all kinds of copyrighted content onto recordable discs. Finally, IIPA has information in 2004 of pirate imports coming into Thailand from places like Malaysia. ¹¹ These problems will necessitate Royal Thai Customs becoming far more active in the area of enforcement at the borders. ¹²

Retail Piracy in Thailand

Piracy hotspots in Thailand were categorized by the government and industry in mid-2004 into "Red Spot" targets (Klongtom, Panthip Plaza, Khao San Road, Patpong, Silom Road, Sukhimvit Road (3-19), Night Bazaar Area, Patong Beach, Chaweng Beach, Pattaya Beach, Santisuk Market, Kinyong Market) and "Yellow Spot" targets (Sapanlek, Baanbor, Mahboonklong, Nomchit Mall, Pata Pinklao, Fortune Tower, Donmuang, Je Leng Plaza, Tawana Plaza, Zeer Rangsit, Kata Beach, Karon Beach, Computer Plaza, Icon, Rincom Market, Yongdee Market, BKS Market, Big C Bangyai, Tantawan Plaza, Bangsrimuang, Hua Hin). Many of these were subject to a government crackdown on piratical activities beginning on May 1, 2003, and lasting through the APEC Ministerial in Bangkok in October 2003. That 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 were, as of early 2004, once again replete with pirated product. As noted below, an enforcement campaign in late 2004 appeared to be working to eradicate retail piracy, particularly around Bangkok.

to Asian pornography along the Thai-Burmese border, opposite Chiang Rai's Mae Sai district, is run by Hong Pang Co., which is owned by drug baron Wei Hseuh-kang).

10 The Motion Picture Association has compiled the following chart regarding number of production facilities in

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	2004
DVD FACTORIES	NA	NA	0	1	9	13	8	7
DVD LINES	NA	NA	0	1	14	16	11	20
TOTAL FACTORIES	NA	NA	20	43	46	51	38	41
TOTAL LINES	NA	NA	36	56	78	102	124	157
RENTAL AND RETAIL SHOPS	2300	2200	2100	1900	1708 (EST)	1586 (EST)	1350 (EST)	NA

¹¹ For example, on November 12, 2004, Thai Highway Police stopped a truck in Chumporn Province and arrested two Thai men, seizing approximately 15,000 pirate optical discs coming from Malaysia in boxes camouflaged by baskets of fruit. The haul included 5,000 pirate copies of U.S. motion pictures on DVD.

of fruit. The haul included 5,000 pirate copies of U.S. motion pictures on DVD.

12 On September 9-10, 2004, the World Customs Organization Intellectual Property Rights Strategic Group (WCO-IPR) and Thailand's Customs Department held a joint workshop on Counterfeiting and Border Measures. The main objective of the workshop was to improve Thai Customs officers' Intellectual Property Rights law enforcement capabilities at Thailand's borders. The two-day program covered legal and procedural issues and included counterfeit product identification sessions administered by copyright holders.

13 Other Bangkok malls where pirated products are readily available include: Future Randi, Seacon, Seri, Future and

¹³ Other Bangkok malls where pirated products are readily available include: Future Randi, Seacon, Seri, Future and Gankee. In addition, there are also a number of malls in other cities and/or provinces where pirated merchandise is available, including Teok Com-Sriracha, Teok Com-Pattaya, Teok Com-Khonkean, Pantip-Chiang Mai, CM Building and Chiang Mai.

Among the pirate retailers, who sell in night markets as well as in notorious shopping malls like Panthip Plaza and Klongtom, the stark trend is away from older (and often lower quality) formats. For example, regarding piracy of motion pictures, the shift has almost entirely been toward pirate DVDs and away from pirate VCDs. 14

Book Piracy

Illegal photocopying of entire textbooks, illegal offset print piracy of entire books, and illegal translations, adaptations and compilations, involving both entire books and substantial portions of books, devastate U.S. publishers in Thailand. Such piracy is rampant around university campuses, ¹⁵ where university presidents, professors, and students exhibit blatant disregard for the law and the rights of copyright owners. The Royal Thai Government has generally disregarded publishers' calls to intervene and demand copyright compliance by university employees and students. ¹⁶ Action needs to be taken to ensure use of legitimate materials on campuses and stamp out the demand for illegal photocopying.

On top of a climate already rife with commercial photocopying and other forms of book piracy, some decisions by the Thai courts seem to endorse the outright copying — even by commercial enterprises — of complete books or substantial portions thereof under a faulty interpretation of the Thai fair use provision. ¹⁷ If Thai law continues to permit what these judges say it does, Thailand will remain in violation of its international obligations under the Berne Convention and the TRIPS Agreement. This deficiency must be corrected through amendments, and/or through the Free Trade Agreement process.

Research conducted by the publishing industry in July 2004 illustrates the extent of the problem at universities in Thailand. Upon visiting a photocopy shop inside the Medical Faculty at

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¹⁴ Statistics indicate that Seacon Square moved from 60% DVD in April 2003 to 80% DVD in April 2004. The ratio of DVDs sold at Panthip Plaza was even starker, from 60% in April 2003 to 90% in April 2004. Zeer Rangsit went from 30% DVD (and 70% VCD) in April 2003, to 60% DVD and 40% VCD in April 2004. The overall percentages went from 58% DVD and 42% VCD in April 2003 to 92% DVD and only 8% VCD in April 2004.

¹⁵ Photocopying and print piracy is rampant in primary and secondary schools as well.

¹⁶ University campuses where piracy of published materials is particularly prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.

¹⁷ See, e.g., Prentice Hall Inc. v. Kanokchai Petchdawong, Black Case No. Or. 326/2542, Red Case No. Or. 784/2542 (Cent. Int. Prop. Int. Trade Court, July 23, 1999) (unofficial translation) (on file with IIPA) (plaintiff claimed copyright infringement by a copy shop owner who was copying entire textbooks; court indicated strongly that receipts showing copies made on behalf of students would likely entitle defendant to avail himself of fair use defense under Article 32, setting no limit on scope of permissible copying under the Thai interpretation of the Berne three-part test. Article 32(6) of the Copyright Law provides, in relevant part:

An act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright. Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright

⁽¹⁾ research or study of the work which is not for commercial profit;

⁽⁶⁾ reproduction, adaptation, exhibition or display by an instructor for the benefit of own instruction which is not for commercial profit:

⁽⁷⁾ reproduction, partial adaptation of work, abridgement or making a summary by an instructor or an academic institution for the purpose of distributing or selling to the attendants in the class or in the institution which is not for commercial profit:

⁽⁸⁾ use of the work in questioning and answering in an examination.

Courts have interpreted these provisions broadly and misapplied the Berne test for limitations such that Thailand is grossly out of step with its neighbors and with international norms, greatly hindering publishers' efforts to protect their copyrights under the law.

the famous Chulalongkorn University in Bangkok, an industry investigator received a list of fourteen popular medical titles available for made-to-order sale in photocopied form, complete with prices of each. The astonishing statistics arising out of the industry study indicate that around 60% of all students obtain illegally photocopied versions of their books for school. Most obtain them from commercial photocopy centers just like the center at Chulalongkorn. These commercial establishments often follow the above-described practice of making copies only after orders are received, hindering industry research and enforcement efforts. Others simply have infringing material in stock. Furthermore, there seems to be no fear of enforcement by authorities. Investigators found that photocopy shops will copy any entire book upon demand, and that 60% of copyshops visited were found with pre-copied books.

Studies indicate that instructors often play a role in this activity as well. Lecturers often have works copied for their students using university facilities. They also frequently provide their adoption lists to copyshops so that those shops can anticipate demand, in some cases even placing the orders for the students' copies themselves and sending someone to collect them. Over two-thirds of students surveyed at Chulalongkorn received photocopied texts from their teachers. It is imperative that universities and schools take a proactive role to fight the scourge of photocopying on their campuses.

Finally, unauthorized translations abound. This problem, excruciatingly difficult to detect, arises because the Thai government demands development of course materials by its professors and instructors without providing adequate resources for the development of these materials. Instructors therefore use translations of books originally marketed in English as their "Thai" original texts, with no permission from the original publisher. Compilations are the norm as well—some professors will take a chapter from each of several different English books on the same topic, translate the chapters and compile them into a new set of course materials for marketing and distribution to students. The Royal Thai Government should provide the necessary resources for development of legitimate Thai materials and mandate that those wishing to translate English-language materials obtain the appropriate licenses for such production.

Finally, print piracy continues to plague publishers of professional textbooks and reference books, especially medical publishers. These volumes are often of high quality, the result of highly sophisticated piracy involving a number of different printers in the Kingdom.

Conservative estimates indicate that in 2004, the industry lost potentially 180,000-270,000 genuine book sales in Bangkok alone due to the above-described problems. Action is past due.

Cartridge-Based Entertainment Software Piracy

Cartridge-based entertainment software is also being heavily pirated in Thailand. In 2004, 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 pirated and counterfeit cartridge-based products are manufactured in China, there also appear to be significant assembly facilities in Thailand. Thailand remains a major transshipment point for pirated Nintendo video game products, especially to Europe. For instance, of over 1,000 seizures in Belgium during 2004, 80% were exports from Thailand. These were primarily small shipments, many to individual consumers

¹⁸ Books included primarily titles from Elsevier, W.B. Saunders Co. and Lippincott, Williams & Wilkins.

who had apparently purchased the counterfeit video games on the Internet. Larger shipments are still generally sourced from China. A substantial number of shipments from Thailand were also seized in Denmark, Germany and the United Kingdom.

Business Software End-User Piracy

Thailand continues to have one of the highest end-user piracy rates in Asia. The raids conducted in 2004 all found flagrant evidence of the use of pirated software in corporations. Nevertheless, the Business Software Alliance has received good support from the Royal Thai Government in its IP awareness campaigns and in its software asset management seminars. In addition, cooperation from the Thai enforcement authorities on BSA retail and end user cases remains very good. Police manpower is always available when requested, raids are conducted effectively, cases are accepted by enquiry officers and public prosecutors, and convictions in retail cases are obtained.

Internet Piracy

Thailand witnessed substantial growth in Internet usage in 2003 and again in 2004. 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). The Business Software Alliance noted that between January and September 2003 there were 141 instances of software being made available for download by persons using Thailand based ISPs. This figure rose an astonishing 400% to 741 such instances in the same period in 2004. 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. The industries have been successful in certain cases involving direct-download piracy. 19 There are also online vendors of pirated products which use the Internet as an advertising medium for burned copies of pirated video game products.

IIPA is deeply concerned about the potential growth of Internet piracy in Thailand, particularly direct P2P downloading of copyrighted content. At the same time, IIPA recognizes the vast opportunities that the Internet presents in terms of developing new markets. Internet cafés present one such possibility. While Internet cafés generally remain unlicensed in Thailand, in 2004, Thailand's Information and Communications Technology (ICT) Ministry has been working with industry on a project called "GoodNet." This project will include some rules and regulations to be followed by more than 300 participating Internet cafés in Thailand. The rules would, significantly, include the caveat that cafés must use only legal software. 20 One rather puzzling requirement was that only online games would be permitted in Internet cafés, purportedly because the Royal Thai Government has already gone through the content reviews of games it would allow "online" and was afraid that allowing discs to be brought in would not facilitate control of the content. The double-edged sword for the videogame industry is that allowing discs into Internet cafés could give foster sale of pirated product, but also could open the market to more legitimate product. Whatever ensues regarding the development of "GoodNet," the Royal Thai Government must ensure that all Internet cafés allow use of only legal software, and that this rule is adequately enforced.

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¹⁹ The record industry was successful in 2003 in working with ISPs to close down 24 websites 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. ²⁰ There would also be other rules aimed at morals regulation, including curfews, prohibitions on smoking and

drinking, and requirements that children of certain ages be accompanied by parents.

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 2004, at an estimated 35%.

COPYRIGHT ENFORCEMENT IN THAILAND

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CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004							
ACTIONS	Motion Pictures	BUSINESS SOFTWARE	SOUND RECORDINGS				
NUMBER OF RAIDS CONDUCTED	1,070	15*	279				
Number of audio CDs seized	NA		154,271				
Number of CD-ROMs seized	NA		NA				
Number of VCDs seized	957,227		9,108				
Number of DVDs seized	714,993		28,351				
Number of CD-Rs seized	822	1976	43,385				
Number of investigations	1,163	11					
NUMBER OF VCD LAB/FACTORY RAIDS	5		1				
NUMBER OF CASES COMMENCED BY POLICE	153	11	266				
Number of Indictments	153		266				
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	155	6	290				
ACQUITTALS AND DISMISSALS	0		-				
NUMBER OF CASES PENDING	0	5	187				
NUMBER OF FACTORY CASES PENDING	9		-				
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	145		73*				
SUSPENDED PRISON TERMS			73				
Maximum 6 months	141	5	72				
OVER 6 MONTHS	1		1				
OVER 1 YEAR	2		•				
TOTAL SUSPENDED PRISON TERMS	144	5	•				
PRISON TERMS SERVED (NOT SUSPENDED)		0	•				
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	4	4	66**				
\$1,000 TO \$5,000	146	1	10				
Over \$5,000	3	0	-				
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	US\$254,522	US\$3,846	US\$56,657				

^{*} In 6 other cases, the result was a criminal fine only, but no jail sentence.

^{**} In 3 other cases, the result was "re-correction" (i.e., no fine and no jail time).

While the Royal Thai Government had made some past attempts to coordinate enforcement, it was only in late 2004 that several elements came together to achieve considerable results in copyright enforcement for most sectors. One of the last steps prior to commencement of the latest enforcement campaign occurred on September 22, when the Justice Department announced the formation of a new Department of Suppression Investigation (DSI), responsible for investigating crimes affecting national security and involving organized crime and money laundering. The new unit comprises over 1,000 officers, of whom 179 are assigned to the Intellectual Property Case Office, responsible for investigating complex intellectual property cases and intellectual property cases involving organized criminal gangs. The Intellectual Property Case Office is also responsible for investigating illegal optical disc plants. Unfortunately, a large percentage of these 1,000 officers are untrained in copyright matters.

"Operation Eradicate" Leads to Factory Raids in Late 2004

Some dramatic enforcement against optical disc production plants in late 2004 kicked off a new campaign called "Operation Eradicate." This set of raids, which targeted optical disc plants, but also went heavily after the retail chains resulted in all pirated shops and stalls around Bangkok closing down around the New Year, an astonishing result. Part of the reason for the success of these raids is that the police are apparently competing with one another. One very positive development is the return of Pol. General Noppadol Soomboonsupt, who orchestrated the eradication of retail piracy from the market back in 2001. In his new role as Deputy Commissioner General of Royal Thai Police, General Noppadol apparently orchestrated the first raid against a DVD plant in October 2004. Other raids on optical disc plants and loci of

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²¹ IIPA recognizes the enormous raiding activity that occurred in 2001, and again in 2003 in advance of the APEC Ministerial in Bangkok, but believes that the combination of the formation of the Department of Suppression Investigation, the MOU between government and industry, the return of General Noppadol and others committed to eradicate piracy, and the campaign, "Operation Eradicate," which has so heavily focused on optical disc plants, resulted in huge gains in the fight against piracy in late 2004.

²² Cf. Somporn Thapanachai, Thailand's Intellectual Property Investigative Unit Gets More Power, Bangkok Post, March 18, 2004 (in which the Intellectual Property Department's Director General Kanissorn Navanugraha announced measures to improve the efficiency of the Justice Ministry's Special Investigation Unit, including expanded powers to investigate infringement of intellectual property rights, particularly copyright. Kanissorn admitted that past raids had rounded up mainly small-time dealers, not the large-scale producers who churn out fakes using the same distribution methods as organized criminal gangs. Mr. Kanissorn also stated that the special unit would assist in forensic testing to identify the original manufacturer of pirated optical disks, noting that every CD stamper used in mass-copying operations leaves its own unique imprint on the finished product, just like a human fingerprint. Comparing the tell-tale patterns left on fake CDs with those of registered machines will allow the authorities to determine their source, he said. The department has reportedly cooperated with copyright owners in collecting 90 percent of the molding patterns of registered machines in the country. Mr. Kanissorn also said he would work with international copyright owners in setting up a database of molding patterns from machines in various countries in the region. "If we cannot find a local match for the molding patterns, we will compare them with those of neighboring countries to see where the fakes came from," Mr. Kanissorn said.)

²³ On November 24, 2004, new Deputy Commissioner of the Metropolitan Police Bureau Major General Jaraumporn

²³ On November 24, 2004, new Deputy Commissioner of the Metropolitan Police Bureau Major General Jaraumporn Suramanee called a meeting of copyright holders and senior police officers in charge of the piracy hotspots to announce a crackdown on illegal products, to begin before the New Year. The metropolitan police assigned 222 people to the operation, and instructed 88 police stations to pay close attention on IPR matters.

²⁴ The government launched a reward scheme to combat pirate manufacturers. In particular, the scheme rewards

²⁴ The government launched a reward scheme to combat pirate manufacturers. In particular, the scheme rewards enforcement officers for significant seizures: one million baht (US\$26,000) per machine up to a maximum of two million baht, plus three baht (US\$.78) per disc provided that the amount of discs seized exceed 300 and consists of titles no more than one year old.

titles no more than one year old. ²⁵ On October 4, 2004, Noppadol instructed officers of the Crime Suppression Division to raid an illegal DVD plant in the Eastern Seaboard Industrial Estate in the Rayong province. The raid took place only three days after Noppadol's appointment, and resulted in five arrests at the "Solid Gold Discs" plant—two Taiwanese, two Burmese, and one Thai—and seizure of approximately 6,000 pirate DVDs infringing *The Day After Tomorrow*. The officers impounded one DVD production line, one screening machine, 322 stampers and one printing machine.

"burning" operations (in which burners were used to imprint pirate copyrighted content onto CD-R or DVD-R) ensued, resulting in seizures of literally millions of discs, as well as at least nine optical disc production lines, 106 high-speed CD-R burners, and five printing machines.²⁶

Retail Raid Activity Sporadic But Picked Up in Late 2004

Retail enforcement also underwent a dramatic rise in November and December 2004 as a result of "Operation Eradicate," resulting in seizures of millions of discs and related materials (e.g., labels).²⁷ Prior to that, raids carried out generally focused on small shops. Indeed, while

- On November 30, 2004, the "Special Police Squad" raided a CD factory called Big Giant in Bang-Bau-Thong, Nonthaburi Province and seized two replicating lines and three printing machines.
- On November 30, 2004, the "Special Police Squad" inspected three factories in the Sai Noi and Bangbuathong districts of Nonthaburi province and found two optical disc production factories that had imported equipment without authorization, resulting in seizure of four production lines.
- On December 9, 2004, border patrol policemen and Customs officers examined a VCD plant in Petchkasem Road, Bangkok, found two unusual VCD replication machines and determined they had been illegally imported; the illegal machinery was seized.
- On December 9, 2004, part of the "Special Police Squad" raided Sear Rungsit, Seri Center, and Nomjit Plaza with a seizure of around 1 million CDs. The team also stopped in a CD plant at Pechtkasem 88 and seized one replicating line and two printing machines that were churning out the movie "Alexander."
- On December 13, 2004, Gen. Noppadol's team conducted a raid in two houses in Krisadanakorn River Side Village in Nakorn Patom Province and seized 100 CD-R burners with a capacity of burning 8,000 CD-Rs per day along with 5,000 bundled CDs infringing U.S. motion pictures and sound recordings.
- On December 17, 2004, one squad of police raided ten retail shops in the Fortune IT Mall in Bangkok, arresting one man and seizing six CD burners, 300 pirated optical discs, nine pornographic CDs and 2,000 covers.
- On December 17, 2004, another police team inspecting a factory in Chachengsao Province found shredded discs indicating an illegal operation. The officers seized the shredded discs and sealed equipment. Motion Picture Association investigators physically pieced together the shredded discs and filed a complaint with police for copyright infringements; the case is still pending with the police.

²⁷ For example:

- On October 4, 2004, in conjunction with the raid on the "Solid Gold Discs" optical disc plant, police raided a warehouse in Bangkok, seizing approximately 100,000 optical discs, 34 crates of smuggled wine and 147 crates of smuggled liquor. Around 28,600 pirate discs infringed U.S. motion picture titles. One suspect was arrested at the warehouse.
- On November 20, 2004, around 200 border patrol policemen conducted a raid in the Klongtom and Baanmor areas and seized over one million pirated optical discs. On the same day, police raided premises in Rachaburi province and seized about 300,000 optical discs. Most of the product was pornography.
- On November 28, 2004, the Metro police went to raid the Night Market at King Rama I Bridge. The pirate, together with a gang of about 30 persons, surrounded and attacked the police, some of whom were injured. The police and right holder are planning follow-up action against these pirates.
- On December 9, 2004, around 200 border patrol policemen seized around 100,000 pirated optical discs in shopping malls in the Sukhumvit area of Bangkok. The same team also closed down Panthip Plaza, and found no pirate product, possibly because of a leak; reportedly, by February 2005, the pirates were back in business. Industry reports that vendors come and go but that more importantly, stock is no longer kept on location, but that buyers are instead solicited by underlings displaying inlay cards. Runners are then sent to "warehouses" in surrounding areas to fill orders as and when needed. Sourcing the warehouses, which also change location so as to avoid detection, is what is really needed, but requires a tremendous amount of investigation.
- On December 13, 2004, Central Investigation Police officers stopped a suspicious vehicle leaving a residence in Nakornpathom province. A search vielded over 2.000 pirated music CDs and enabled officers to obtain a warrant to search the residence and an adjacent building, where around 30,000 "burned" CD-Rs, 102 CD-R burners and 12,000 blank CD-Rs were discovered and seized.
- On December 17, 2004, nearly 200 police officers from the Border Patrol Police Bureau, the Metropolitan Police Bureau, Crime Suppression Division and the Customs Department raided two warehouses and a retail shop in Bangkok, seizing 5,068 pirate DVDs, 932 pirate music CDs and 2,648 covers. Simultaneously, police from the Economic Crime Investigation Bureau raided a warehouse in Bangkok's Dindaeng district, seizing 47,160 pirate DVDs, of which 27,190 discs were infringing U.S. motion pictures.

²⁶ For example:

right holders noted a significant drop in the number of pirate stalls in the last week of June 2004, this was due not to raiding activity but to an order from the police to stall owners in some of the more notorious pirate hot spots; however, the police apparently gave the "all-clear" signal two weeks later. It is not a coincidence that these stores were told to "shut down" for two weeks during the FTA negotiations with the United States and were told they could reopen again after the two-week shutdown.²⁸

Prior to the commencement of "Operation Eradicate," the Royal Thai Government's raiding activity included over 400 raids that resulted in over 200,000 total discs seized. ²⁹ However, these raids did not result in deterrence in the market. On June 26, the Royal Thai Police and the Department of Intellectual Property and local copyright representatives executed a Memorandum of Understanding regarding heightened enforcement in 36 designated target spots throughout the country (so-called "red spot" targets and "yellow spot" targets already mentioned).

IIPA is heartened by the extensive raiding activity, especially surrounding "Operation Eradicate." It is hoped that this is a taste of what is to come, and that the Thai authorities will not cease these actions until piracy is truly eradicated from Thailand. Nonetheless, it is also vital that the enforcement authorities begin to target the upstream sources of pirated products, i.e., those who control the production and distribution networks.

On December 17, 2004, the police raided a major mafia group and seized about 300,000 optical discs.

- Between February 27 and March 3, 2004, the Central Investigation Bureau, Economic Crime Investigation
 Division of the Thai Police, and local police conducted a major operation aimed at pirate syndicates in the tourist
 areas of Southern Thailand including Samui Island, Auo Nang in the Krabi Province, and Patong beach in Phuket.
 Over 60 street vendors and retail shops as well as three warehouses were raided resulting in the seizure of over
 100,000 pirate optical discs. Many pirate copies of U.S. motion pictures were part of the seizures.
- On June 24, 2004, the Economic Crime Investigation Division (ECID) of the Thai police conducted a raid at the
 Hua Lumpong Railway Station in Bangkok and arrested two Thai nationals. Agents seized 2,400 DVDs (including
 about 1,000 U.S. titles), 2,000 DVD covers and two cars. The pirated products were packed into two parcels that
 had been shipped from Malaysia via train.
- On August 20, 2004, officers from Thailand's Excise Department raided a house and vehicle in Bangkok and seized around 50,000 pirate movie and music optical discs and around 50,000 packs of untaxed cigarettes. Around 10,000 of the seized optical discs were infringing U.S. motion pictures. The discs had been imported from China and two Thai nationals were arrested. The suspects were charged under the Excise Act, the Copyright Act and the Money Laundering Act (smuggling goods). This case is highly significant in that it is the first known case in which Excise officers enforced the law against pirate products.
- On September 3, 2004, officers from the Registration Division (Central Investigation Bureau) of the Bangkok police raided an illegal warehouse located in Bangkok's Dindaeng district. As a result of the operation, approximately 70,000 pirated optical discs were seized, of which 6,330 DVDs and 19,110 VCDs were infringing more than 100 U.S. motion pictures. The warehouse was suspected to be a distribution hub for pirate products in the Klongtom neighborhood and surrounding area. There was no one on the premises during the raid.

²⁸ Both the record industry and the motion picture industry noted this precipitous drop in the number of pirate stalls on or around June 25, 2004, not coincidentally, IIPA believes, just four days before commencement of the FTA negotiations with the United States. The motion picture industry's market survey showed a marked decline in the number of pirate retail outlets operating in the Bangkok metropolitan area, from a high of 133 stalls on April 29, 2003, down to 29 stalls on June 25, 2004; the vendors that remained were mainly selling pornography. Record industry observers noted that in Panthip Plaza, the police had closed down all the pirate stalls, and they were "shuttered up," although they note that cautious and surreptitious sales continued.

²⁹ For example:

Government Must Get Involved to Legalize Use of Copyrighted Materials in Businesses, Universities

The Royal Thai Government must, as it did in the area of optical disc and retail piracy in late 2004, take a public stand against the unauthorized use of business software, published materials, and other copyrighted works, in businesses, universities and government agencies. In particular, IIPA urges the Department of Education to take the lead in sending strong messages to educational institutions to ensure use of legitimate materials, including textbooks and business software. For the entertainment software industry, piracy at Internet cafés is a significant problem. Of the 7,000 Internet cafés in the country, less than 5% are licensed. The government, however, has taken no enforcement actions against these cafés.

Post-Raid Problems and Procedural Hurdles at the IP&IT Court Lead to Non-Deterrent Results

The Thai Intellectual Property and International Trade (IP&IT) Court has long stood as a shining example of how a country, through specializing its judiciary to the particularities of copyright infringement and piracy, could effectively improve the functioning of its courts and deal with a difficult legal problem at the same time. Over the years, the IP&IT court has sped up dockets and done away with myriad other judicial woes that long plagued right holders. In 2004, the court continued to work well for some industries and could provide a good model for other territories. In 2004, the motion picture industries had 153 actions initiated and decided (up from 66 in 2003) and the number of actions pending was reduced from 20 cases in 2003 to 9 cases in 2004. The court officers (both prosecutors and judges) were very competent and professional in these cases. The entertainment software industry reports, on the other hand, that the Thai courts sometimes render very meager sentences; jail terms are often suspended and only minimum fines are imposed with offenders commonly being given community service.

COPYRIGHT LAW AND RELATED ISSUES

Government on Verge of Passage of Optical Disc Law, But Law Contains Deficiencies

In October 2004, the optical disc bill approved by the Cabinet in 2002 and by the Parliament in May, 2004 received Senate approval and was forwarded to the King for Royal Assent. ³⁰ However, certain provisions of the law were the subject of a last-minute challenge, prompting a court review for confirmation of the law's constitutionality. Specifically, one Senator petitioned that Article 38 was inconsistent with Thailand's "Supremacy Law." Article 38 provided that it would be a criminal offense for an optical disc plant owner to fail to report to the authorities the relocation or transfer of ownership of replicating machines. Moreover, failure to report would subject such equipment to forfeiture.

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³⁰ Prior to the passage of a comprehensive optical disc law, the only legislation related to optical disc production in Thailand was 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. Another stopgap measure was 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, but has not led to a single criminal conviction.

Unfortunately, the Constitutional Court ruled in early February 2005 in favor of this petition, the result being that Article 38 will be deleted from the bill. Separately, a large group of copyright owners representing various industries, have filed a petition directly to the King, asserting that Articles 5 (paragraph 2), 23, 12 and 27 are contrary to the Thai Constitutional Law, the Berne Convention and TRIPS. (These articles subject copyright owners to criminal charges and fines if they do not notify authorities prior to beginning optical disc production or if they fail to apply for a Mastering Code). This group of right holders has requested that the King send the bill back to Parliament for reconsideration.

If the proposed law is signed by the King, the next step would be statutory publication in the official gazette. The law would take effect 90 days thereafter. The implementing regulations which provide further detail for the legislation are still undergoing preparation and have not yet been completed. In addition to the problems described immediately above, the law on the verge of final assent still fails to meet the basic requirements of an effective optical disc law. The major weaknesses in the latest draft Bill IIPA reviewed included the following:

- 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 required only "notification," not approval, for a plant to begin producing optical discs. There also was no provision governing renewal (which would allow the government to approve or refuse the plant's continued operations). The law should require "approval" (i.e., plants should be obligated to "notify and 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 obtained the necessary authority or license to replicate the copyrighted work).
- No Identification Code Requirement for Stampers/Masters: The Thai Bill defined stampers and masters as machines, which means there was 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. However, we understand that the Department of Intellectual Property has agreed to redefine "stampers and masters" as optical disc products.
- No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials: The Thai Bill contained after-the-fact "notification" requirements (with lengthy grace periods), and there was no provision for monitoring transfers of 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 should 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 failed to 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" is not helpful, and regulations 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 failed to 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 could provide for this.
- Inadequate Criminal Penalties: The Thai Bill contained 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, would result only in the imposition of non-deterrent fines (US\$2,500, with no express possibility of revocation or plant closure). Penalties should be deterrent, including mandatory imprisonment and deterrent fines, to be doubled for recidivists.
- "Mastering Code" May Inadvertently Create Burden on Right Holders: 31 The definition of "Mastering Code" inadvertently would create burdens on the ability of legitimate copyright owners to do business in Thailand, and also likely violates Thailand's international obligations. The definition of Mastering Code and other provisions provide that copyright owners must apply for and affix to any legitimate discs a "mastering code" to all discs. This requirement creates a formality that probably runs afoul of Thailand's international obligations, and also runs counter to the purpose of an optical disc legislation, which is to control the production of optical discs by requiring optical disc plants to apply for and affix mastering code to all discs to trace the content back to a particular plant where a disc was produced.

Thai Parliament Should Modernize the Copyright Law

IIPA recognizes that one element of the FTA negotiations with the United States revolves around substantive copyright protection, and that, in light of this, consideration of a draft set of copyright amendments released by the government in May 2003 may have slowed somewhat. Nonetheless, IIPA understands that the previous draft may still be undergoing revision and consideration. IIPA believes that passage of a strong copyright law which is consistent with an FTA with the United States would be a welcome development. While not intending to provide an exhaustive list of possible FTA requirements, IIPA notes below where that 2003 draft text stood with respect to many important substantive and enforcement concepts. The draft amendments which IIPA reviewed would have made the following positive changes:

- Strengthen civil remedies by allowing courts to award compensatory and punitive damages and lost profits.
- Possibly make it an offense for a photocopy shop to provide infringing copies of works (i.e., the handing over of infringing copies of a work for gain).

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³¹ IIPA understands that the situation with the issuance of "mastering code" to copyright owners may well be in the process of clarification. IIPA hopes that in the final version of the law, or in implementing regulations at the latest, that this issue will be resolved, and that in fact, right holders will not be required to affix their own copyright codes to legitimate CDs distributed in Thailand.

- Clarify that temporary copies are covered as reproductions under the Thai Act.
- Distinguish between "disposal" (sale or other transfer), rental, and "communication to the public."
- Attempt to deal with the WIPO Treaties' requirements, including to prohibit the circumvention of technological protection measures (TPMs), and to prohibit the unlawful tampering with rights management information (RMI).
- Strengthen criminal provisions in certain respects.
- Establish voluntary collective management of copyright and safeguarding against overzealous collection of royalties on behalf of performers (or the unlawful collection on behalf of other copyright owners).

At the same time, there were certain areas which remained ambiguous and the government needed to clarify:

- Whether the exclusive "communication to the public" right includes coverage of "any communication, whether by wire or wireless means."
- Whether the addition of draft Section 70/2 covers a photocopy shop that may not make, but hands over, the infringing copy.
- Whether competent officials have the ability to carry out inspections ex officio or upon the request of a right holder, whether they may carry out inspections "at any time of day or night," and whether they may seize infringing or suspected infringing goods, documents, tools, and implements used in commission of the infringement/offense.
- Whether right holders may participate in inspections of premises and obtain samples of infringing copies and material and have access to equipment and documents seized.
- Whether the remedies of forfeiture or destruction of infringing goods/documents/tools/ implements is available.
- Whether leaking information regarding a surprise inspection or entry into a premise is a criminal offense.
- Whether the exception to temporary copy protection is explicitly subject to the Berne three-part test, is made not applicable to computer programs, and otherwise, is sufficiently narrow to satisfy Thailand's international obligations.
- Whether 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.
- Whether landlords (e.g., of the pirate markets) are liable for infringing activities of their tenants.

- Whether the exception in Section 43 is interpreted in Thailand to permit unauthorized reproductions of computer programs as well as other works, which would be a violation of Thailand's international standards.
- Whether provisions on presumptions of subsistence of copyright and copyright ownership are made subject to burdensome proof requirements that are TRIPSincompatible in practice.

Finally, there are other areas in which the draft would have weakened protection provided in the current law (most notably, the draft would weaken criminal penalties in several significant ways, including by removing mandatory statutory minimum fines and imprisonment, and by lowering maximum fines). In addition, we urge the Thai government to follow the international trend of 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).

We note that the draft attempted 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 2003 draft fell somwhat short of meeting the requirements of key aspects of these important treaties.³² In particular, the draft provisions to prohibit the circumvention of technological protection measures (TPMs) would have to be tightened further to fully implement this crucial requirement of the WIPO treaties, by:

- 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). 33
- Providing for civil, provisional, and administrative remedies, including injunctive relief (in addition to criminal remedies) for circumventing, and providing for at least the same level of criminal penalties for circumventing TPMs as for copyright offenses.

In addition, Article 32 of the current law creates an overly-broad exception which has been interpreted by courts to allow photocopying of entire textbooks and other published materials, as long as the copy is made for "educational purposes." This Article, as interpreted,

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³² 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.

³³ The draft provision also leaves unclear whether other indirect proof of improper purpose or use is sufficient, such

The draft provision also leaves unclear whether other indirect proof of improper purpose or use is sufficient, 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.

is entirely out of step with Thailand's international obligations. The Royal Thai Government must amend the law to ensure that exceptions or limitations in the law are not applied to permit students, teachers, or copyshops (or anyone else acting on their behalf) to make or distribute unauthorized reproductions or unauthorized translations of works, compilations, or substantial portions thereof, in a manner that impinges on the rights accorded to copyright owners under international law.

By updating its copyright regime for the digital age and joining the WIPO Treaties, Thailand can better position itself in the FTA negotiations with the U.S., and can emerge as a leader in the area of copyright protection in Southeast Asia.³⁴

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, ³⁵ 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 more than five 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.

Royal Thai Government Must Address Organized Crime

It has long been known that piracy in Thailand is a highly organized criminal enterprise, and that the players in Thai piracy are often powerful, are often engaged in other criminal activities, and are often multi-national in scope. Even in the case of small-time pirates, one element commonly found in organized syndicate behavior—violence—is prevalent.³⁶ The fact is that organized crime is deeply involved in Thai piracy.³⁷ In addition, foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China, and Malaysia.³⁸ It is critical that the Royal Thai Government begin to address organized

³⁴ IIPA notes, for example, that 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."

Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

³⁶ For example, on November 28, 2004 Bangkok Metropolitan Police officers raiding a night market at King Rama I Bridge were attacked by around 30 pirates and gang members. Some officers were injured in the incident.

³⁷ In 2004, a 40-year-old Thai man suspected of trying to run a piracy and protection racket in a Bangkok shopping mall was shot and killed as he sat outside his shop after closing hours in September 2004. Known as Lek Fortune, this individual had recently opened a pirate video shop in the Fortune Town IT Mall in Bangkok's Dindaeng district. According to the man's nephew and business partner, Fortune was shot twice in the head by a man who ran outside of the shopping complex to a waiting motorbike after the shooting. The police believe the murder resulted from conflicts the dead man had had with organized criminal gangs who control the piracy business in the Fortune Town mall, and in another mall where Mr. Fortune had previously operated a shop. Mr. Fortune is suspected of trying to break a gang's existing monopoly on providing "protection" to shop owners.

³⁸ There appears to be increasing involvement of organized crime in piracy in Thailand. On September 6, 2003, the 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 four Thai and one Singaporean national. Several Malaysian nationals have been arrested trying to transport pirate optical discs from Malaysia to Thailand.

criminal syndicate involvement in piracy, initiating investigations into and working toward the apprehension of those who control the piracy production and distribution networks. Prosecuting mere employees of these syndicates will not make a dent in the piracy problem

To directly confront the problem of organized crime and its relation to copyright piracy in Thailand, it is imperative that the Royal Thai Government (1) recognize the problem, and (2) take all necessary steps to address it. One way to ensure that organized criminals engaged in copyright piracy can be stopped is to include IP violations in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA). IIPA believes that the AMLO (Anti-Money Laundering Office) officials must have copyright piracy included as one predicate offense in order to successfully tackle organized crime and copyright piracy in Thailand. In addition to using existing tools and simply adding copyright piracy as a predicate offense, Thailand is also urged to look towards adopting a comprehensive organized crime statute (cf. Hong Kong's Organized and Serious Crimes Ordinance [OSCO]), which would include intellectual property rights violations as a predicate offense.

Unfortunately, as was reported in the press, while the government had intended to include copyright piracy as a predicate offense in a draft bill to amend the MLPSA, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense. The decision remains up to the Cabinet, and IIPA in strongest terms urges the Cabinet not to delete copyright piracy as a predicate offense for the enforcement of the MLPSA.

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). 42

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\$52,030). 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

³⁹ Under this statute, generally, it is a crime to transfer, convert or receive the transfer of funds or property arising from certain criminal acts including hiding or concealing the source of funds. Violators are liable to imprisonment of a maximum of ten years and a fine of up to 200,000 baht (about US\$5,200).

⁴⁰ IIPA notes that it is inconsistent that Trademark and Patent infringements are considered predicate offenses for enforcement of such organized crime statutes, but that copyright offenses are left out.

⁴¹ Nont Horayangura and Say Sujintaya, *Committee rejects IP offences on public interest grounds*, September 28 2004, at http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050.

⁴² 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.

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 2003, \$2.7 billion in goods entered the U.S. from Thailand duty free under the GSP Program—approximately 17.9% of its total exports to the U.S. In the first eleven months of 2004, almost \$2.9 billion in goods entered the U.S. from Thailand duty free under the GSP Program—more than 18.1% of its total exports to the U.S. Enjoying the benefit is subject to the requirement that Thailand provide "adequate and effective" copyright protection.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 SPECIAL MENTION

AZERBAIJAN

As the U.S. Trade Representative noted when Azerbaijan was placed on the <u>Watch List</u> in 2004, there are many steps remaining for Azerbaijan "to fully implement the 1995 U.S.-Azerbaijan Trade Agreement and address deficiencies in its IPR laws." In fact, Azerbaijan obligated itself to fix these deficiencies over ten 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 which need to be corrected in order to bring the country into compliance with the Berne Convention (to which it adhered in 1999) and the Geneva Phonograms Convention (which it joined in 2001). The long delay in the protection of sound recordings has 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 obligations under the bilateral trade agreement, the Berne Convention, and the WTO TRIPS Agreement. Also unclear is whether Azerbaijani law provides civil *ex parte* search provisions as required by TRIPS.

Article 158 of the Azerbaijani Criminal Code (2000) provides liability and sanctions 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.

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).

Enforcement deficiencies: There is currently no "adequate and effective" enforcement in Azerbaijan. There is no meaningful police, customs, or prosecutorial activity, as required by the bilateral trade agreement and the WTO TRIPS Agreement. There are administrative sanctions (Article 186-1) providing for fines of 20 times the minimum monthly wages for copyright infringements. However, these fines are only imposed if the infringement causes damages that equal more than 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. An estimated 11.8 million pirate copies of audio carriers including 8.6 million cassettes and 3.2 million CDs were available in the Azerbaijani market in 2004. Piracy rates for the music market writ large were an estimated 81.6%, and as for international repertoire — over 90%. Losses suffered by American rightholders amounted to US\$12 million and overall losses of international rightholders exceeded US\$17 million.

There were no reports on cases resulting in either administrative or criminal sanctions for neighboring rights infringements. Cases regarding copyright violations brought on behalf of Azerbaijani rightholders are usually considered in civil courts. There are no reports of any counterfeit audio products of international rightholders seized during the past several years.

There are no separate subdivisions or specially appointed officers dealing with the intellectual property infringements within the Azerbaijani law enforcement agencies.

WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT BOLIVIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Bolivia be kept on the Special 301 <u>Watch List</u> in 2005.

Overview of Key Problems: Bolivia has shown no progress on copyright reform in almost a decade. By failing to provide a TRIPS-compliant copyright law along with adequate and effective copyright enforcement, Bolivia does not meet its current bilateral and multilateral. For example, the law lacks civil *ex parte* measures, a major problem for the business software community in enforcing copyright in Bolivia. In all of its civil cases, BSA has had to adhere to Bolivian procedures, which include notifying the defendants at least 24 hours prior to the inspection. Border measures are weak. Copyright legal reform has been underway for years without result. 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. Bolivia is participating as an observer in the Free Trade Agreement (FTA) negotiations with the United States and other Andean countries (Colombia, Ecuador, and Peru). IIPA and its members expect the IPR chapter in this agreement, to which Bolivia would be required to adhere, to have strong copyright law and enforcement provisions.

Actions that the Government of Bolivia Should Take: To improve the copyright law and enforcement in Bolivia, we recommend the following actions for 2005—

- Halt legislative consideration of the proposed copyright legislation drafted in 2001 because it is severely deficient. TRIPS and WIPO treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)) law reform must be considered and approved;
- Ratify the WCT and WPPT, and fully implement these obligations in any copyright law reform (as referenced above);
- Adopt ISP liability measures including notice and takedown provisions;
- Reform the penal code to provide deterrent level penalties for copyright infringement;
- Extend the term of protection for sound recordings to at least 70 years;
- Include statutory damages provisions for copyright infringement in the civil code; and
- Significantly improve anti-piracy enforcement efforts in-practice.

Bilateral Negotiations and Trade Programs

In November 2003, Ambassador Robert Zoellick notified the U.S. Congress that the Bush administration intended to begin Free Trade Agreement (FTA) negotiations with the Andean nations. 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. IIPA will be looking for an agreement that achieves the same high standards as were achieved in the recently concluded FTA with Central America.

Bolivia currently receives preferential trade benefits under two U.S. trade programs—The Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), as amended. These two programs contain standards of intellectual property rights which must be afforded to U.S. copyright owners. Also, in the 2004 Special 301 review, USTR kept Bolivia on the Watch List, noting that piracy and inadequate laws are significant problems. Finally, 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.

COPYRIGHT PIRACY

Business software piracy by both resellers and end-users is widespread in Bolivia. In addition, music piracy is so rampant in Bolivia that all international recording companies have closed their offices and no local talent has been produced in years. Domestic repertoire is suffering enormously as a result of the absence of local and international producers. The major form of piracy afflicting the U.S. book publishing industry in the region involves commercial

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¹ During the first 11 months of 2004, \$15.2 million worth of Bolivian goods (or 6.4% 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 95.7% increase over the same period in the previous year. Another \$113.1 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2004, representing an increase of 133.9% from the same period in 2003. For more Ecuador on the history of under Special 301 review, see **Appendix** (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and **Appendix** (http://www.iipa.com/pdf/ 2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

² See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act:

² See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 1, 2004 at http://www.iipa.com/rbi/2004 June 1 IIPA ATPA trade filing for USTIC.pdf.

http://www.iipa.com/rbi/2004 June1 IIPA ATPA trade filing for USTIC.pdf.

Tress Release, Office of the U.S. Trade Representative, "Special 301 Report Finds Continued Progress but Needed," Significant Improvements May 3, 2004, available http://www.ustr.gov/Document Library/Press Releases/2004/May/Special 301 Report Finds Continued Progress But_Significant_Improvements_Needed.html. See also USTR, 2004 Special 301 Report, available at http://www.ustr.gov/assets/Document Library/Reports Publications/2004/2004 Special 301/asset upload file16 59 95.pdf. ("Bolivia's existing legislation for IPR protection is deficient. Bolivia has failed to provide for ex parte civil search orders. In addition, damages are inadequate, enforcement efforts have been sporadic and largely ineffective, and border enforcement remains weak. While the 1992 Copyright Law recognizes copyright infringement as a public offense and the new Bolivian Criminal Procedures Code began to provide for the criminal prosecution of IPR violations, enforcement by Bolivian Courts has been disappointing. Unfortunately, no progress has been made on amending the copyright law to bring it up to international standards. Furthermore, it appears that the Bolivian government agencies use unlicensed software. Piracy rates for videos, sound recordings, and software remain among the highest in Latin America, according to industry sources. Despite these serious deficiencies in enforcement, the Mesa Administration has publicly committed itself to transparency and has demonstrated at multiple levels a desire to work with the United States on institutionalization, combating corruption, and increasing the efficiency of the Bolivian Government. We welcome this commitment and urge the Bolivian Government to continue in its efforts to improve enforcement.").

photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported in the region. Video piracy remains a consistent problem throughout the Andean region. The U.S. entertainment software industry suffers from inadequate enforcement in the Andean region; piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

BOLIVIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁴							
INDUSTRY	20	04	2003				
INDUSTRI	Loss	Level	Loss	Level			
Records & Music	16.0	90%	16.0	90%			
Business Software ⁵	7.0	78%	7.0	78%			
Motion Pictures	2.0	NA	2.0	100%			
Entertainment Software	NA	NA	NA	NA			
Books	NA	NA	NA	NA			
TOTALS	25.0		25.0				

COPYRIGHT ENFORCEMENT

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

As for 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 2004, the BSA conducted seven civil inspections. In all of these cases, the BSA was required 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 were previously installed but deleted a few hours before the inspection. Of the seven civil inspections conducted in 2004, only two were settled.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Bolivia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. The preliminary 2003 losses which had appeared in previously released IIPA charts level (\$11 million) were based on the older methodology, which is why they differ from the 2003 numbers in this report.

Unwarranted Delays in Civil Enforcement

The Bolivian Civil Procedure Code fails to impose any time limits for courts to review and approve civil search requests. On average, it takes 45 days to obtain a civil search and seizure order, by which time news of the raid may have leaked to the defendant or BSA's evidence may have grown stale or simply disappeared. This unwarranted delay, which is far longer than the average authorization process in other countries in Latin America, violates Article 41 of TRIPS, which requires that remedies for copyright infringement be "expeditious."

Depending on the city in which the civil complaint is filed, it could take up to four to five weeks to obtain a search order. As if the delay itself were not detrimental enough, once the court issues the order, the court must notify the defendant, as mandated by 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. 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 example, 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.⁶ The same solution has been adopted by the United States (up to a maximum of \$30,000 per protected work).⁷ The overhaul of the intellectual property laws submitted to the Bolivian congress in 2001 added a statutory damages provision of between three to five times the retail value of the protected work.⁸ It is unclear whether the new, bifurcated, version of the bill, recently introduced by SENAPI (see discussion below), preserves this provision. As indicated above, other provisions of the 2001 copyright reform bill fail to meet TRIPS and WCT/WPPT standards. To the extent the recent 2004 bill is identical to its predecessor, the new bill likewise has these deficiencies.

Inadequate and Ineffective Criminal Enforcement

Enforcing copyrights through the Bolivian criminal system has proven to be totally ineffective. In June 2003, the Court of Criminal Instruction in Cochabamba issued a criminal sentence—regarded as the first in the history of country—for violation of intellectual property rights. The court determined that material evidence and expert testimony demonstrated that the

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⁶ Ley de Derechos de Author, No. 9610, Article 103.

⁷ 17 U.S.C. § 504 (c)(1). In cases of "willful" infringement, statutory damages can be elevated to as much as US\$150,000 per work infringed. 17 U.S.C. § 504(c)(2).

⁸ Anteproyecto de Código de Propiedad Intelectual, Article 175 I.

owner of a computer equipment store had violated Bolivia's Criminal Code provisions on intellectual property rights by profiting from the reproduction, plagiarizing, and distribution of Microsoft software without license or rights. The court sentenced the owner to one year in prison which was suspended in accordance with provisions in the law for first time offenders.

The music industry confirmed that no raids were conducted by the authorities to pursue music piracy. Unfortunately, no new resources have been allocated to SENAPI or any other agency for the purposes of combating IPR violations. We urge the Bolivian government to adopt and implement a national anti-piracy effort to combat IPR violations.

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. 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, 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 rightholder.

2001 Bill to Amend the Copyright Law

Efforts to overhaul the 1992 Bolivian 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

Community Copyright Office Directors.

⁹ 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

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.

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. The 2001 bill was subsequently abandoned due to its complex structure and content. However, reports indicate that SENAPI presented a new proposal in May 2004, which split the bill into two parts: one for trademark and patent (industrial property), and another for copyright. IIPA does not know this 2004 copyright bill contains identical proposals in the 2001 version or not.

WIPO Treaties

Bolivia is a signatory to the WIPO treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—but has not yet completed ratification with WIPO. 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. According to reports produced by SENAPI, the treaties have not been presented to Congress, pending amendments to the copyright law. IIPA encourages the government of Bolivia to add ratification of the WIPO treaties to the 2005 legislative agenda.

Criminal Procedure Code Reform

The Bolivian government published amendments to its criminal code on March 10, 1997. The amended Article 362 of the Criminal 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 Criminal Code now allows the police to take enforcement actions against pirates. Previously, the code 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 quidance.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 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 of Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan; the reports on Azerbaijan and Georgia can be found in the part of this filing entitled Countries Deserving Special Mention.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

- <u>Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan</u> be retained on the Special 301 <u>Watch List</u> in 2005;
- The U.S. government should continue to monitor the post-WTO accession progress of <u>Azerbaijan and Georgia</u> for the reasons noted in the part of this filing entitled <u>Countries</u> <u>Deserving Special Mention</u>;
- In addition to the <u>Watch List</u> ranking, the U.S. government should suspend the duty-free trade benefits under the Generalized System of Preferences (GSP) of <u>Kazakhstan and Uzbekistan</u> for the reasons stated in the petitions filed by the IIPA concerning the shortcomings in the legal regimes of these countries and reiterated at U.S. government hearings (2003);³ and
- The U.S. government should block accession to the World Trade Organization of <u>Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan (as well as Russia and Ukraine for the reasons noted in those two country reports)</u> 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 priorities in these countries is that: (1) the legal regimes (in varying degrees in each country) are in need of critical reforms to

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/2005SPEC301HISTORICALSUMMARY.pdf. Please see previous years' 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 lose its eligibility immediately for GSP benefits (based on the IIPA 2000 petition and our testimony at the U.S. 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.

their copyright laws, criminal codes, customs codes, civil procedure codes, and administrative codes; in some countries there is also the need for the 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 large-scale commercial pirates, much less against smaller scale operations. Such enforcement should include 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 laws, criminal codes, customs codes, administrative codes, and civil procedure codes (adding ex parte search provisions) to provide 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.

BELARUS

In May 2004, the U.S. Trade Representative criticized enforcement in Belarus as "weak and ineffective" (in his annual announcement on Special 301 designations) and noted his concerns with regard to the "migration of optical media production facilities from neighboring countries." In 2004, there were no industry reports of either legal reforms or enforcement successes in Belarus. In recent years, Belarus has joined the relevant neighboring rights treaties—the WIPO Performances and Phonograms Treaty (WPPT) and the Geneva Phonograms Convention (2003)—the latter providing, at long last, 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, as noted by the USTR, of optical media production facilities into Belarus from neighboring countries. One plant (Armita) located in Brest, Belarus migrated from Ukraine a few years ago; in 2002, the plant closed and a criminal investigation was commenced in Belarus. However, the case was transferred to the Ukrainian General Prosecutor's office for a criminal investigation there, because the plant operator and his deputy are Ukrainian nationals. The case was later suspended in Ukraine because the two subjects of the investigation disappeared. The manufacturing equipment was exported out of Belarus to an unknown destination and no further action was taken by the Government of Belarus—all of which further underscores the need for more effective regulation of optical media production and distribution, including criminal sanctions for violations.

The other important step that the government must take is to insist that border enforcement authorities act more effectively to prevent other plants in 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, CD-Rs, etc.). In October 2004, the Vigmaplast optical disc replication plant was opened near Minsk; it has a single line and an estimated plant capacity of 5.2 million discs a year.

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) 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 Copyright Law amendments added provisions relating to anti-circumvention devices and services, and the removal or alteration of rights management information (Article 39.5). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices.

Criminal code provisions were adopted several years ago (in force in 2000). The provisions (Article 201) include sanctions for up to five years' imprisonment for repeat offenders of copyright and neighboring rights violations. However, the criminal sanctions only apply after there have been administrative violations, and are only triggered by a too high threshold ("large-scale damage") which is BR16,500 (US\$5,530). Also, there are no provisions for the confiscation of manufacturing equipment used to produce pirated material.

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. However, there is no *ex officio* authority to act in administrative cases either, so even in these instances, a statement from a rightholder is required to commence a case, thus thwarting effective enforcement.

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. Belarusian 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 preexisting 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. Belarusian officials insist this protection does currently exist, at least for works. Government 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 statutory amendment which would 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" but not sound recordings; a change in the law to explicitly extend protection for sound recordings (and works) is essential. Unfortunately, draft copyright law amendments prepared by the government and submitted to the parliament in 2004 for consideration in 2005 do not address the problem of protection for pre-existing works or sound recordings.

There are no known available civil *ex parte* search procedures in Belarusian law; these are needed for effective enforcement against end-user pirates, especially in the software industry.

Neither are its anti-circumvention or copyright management information provisions fully compatible with the WIPO Digital Treaties. The provisions regarding technological protection measures need further change. In particular, the provisions must cover prohibitions 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. Such

provisions should protect against the alteration, removal or falsification of this information. The Belarusian provisions provide some, but not all, of the required protection against Internet and other digital piracy.

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 May 2004, Belarusian officials reported that the Council of Ministers (interministerial committee) had adopted a program for IPR protection for 2004 and 2005. However, this report focused mainly on additional legislative reforms to copyright (and patent and trademark laws), and should that it would establish a training center for IPR enforcers. While positive news, the government of Belarus needs to focus on actual enforcement activity — running raids and seizures, as well as commencing criminal cases against commercial pirates.

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, there is one known optical media plant in Belarus—the Vigmaplast optical disc plant near Minsk, noted above (with a single operational line). However, little else is known about its operations.

The level of music piracy is estimated at about 71%; trade losses for 2004 were estimated at \$26 million. It is estimated by the recording industry that in total 9.1 million cassettes and 9.1 million CDs were sold in Belarus in 2004 and of these, 6.1 million cassettes and 6.8 million CDs were pirated copies. The industry also reported 141 raids and the seizure of US\$732,384 worth of pirate material (61,500 CDs, 7,600 DVDs, 630 cassettes) in 2004 by local enforcement agencies. In 2004, the border authorities, in a total of 50 cases, confiscated 10,000 pirate CDs and 5,800 pirate DVDs, all destined for Western Europe.

KAZAKHSTAN

The U.S. Trade Representative, in his May 2004 Special 301 announcement, noted that Kazakhstan has still not met all of 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 noted that even though "searches and seizures increased in volume and thoroughness . . . enforcement of IPR in Kazakhstan remains weak, particularly criminal enforcement." The USTR noted that "[v]ery few defendants are convicted, and those who are convicted receive only minimal penalties." The enforcement problem is caused by a high burden of proof in criminal cases which needs, according to the U.S. government, legislative reform (even beyond the reforms of recent years). One legislative reform goal was accomplished in 2004 with the passage of provisions providing explicit protection for pre-existing foreign works and sound recordings. However, many other critical deficiencies remain, now more than ten years after Kazakhstan pledged to correct them, 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 accession in the WTO (which it is planning to join in 2006), and that it suspend all GSP benefits to Kazakhstan, 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 amended in 1996, and again, in July 2004.

Kazakhstan joined the Berne Convention (1999) and the Geneva Phonograms Convention (2001), providing a point of attachment for foreign sound recordings. In addition, effective November 12, 2004, Kazakhstan acceded to both WIPO Digital Treaties (WCT and WPPT). This was a very positive step.

Legal reform deficiencies

Effective July 9, 2004, Copyright Law amendments were adopted in Kazakhstan further revising the Copyright Law of 1996. Among other things, the amendments (Article 5(4)) fixed the long-standing problem of providing express protection for pre-existing foreign works and sound recordings. This was a major step forward. Unfortunately, the ten-year delay in adopting this provision means that there will be a lot of (now illegal) back-catalog material in the marketplace that will take years to root out. Further, the 2004 provision only provides a flat 50 year window, so pre-1954 works and sound recordings remain in the public domain.

In addition, the 2004 amendments (which were part of a larger package) included: updating laws to facilitate electronic commerce and Internet technology by implementing the digital treaties (since Kazakhstan in 2004, also became a member of those treaties); and updating the laws for E.U. compatibility. Several key legal reforms — notably in the criminal enforcement area — remain. Development of a modern IPR regime in Kazakhstan is imperative because, for example, the software and recording industries, consider Kazakhstan the most promising marketplace of the C.I.S. members behind only Russia and Ukraine.

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.

The current Criminal Code entered into force on January 1, 1998. Article 184 of the Criminal Code includes substantial fines which vary depending on the profit lost and/or "large damage" resulting from infringement. The fines run from 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. IIPA understands that Article 192(4) in the Criminal Code provides police with ex officio authority to commence criminal copyright cases, but that it is rarely used. Additional administrative and criminal law amendments have been prepared for adoption but unfortunately, not all of the copyright industries have been consulted to review the drafts. In June 2004, IIPA did provide the government of Kazakhstan with "model" enforcement provisions; IIPA urges the government of Kazakhstan to use the IIPA draft, to consult with local copyright industry representatives, and to adopt the proper enforcement revisions in 2005.

On October 28, 2004, the Government of Kazakhstan sent a package of amendments to the parliament that would revise the Criminal Code and Criminal Procedure Code. The amendments would, if adopted, revise the threshold to commence a criminal case (replacing the "considerable harm" standard with a fixed amount), and it would provide for *ex officio* authority to commence an IPR case. IIPA is cautiously optimistic about these proposals and their passage in 2005.

Under the Administrative Code (Article 129), there are IPR — copyright and neighboring rights — code violations. However, only the Ministry of Justice authorities and not the police are authorized to bring charges for such offenses. This is why the authority to bring IPR administrative cases must be broadened (to the police), and why, in general, the police need *ex officio* authority under the Criminal Code and Criminal Procedures Code.

One example of the ineffectiveness of the criminal enforcement system comes from an "enforcement report" issued by the government of Kazakhstan Economic Crimes agency, in December 2004. According to the report, 140,000 pirate audio and video tapes and CDs were seized in the first 11 months of 2004; the estimated worth of these materials is about 15 million tenge (US\$115,564). In addition, the report noted a total of 20 criminal cases in 2004 (the government reported 68 trademark criminal cases and seven copyright cases in all of 2003; no information was provided about any sentences imposed in these cases). IIPA knows of no criminal convictions with jail sentences imposed in 2004 in the music, film or entertainment industries. The business software association (BSA) reports eight pending cases and four court decisions of reseller software piracy (distributing unlicensed software) in 2004. In these cases: one infringer was ordered to undertake community service; one was fined 100 times the monthly index, a total of US\$706; another was fined (US\$270); and one was handled as an administrative fine of five times the monthly index (and material was confiscated). For a marketplace and population the size of Kazakhstan, these statistics reflect the need to do much more to deter piracy and claim effective criminal enforcement. In October 2003 and August 2004, the copyright industries signed memoranda of understanding with the government of Kazakhstan; there were also training programs in 2004 (BSA participated). In short, the government pledged to the copyright industries to undertake more and better enforcement. These memoranda are goodwill gestures and positive first steps, but nothing more without actual on-the-ground action.

In 2003 (effective May 1, 2003), the Customs Code was completely revised. 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 further weaken, not strengthen, border measures. IIPA recommends that this registration system be repealed and that border officials be given clear *ex officio* authority to seize infringing material and to commence their own criminal investigations. The government of Kazakhstan pledged in 2004 that there would be further modernizations of the customs code in 2004, but no changes were adopted.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$133.6 million in the first 11 months of 2004. In addition, the government of Kazakhstan enjoyed \$74.2 million in FY 2004 for other economic/social reform, law enforcement and democracy programs from the U.S. government. Also, the U.S. government and Kazakh government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries. The copyright industries have waited over ten years for effective change to the IPR regime in Kazakhstan; IIPA recommends the withdrawal of GSP benefits to 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. As noted, the government reported that only 140,000 IPR copies were seized in (the first 11 months of) 2004. It is estimated that approximately 18.6 million pirate copies of sound recordings alone were sold in 2004—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 business software industry (BSA), the unofficial statistics indicate 35 criminal cases were initiated in 2004 (under Article 184); an additional 29 criminal cases were initiated for trademark infringements (Article 199).

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 68%; trade losses for 2004 were estimated at \$23 million. It is estimated by the recording industry that in total 16.2 million cassettes and 10.8 million CDs were sold in Kazakhstan in 2004 and of these, 11.2 million cassettes and 7.4 million CDs were pirated copies. The industry also reported 1,135 raids and the seizure of US\$695,991 worth of pirate material (49,800 CDs, 5,672 DVDs, 105,000 cassettes and 10 recording devices) in 2004 by local enforcement agencies.

Last, there is one known optical disc production facility reported in Kazakhstan at present; it is reported that the plant, with a single operating line, is capable of producing 8.1

million discs per year. The plant does have an IFPI-issued SID code (August 2002), and does provide exemplars (examples) of CDs manufactured at the plant to be used for forensics evidence. However, there is still optical disc regulation in place. The absence of such a system, the lack of overall 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 2004 announcement placing Tajikistan on the Watch List said, "Tajikistan's IPR regime has numerous deficiencies, particularly with respect to copyright protection. Specifically, Tajikistan has not joined the Geneva Phonograms Convention, does not provide IPR protection to foreign sound recordings, and does not explicitly protect pre-existing works or sound recordings . . . " Further the USTR noted that Tajikistan has yet to fulfill all of its intellectual property rights commitments under the 1993 U.S.-Tajikistan Trade Agreement and its IPR enforcement "remains weak." So, over 10 years after pledging to do so, Tajikistan does not even provide the basic rights or protection for U.S. or other foreign sound recordings, among its many other IPR deficiencies.

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 overregulates 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 the Berne Convention (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 needs to amend its criminal code to adopt criminal provisions for IPR violations. The failure to provide this essential remedy 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 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. The Criminal Code (Article 156) does provide for copyright and neighboring rights sanctions (where there is "significant harm" to the

rightholder). However, there has not been a single criminal IPR case reported. Nor has there been a single case reported under the administrative code; this code, revised in 1999 (Article 158-2) 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-plus-year-old obligations under the Bilateral Trade Agreement, amend the relevant IPR laws and engage in effective enforcement. The U.S. government and Tajik government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

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 81%; trade losses for 2004 were estimated at \$5 million. It is estimated by the recording industry that in total 7.2 million cassettes and 1.3 million CDs were sold in Tajikistan in 2004 and of these, 5.8 million cassettes and 1.1 million CDs were pirated copies.

TURKMENISTAN

The U.S. Trade Representative, in his May 2004 announcement placing Turkmenistan on the Watch List, noted the many steps that Turkmenistan must take in order to "satisfy all of its IPR obligations 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 and join the relevant treaties.

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 and separate 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. As a result, the operational copyright law is the 1961 Civil Code as amended 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.

In addition to the necessity to adopt a copyright and neighboring rights law, Turkmenistan must also adopt deterrent sanctions into its copyright regime. Article 153 of the Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of "significant harm" — a threshold that is too high. IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate.

Provisions must also 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.

The U.S. government and Turkmen government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 85%; trade losses for 2004 were estimated at \$7 million. It is estimated by the recording industry that in total 6.9 million cassettes and 1.7 million CDs were sold in Turkmenistan in 2004 and of these, 5.7 million cassettes and 1.5 million CDs were pirated copies.

UZBEKISTAN

The U.S. Trade Representative, in his May 2004 announcement placing Uzbekistan on the <u>Watch List</u>, noted that Uzbekistan is "out of compliance with its intellectual property commitments under the 1994 U.S.-Uzbekistan Trade Agreement, particularly with respect to copyright protection and enforcement." 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—over ten years after it agreed to make basic changes in its law and enforcement regime. The USTR noted that "IPR enforcement remains very weak" in Uzbekistan; IIPA agrees.

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, 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 were missing key provisions; for example, the draft did not provide protection for preexisting works and sound recordings. In any case, the January 2004 amendments were never adopted.

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 (Uzbekistan enjoyed about \$3 million in GSP benefits in the first 11 months of 2004). To enjoy GSP benefits Uzbekistan must: join the Berne Convention and the Geneva Phonograms Convention; and amend 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) no exclusive public performance (or making available) right for producers of sound recordings, at a minimum for digital transmissions; in lieu the current law provides only a right of remuneration (for the public communication of the recording, broadcasting, or communication to the public by cable); and (2) onerous provisions that over-regulate the terms and conditions of authors' contracts. The December 2000 amendments did two things: (1) added "copying of a record" to the enumerated rights of producers to fix a glaring deficiency; and (2) 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 (i.e., crimes involving the pirating of sound recordings). 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 to amend the criminal code were also circulated in January 2004, but never adopted. The January 2004 draft would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties applied "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—were much too low to be deterrent penalties as needed. IIPA recommends that if this draft is still viable, the first provision be deleted; and the second (50 to 100 times) 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, experience shows that such licensing systems are not effective against the pirate production enterprises, which are common in this region.

The U.S. government and Uzbek government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries. In addition, the government of Uzbekistan enjoyed \$50.6 million in FY 2004 for other economic/social reform, law enforcement and democracy programs from the U.S. government.

Yet, even as the U.S. government is promising to enhance trade and investment with Uzbekistan and providing other aid, 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 over ten years ago, and is woefully inadequate as a potential WTO member. 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 2004 were estimated at \$31 million. It is estimated by the recording industry that in total 32 million cassettes and 8 million CDs were sold in Uzbekistan in 2004 and of these, 25 million cassettes and 7 million CDs were pirated copies. The recording industry reports that illegal musical cassettes are produced mainly in Uzbekistan, but that illegal CDs are produced in neighboring countries, particularly Russia, and 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 operations due to the poor enforcement regime.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT ECUADOR

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Ecuador remain on the Special 301 Watch List.

Overview of Key Problems: Inadequate and ineffective copyright enforcement—in administrative, criminal, and civil cases—is a significant problem adversely affecting those copyright industries doing business in Ecuador. The business software and recording industries continue to confront high piracy levels due to insufficient enforcement by Ecuadorian officials. Delays in the creation of specialized IP courts continue despite a requirement in the 1998 copyright law requiring their creation. The business software industry also reports continuing reluctance by the courts to issue *ex parte* search warrants and high bond requirements. With respect to administrative copyright enforcement, the National Copyright Authority (IEPI) has little presence within the Ecuadorian community, making its enforcement ability very weak. The 1998 copyright law is a relatively strong and comprehensive piece of legislation. However, a provision in a 1999 education law purports to give educational institutions free software licenses, an action which undercuts the exclusive rights of software publishers. Though no such licenses have been issued to date, some educational institutions are, in fact, demanding free software licenses based on this provision.

Ecuador currently participates in Free Trade Agreement (FTA) negotiations between the United States and other Andean region countries (Peru and Colombia). Reports suggest that negotiations on the IPR chapter are nearing completion. 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 Ecuador 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.

Actions Which the Government of Ecuador Should Take: To improve IPR enforcement in Ecuador, the government should take the following actions in 2005:

- 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;
- Provide IEPI with the necessary budget and national plan to combat piracy effectively;

- Amend the provision of the Education Law of 1999;
- Adopt legislation to establish notice and takedown provisions and create ISP liability;
- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers; and
- Adopt optical disc legislation.

Bilateral Negotiations and Trade Programs

The U.S. began FTA negotiations with Ecuador in May 2004, as part of the first round of Andean country negotiations which included Colombia and Peru. 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. IIPA will be looking for an agreement that achieves the same high standards as were achieved in the recently concluded FTA with Central America.

Ecuador currently receives preferential trade benefits under two U.S. trade programs—The Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), as amended.² These two programs contain standards of intellectual property rights which must be afforded to U.S. copyright owners.³ It is essential that Ecuador take immediate steps to improve its poor enforcement record, and that it not delay until negotiations are concluded to begin to address this problem.

In last year's Special 301 review, USTR kept Ecuador on the <u>Watch List</u>, noting that enforcement remains a significant problem.⁴

¹ See Press Release 2004-35, Office of the U.S. Trade Representative, "Peru and Ecuador to Join with Colombia in May 18-19 Launch of FTA Negotiations with the United States," May 3, 2004, *available at* http://www.ustr.gov/Document_Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1
http://www.ustr.gov/Document_Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1
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² During the first 11 months of 2004, \$42.5 million worth of Ecuadorian goods (or 1.1% 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 3.3% decrease over the same period in the previous year. In the first 11 months of 2004, \$2.5 billion entered under the ATPA, representing a 76.5% increase from the same period in 2003. For more information on the history of Ecuador under Special 301 review, see Appendix D (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

³ See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 1, 2004 at http://www.iipa.com/rbi/2004_June1_IIPA_ATPA_trade_filing_for_USTIC.pdf.

⁴ See Press Release, Office of the U.S. Trade Representative, "Special 301 Report Finds Continued Progress but Significant Improvements Needed," available May 2004, 3, http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Special_301_Report_Finds_Continued_Progress_ But Significant Improvements Needed.html. See also USTR, Special 301 Report, available http://www.ustr.gov/assets/Document Library/Reports Publications/2004/2004 Special 301/asset upload file16 59 95.pdf ("Ecuador has shown little progress in improving IPR protection over the last year, and although it has a generally adequate IPR law, enforcement of the law remains a significant problem. . . Enforcement of copyrights also remains a significant problem, especially with respect to sound recordings, computer software, and motion pictures, as does enforcement of trademark rights. As a result, there continues to be an active local trade in pirated audio and video recordings, computer software, and counterfeit brand name apparel. Music piracy is rampant in the streets of key cities, yet the local authorities appear to have made no efforts to prevent the sale of pirated music, nor have they investigated the duplication and distribution sources for these products. The Ecuadorian Government has yet to

COPYRIGHT PIRACY

End-user piracy and some hard-disk loading (the practice of loading unlicensed software onto computer hardware and selling the entire package to an end-user) continue to plague the business software industry in Ecuador. End-user 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. Estimates are that more than 80 million CD-Rs enter Ecuador every year, most destined for piracy. The government has poor border controls, making it difficult to investigate CD-R importers and their links to pirate organizations. Additionally, there is strong evidence of widespread tax evasion (e.g., under-valuation) and other irregularities associated with CD-R importing. Piracy represents 95% of the total pirate market in Ecuador with no signs of abatement any time soon. Although piracy could be pursued ex officio by the authorities, only a few sporadic raids are conducted every year, and the resources dedicated to IEPI's enforcement activities are insufficient. As a result, the majority of international record companies have closed their offices in the country, and two local independent companies are barely managing 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.

The major form of piracy afflicting the U.S. book publishing industry in the region involves commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported in the region. Video piracy remains a consistent problem throughout the Andean region, reaching 90% in Ecuador. The U.S. entertainment software industry suffers from inadequate enforcement by governmental and judicial authorities in the Andean region. Piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

establish the specialized intellectual property courts required by the 1998 IPR law. Even though Ecuador's current substantive copyright legislation appears generally in line with its international obligations, the performance of Ecuador's judiciary remains deficient, in that the courts appear unwilling to enforce the law. The United States urges Ecuador to strengthen enforcement of IPR and will closely monitor Ecuador's efforts to address IP-related concerns.").

ECUADOR Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁵								
INDUSTRY	20	04	2003					
INDOSTRI	Loss	Level	Loss	Level				
Records & Music	20.0	95%	19.0	95%				
Business Software ⁶	7.0	69%	7.0	68%				
Motion Pictures	NA	NA	NA	95%				
Entertainment Software	NA	NA	NA	NA				
Books	2.5	NA	2.3	NA				
TOTALS	29.5		28.3					

COPYRIGHT ENFORCEMENT

IEPI's anti-piracy enforcement efforts are weak and ineffective

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 experiences staff shortages, low salaries and even strikes.

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.

BSA has provided leads to IEPI for the purpose of inspections, with IEPI conducting six inspections during 2004. BSA expects IEPI to conduct more inspections during the first quarter of 2005, though IEPI will only be successful if the Ecuadorian government supports it 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 such 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. Due to the lack of enforcement, especially in Quayaquil, vendors of pirate CDs cover flea markets and public spaces. In fact, some CD-burning labs operate openly.

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⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁶ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Ecuador, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. The preliminary 2003 losses which had appeared in previously released IIPA charts level (\$11 million) were based on the older methodology, which is why they differ from the 2003 numbers in this report.

Judicial action is still a barrier in effective enforcement.

To date, the National Judiciary Council has not yet created specialized courts for intellectual property matters. Thus the petitions for civil *ex parte* actions are brought before civil courts which have neither the knowledge nor the expertise necessary to attend to these types of petitions. Due to this situation, seizure orders are either not granted, or are delayed.

Judges remain reluctant to grant precautionary measures. For example, 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 entered the Ecuadorian judicial system in 2003, 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 intellectual property law (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
 rightholders, which discourages rightholders from pursuing 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 years, during 2003 and 2044 BSA did not file any cases before civil courts.

COPYRIGHT LAW 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 semi-

conductor chip protection, industrial designs, utility models and unfair competition. The law also addresses 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 the WIPO Performances and Phonograms (WPPT). Some amendment to the law will likely be required to fully implement the IPR obligations in the upcoming Andean FTA.

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 certain 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.

Corporations must certify compliance with copyright law in annual reports

In February 2004, the Superintendency of Companies issued a regulation requiring companies to certify, in an annual report, that they were complying with copyright law by using only licensed and non-infringing software in their businesses. BSA is currently working in coordination with the Chamber of Commerce in Quito to educate the business community about the compliance requirements of this new regulation.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT HUNGARY

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Hungary remain on the Special 301 <u>Watch List</u> in 2005. Over the past several years Hungary has greatly modernized its copyright legal regime, including extensive revisions to its copyright law and criminal code, as well as other related legal reforms necessary for EU accession. Hungary became an EU member on May 1, 2004. Unfortunately, even after the legal reforms, copyright owners report persistent prosecutorial delays and other problems that are hampering growth in the Hungarian marketplace.

Overview of Key Problems: In sum, the problems adversely affecting the copyright industries in Hungary are

- Prosecutorial delays impinging IPR cases;
- Imposition of low fines and generally weak sentences, for the cases that do make it to the courts;
- Failure to provide TRIPS compatible enforcement, including the issuance of deterrent penalties (see above), and failure to provide civil *ex parte* remedies in practice; and
- Weak border enforcement.

Actions which the Government of Hungary Should Take in 2005: Overall, Hungary needs to improve its enforcement of IPR. In order to do that, at a minimum, the Hungarian government should:

- Develop procedural systems to overcome judicial delays, including streamlining legal investigations;
- Make clear to the judiciary (including police and prosecutors) that IPR cases are a priority:
- Impose stiffer penalties and sentences to deter copyright pirates;
- Improve the effectiveness of the border police, including *ex officio* actions to intercept pirate product imported into Hungary;
- Improve enforcement against Internet piracy (including compliance with the 2001 Act CVIII on Electronic Commerce and Information Society Services and the relevant provisions in the Criminal Code):
- Adopt optical media regulations to combat and control optical media production and distribution; and
- Develop, with the copyright industries, a joint IPR enforcement public awareness campaign, including instructions on the detrimental effects of Internet piracy and CD-R/DVD-R burning by/in educational institutions (schools, colleges, universities).

Copyright 2005 International Intellectual Property Alliance

2005 Special 301: Hungary

HUNGARY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	20	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	
Business Software											
Applications ²	56.0	42%	55.0	42%	32.8	45%	21.3	48%	33.3	51%	
Motion Pictures	20.0	35%	20.0	30%	18.0	30%	18.0	40%	18.0	40%	
Records & Music	11.5	38%	8.0	30%	6.0	30%	4.5	30%	3.0	20%	
Entertainment											
Software ³	21.5	59%	NA	NA	NA	NA	43.3	90%	9.6	86%	
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA	
TOTALS	113.0		87.0		60.8		91.1		67.9		

As a part of Hungary's accession into the EU in 2004, Hungary lost its eligibility in the U.S. trade preferences program known as the Generalized System of Preferences (GSP).⁴ Other agreements with the U.S., such as a U.S.-Hungary trade agreement, and a subsequent IPR agreement, which contain key national treaty obligations, remain in force.

COPYRIGHT PIRACY

Piracy persists at levels higher than expected for a legal regime as well developed as that in Hungary, in large measure due to weak border (material is smuggled from Russia and other neighboring countries), and ineffective criminal IPR enforcement.

Optical Media Piracy

Hungary is still a major destination for illegal copies of CDs, and especially, in the case of entertainment software, factory produced CD-Rs. The two major sources of CD-Rs sold in Hungary are Ukraine and Russia particularly, for entertainment software. The music industry does not report a CD-R import problem; their problem is the importation of pirated music CDs from Russia, and to a lesser degree, Ukraine, as well as from Serbia and Montenegro. All the industries report problems with locally mass-produced CD-R pirate materials—where most of the CD-R material originates; these materials predominate in Hungary because of the relatively low local prices of CD burners and blank CD-Rs. The burning of CDs is also done by private

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

² RSA's final 2003 figures represent the LLC.

BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Hungary, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$96 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁴ Hungary did participate in the Generalized System of Preferences (GSP) trade program until May 1, 2004, when it joined the European Union. During 2003, \$404.8 million worth of Hungarian goods entered the U.S. under the duty-free GSP code; in 2004 (through April), that figure was \$121.2 million.

users—especially students and small retail operations, but it is done in large measure by organized crime syndicates in the case of entertainment software and music products.

The sale of locally burned pirate DVD-Rs at flea markets, by street vendors, and in video retail shops, is an increasing concern. In Budapest's largest weekend flea market (Petöfi Hall), there are about ten stalls where customers can place orders for pirate product after consulting lists or inlay catalogs of available titles. Pirate DVD-Rs are increasingly found at other flea markets across Budapest (including, for example at the Jozsefvaros and Verseny-Utca markets). Although lessened from last year, the importation of pirate DVDs from Russia and Ukraine (sourced in Russia) is a persistent problem, involving mainly pre-release titles carried by individuals (in luggage) to supply street vendors in the Petöfi Hall market as well as other flea markets across the country.

A new distribution channel that is rapidly increasing consists of "second hand" record stores distributing high quality counterfeit CDs from Russia and Ukraine alongside legitimate recordings. The largest such distributor is the "Daily Price" franchise chain with 20-25 retail shops. The second hand shops use as their excuse, their "inability" to differentiate between legitimate and counterfeit product; the courts, alas, accept this reasoning, as two recent cases illustrate. In those cases involving high quality pirate products, the shop owners were exonerated because the court said they could not be expected to identify legal versus illegal product. In fact, these shops purposefully turn a blind eye; they have been uncooperative to concerns raised by MAHASZ, the local recoding industry organization. MAHASZ has tried to cooperate with these vendors and educate them with identification manuals but the shops disregard these materials. These shops are part of an intentional well-organized distribution network with shipments coming from Russia and Ukraine, delivered to warehouses (for example, the "Daily Price" main warehouse), and subsequently distributed to the outlet stores. The courts have not been effective in dealing with this form of blatant organized piracy. In fact, in the two cases noted above, the prosecutors did not file an appeal.

According to local industries, there are currently three optical disc plants (using SID codes), plus a fourth making CD-Rs in Hungary, with a total in the plants of 14 lines. There are no known dedicated DVD plants, but two of the lines in the existing plants are DVD lines. The total plant capacity is estimated to be as high as 49 million discs per year; manufacturing is done not only for the local Hungarian market but for other countries such as Serbia and Montenegro, Romania, etc. It is unclear how many of the plants are operational, or how many are engaged in illegal activity (undetectable unauthorized production or overproduction), although there are suspicions about one of the plants being engaged unauthorized activity. However, the existence of these plants, without a comprehensive licensing and inspection scheme or transparency about their operations, clearly calls for regulations on the manufacturing and distribution of optical discs. In order to properly regulate production, distribution, import and export of optical media, the Hungarian government is urged to set up plant monitoring procedures like others in the region, to regulate the facilities and equipment where optical discs are manufactured.

CD-R and DVD-R Piracy and Internet Piracy

CD-R and DVD-R piracy, noted above, is fueled in large measure by the Internet, which is providing an effective channel for the marketing and distribution of pirate discs.

DVD-R piracy via the Internet is a local problem, with material offered from Hungarian-based websites; dubbing (for released titles) and subtitling (for titles not yet released in local theaters) are done in Hungary or neighboring countries. There are also pay-per-download websites (estimated at 10,000 sites, but with 20 key FTP sites, with more than 1,000 downloads per day). The annual number of illegal pay-per-download movies is estimated to be 3.3 million per year. In November 2004, the local anti-piracy organization ASVA was able to assist the police in Miskolc in a series of raids against three groups that offered pre-release materials; the raid resulted in the seizure of eight FTP servers containing thousands of films, music, software and interactive games. One of the servers was located at the Miskolc University. The contents of the servers are undergoing forensics investigations; three individuals were arrested and are under criminal investigation and eventual prosecution. In another investigation in Sopron (Western Hungary) an individual was arrested and charged with offering thousands of copyrighted materials to over 2,000 customers (the police obtained customer lists) from his website. Downloading of infringing entertainment software products is also a serious concern to the video game industry.

The music industry reports that illegal sites service CD-R burning and other sites offer files for downloading and file-sharing. There are two types of downloading services: free services and emerging fee services. The fee is charged via mobile phones—by sending a SMS message—which gives a user a password to access the files for downloading. The file-sharing occurs on FTP (File Transfer Protocol) servers among a closed community of people accessible with a password via hyperlinks. These servers offer all types of illegal files, including music, films and computer programs, in particular games. The common practice on the FTP servers is to state that the server takes "no responsibility" for the content found on the server. Of course, that is not consistent with copyright law where the reproduction right is clear about liability. These servers are especially popular with teenagers who are unaware of the illegality of their activity. When notice is served that these activities are illegal, the illegal file-sharing moves to a new website on another server with notice sent to all registered users via newsletter or e-mail (MAHASZ is copied on these communications). One of the main priorities of the new anti-piracy organization PROART is to run a comprehensive awareness campaign on Internet piracy.

The Internet is also being used to market technical equipment for circumventing copyright protection technologies. The 1999 copyright 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, and to date has still not proven to be effective.

On the basis of a 2002 cooperation agreement with the local ISPs, the recording (MAHASZ, the recording industry's anti-piracy organization), audiovisual (ASVA), 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 (in 99% of the cases). In most cases notifying via e-mail is sufficient, although a few ISPs insist on receiving notification via fax. MAHASZ reports that, in 2004, it sent a total of 282 cease and desist notices to websites with illegal music files of which 212 websites were on local (Hungarian) serves, and 70 on foreign servers. Of these the notices resulted in, 204 of the 212 local servers and 65 of the 70 foreign servers, removing material from the Internet by the ISP. ASVA (the movie industry's anti-piracy organization) reports that in 2004, it sent a total of 81 cease and desist notices to ISPs and that all of these notices resulted in the removal of the material from the Internet by the ISP. The Hungarian police were also involved with the U.S. FBI in coordinated simultaneous raids in multiple countries in April 2004; these raids were

directed at individuals involved in the distribution of music and film materials via the Internet. In one action, the Hungarian police arrested two system administrators in a technical university dormitory for file-sharing activities.

Business Software Piracy

The predominant concerns for the business software industry are: (1) the absence of 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, which impede the progress and outcome of cases. Sanctions imposed by courts remain weak and thereby fail to act as a deterrent for pirates. Fines are very low (under US\$500) and prison sentences are regularly suspended or otherwise inadequate. Preliminary estimated trade losses due to business software piracy in Hungary were US\$50 million, with a 42% piracy rate.

Record and Music Piracy

The recording industry estimates the level of music piracy in Hungary in 2004 was 38% of the market. Trade losses to the music industry in 2004 were <u>US\$11.5 million</u>, the third year of increasing losses. This rise is due to a shrinking market for legitimate music combined with a growth of CD-R piracy, and the persistent problem of imports of high-quality CDs into the country. The estimated share of pre-manufactured CD and CD-R piracy is 70% and 30%, respectively. MAHASZ reports that, in 2004, the total number of seized material was 35,000 units, of which 24,000 were CD-Rs, 10,000 CDs and 1,000 cassettes. The police conducted 90% of these seizures; customs officials undertook the remaining 10% of seizures.

The largest seizure of 2004 took place in the north-eastern town of Kazincbarcika. After several "test purchases" by the music industry, two brothers were arrested on January 21, 2004. During a subsequent search, large quantities of CDs and DVDs were found by police and MAHASZ officials in cars owned by the detainees, as well as in their homes. Computers and CD-R burners used for pirating activities were also seized. The two brothers were taken into custody and a trial is pending. The raid was a direct result of increased cooperation between MAHASZ and Hungarian police authorities.

Although there was some discussion in 2004 to combine MAHASZ (the recording industry's anti-piracy association) and ASVA (the motion picture industry's anti-piracy organization), the two organizations were not joined, and remain separate entities. However, record producers and the collecting societies of film creators, performers, and authors established a joint anti-piracy organization in 2004. The new organization, PROART is operational (as of February 2005), with four employees. PROART's first step will be to establish cooperation agreements with Customs, Police and the General Prosecutor's Office.

Audiovisual Piracy

In addition to the optical disc and Internet piracy problems already described above, the motion picture industry reports local television and cable piracy. This consists of stations broadcasting or retransmitting films that they have no rights to or, in some cases, using pirate

videocassettes for broadcast (especially by small cable providers in small villages, and often owned by the local authorities). In addition, there is a high level of back-to-back copying in small rental/retail shops. They tend to offer sophisticated counterfeit products, and maintain small amounts of stock on site to make identification and collection of evidence difficult. The motion picture industry reports estimated losses in 2004 due to audiovisual piracy at <u>US\$20</u> million.

Entertainment Software Piracy

The entertainment software industry reports a strong legitimate market for its product in the country's large stores, as well as in music and software stores. The availability of pirated entertainment software products on optical disc appears to have declined from weekend market venues, as well as from smaller retail shops in particular market districts. However, piracy of cartridge-based video game products appears to have grown worse in the last year in the market districts, as well as at informal markets. When an "informal" retail outlet is closed down, it simply re-opens in another location. Pirated products, however, remain readily available at Petofi Stadium, although they are not sold openly. It is believed that organized criminal syndicates control the supply and distribution of material at the stadium (not unlike the problems encountered at Poland's Warsaw Stadium). At the Petöfi 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. ESA estimates that the value of pirated videogame product in the Hungarian marketplace was US\$21.5 million in 2004, with an estimated piracy level of 59%.

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 2004.

COPYRIGHT ENFORCEMENT

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 on raids and seizures. In 2004, several important raids aimed at music and business software piracy were undertaken. For example, in April 2004 the Hungarian police, in cooperation with the BSA, took action in Hungary along with actions across Europe as part of Operation Fastlink. The operation was aimed at closing a number of Internet piracy syndicates. The operation was hailed as the largest multi-national enforcement action ever undertaken against Internet piracy rings. In another case, the police raided a pirate marketing illegal software (of BSA-member product), and confiscated a 120 gigabyte hard disc, and 174 CDs and DVDs containing 1.5 terabytes of copyrighted works. As a general rule, police take action upon

request by the rightholders, but the police have also have increased the number of *ex officio* actions in copyright cases as authorized in Article 6 of the Criminal Procedure Law (Basic Principles of Criminal Procedure).

BSA reports that in 2004, there were 80 *ex officio* cases handled by the police, although all were directed against small targets. Police cooperation in investigations of BSA cases remained strong in 2004. The entertainment software industry (ESA) reports that some of its members also had good levels of cooperation with the police, and with customs authorities. Several cases initiated in 2004 were settled successfully. The entertainment software industry is hopeful this level of activity will continue. ASVA, the anti-piracy program affiliated with MPA, continues to receive good cooperation from the police but frustration with enforcement officials due to prosecutorial indifference and procedural problems moving cases; these problems have diminished police morale and their willingness to continue cooperating in some audiovisual cases.

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.

CRIMINAL CORVEIGHT ENCORCEMENT S	STATISTICS IN 2004							
CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 HUNGARY								
Actions	BUSINESS APPLICATIONS SOFTWARE	Sound Recordings						
Number of Raids Conducted	7	198						
LED BY POLICE	7	185						
LED BY CUSTOMS	0	13						
NUMBER OF CASES COMMENCED	92	188						
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	20	160						
ACQUITTALS AND DISMISSALS	3	45						
Number of Cases Pending	72	143						
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	1	3						
Suspended Prison Terms	8	1						
Maximum 6 months	4							
OVER 6 MONTHS	4							
OVER 1 YEAR	0							
TOTAL SUSPENDED PRISON TERMS		4 months						
Prison Terms Served (not suspended)		2						
MAXIMUM 6 MONTHS	0	1						
OVER 6 MONTHS	0	1						
OVER 1 YEAR	2	0						
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	2	10						
NUMBER OF CASES RESULTING IN CRIMINAL FINES	_	100						
UP TO \$1,000	14	100						
\$1,000 TO \$5,000	0	0						
Over \$5,000	0	0						
TOTAL AMOUNT OF FINES LEVIED	HUF700,000	US\$30,000						

Prosecutorial and Judicial Delays; No Deterrent Penalties

Unfortunately even given the successes with raids and seizures, prosecutorial delays and weak sentences (for the few criminal cases that do reach judgment), remain a serious problem.

BSA reports 18 criminal law suits against end users in 2004 (compared with 33 in 2003). 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 2004, even though the case was initiated in 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. BSA noted some progress in 2004. In April 2004, an end-user pirate received a prison sentence for copyright infringement although other crimes were also involved in the case. More severe sentences would certainly demonstrate that the Hungarian courts are serious about imposing deterrent sanctions.

Despite generally good cooperation from the police, the audiovisual industry and the music industry report that Hungarian prosecutors and judges remain reluctant to treat copyright infringements as serious crimes. Securing adequate prosecution and deterrent sentencing from the courts is still difficult. The motion picture industry reports that despite 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. AVSA has turned to alternative enforcement schemes including the use of tax authorities, consumer protection bodies, and local licensing offices. However, criminal penalties must be effectively utilized if the overall piracy levels are to improve.

Border Enforcement

Even though Hungary adopted TRIPS compliant customs laws (in 1997; Decree No. 128/1997), enforcement remains a problem. Weak border enforcement is a longstanding concern, especially because of Hungary's proximity to Ukraine and Russia producers and exports of optical disc materials. As part of EU accession, Hungary in 2004 established an Intellectual Property Enforcement Department (IPED) within Hungarian Customs. It is hoped that this may result in improvements in the near future. The IPED consists of one dedicated IP customs officer in each of the six customs regions. The first impression (although it may be too early to judge), is that IPED is willing to cooperate with the copyright industries; it has also expressed a need for additional training on IP matters. ASVA reports that IPED agreed to mobilize teams to conduct investigations and raids at the border and inside Hungary in cooperation with ASVA, based on its customs authority (including the right to inspect tax authority-related documents). The new anti-piracy organization PROART had its first meeting with IPED in December 2004 and is hoping for good cooperation with customs authorities as well.

In the past, customs authorities have had difficulty distinguishing between legal and illegal products; improvements must be made to the quality and efficiency of Hungarian border controls and checks. Since 1997, the laws have been in place to properly regulate importation

of IP materials without proper licenses. To avoid importation of illegal products, a sole distributor must make an application to the National Customs Authority for a license. Unfortunately, these laws have had no significant impact in stopping the illegal importation of IP related products. In short, 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 94(5)-(7)].

BSA did not undertake any new civil *ex parte* raids in 2004. BSA did, however, have five end user cases ongoing in the civil courts, and it filed twenty end user civil claims in 2004. BSA also reports 20 end user criminal judgments, and settlements in 10 cases with end users during 2004.

LEGAL REFORM AND RELATED ISSUES

Copyright Law

In 1999, and again in 2003, Hungary amended its copyright laws to be compliant with international norms and for accession to the European Union (the Copyright Directive (2001/29/EC)). Amendments in Act CII of 2003 updated almost all of the Hungarian IP regulations, which entered into force on May 1, 2004, on the date Hungary became a member of the EU.

However, despite these changes and progress made in earlier amendments to the copyright act, certain problems remain. The Hungarian government should correct the following deficiencies in its copyright legal regime:

• The December 2003 amendments to adopt civil *ex parte* search procedures are still being tested in 2004. The provisions have not yet proven to be reliable and effective; IIPA recommends as a result that the provisions need to be further amended in order for Hungary to meet its TRIPS obligations (Article 50). The Copyright Act only makes verification easier. It states that if the moving party establishes sufficient evidence, the court may, at this party's request, compel the other party to present documents or other material evidence in his/her possession, as well as order an inspection. In reality, this means there is no effective *ex parte* procedure, because the procedure described above

is only utilized as part of a lawsuit. These notification requirements put the defendant on notice, increasing the risk of the removal or destruction of evidence.

- The current cumbersome and unnecessary requirements for proving ownership of rights is an imposition on rightsholders and needs to be revised. At present, the requirements enable 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 four 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 2005 SPECIAL 301 REPORT ISRAEL

EXECUTIVE SUMMARY

Special 301 Recommendation: Israel should remain on the Watch List.

Overview of Key Problems: There were several developments in 2004 warranting Israel's retention on the Watch List. An Antitrust court case earlier in the year confirmed that U.S. sound recordings must be protected under "national treatment" principles pursuant to the U.S.-Israel bilateral agreement and that they are also protectable in case of simultaneous publication. Officials at the Ministry of Justice subsequently gave oral assurances that Israel will not seek to change this via legislative amendments, and we understand that such a commitment was conveyed in writing to USTR. In addition, the Supreme Court of Israel has affirmed a lower court decision concluding that works retransmitted by Israeli TV cable companies are subject to copyright protection, meaning that Israeli cable operators must obtain licenses in advance for such retransmissions. In addition, several criminal court decisions in Israel in 2004 indicate a more serious attitude among judges toward copyright piracy. Estimated losses to the U.S. copyright industries in 2004 due to copyright piracy in Israel were US\$113.4 million.

Notwithstanding these positive developments, disturbing legislative initiatives have evolved. Soon after the Supreme Court's decision on cable retransmission, the Israeli government introduced a draft law to the Knesset, bypassing the Supreme Court's decision and suggesting to demote the cable and satellite retransmission right to a mere right for remuneration. The exemption, which is proposed for an interim period (of three years) is currently pending at the Knesset's Economic Committee.

Moreover, CD piracy, especially the "burning" of content onto CD-Rs, DVD-Rs, etc., continued to cause major losses to the copyright industries. Criminal cases brought in 2004 did not have much of a deterrent effect on this activity. Further, while the decision regarding cable retransmissions was positive as to the legal rule, the ruling did not resolve the basic issue, namely, that right holders in content should enjoy a broad right in the retransmission of their programming. The court ruling neither did away with the current practice of affording a mere remuneration right/compulsory license as to retransmissions, nor dealt with the complicated implementation, including uncertainty as to the royalty rate and the cumbersome court procedure to obtain payment.

In addition, the Israeli government is considering amendments to the copyright law that would weaken protection in the crucial area of digital rights. Among the proposed changes, rights of communication to the public/broadcast would be relegated to mere rights of remuneration (there are both copyright law amendments and a recent *Bezeq* -telecommunications law amendment), and new broad exceptions would be introduced which would unduly harm right holders' ability to adequately protect their works in the digital environment. In addition, a potentially highly damaging amendment was proposed in the fall of 2004, which would broaden the scope of the private copying (fair use) exemption and create a

new private copy levy for digital carriers (CD-R, CD-RW, etc.). That draft does not expressly exclude peer-to-peer file exchange from the fair use exemption, nor does it offer legal protection of technical protection measures against digital copying.

The current law, as amended in 2002, still fails to criminalize the unauthorized use of business software in a business setting — so-called "corporate end-user piracy of business software," in violation of TRIPS. The law also fails to meet the requirements of the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), including in the areas of temporary copy protection (which is not express in the current law), providing treaties-compatible exclusive rights, including the communication to the public right which includes the "making available" right, and protections against unlawful "circumvention" (act and trafficking in devices etc.) of technological protection measures used by right holders to protect their works. For such a technologically advanced country — one that supplies a good deal of the TPM technology to the world — it is unfathomable to us that Israel would choose to fall so far behind its neighbors, Europe, and the United States in providing an adequate legal infrastructure for electronic commerce. ¹

Actions to be Taken in 2005:

- Maintain full copyright protection to the retransmission of cable and satellite programs.
- Refrain from consideration/passage of draft legislation providing a digital private copying exemption/levy.
- 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 (noting slightly higher
 penalties in 2004).
- Employ all laws to fight piracy, e.g., the Finance Ministry should conduct selected inspections of suspect businesses for unpaid taxes/unreported revenues, and initiate criminal cases against tax evaders.
- Reconsider copyright amendment process to take into account rights in the digital age, including full implementation of the WCT and WPPT, and make other necessary changes to ensure TRIPS compliance, e.g., criminalize end-user piracy of business software.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing.² Please also see previous years' reports.³

¹ IIPA notes that in May 2004 The "Committee for examination of legal problems involved in electronic trade" working under the Ministry of Justice published the first part of its recommendations with regard to, among other things, service provider liability for infringing content created by third parties including infringement of copyright on the Internet (Chapter 4, Section 3), civil liability of ISPs and conditions for "safe harbor" immunity (Chapter 4, Section 4). The Committee recommended some ISP limitations on liability based on the U.S. "DMCA" and the EU "E-Commerce Directive 2000/31" models. It is not clear at the present time what the next steps are.

² http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf.

³ http://www.iipa.com/countryreports.html.

ISRAEL

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2000-2004⁴

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	30.0	40%	30.0	50%	30.0	50%	15.0	50%	15.0	50%
Records & Music	34.0	40%	40.0	63%	34.0	50%	40.0	25%	45.0	30%
Business Software ⁵	36.0	37%	35.0	35%	29.9	37%	36.9	40%	51.3	41%
Entertainment Software ⁶	12.4	88%	NA	75%	17.2	68%	66.5	89%	52.0	NA
Books	1.0	NA								
TOTALS	113.4		106.0		112.1		159.4		164.3	

COPYRIGHT LAW AND RELATED ISSUES

Copyright in Israel is governed under 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). The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings). The various laws have been amended a number of times over the years.

The Knesset passed a Bill for the Amendment of the Copyright Ordinance (No. 8), 5762-2002 (effective November 3, 2002), strengthening criminal liability in a number of ways, 9 improving presumptions regarding copyright ownership that apply to both civil and criminal proceedings, 10 imposing criminal liability on the officer of a company in which an offense is committed (unless s/he proves s/he did everything possible to prevent the offence from being

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Israel, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$69 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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 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).

⁸ 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.

⁹ For example, the law increases the maximum prison sentences to five years for certain offenses ("making of infringing copies for commercial purposes" or "import of infringing copies for commercial purposes") and up to three years for other offenses ("the sale, rental or distribution of infringing copies not as a business but in a commercial volume" and the "holding an infringing copy in order to trade therein")

While it appears that the new presumption is very strong (in that the burden is on defendant to show proof to the contrary regarding subsistence of copyright ownership), it remained unclear in early 2005 how this provision will be interpreted in practice.

committed), and doubling fines for copyright offenses committed by companies. Nonetheless, the law and enforcement system in Israel remain largely TRIPS-deficient; among the legal issues are the unavailability in practice of adequate civil damages, and the inadequacy of the statutory damages system as a substitute (since the Supreme Court has ruled that statutory damages are to be ascertained on a per-title basis rather than a per-copy basis, and unlike other jurisdictions, the maximum per-title damage amount is exceedingly low).

National Treatment for U.S. Sound Recordings in Israel Confirmed

On April 30, 2004, the Restraints-of-Trade Tribunal in Jerusalem decided in favor of IFPI-Israel and confirmed copyright protection for U.S. and other foreign phonograms, as well as the application of the 30-day simultaneous publication principle. The judge specifically held that the U.S.-Israel Bilateral obligates Israel to provide national treatment to U.S. sound recordings. The Court stated: "we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel." The Israeli government has apparently accepted the decision and has confirmed to its U.S. counterparts that national treatment will be afforded to U.S. and foreign sound recordings. This is a highly positive development, and we commend the Israeli government for recognizing the correct ruling by Restraints-of-Trade Tribunal. This removes what had been a major concern of the US copyright industries, although we remain extremely concerned with other aspects of proposed copyright reform as outlined below.

2003 Copyright Law Amendments in Israel Would Weaken Protection

In 2003, the Ministry of Justice released a draft Copyright Law, 5764-2003, which was 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. In particular, the most fundamental problem is the draft does not deal at all with the use of technological protection measures through the prohibition of trafficking in circumventing devices. ¹² Instead, the draft

With a view to clarifying the benefits in Israel of authors and proprietors in the United States of America since May 15, 1948, my Government has instructed me to state its assurances that under the provisions of the Israeli law 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*, and that citizens of the United States are entitled to obtain copyright for their works in Israel on substantially the same basis as the citizens of Israel, including rights similar to those provided by section 1(e) of the aforesaid title 17. [emphasis added]

In addition to the above, the U.S.-Israel Free Trade Agreement from 1985 addresses intellectual property and reaffirms the parties' obligations under bilateral and multilateral agreements; it explicitly provides that "nationals and companies of each Party shall continue to be accorded national and MFN treatment ... with respect to obtaining and enforcing copyrights."

12 In addition, the draft does not address the liability of intermediaries, i.e., ISPs, in connection with the transmission

¹¹ The Court quoted the Israeli Ambassador in Washington's letter which was deposited with the Secretary of State in May 1950 as part of an exchange of letters, as follows:

¹² In addition, the draft does not address the liability of intermediaries, i.e., ISPs, in connection with the transmission of infringing materials. ¹² IIPA notes that in May 2004 The "Committee for examination of legal problems involved in electronic trade" working under the Ministry of Justice published the first part of its recommendations with regard to,

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. We urge leaders in Israel to consider how vitally important it is for the Ministry of Justice to prepare 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. The following are some main points regarding the 2003 draft:

- Broadcasting or Public Performance Compulsory Remuneration the Need for Equal Treatment for U.S. Sound Recordings: Section 20 of the draft would establish 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. 13 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. 14 The 1950 Bilateral has never been superseded or amended, so that the operable language is still in force. The Israeli government recently confirmed that U.S. sound recordings will continue to be protected in Israel on the basis of national treatment. Any change to degrade the rights in phonograms to neighboring rights, effectively resulting in the abolition of any right in broadcasting and public performance for U.S. right holders, would be inconsistent with that recent communication. Recently, officials at the Ministry of Justice have indicated that they are considering suspending this initiative for the time being. If this proposal is indeed suspended (and subsequently cancelled), this will be a positive step toward maintaining adequate rights for phonogram producers.
- 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. Mandatory collective management of this sort disregards the basic principle

among other things, service provider liability for infringing content created by third parties including infringement of copyright on the Internet (Chapter 4, Section 3), civil liability of ISPs and conditions for "safe harbor" immunity (Chapter 4, Section 4). The Committee recommended some ISP limitations on liability based on the U.S. "DMCA" and the EU "E-Commerce Directive 2000/31" models. It is not clear at the present time what the next steps are.

13 The Israelis' argument is undoubtedly that, applying Section 9 of the draft law, they would be able to deny sound

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¹³ 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."

¹⁴ 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."

¹⁵ 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.

¹⁶ See Section 20(a) of the Draft.

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. Recently, officials at the Ministry of Justice have indicated that they are also considering suspending the initiative for a joint collecting scheme for the time being. If this proposal is indeed suspended (and subsequently cancelled), this will be a positive step.

- 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 most likely leaves Israel's law in violation of TRIPS.¹⁷
- 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, and its application to U.S. works (including sound recordings) would violate its bilateral obligations as well. 18
- 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.

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¹⁷ 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.

¹⁸ The provisions on the qualification for copyright protection are not consistent with the obligations arising under Article 3.1(a) of the Berne Convention, to which Israel is a party. That Berne provision requires that protections of the Convention apply to "authors who are nationals of one of the countries of the Union, for their works, whether published or not." In other words, Israel must provide full national treatment for foreign copyright owners from Berne Union countries.

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." Clarification is sought as to whether Section 11(1) is intended to cover temporary copies. Either way, it would be preferable for the phrase "whether temporary or permanent" to be added to Section 11(1).

- Exceptions in General: In light of the long list of exceptions, it is essential that the law implement expressly the well established Berne "three-step test" (incorporated into TRIPS). Some of the exceptions listed in the draft appear to be very broad and are likely to damage the interests of copyright owners, especially in the digital environment. The exception for "incidental" copies needs further limitation.
- 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"). Section 18(A) would reverse the recent Supreme Court decision affirming the legitimate protection for the retransmission right under copyright. The compulsory license is also exceedingly broad; while the amendment justifies the need to solve cases where the identity of the rights owners cannot be verified prior to the retransmission, the amendment exempts any and all retransmissions, even where the rights owners are easily accessible and willing to license (e.g. through blanket licenses available through local collective societies). The amendments do not require that permitted retransmissions be unaltered and/or unabridged. The amendments also indicate that, in certain instances, the Minister could determine that reduced royalties or no royalties might be payable to copyright owners. The amendments arguably undercut the right of communication to the public, in a way that is not consistent with Berne's 11bis(1) and/or (2), and would impose an undue burden on right holders who would have to "fight" for equitable remuneration. The broad wording of Section 18(A) must be trimmed to exclude Internet and cellular phone transmissions, as well as broadcasts from being subject to "secondary broadcast" without permission from the copyright owner. 19
- Overly Broad Exception as to Computer Programs: Section 29(A) creates an overly broad exception for the purpose of making backup copies of computer programs. It permits the "copying of a computer program for backup purposes, by a party that possesses an authorized copy of a computer program." This exception does not restrict the number of copies that can be made, however, nor does it limit the use of such copies. Experience demonstrates that pirates will take advantage of this lack of clarity to claim that illegal copies, offered on burnt CDs for resale, are permitted back-ups. 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). The provision allows

¹⁹ In addition, any proposed replacement of copyright in re-broadcasts with equitable remuneration should 1) exclude re-broadcasts of musical recordings and video-clips, i.e., leaving the present law in force in respect thereof; 2) confine such re-broadcasts subject to compulsory remuneration to the rare cases where the re-broadcaster is unable to ascertain and obtain authorization from the copyright owners for the re-broadcast; and 3) expressly exclude Internet and cellular phone re-transmissions.

²⁰ As an example of a provision that satisfies international discipline, see Council Directive 91/250/EEC of 14 May

²⁰ 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 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:

reproductions or 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. There is scope for confusion and
 harm if overly broad drafting extends the temporary copy exception to software, inconsistent
 with policy in other jurisdictions.
- 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. ²¹ This exception could lead to the unlimited copying of works, and goes far beyond the
- (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.
- ²¹ 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.

permissible bounds of a typical "distance-learning" exception under international standards. ²²

- Absolute Exemption for Rental by Public Libraries and Libraries of Educational Institutions is Overly Broad: Section 16(2) provides an absolute exemption to rentals covering even rentals for commercial purposes (e.g. by a library held by a private educational institution). Such institutions should be exempted only if they meet the same requirements for exemption as for other entities²³ (i.e., non-commercial rental only).
- 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. ²⁴ The international trend is to provide at least seventy years for both audiovisual works and sound recordings, and the United States provides protection of 95 years for works of corporate authorship. The government of Israel should not do the creators of audiovisual works and sound recordings the 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 overseas source countries such as Russia, the Ukraine, or the Palestinian territories. 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. In any event, the parallel importation clause is overly broad and goes beyond common "parallel importation" clauses; It legitimizes importation of copyright works produced by the copyright owner abroad, even if that entity is not the copyright owner in Israel, thereby disregarding any territorial division that might exist in ownership of copyright, counter to the exclusive right provided by the Berne Convention and TRIPS. It further legitimizes imported copies on the basis of being in the public domain abroad, even if they are subject to copyright protection in Israel.
- 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

International Intellectual Property Alliance

²² 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.

²³ The exemption for non-commercial rental exists only where it is for non-commercial purposes – Section 16(2) of the Draft.

²⁴ 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.

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. Section 66(a) eliminates the current minimum statutory damages award that can be obtained. The potential for little or even no recovery where infringement has been proven seriously weakens the deterrent impact of statutory damages and is against the principles set forth in 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." In addition, Section 70(c) curtails the right of copyright owners for conversion against honest third parties (not end-consumer) who are in possession of infringing copies. This limitation is inconsistent with the TRIPS obligations relating to the right for seizure, removal and destruction of infringing copies whenever they are not in the possession of an end-consumer.

- Israel Should Confirm that Infringements Are Covered Even When Not for Profit: The references to "business aim," "commercial scale," and "commercial matter" are problematic in the digital environment. This is particularly relevant where an infringement is severely prejudicial to copyright owners, for example, uploading pre-release films on to the Internet. Often such actions are undertaken with no "business aim" but cause enormous harm to right holders. Such infringements must be covered notwithstanding that they are not done for a profit motive.
- **Definitions**: In the interest of legal certainty, IIPA recommends more specifically defining "film producer," and defining "creators" (in particular in the section on moral rights). IIPA recommends using the same definition ascribed to "authors" in the British law.

Some Potentially Troubling Developments in 2004

Proposed Private Copy Levy: In 2004, discussion emerged of a possible private copy levy for copies of musical works. On October 19, 2004, the Ministry of Justice released proposed amendments, "Copyright law (private copying), 5765-2004" ("the Private Copying Bill"), which would introduce a private copy levy for music. ²⁶ The current Copyright Ordinance of Israel has a private copying exemption applying to analog reproduction for private use and foresees levies for audio-cassettes in Sections 3C-3F. There is no need whatsoever to extend this exemption into the digital domain. IIPA considers this proposal to be an overly broad exemption to the reproduction right which seriously threatens the development of a legitimate on-line market for

²⁵ The current draft defines the "producer" of an audiovisual work as follows: "whoever is responsible for the performance of the actions needed for the creation of the audiovisual work of art or the record, as may be the case." We recommend revising this proposed definition and more specifically defining producer to promote legal certainty. We suggest that the definition states that the producer is the "physical person or legal entity that takes the initiative, organization and responsibility for the production and publication of the work."

²⁶ This bill reportedly provides that "private copying of music from a disc" does not infringe upon copyright so long as

This bill reportedly provides that "private copying of music from a disc" does not infringe upon copyright so long as copyright owners, artists-performers and producers are remunerated by a levy (imposed at the manufacturing and import level). The levy would be collected through and governed by the Excise Law mechanisms. The Ministry would determine (based on consultations with a specially appointed committee) which copying devices would be subject to the levy (CD-RW, DAT, and the like). The Ministry would determine the levy's rate, which is not to exceed 5% of the consumer's price of the device.

recorded music in Israel. Broadband connectivity in Israel is wide-spread and increasing. U.S. copyright owners, including the recording industry, will need strong digital rights in order to enjoy a legal context within which legitimate on-line delivery can reach its full potential. IIPA urges the Israeli government to immediately withdraw this potentially very damaging private copying bill.

Cable/Satellite Retransmission Licensing: As noted, the 2003 amendments proposed an article for an interim exemption (for three years), exempting secondary broadcasting from being an infringement if "appropriate royalties" were paid by the secondary broadcaster. There is language in draft Communications Act amendments that suggests that the obligation to pay royalties for both cable and satellite retransmissions could be suspended by the Minister for a three-year period. ²⁷ It is unclear how these amendments would interact with the proposed Copyright Act amendments.

COPYRIGHT PIRACY IN ISRAEL

Copyright piracy continues to hurt copyright owners trying to do legitimate business in Israel. The trend in 2004 is toward CD-R and DVD-R burning of films, music, software, and other copyrighted content downloaded from the Internet and importation of software and multimedia especially from countries like Ukraine. This system of burning has led to an increase in the number of pirate CD-R and DVD-R labs, which poses a major problem, as these labs are difficult to locate and can be set up in small rooms in domestic premises. These activities, which fill stores in major marketplaces including in Tel Aviv, Haifa, and Herzlia, enegatively impact both the home entertainment market and the theatrical market for the motion picture industry, and disturb new and popular releases for other industries. A number of "parallel markets" exist in areas with large Russian populations, selling all forms of illegally copied copyrighted content partly due to a lack of Russian language products.

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. Flea markets also carry extensive pirated product. Manufactured and imported (from the Far East, Russia, and Ukraine) optical discs (CDs, CD-ROMs, VCDs, DVDs) once again made up a decreasing percentage of pirate music and audiovisual works in 2004. The music industry reports that the overwhelming majority of pirated optical discs for sale in the Israeli market are locally burned CD-Rs. Illegal public screenings continue to be a problem in hotels, cafes and pubs; this problem has grown in 2004 because of increasing numbers of pirate DVDs and new sophisticated performance equipment. Parallel imports of Zone 1 DVDs (DVDs programmed for

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²⁷ The Explanatory Memorandum to these amendments states: "It is made clear that the proposed arrangement is subject to the provisions of Section 6(xxi) (b) and 6(xlix) of the Law that determines an exemption from the obligation to pay royalties in the matter of a secondary broadcast of specific broadcasts in Israel."

²⁸ The popularity of disc burning is increasing in part because of the availability of subtitles on the Internet that can be

The popularity of disc burning is increasing in part because of the availability of subtitles on the Internet that can be overlaid onto downloaded films. Internet piracy of all varieties is increasing in Israel. Israel boasted approximately 2.5 million Internet users aged 13 and above in November 2003, See Globes, at http://www.globes.co.il. Dozens of websites are taking advantage of this by listing stores that will "custom burn" content onto CD-Rs or DVD-Rs.

29 The popularity of CD-R piracy in the motion picture industry increased in 2003 because of the availability of

²⁹ 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.

³⁰ Nearly 90% of the pirate music market is CD-R, with the other 10% of pirate CDs being imported into Israel from

Russia, Ukraine and Thailand (at present most illegal products appear to originate from Ukraine, as recent customs seizures in November and December 2004 show over 30,000 counterfeit CD-Rs/DV-Rs) 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.

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 for U.S. publishers in Israel, consists of photocopying and reproduction of textbooks by various educational institutions, including universities, without authorization of the right holders.³¹ In addition, pirated and counterfeit cartridge-based games continue to be imported from Asia and Ukraine, while pirated games on optical disc media are imported from Ukraine and Russia. Downloading infringing entertainment software from the Internet has also increased.

COPYRIGHT ENFORCEMENT IN ISRAEL

Copyright enforcement efforts by the Israeli government were not overwhelming in 2004. 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). The Special IPR Police Units remain under-staffed and under-funded. In addition, a reorganization of the police departments is under way. It is planned to integrate the IPR Unit with the National Unit for Fraud Investigation. This merger is expected to negatively affect the availability of the already understaffed unit for IPR cases. This lack of initiative on the part of Israeli enforcement agencies means the copyright industries must resort to "self-help." The recording industry group, IFPI-Israel, and the motion picture industry's group, ALIS, focused largely on underground CD-R and DVD-R labs again in 2004, with some assistance from the Special IPR Police, and achieved some good results.

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³¹ Teaching staff in various institutions have been known to produce "study files" that include illegally copied materials. In addition, pirate reprints have been distributed in retail bookstores selling for full retail price, thereby making them difficult for consumers and enforcement officers to identify.

³² URA pater with interest that BIAA and in the piece of the piece o

³² 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. The Business Software Alliance notes that steps are being taken to create the legal frame work that will eventually bring cases to tackle Internet piracy.

piracy.

33 There is reportedly a commander and two to three officers within each unit. A unit covers an entire region (e.g., South, North, Central, and Tel Aviv areas).

³⁴ Aggregate statistics indicate that motion picture industry's local anti-piracy organization, ALIS, raided 16 CD-R "burning" labs, seizing 49,216 pirate CD-Rs, 1,182 pirate DVD-Rs 219 CD-R burners and 14 DVD-R burners in the first half of 2004. For example:

On March 16, 2004, IFPI-Israel exposed a CD burning lab, seizing 5 tower burners containing 7 burners each, 4 color printers, a shrinkwrap machine, 50 VCRs and a large quantity of raw material. Two suspects were arrested and detained.

[•] In April 2004 customs officials at Ben Gurion International Airport seized 6,000 multimedia CD-R/DV-R coming from Ukraine burnt with various illegal products including business software.

On October 18, 2004, ALIS conducted a raid in Ramat-Gan City, in cooperation with the Special IP Police of Tel-Aviv, against a pirate DVD-R lab, seizing 25 DVD-R burners, 1 photocopier, 1 scanner, 1 paper cutter, 5,270 pirate DVD-Rs (all U.S. motion pictures), approx. 150,000 pirate inlays and 1,685 blank DVD-Rs. The owner of the lab, Yaron Ha-Cohen (a recidivist), was arrested and taken into custody. Also present were many multimedia games, approximately 1,518, and various business software products.

On December 28, 2004, ALIS in cooperation with the local IFPI group and the southern IP Special Police Unit Israel raided a pirate CD-R "burning" lab in Ashkelon City, seizing 12 CD-R burners and hundreds of pirate CD-Rs.

One of the main problems affecting enforcement in Israel is the incapacity of the State Attorneys and police prosecutors to deal with the number of piracy cases presented to them. The recording industry reports having carried out approximately 500 raids in 2004, most of which in conjunction with the IPR Unit. It is estimated that a mere 15% of those raids were followed by prosecutorial follow-up and charges filed. Such is the bottleneck at prosecutorial level that magistrates increasingly revert to pleading deals that do not reflect the gravity of the offense.

Israel suffers from exceedingly high recidivism rates, as head pirates usually replace the vendor/producer caught in a previous raid with another who does not have a criminal record. It is telling that, while the Israeli Government is well aware of this phenomenon, they do little or nothing to change the system, and never go after the piracy kingpins. One positive development in 2004, continuing a trend from 2003 and before, was the criminal courts' willingness to take on piracy cases, and the prosecutors' willingness to appeal lenient judgments. Unfortunately, most criminal cases brought in Israel are still against small-time pirates, and imprisonment is an exception as a penalty for copyright piracy, not 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). One exception to this rule involved the case against a recidivist, who was ordered detained until completion of trial. The entertainment software industry reports that the Customs authorities have been particularly helpful.

On July 11-12, 2004, IFPI's Israel group raided a home in the city of Givatayim (close to Tel-Aviv), a "burning" lab
and a printing house, seizing 6 CD-R tower burners containing 7 burners each, thousands of CD inlay cards,
approximately 7,000 pirate CD-Rs, 5,000 blank CD-Rs and raw materials.

For example, on August 4, ALIS seized 1,362 pirate discs, 13 CD-R burners, and hundreds of blank discs and inlays in a raid on a lab in Jerusalem. Two suspects were detained by the Police and were held under "house arrest" from August 12 until they were sentenced. The suspects were sentenced to four and a half months of community service, 4 months of suspended imprisonment and a fine of NIS 70,000, or 8 months of actual imprisonment. In previous reports, IIPA has noted an increasing number of cases resulting in actual imprisonment (one in 2003 resulted in a sentence of 20 months imprisonment). In at least five known cases in 2001-2002, jail time was actually served. 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.

³⁶ In January 2003, an appeals court overturned a particularly light sentence imposed on a repeat offender and imposed a fine of US\$51,000 (up from 6 months of community service and a US\$12,000 fine). The defendant, originally sentenced in early 2001, had been convicted in 14 separate cases of distributing pirate optical discs. Upon ALIS' urging, the prosecutor appealed the sentence and requested a more deterrent fine and/or imprisonment. The revised sentence also included a suspended one-year term of imprisonment contingent upon payment of the fine.

³⁷ An ESA member company reports that in one case, the owner of a warehouse where infringing material was found was merely fined \$450.00 and had a three month suspended (conditional) sentence.

In mid-2004, IFPI-Israel, in conjunction with the Police, ran a raid against a recidivist, Denis Ben Gregory Neiman, seizing over 1,000 pirate music, movie discs, and multimedia games. On July 14, 2004, the Haifa District Court reversed a lower court decision and ordered the respondent, Denis Ben Gregory Neiman, to be held in jail until the conclusion of criminal infringement proceedings. The defendant had claimed that he should be held on house arrest, and the Haifa Magistrates Court agreed (Order 3019/04), but was overruled by the District Court, noting:

These offences attributed to the respondent are not foreseen as precarious offences, whether as a result of a broad social phenomenon of copying programs and CDs by means of home computer systems or whether as a result of other social reasons. However this image does not rightly reflect the damage such offenders cause the public. CD counterfeiters and distributors harm firstly and primarily the artists who invest their energy and talent in their artistic work, the performers and distributors, who do not enjoy the fruits of their labor. I do not see a difference between the theft of an artistic piece and its distribution and any other Intellectual Property theft from its owner. As a bank robbery is regarded as a severe crime or auto theft from car agencies, such we need to see Intellectual Property theft and its trade. It had been said: 'The phenomenon of IP offences reached a wide dimension that results in severe damage to local and international trade, obliging enforcement authorities and the justice system to make sure an effective deterrent is implemented against such offences.' This type of delinquency lying in the case before me is not foreseen in the

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; 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. Some measures were conducted in 2004 but on a smaller scale than previously, under the umbrella of the "Roof Organization for the Protection of Copyright" backed by the United Commerce Chamber.

worldview as a property offence in the conventional meaning of the word. However, one must see it as such. The intrusion into a digital database, its duplication and distribution is not, economically speaking, different from any other intrusion into a private domain stealing its content. The economic damage caused as a result of such offences is that the life work of many is stolen and sold to the mass public. The society does not always severely address these types of offences; however, it is my opinion that it is time to change the policy and the legal assumption as far as this type of offences are concerned. The State of Israel v. Denis Ben Gregory Neiman (4587/04).

³⁹ In 2004, Customs agents seized 6,500 pirated video games (being shipped from Ukraine) at the airport.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 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 Western Europe. Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000, amendments implementing the EU Copyright Directive in 2003 (increasing administrative sanctions) and the adoption of the Urbani Decree in 2004 (dealing with the online environment) have led to improvements in enforcement in some copyright sectors; but incorporating meaningful deterrence into the Italian enforcement system remains the key issue for the copyright industries. The nature of piracy has changed 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, other forms of piracy, such as commercial photocopying of books and journals, have stayed the same, with devastating effects on the publishing industry. Additionally, while some industries report some improvement in the civil courts, judges are sometimes still reluctant to take on software end-user piracy cases. With the new Anti-Piracy Law and with 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 piracy rates. It is also essential that Italy adopts effective legislation/decrees dealing with online piracy and undertakes aggressive enforcement in that environment.

The software industry fought, unsuccessfully, for a full exemption to an SIAE "stickering" requirement, which is extremely burdensome for this type of product. Rather than resolving the issue, however, the Italian government has compounded the problem with its adoption of provisions in the Urbani Decree that impose a "virtual stickering" obligation, which would pose particular problems for business and entertainment software. 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

- Ensure that a imminent (or just begun) nationwide anti-piracy campaign which focuses on piracy by organized criminal syndicates, covers all types of piracy, including Internet piracy and unauthorized commercial photocopying, and is effectively carried forward;
- Continue to implement the Anti-Piracy Law and other recent enforcement improvements 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;

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¹ For more details on Italy's Special 301 history, see IIPA's "History" appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf.

- Eliminate the stickering requirement on software;
- Correct deficiencies in implementing amendments to the EU Copyright Directive and the E-Commerce Directive;
- Ensure that the amendments to the Urbani Decree are consistent with effective enforcement in the online environment.

ITALY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ²												
INDUSTRY	2004		2003		2002		2001		2000			
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level		
Motion Pictures	160.0	15%	140.0	20%	140.0	20%	140.0	20%	140.0	20%		
Records & Music	45.0	23%	42.0	22%	42.0	23%	40.0	23%	50.0	25%		
Business Software ³	567.0	47%	642.0	49%	363.4	47%	338.8	45%	327.0	46%		
Entertainment												
Software ⁴	NA	34%	168.5	47%	215.4	55%	NA	74%	NA	65%		
Books	23.0	NA	23.0	NA	23.0	NA	23.5	NA	23.5	NA		
TOTALS	795.0		1015.5		783.8		542.3		540.5			

COPYRIGHT PIRACY IN ITALY

Piracy levels remain too high across all industry sectors; CD and DVD-R burning and Internet piracy grow.

Until 2004, piracy rates in Italy across all industries had remained at 20% or higher for the last 10 years. As a result of continuing, improved implementation of the 2000 Anti-Piracy Law (AP Law) in 2003 and 2004, piracy rates dipped below 20% for the first time in some sectors. The AP Law and the 2003 increases in administrative penalties have resulted in 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 (OD) piracy market, from production to distribution, using illegal immigrant networks to sell, primarily, CD-Rs and DVD-Rs as well as factory-produced CDs and DVDs and entertainment software product in PC and console formats. Cartridge-based video games (and their

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

www.iipa.com/pdf/2005spec301methodology.pdf.

3 BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Italy, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$1.127 billion) that was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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.

component parts) continue to be imported from Asia, and are also distributed through networks run by organized criminal syndicates.

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 also been seized in 2004. As a result of the mid-2003 increase in the administrative fine (imposed on the spot by the police) from €52 (US\$67) up to €154 (US\$198), 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, entertainment and business software and books—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. In a first action of its kind, a massive Guardia di Finanza (GdF) operation—Operation Mouse—was conducted in 2003, resulting 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. The GdF has confirmed that 90% of the people charged in this operation with piracy have been convicted by local courts, In February 2004, in the first such raid against a portal site, the GdF conducted a raid in Bergamo against an e-Donkey portal site offering links to files of pirate works of all kinds (movies, business and entertainment software, music, books and TV programs) on the e-Donkey network. The portal had an estimated 20,000 users. The GdF closed the site and arrested two persons operating the site. The GdF conducted 30 other such raids in other provinces.

Furthermore, right holders 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. Right holders 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. Right holders 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.

Finally, to assist in dealing with the Internet piracy problem, the Motion Picture Association (MPA) sought and obtained a decree criminalizing uploading on the Internet. The Urbani Decree dealt with P2P infringement and went into force on May 23, 2004. Aspects of the Decree were opposed by ISPs, which gave rise to efforts to water it down. Hearings on amending the Decree (the so-called Asciutti Bill) were held in fall 2004 before the Italian Senate, and that bill is due to be voted on soon. The outcome is uncertain.

The decree contains at least one potentially problematic provision. This would impose a "virtual stickering" requirement whereby uploaders must display a "notice regarding the due fulfilment of obligations under author's right legislation and related rights, specifying the sanctions provided under the Copyright Law." Because it is unclear how this is to operate, a committee (the "Stanca" committee) has been formed to deal with it and has proposed deleting it. The outcome, as noted above, is uncertain.

One of the amendments proposed to the decree in the so-called "Asciutti Bill" would distinguish between acts done for lucrative purposes ("lucro") and acts done "for gain" ("profitto"); the latter broader standard is now part of the Urbani Decree. The Asciutti Bill would limit criminal penalties to acts done for direct lucrative purposes, rather than indirect "for gain" purposes. At least portions of the copyright industries would oppose this change.

Unauthorized commercial photocopying, corporate end user piracy of business software, and broadcast, cable and satellite piracy continue to damage U.S. copyright owners.

Wide-scale photocopying piracy is an enormous problem in Italy, due to the failure of the enforcement authorities to take aggressive action against it. In 2000, the publishing community sought and received in the new AP Law the authority to require remuneration for the act of photocopying, primarily out of frustration from lack of government enforcement action and as a "second-best" solution. 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, were arrived at for both educational institutions and copy shops, but these institutions routinely fail to pay royalties due, and SIAE and the government continue to take 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, millions of dollars in annual losses to all publishers, including U.S. publishers. Action must be taken to crack down on illegal photocopying activity, to enforce payment under the AP law, and to promote use of legitimate materials on university and school campuses.

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. A recent study put the piracy rate in Sicily at 70% of the market there. Prior procedural difficulties in bringing cases against end users in the Italian courts appear to have lessened somewhat, 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. Moreover, as noted, the Urbani Decree compounds the problem by extending the stickering obligation to those uploading content to the Internet.

The motion picture industry continues to face broadcast piracy particularly in the south of Italy and in Sicily, but consistent enforcement has reduced this somewhat. The creation of regional communication committees within the Authority for Guaranties in Communication (AGC) will hopefully lead to further reductions in broadcast piracy levels.

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 and 2004 have seen

⁵ See IIPA's 2003 Special 301 country report on Italy, page 503, available at http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf.

improvements in these areas, with piracy rates now estimated at 5%. Similarly, satellite signal theft and smart card piracy, discussed in IIPA's 2003 submission⁶ 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 continues 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, though the principal impediment to more deterrent enforcement continues to be the attitude of many judges that piracy is not a serious crime and who, as a result, impose the lightest sentences. Despite these gains, the judicial system remains in dire need of reform. Case loads must be lightened, and 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.

Criminal enforcement: The AP Law raised maximum fines from €1,549.30 (US\$1,996) to €15,493.17 (US\$19,957). Minimum prison terms increased from three months to six months, but still may be suspended at this higher level. Maximum prison terms were 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. This problem is particularly acute when the right holder is a large corporation. Judges tend to discriminate in sentencing when companies are involved. It also 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, 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 2004 was again one of their best years ever with 1,672 CD-R burners seized and almost 1,400,000 CD-Rs seized. The focus on CD-R production led to a decrease in burned CD-Rs available in the pirate market. The industry cooperated in 355 raids, and over 1,350 individuals have been arrested and/or charged with copyright offenses. The biggest CD-R burner seizure took place in Naples, with 321 units seized. This is one of the largest seizures of recordable machines ever in Italy. In addition, the first criminal actions against Internet piracy have been carried out by the GdF with the technical assistance of the music industry anti-piracy unit. More than 50 people have been criminally charged for copyright law violations. They were all illegally sharing music files over the most popular P2P platforms like KaZaA and E-Donkey.

⁶ See IIPA's 2003 Special 301 country report on Italy, page 502, available at http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf.

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. Around 80% of the arrests in 2004 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, sentences in almost all first convictions will be, and have been, suspended.

MPA reports that in 2004, 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. Deterrent sentencing continues to be a problem 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. It was hoped that a new law on immigration, passed in July 2002, which provided for the deportation of illegal immigrants convicted of copyright law violations, would help. Experience to date has been disappointing; the law has had little impact.

The business software industry continues to report positive developments on the criminal enforcement front following adoption of the AP Law. In November 2004, Operazione Corsaro 2 took place, the largest operation against enterprise end user piracy ever conducted in Italy, even larger than Operazione Corsaro I, a year earlier. More than 1,000 officers from the GdF raided 412 companies. The GdF found over 9,000 copies of illegal software and seized over 800 PCs; 268 individuals were ultimately charged.

The enforcement statistics below display criminal enforcement in Italy in 2004.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 ITALY									
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS					
NUMBER OF RAIDS CONDUCTED	53	573*	355	981					
NUMBER OF VCDs SEIZED	34			34					
NUMBER OF DVDs SEIZED	912,842			912,842					
NUMBER OF CD-RS SEIZED		5,965*	1,390,017	1,395,982					
NUMBER OF INVESTIGATIONS	126		355	481					
NUMBER OF VCD LAB/FACTORY RAIDS									
NUMBER OF CASES COMMENCED	126			126					
NUMBER OF INDICTMENTS	11			11					
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	10			10					
ACQUITTALS AND DISMISSALS	1			1					
NUMBER OF CASES PENDING	21			21					
NUMBER OF FACTORY CASES PENDING									
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	10		45	55					
SUSPENDED PRISON TERMS	3		4	7					
MAXIMUM 6 MONTHS	3		4	7					
OVER 6 MONTHS									
OVER 1 YEAR									
TOTAL SUSPENDED PRISON TERMS	3		4	7					
PRISON TERMS SERVED (NOT SUSPENDED)	7		41	48					
MAXIMUM 6 MONTHS	3		29	32					
OVER 6 MONTHS	4		6	10					
OVER 1 YEAR	3		6	9					
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	7		41	48					
NUMBER OF CASES RESULTING IN CRIMINAL FINES	1	310*	45	356					
UP TO \$1,000			25	25					
\$1,000 TO \$5,000	1		18	19					
OVER \$5,000			2	2					
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	6,508.55		62,641.39	69,149.94					
*These data refer only to the raids where BSA provided technica	l support	1		,					

<u>Civil enforcement needs continued improvement.</u> 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 continue to 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. The Business Software Alliance (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 and motion picture industries are shown below.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2004											
ITALY											
ACTIONS	MOTION PICTURES	Business Software	TOTALS								
NUMBER OF CIVIL RAIDS CONDUCTED	0	6	6								
POST-SEARCH ACTION		6	6								
CASES PENDING	10	3	13								
CASES DROPPED	0	7	7								
CASES SETTLED OR ADJUDICATED	0	8	8								
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)		200,000	200,000								
SETTLEMENT/JUDGMENT AMOUNT (\$USD)		200,000	200,000								

COPYRIGHT LAW DEVELOPMENTS

The EU Copyright and E-Commerce Directives. 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 the recent lower court case from Bolzano, Italy, finding mod chips (and modified videogame consoles) to be legal, 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.

⁷ An update on this case was not received before publication of this submission.

Need to eliminate the SIAE sticker requirements for software: The SIAE stickering obligations remain an issue for the software industry in Italy. Article 181 bis of Italy's AP 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 have found their products subject to seizure.

The September 2001 regulation implementing the stickering scheme failed to resolve these problems. The Italian government had assured industry that 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. Ultimately, industry and the government negotiated a compromise that 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. Instead, the Urbani Decree expanded the stickering regime to cover products uploaded to the Internet.

The software industries believe 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.

These issues remain to be resolved. The Senate is currently considering amendments to the Urbani Decree that would address some, although not all, of these concerns.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT LATVIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Latvia should remain on the Special 301 Watch List.

Overview of Key Problems: Latvian enforcement efforts continue to be inadequate to combat piracy, in particular, to stop the shipment of illegal materials from Russia into Latvia for sale in the local market, or for further shipment into other countries. IIPA is disappointed by the Latvian government's continued failure to provide appropriate levels of effort or resources, now over the past ten years, to adequately address high piracy rates and to provide effective enforcement. The legitimate market for copyright materials in Latvia has significantly decreased as a direct consequence of the overall poor enforcement regime there. In short, many of the necessary legal reforms are in place, but on-the-ground enforcement remains woefully weak.

One significant shortcoming is the lack of effective border enforcement. Customs officials are rarely taking any actions to properly inspect or seize shipments entering the country, nor have they properly targeted materials transshipped through (and stored in) Latvia destined for other territories. In 2004, there were no known instances where Customs officials and rightholder organizations worked together on cases of smuggled goods. A related problem is the continued lack of communications between police and customs officials. The Economic Police remain under-resourced and under-utilized. The on-the-ground enforcement agencies continuously point to "insufficient financial and human resources" as the excuse for ineffective investigations and seizures and an overall lack of activity. The Latvian authorities need to make IP crimes a priority, as they have pledged to do in their bilateral and multilateral commitments with the United States government. The recent establishment of the centralized state IPR division under the Ministry of Interior is a long-awaited positive step by the Latvian government to undertake effective IPR enforcement. The copyright industries welcome the establishment of this structure, and hope it will engage in effective actions against commercial piracy

The Municipal Police in Riga organized seminars for their officials, but these well-intentioned training programs were not followed up with any significant enforcement measures. Overall, the few actions taken by enforcement authorities, in particular by the Municipal Police in Riga, have been undermined by poor cooperation with prosecutors, onerous evidentiary requirements, and courts reluctant to properly adjudicate copyright cases. Prosecutors continue to make copyright cases a low priority; penalties for copyright infringements are minimal (usually comparable to fines for minor administrative offenses); and the courts return infringing goods back to the pirates. For example, in 2004, the Municipal Police in Riga initiated and performed several successful raids; these were followed with administrative cases, and expert reports from the State Expertise Center which verified that the seized goods were pirate. However, despite the well-prepared evidence, in three cases, charges were dropped and the pirate copies were returned. This type of court action can only discourage the Municipal Police from taking further actions against piracy. There needs to be more communication, and thus more successful cooperation between the enforcement authorities, including the Economic Police, the Municipal Police, State

Police, Customs, prosecutors and courts (including establishment of an IPR enforcement interministerial committee which is under review), as well as more effective cooperation with rightsholder organizations.

Latvia's 2000 copyright law was further amended in April 2004 (in force April 29, 2004) in order to implement the WIPO digital treaties. The two sets of amendments were also intended to comply with the EU directives for Latvia's EU accession, which took place on May 1, 2004. The copyright law still contains several key deficiencies, most importantly the absence of TRIPS-mandated civil *ex parte* search procedures, and the recent elimination of a WPPT-compliant definition of "broadcasting."

Actions which the Latvian Government Should Take in 2005

Enforcement

- The government needs to instruct Latvian enforcement agencies to make copyright piracy a priority issue for action;
- The government must complete the creation of the inter-ministerial committee for IPR enforcement—including the Interior, Justice, Culture and Finance ministries—consistent with the 2003 Prime Minister's decree; and the Interior Ministry must ensure that the dedicated IPR crime unit is fully funded (US\$300,000) and effectively and properly staffed;
- 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, computer software, 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 (the proposed IPR enforcement inter-ministerial committee would help accomplish this goal). 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

- 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 Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	NA	NA	NA	85%	NA	85%	1.5	NA	1.5	85%
Records & Music	12.0	85%	10.0	80%	8.0	67%	NA	NA	4.0	65%
Business Software ²	9.0	58%	10.0	57%	7.4	58%	NA	59%	NA	77%
Entertainment Software ³	NA	80%	NA	95%	NA	NA	NA	NA	NA	NA
Books	NA	NA								
TOTALS	21.0		20.0		15.4		1.5		5.5	

In September 2003, the U.S. government welcomed the European Commission's decision to accept a political understanding with the U.S. to preserve U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Latvia. The Latvian BIT provides important copyright-related obligations for broad national treatment for U.S. works and sound recordings. There were reports in 2004, that Latvia might abrogate the BIT, notwithstanding the agreement with the E.U., but IIPA understands this was never accomplished. The copyright industries urge the U.S. government and the Latvian government to maintain the current BIT agreement.

COPYRIGHT PIRACY

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 urge the Latvian customs authorities to start taking action, including *ex officio* investigations/searches when they detect border trade and domestic enforcement violations. Customs requires training and resources to address this problem effectively. Numerous pirated materials enter the country from Lithuania, Belarus and Russia, which damages the local market for legitimate products; the software industry reports that the majority of pirated software comes from Russia and Belarus transshipped to Latvia via Lithuania. Pirated material from Russia is often imported into Latvia through the use of false documentation (with non-existent Russian companies claiming licenses) that Customs officials and the courts accept in good faith. Much of the pirate material, including audio CDs, CD-ROMs containing business software, videos, and audiocassettes, arrives from Lithuania. One method of

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Latvia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a higher loss estimate (\$10 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁴ For 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/2005SPEC301USTRHISTORY.pdf), as well as and Appendix E at (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission. Latvia was, until its entry into the European Union on May 1, 2004, a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program, which contains IPR criteria. In 2003, \$11.1 million worth of Latvian goods entered the U.S. under the duty-free GSP code; in 2004 (ending on April 30), only \$3.5 million work of goods received the benefits.

entry is via bus—Latvia "trade-tourists" frequent the largest Lithuanian flea market (Gariunai) and return to Latvia with this material. 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, as in years past, almost all of the illegal software on CD-ROMs found in Latvia was made elsewhere and that Latvian customs have yet to seize a single shipment (which it could do if it used 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 PCs is made in Russia.

The recording industry is aware of the transhipment of mostly Russian-made pirate sound recording material through Latvia; this is a problem Latvia shares with its neighbours Estonia and Lithuania. The material is ultimately destined for (many of) the countries of the European Union. The key to stopping this problem is through effective action, especially at the eastern border, which is particularly problematic. This is true of Estonia and Lithuania as well, where effective border enforcement measures on the Russian or Belorussian sides should be of paramount importance.

CD-R piracy and Internet piracy: Illegal copying on CD-Rs and the absence of any enforcement action against this type of piracy is one of the main reasons for the decline of a legitimate music market in Latvia. Sales of blank optical media are growing rapidly. For example, a local company, Acme Plus, reportedly imported into Latvia nine million CD-Rs in 2004. The sales of legitimate music CDs have not reached one million units since 2002. Legitimate music sales in 2004 fell between three and four times compared to 2003, and no album reached the local gold or platinum status. 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 pirated videogames for direct download, and "master" copies from which to burn CDs. In Latvia, some illegal sites operate from government-controlled servers. In 2004, the recording industry identified and sent 56 "cease and desist" notices to 15 infringing sites estimated to contain around 1,000 illegal files; 13 of those sites (87%) were removed from the Internet. Despite the increasing figures, several websites have been operating with impunity for over four years without any prosecutorial action to shut them down. While there were some successes against such sites in neighboring Lithuania in 2004, there were no reported actions taken against these sites in Latvia. IIPA is unaware of any court cases dealing with Internet piracy. It is critically important that the Latvian enforcement authorities begin such efforts especially now that the 2004 amendments implementing the WIPO digital treaties are completed.

BSA reports that no Internet-related raids or arrests have taken place in relation to business software in 2004. 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 ineffective enforcement the estimated level of music piracy is rising every year, currently reaching 85% of the market in 2004 (the piracy level for local repertoire is approximately 70 to 75%). 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 rose

slightly, to approximately US\$5 for international repertoire and US\$6 for local repertoire (most pirated local repertoire is CD-R). 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 May and December 2004, BSA held meetings with the State Revenue and Customs authorities; these meetings highlighted the weak border enforcement and the various methods of distribution of pirated software into Latvia.

The Motion Picture Association (MPA) reports that the video piracy rate in Latvia remains very high (actual piracy rates, which were 85% in 2003, were not available for 2004). 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 now exists as well. Pirate sites marketing hard goods are expected to be a growing problem.

The entertainment software industry (Entertainment Software Association, ESA) reports that poor border enforcement remains a significant problem. Most of the pirated entertainment software products entering the market are imported from Russia by the same organized criminal syndicates running piracy operations in Russia and apparently throughout the region. Internet café piracy continues to be a problem, with only a few of the cafés using licensed products. Pirated products remain readily available at retail establishments and particularly at flea market venues. There were more raids and seizures in 2004 against retail locations (mostly involving PC games, although a few console games were also found). However, there was very little action taken against the criminal syndicates involved in the distribution of pirated products. While many cases remain pending, an ESA member company was able to successfully prosecute a case to conclusion (in that case, a company director was sentenced to five months probation and assessed damages for the seizure of 140 pirated video game discs). Improvements to the country's border enforcement regime are essential if the flow of pirated products from Russia is to be stopped. Action must likewise be taken against the organized criminal syndicates involved in piracy, using special anti-organized crime statutes if available. Local piracy rates for entertainment software product remained very high in 2004.

COPYRIGHT ENFORCEMENT

Lack of centralized coordination and communication: In November 2004, a consultative council on IPR enforcement (the "Council") was established in the Ministry of Interior; the Council includes IPR rightholder groups (copyright and industrial property), as well as government officials from the Ministry of Interior. In January 2005, the Ministry of Interior established a dedicated IPR enforcement division within the Economic Police (with an annual budget of US\$300,000 and a staff of 20); it is intended to commence action in March 2005. Unfortunately, the plans do not include the all-important Customs authorities who are critical for

effective enforcement. It is critical for the Ministry of Finance to instruct Customs authorities to work in close cooperation with the new division. The copyright industries welcome the establishment of this new division and hope that it will prove effective. Three years ago, the Latvian government agreed to establish and fund (at about US\$350,000) an anti-piracy department within the State Police but a dedicated IPR enforcement division of the state police was never established and the monies were spent elsewhere. IPR enforcement was relegated to a special department in the Economic Police that, according to the Minister of Interior in a September 2004 news account, only employs six officers; it is unclear whether these six officers will now be reassigned. The Economic Police currently responsible for IPR enforcement are generally not effectively cooperating with other enforcement agencies. The government has to change the direction of this type of under-financed, poorly executed, and low priority type of enforcement.

In late 2003, the Prime Minister issued a decree to establish an inter-ministerial Working Group in the Ministry of Justice, including the Culture, Finance and Interior ministries, with the main task 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 included: (a) preparing draft amendments to the different legislative acts such as the Civil Procedure Law and the Copyright Law (including an ex parte provision—which is still to be implemented); (b) preparing new legislative acts (for example, regulations on destruction of pirated goods); and (c) the establishment of an interministerial committee for IPR enforcement. The Working Group has met only one time to date. The Justice Ministry proposed terminating the Working Group. The copyright industries prepared their own report urging the government to follow its own Action Plan including the establishment of a true inter-ministerial committee for IPR enforcement consisting of representatives from the ministries of Interior, Culture, Justice, Finance, Economic Affairs and Agriculture, as well as rightholders. In short, the Action Plan needs to be fully implemented so that effective enforcement can commence.

Border enforcement remained weak in 2004: 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 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 been effective to date.

Customs officers are barely taking any actions, not to mention exercising the *ex officio* authority granted to them in Government Regulation No. 420. Customs officials need to make IPR a priority and need to coordinate Latvian, Estonian and Lithuanian activities to help stem the tide of pirated Russian material entering all three countries, especially on the eastern border with Russia. Reportedly, Russian organized crime groups have threatened and/or bribed Customs authorities to dissuade IPR enforcement actions (especially by acceptance of clearly forged documents). Russian customs officials agreed to cooperate and share cross-border information several years ago. In fact, BSA reports that Russian and Latvian, Lithuanian, and Estonian customs officers began working together in 2001, but have yet to focus on IPR-related seizures.

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⁵ Two laws from 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.

Low level of police raids and results despite moderate cooperation with industry: The Economic Police reported (in news accounts) that in the first eight months of 2004, 13,000 pirated CDs and over 16,000 DVDs and video recordings were seized. The same report noted that in 2004 (through September) only one criminal case was commenced for copyright and neighboring rights violations, plus 39 "other" (presumably administrative) cases were

underway for a total of 339 administrative law violations.

The LaMPA organized some raids with the Economic Police that failed, as the target outlets and market places were informed in advance. Retailers of all pirated goods (music, films, software) operate as if they are untouchable because of high levels of corruption in enforcement regimes. Throughout 2004, LaMPA member companies made regular visits to the largest pirate markets and outlets, and collected comprehensive evidence of the illegal trade which was passed on to the Economic Police. Even with this evidence, there were no serious raids taken against the well known and biggest importers, distributors and retailers of pirate goods. In June 2004, the Economic Police detained four individuals known to be major suppliers of pirate recordings at the notorious Latgalite market (consisting of about twenty illegal dealers). The police seized a total of 5,036 CDs and 741 DVDs from the suspects' cars and homes and instigated criminal cases in accordance with Article 149 of the Criminal Law ("Unlawful Acts with Objects of Copyright and Neighboring Rights"). There is no evidence that the cases were followed up. The IPR team within the Economic Police is marred by corruption and regular and unwarranted transfers of its few effective members to unrelated departments. The recording industry reports further that cooperation with the regional police (for whom LaMPA provides expert reports on a regular basis) is generally good. There are raids on smaller targets: for example, on February 1, 2005, the Economic Police conducted a raid in Riga which netted 326 pirate DVDs and 37 VHS tapes, and even for its small size also garnered press coverage. In addition, there have been over the years numerous training programs, such as the program the software industry (BSA) provided for the Riga Municipal Police in 2004.

The Business Software Alliance (BSA) reports some 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 22 raids in 2004 with the cooperation of BSA: 20 of these concerned end-users, two identified the illegal sale of counterfeit business software applications. As a result, two criminal cases, and nine administrative cases, were initiated. Only one case resulted in a conviction in 2004—it was a reseller action. The reseller in question was punished with 80 hours of forced labor.

Prosecutorial delays: The problems of prosecutorial delays—anywhere from 18 months to two years just to begin a trial—persist. 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, a prosecutor must review and get the Prosecutor's Office to issue a formal charge. Delays at the prosecution stage are the most frequently mentioned problem with effective enforcement by rightsholders. Several IIPA members have conducted training seminars for prosecutors over the last few years, but the level of expertise among state prosecutors in relation to IPR matters remains low.

Inadequate administrative penalties: Copyright infringement cases in Latvia are often pursued as administrative offenses, which can take a short amount of time (anywhere from two to four months). As noted, there were 322 such cases in the first eight months of 2004. Businesses, especially illegal kiosks and stores that sell pirated material, should be fined and/or their business licenses revoked; however, these penalties are not applied. Instead, convicted

pirates are fined only 50-100 Lats (US\$92 to US\$183) and, in case of repeat infringers, a maximum of 250 Lats (US\$458), which is too weak to act as a deterrent.

No civil ex parte search provision: A glaring deficiency of the 2000 copyright law, not corrected in the 2004 amendment, is that the law does not provide for a TRIPS-required civil *ex parte* search remedy. This omission must be corrected. 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 been working for several years, with many delays, in order to get these provisions implemented. 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 Union procedural codes. These procedural provisions are woefully antiquated and result in substantial difficulties in prosecuting cases, especially because they call for the securing of detailed (and unnecessary) expert reports in copyright infringement cases before criminal actions can proceed against pirates. These delays have the effect of "pushing" criminal cases into the administrative areas, where they are quickly disposed of, with the application of weak penalties. Further, as illustrated above, cases can be dismissed and pirate goods returned even if the expert reports are correct.

COPYRIGHT AND RELATED REFORM

On January 21, 1999, the Latvian Parliament adopted a package of amendments to several copyright-related laws, including the Code of Administrative Offenses, the Criminal Code, the Consumer Protection Act and the Customs Act as part of its accession to the World Trade Organization (WTO). In April 2004, as part of its accession to the WIPO digital treaties, and in order to more fully comply with the EU directives, the Latvian Parliament adopted additional copyright amendments. These amendments, effective April 29, 2004, included provisions allowing rightsholders to prevent the circumvention of technological protection measures, as well as to protect so-called "copyright management information."

In 2000, Latvia deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty; Latvia became a member of the WCT and WPPT in 2002 when each of those treaties entered into force.

The Copyright Law of 2000 and the 2004 amendments: Latvia's 2000 copyright law was the result of a series of reforms undertaken in the late 1990s. The 2000 law contained significant improvements over the prior 1993 law, including a right of "making available" and stronger remedies for software piracy infringements (both end-user and reseller). The 2004 amendments added technological protection measure and copyright management information provisions consistent with the digital treaties, as well as full national treatment for foreign authors

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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 Phonogram 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).

and neighboring rightholders [Article 56(5)] and proper legal presumptions for neighboring rightholders [Article 47(8)]. However, several deficiencies remain in the law:

- No exclusive rights for phonogram producers, which are provided 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.
- The new law deleted the definition of "broadcasting" (it was defined in the Broadcasting Act very broadly to include webcasting and simulcasting). A WPPT-compliant definition must be added back into the Copyright Law.
- Article 63(5) makes the rental right for phonogram and film producers subject to mandatory collective management (diminishing the exclusive rights of producers).
- No civil *ex parte* search procedure, a TRIPS-required tool, which is especially critical to enforcement in business software actions.
- Low administrative penalties that do not deter piracy.
- An objectionable provision regarding the destruction of equipment used to produce illegal copies, which permits the equipment (and perhaps the illegal copies) to be donated to charity rather than destroyed [Article 69(3)].

Criminal law: Latvia's current criminal law entered into force on April 1, 1999, with amendments adopted effective 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\$30,500). Unfortunately, the reality is that courts still impose very low penalties.

The Latvian government started drafting a new Criminal Procedure Law in 2001 through a special parliamentary committee. The draft law passed its first reading in the Parliament on June 19, 2003. Missing, however, are special provisions and procedures regarding copyright and neighboring rights cases. Although the draft provides simpler procedures, the efforts of music industry and other rightsholders to include the principle of presumption of ownership, and liability for juridical entities, are not adequately addressed.

Administrative Offenses Code and the civil law: In 2003 (effective July 24, 2003) amendments to the Administrative Offenses Code were enacted. Administrative penalties apply for the acquisition of pirated goods with the aim of distribution, storage or the hiding of pirated goods. Second time offenders are subject to criminal penalties as are certain cases involving the distribution of pirated goods.

In 2002, a proposal that would have increased fines against juridical entities infringing copyrights was unfortunately rejected by the Parliament.

There are no known pending amendments regarding civil penalties. Consistent with the legal regime, the copyright law only includes the measures rightholders can take in civil proceedings (in Article 69). However, the Civil Code (Articles 1770-1792) does not provide the necessary sanctions for copyright infringements.

Government software management: BSA reports that the level of unlicensed use of business software applications within the Latvian public sector remains at a high level, but that a series of reviews of software installations and purchases of missing licenses did take place in

2004 in the central government in Latvia. The ministries of Defense, Education and Science, Finance, State and Treasury did conduct internal software audits and purchased the necessary licenses. BSA praises the Latvian Government for these very positive steps, as the government's use of licensed software is seen as an critical model for business users of software: it is essential that government take all the necessary 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 2005 SPECIAL 301 REPORT LITHUANIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Lithuania should remain on the Watch List in 2005.

Overview of Key Problems: Copyright owners in Lithuania continue to confront generally poor and ineffective on-the-ground enforcement, especially at the border, which is evidenced by the sustained high piracy levels. The government has neither dedicated the resources, nor expressed the high-level commitment necessary to enforce the laws adopted during the past several years to slow piracy. Lithuania, as a result of geography, is extremely vulnerable to transshipment problems of pirated materials thought its borders, which is why border enforcement is so critical, and unfortunate that it is so critically lacking. Two years ago, customs officers were properly vested with ex officio authority to inspect, intercept, and seize suspect shipments of pirated product entering the country, but they are not using this authority. In addition, customs, police and other enforcement agencies need to engage in cooperative enforcement especially to deal with the challenges of the organized criminal groups engaged in piracy (and there is evidence of ties to Russian organized criminal syndicates). Stronger criminal sanctions are necessary, including the commencement of criminal searches and raids. Also, the courts continue to place evidentiary hurdles to proper enforcement, including requirements for unnecessary expert reports which only serve to delay judicial consideration. Criminal penalties and administrative fines remain low and thus are not deterrents to piracy.

Lithuania amended its copyright law in 2003 in an effort to further harmonize its law with the EU, which it joined effective May 1, 2004; but the law still has many deficiencies outlined in this report. Also in 2003, Lithuania enacted a new criminal code and criminal procedure code. One potential deficiency in the criminal code was resolved in 2004 when a panel of Supreme Court judges ruled that the new criminal penalties do apply to the reproduction or distribution of illegal copies of sound recordings, as well as to other works.

Actions to be Taken by the Lithuanian Government in 2005

<u>Enforcement actions needed:</u> High level officials in the Lithuanian government need to demonstrate an interest and take meaningful activity to slow rampant piracy of music, film and software. To do this, IIPA recommends the following actions:

 The IPR Division in the Economic Police (the Criminal Police Investigation Bureau) should focus its work on the key source of persistent piracy in Lithuania, i.e., against organized crime syndicates. If necessary this work should be undertaken in cooperation with other enforcement agencies, in particular with the anti-organized crime department in the police.

Copyright 2005 International Intellectual Property Alliance

- Commencement by police of criminal raids; implementation of administrative actions (for example, withdrawing business licenses from infringing kiosks); commencement of criminal prosecutions.
- Customs officers, in particular the Customs Criminal Service, are urged to commence actions, including ex officio actions to intercept pirate product smuggled into the country.
- Simplifying and eliminating cumbersome and complicated procedures in criminal and administrative IPR cases; relaxing the onerous evidentiary burdens in criminal cases.
- Developing coordinated and cooperative strategies between and among enforcement authorities as well as with right holders' organizations.

<u>Legislative actions needed:</u> There are three major law reforms still needed for effective IPR protection and enforcement:

- Adoption of optical media regulations to properly license and enforce the production, distribution, import and export of optical media.
- Correction of the deficiencies in the copyright law as detailed in this report.
- Adoption of a government order regarding the legal use of business software within state institutions to improve implementation of the 2001 decree of the Minister of Internal Affairs concerning recommendations on such uses.

LITHUANIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ¹											
INDUSTRY	2004		2003		2002		2001		2000		
INDOSTRI	Loss	Level									
Records & Music ²	15.0	80%	13.5	85%	12.0	85%	7.0	85%	7.0	85%	
Motion Pictures	1.5	65%	NA	NA	NA	90%	1.5	NA	1.5	80%	
Business Software ³	11.0	58%	10.0	58%	4.6	53%	3.9	56%	NA	76%	
Entertainment Software ⁴	NA	85%	NA	90%	NA	80%	NA	NA	3.5	98%	
Books	NA	NA									
TOTALS	27.5		23.5		16.6		12.4		12.0		

As a result of Lithuania's accession into the EU in 2004, Lithuania lost its eligibility for the U.S. trade preferences known as the Generalized System of Preferences (GSP). However, other trade agreements with the U.S., such as those contained in the U.S.-Lithuanian bilateral investment treaty (BIT), including key national treaty obligations, remain in force. The latter was

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.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 U.S. dollar value.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Lithuania, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate (\$17 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

accommodated by a September 2003 understanding by the European Commission with several EU-accession countries, including Lithuania, and with the United States.⁵

COPYRIGHT PIRACY IN LITHUANIA

Border enforcement: Given its pivotal geographical location and due to 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. Most pirate product is smuggled into Lithuania, which has great border enforcement challenges (with Latvia, Belarus and Poland) and especially given that its neighbor Russia is a major producer of illegal material. In fact, Lithuania is the preferred destination for pirated product made in Russia and material made in or shipped through Belarus, as well as Poland and, to a lesser extent, Ukraine. Products are shipped through Lithuania to other European countries, principally to Poland, but also to Latvia, Estonia, Scandinavia and Germany. Based on incidents of materials seized by British customs (of hand-carried CDs and DVDs), it is likely that material is being shipped throughout Europe. All of this is why border enforcement should be the number one priority for IPR enforcement agencies in Lithuania.

It has been four years since Lithuanian customs officials obtained the proper *(ex officio)* authority to undertake border searches and investigations. But this legal change, while welcome, has not been used effectively by border authorities. In fact, practice has already shown that customs officials are unlikely to search vehicles (especially from EU countries), and in the case of drivers entering from Belarus have even allowed for self-policing "reports" to be filed days after entry. In 2004, there were no *ex officio* actions taken by customs officials regarding copyright and neighboring rights infringements. There were two cases where customs officials asked the local recording industry group (FGPA) for its expertise on detained goods, but in both cases the materials turned out to be legal; there were also five trademark actions. As a result of poor enforcement at the border, organized criminal groups involved in IPR piracy are able to operate through border crossings unhindered.

Optical media piracy: There is one known CD manufacturing plant in Lithuania—Baltic Optical Disc (BOD)—producing for the local market as well as neighboring Latvia and Lithuania. In 2003, the plant had a single line. Now it has two lines (but only one is reportedly operating). The total plant capacity is estimated at 7 million discs per year including CD-R (blank disc) replication. However, the plant's current annual capacity is estimated to be 5.5 million discs. In March 2003, the recording industry (IFPI) filed a criminal complaint against BOD alleging pirate production. Despite expectations that an investigation would be completed and initiated before the courts by now, the investigation is still pending in the Prosecutor's Office. This is why Lithuania needs to adopt a comprehensive optical disc licensing and enforcement regime to properly regulate plants like BOD and any others that may open. IIPA and its members have provided the government of Lithuania (Ministry of Culture) with draft model optical disc

goods entered the U.S. under the duty-free GSP code; in 2004 (through April), that figure was \$1.8 million.

⁵ U.S. State Department, "U.S. Welcomes EC Decision on Bilateral Investment Treaties," September 3, 2003 at http://www.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/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and Appendix E (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) of this submission. Also available are previous reports on Lithuania at http://www.iipa.com/countryreports.html. Lithuania did participate in the Generalized System of Preferences (GSP) trade program until May 1, 2004 when it joined the European Union. During 2003, \$6 million worth of Lithuanian in the country of the

regulations which have been adopted in other countries, and we urge the Lithuanian government to make this a priority, including tying licensing of plants to criminal sanctions for illegal plant owners and operators. The government of Lithuania (Ministry of Culture) has scheduled a roundtable discussion on piracy, including optical disc piracy in April 2005.

CD-R piracy: A common form of music piracy in Lithuania is the sale of pre-recorded CDs and CD-Rs via the Internet (web pages and targeted e-mails) which contain lists of available selections. Hard copies are delivered 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. The share of seized recorded CD-Rs in the pirate market is not substantial, composing currently about 5-10% of the illegal market. The local recording industry group (FGPA) estimates that approximately 80% of all blank media sold were used for illegal copying of music, films and computer games.

Illegal production of CD-Rs (blank CDs) needs to be investigated and illegal producers prosecuted. In 2004, the Criminal Police Investigation Bureau (CPIB), with the assistance of the Lithuanian Music Industry Association (LMIA), took a few notable actions against the CD-R pirates. In February 2004, the CPIB and LMIA discovered an illegal CD-R burning laboratory in Vilnius containing musical recording devices, nine CD-R burners and more than 6,000 pirate copies and subsequently in a related warehouse, 30,000 additional pirate discs. Two suspects were arrested and a criminal case was initiated and is now on-going. In another case, in December 2004, the CPIB and LMIA discovered an illegal CD-R production facility in Kaunas containing 20 CD-R burners, 20,000 CD-Rs consisting of music, 10,000 blank CD-Rs and 2,800 DVDs. The police initiated a criminal case, which is on-going.

Internet piracy: Many Lithuanian websites contain advertising for infringing copyrighted hard goods. The numbers of such sites are increasing and the sites are operating with impunity (since 1999) because there has not been a single prosecutorial action to shut them down. The trend now is to move these illegal websites to servers located outside Lithuania. The motion picture industry (MPA) also reports that there are many amateur websites marketing pirate products and parallel imported DVDs. The copyright industries report that despite a cooperation agreement concluded on April 26, 2004 between the Internet service providers (ISPs) and local rightsholders, no actions have been taken against Internet piracy. To illustrate the lack of willingness of the ISPs, in 2004 the local recording industry association (FGPA) sent nine notifications of the existence of illegal websites to the ISPs, yet only two of those sites were closed.

To date, there have been no criminal or civil cases dealing with Internet piracy. In 2004, IFPI identified and sent 56 cease and desist notices to 36 infringing sites estimated to contain around 270 illegal files. Fourteen of the 36 sites were taken down from the Internet. In December 2004, on LMIA's motion, the Criminal Police Investigation Bureau closed down six Internet sites offering films, music, computer games, and software. In 2004, FGPA sent the Economic Police an additional eight notifications with the information on 28 illegal websites, to which the police did not react. The Economic Police claim they have neither the time nor resources to tackle Internet piracy. Moreover, the police, prosecutors and the courts interpret the laws to limit enforcement actions against Internet pirates only if there is proven commercial profit, rather than economic harm to rightholders. According to the business software industry (BSA), in 2004, there were four criminal, one administrative and one civil case initiated in relation to Internet software piracy. The courts granted a single criminal judgment, two criminal

orders, one administrative judgment and one civil judgment; in addition, one criminal case is pending due to an ongoing investigation. The total amount of fines adjudged in criminal and administrative Internet cases is US\$616.50 and, in the one civil case (Bliznikas) US\$10,451.76.

In general, the enforcement authorities do not treat the offering for sale of pirate CDs and CD-Rs as a requisite commercial activity; instead there is a requirement that at least one copy must be purchased to prove commercial intent. The Special Internet Crimes Investigation Unit has not taken any action against Internet IPR piracy (focusing instead on hacking and pornography).

High piracy levels: Pirated products in Lithuania are sold in markets, kiosks and retail outlets. In recent years, the only noticeable improvements have been in the center of Vilnius. The marketplaces in Vilnius where pirate product is sold are the Kalvarijos market, and the Garuinai, Antaklnis and Paergale markets, especially on the weekends. Hordes of commercial tourists from Latvia visit, especially the Garuinai market on Saturdays. Illegal distribution has changed in the past few years, moving more to hand-to-hand piracy (i.e., people illegally offering pirate products for sale in offices and other public places such as cafés, bars, restaurants by carrying the catalogues as well as the products) of CDs and DVDs, especially of international repertoire.

The recording industry reports that the music piracy situation in Lithuania is still unacceptably high. Although the overall level of piracy in Lithuania was about 60% in 2004, the levels of piracy for international repertoire is substantially higher, around 80%. Currently, around 10% of all pirated sound carriers are audiocassettes and 90% are pirated CDs and CD-Rs. The average retail price of pirate CDs with the most popular international repertoire is 10 to 15 Litas (~US\$3.00 to US\$5.80), sometimes 8 Litas for "outdated" repertoire as opposed to the 55-60 Litas (~US\$18.00) for full-priced legitimate CD with international repertoire. Based on police seizures (in 2004), 80% of pirate products in the markets is international repertoire, 15% is Russian and 5% is local repertoire. The legitimate music industry in Lithuania has been struggling for years to survive. Recent, otherwise highly successful international releases sold more than ten times as many copies in neighboring Latvia and Estonia than in Lithuania (even though Lithuania has a much larger population). This clearly illustrates the massive levels of piracy of international repertoire. Organized criminal groups are now heavily involved in trafficking pirate CDs, with very limited enforcement undertaken by the authorities. The estimated trade losses due to recording and music piracy were \$15 million in 2005.

The Entertainment Software Association (ESA) reports that piracy has grown worse in the last year, with pirated products flooding the country from Russia, Ukraine and even Belarus. Pirated products remain readily available at retail and flea market venues. It is believed that the same piracy syndicates operating in Russia also control distribution in Lithuania. As noted above, Internet piracy is also growing, although it still used largely to advertise pre-recorded pirated products. Piracy at Internet cafés is also problematic, as only 10% of the 400 cafés in the country are licensed. Some ESA member companies have brought cases against small retail outlets. However, these cases typically are settled. One recent such case involved 6,000 pirated video game discs seized by the (tax) police; the case was settled with nominal damages paid by the vendor. With the unabated flow of pirated products from Russia and Ukraine, it is imperative that the Lithuania's border enforcement regime be improved. Some ESA member companies have begun recording their trademarks with customs authorities, but unfortunately, this has not resulted in any border actions.

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. In 2004, 35 inspections, including five major raids, were undertaken by the Criminal Police. Regular day-to-day inspections are undertaken by Vilnius City Police department officials. At present, the open sale of large quantities of business software at flea markets has diminished. 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; in December 2004, a guidebook for government officials on software management was translated into Lithuanian and sent to administrators in government ministries.

The motion picture industry (MPA) still finds that Lithuania is the least developed market of the three Baltic nations. The MPA estimates that the video piracy rate in Lithuania is 65%, with total losses estimated at \$1.5 million in 2004. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. TV and local cable piracy are also problems (often screening pirate copies of blockbuster films). The legitimate video industry is trying to make inroads into this predominately pirate market, with local partners of several MPA members trying to work with enforcement officials, and also reducing prices significantly to compete with the ample pirate product in video or DVD, for sale or rent.

COPYRIGHT ENFORCEMENT IN LITHUANIA

For years, Lithuanian law enforcement agencies complained that they needed adequate training before they could conduct proper enforcement. There have been years of training programs undertaken by governments, IIPA and other industry representatives. For example, there was a program held under the auspices of the EU in 2004, and a U.S. government program in January 2005 for police, customs officials, prosecutors and judges. Yet, the problems of poor enforcement persist, in large measure because IPR enforcement tends to be given a low priority by senior Lithuanian government officials, and due to inadequate resources. After years of training and legal reforms, it is time for judges, customs officials, police and prosecutors to properly start acting against IPR pirates, especially against organized crime syndicates active within Lithuania.

Poor coordination among the criminal enforcement agencies: In 2002, the Ministry of Finance abolished a specialized IPR unit in the Tax Police. Since that time, the Economic Police and Customs are the only Lithuanian authorities with jurisdiction to pursue copyright infringements. Unfortunately, there has been little to no communication or cooperation between these two agencies and other law enforcement agencies. In 2002, a Division of Intellectual Property Protection, the Criminal Police Investigation Bureau within the Economic Police was established. So, at present the three bodies with responsibility for IPR enforcement are the Economic Police, the Criminal Police and Customs—but still, there is little communication or cooperation between and among these three organizations, which is needed for effective enforcement. Moreover, there is no central police authority or clear division of authority and responsibility to further the coordination of IPR investigations at the national level. Currently there are only five officials dealing with IP issues in the Criminal Police Division. The Economic Police have to date resisted adding IPR investigators because of limited resources. The copyright industries have for years requested that the Lithuanian government provide the

necessary resources for the Criminal Police Investigation Bureau. In the absence of these resources, the Economic Police have, for the past several years, directed their actions against small-scale pirates instead of focusing on large-scale pirate operations, businesses, and organized criminal syndicates. IIPA and its members continue to urge the government to properly staff and resource the Criminal Police Investigation Bureau, to direct the bureau to retarget large-scale operations and criminal syndicates, and that these actions are undertaken with the active cooperation of the anti-organized crime department and other enforcement agencies.

According to the Criminal Police Investigation Bureau, there was a total of 131 criminal cases and 180 administrative investigations brought against suspected copyright infringers in 2004. The police reported seizing a total of 253,100 optical discs and initiating pre-trial investigations in 34 criminal cases and 23 administrative actions. The regional police departments seized a total of 64,000 optical discs. In one instance, the Criminal Police seized 13,000 pirated IP products in a smuggling case. The reports from the local music industry (LMIA) reported that a total of 239 companies were raided and over 317,000 pirated goods (in total) were seized in 2004. LMIA provided 135 expert opinions for the courts, pertaining to 54,000 items seized. LMIA also reported regional police actions undertaken in 2004 in Ukmerge, Anyksciai, Utena, Panevezys, and Siauliai. The business software industry is encouraged by increasing levels of police actions; but, as they and other industries note, the market continues to be flooded with the pirate product because the targeting has not been directed at large-scale operations and criminal syndicates.

Another emerging problem is that the police do not follow cases through to a court decision, so there is no overview of the end-result of investigations and cases. Furthermore, prosecutors and judges need to start taking effective actions against blatant piracy, ending the prosecutorial bottlenecks (and procedural hurdles) and ultimately bringing criminal cases to trial and handing out deterrent sentences. Anything short of this will serve to undermine (and hurt the morale of) positive police activity.

In 2002, the ministries of Culture, Justice, and Interior, along with the Prosecutor's Office, established the Division of Intellectual Property Protection under the Lithuanian Forensic Science Centre, which would provide expert opinions in copyright cases with the approximate annual budget of US\$145,000 (~500,000 Litas). This Forensic Science Centre has now been in operation for almost three years, with a six person staff. The Centre acts to formalize expert reports, even though this practice is contrary to other European systems that rely on private sector, rather than government reports. The reliance on a government expert report is unnecessary and causes delays in trials. IIPA continues to urge the government to rededicate the resources of this operation to a specialized IPR police unit or similar enforcement operation.

Inadequate and ineffective border enforcement: As has been noted, the weakest link in the Lithuanian enforcement apparatus is at the border. Given the ease of smuggling and prevalence of transshipped goods through Lithuania to other countries, there is much about border enforcement that needs improvement. This is especially critical now that the proper *ex officio* authority has been vested in customs officials, to commence their own searches, seizures and investigations. 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. In 2004, all *ex officio* actions implemented by customs authorities pertained to trademark, but not to copyright, infringements (with two instances of very small amounts of material seized by regional customs officials).

Customs officials have been regularly trained at IPR seminars, several times per year. Customs officials insist that a major contributor to poor enforcement is the nature of the internal EU market (especially now that Lithuania is an EU member).

Although IIPA and its members continue to urge better cooperation, Lithuanian customs officials claim that they do cooperate with the Economic Police. Customs cannot, under current law, take actions inside the country, so internal investigations are left to the Economic Police. There is obviously a need for the government of Lithuania to clearly define the roles and responsibilities for IPR enforcement among the agencies. Customs reports that the cooperation with rightholders (such as FGPA, the local recording industry association, and LATGA-A) is generally good and that they regularly request that such rightholders contact them with additional complaints. One major complaint by the local recording industry association is the high cost of commencing an application—500 Litas (US\$188).

Criminal enforcement needs to improve: A new criminal code and criminal procedure coder entered into force in May 2003, giving prosecutors more tools to use in IPR actions. However, for the second year, the prosecutors have brought only a few IPR criminal cases even though their authority to do so has been strengthened by the 2003 revisions. The recording industry reports an increasing number of obvious criminal music piracy cases ending due to the expiration of deadlines (procedural hurdles) or defendants being exonerated. The business software industry (BSA) reports that in 2004, the police and prosecutors commenced 22 criminal cases.

A summary of criminal copyright enforcement statistics for 2004 is as follows: the recording industry (IFPI) reported 239 raids conducted by the police with LMIA (the local music industry association). The business software industry reported 71 raids total, 51 of those conducted by the police. Further they reported 22 business software criminal cases commenced; 14 defendants convicted; 2 acquittals and 17 cases pending. Of the convictions only one resulted in any jail time, a six month (maximum) sentence; twelve of the other cases resulted in fines (six of less than \$1,000; five of between \$1,000 and \$5,000 and one over \$5,000). The software industry reported a total of US\$15,937.50 in fines levied in all the criminal cases in 2004.

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, two unfavorable rulings by the Lithuanian Supreme Court had cast doubt on criminal liability with respect to end-user piracy. The two cases (in 2003)—*Orana* and *Amalkera*—raised before the Lithuanian Supreme Court the question of whether end-user piracy constituted an act for a "commercial purpose." The Supreme Court in those cases held to a restrictive definition of "commercial purposes," limiting it to situations where products are distributed or sold, but not used. On October 7, 2004, based on a BSA initiated matter, the Supreme Court adopted a new consultative ruling and extended the definition of "commercial purposes" to end-user piracy. According to this ruling, acts carried out for commercial purposes are those carried out for both direct and indirect economic or commercial advantage.

Civil actions report: In 2004, BSA obtained civil judgments in reseller and end-user cases: in total, six judgments at District Court/Court of Appeal level were handed down, resulting in damages awards totaling 218,326 Litas (US\$81,512). BSA has relied heavily on the strong damages laws present in Lithuanian copyright law. BSA entered into 19 settlements with end-users and resellers in 2004, for a total value of 80,978 Litas (US\$30,234). 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: Lithuania's administrative penalties are inadequate and cannot act as a deterrent to IPR violations. BSA and the recording industry report that the only available sanctions under the Administrative Code are monetary fines, rather than the suspension or revocation of licenses which would act as deterrents to resellers and certain other pirates. Even when fines are imposed, they are very low and thus not nearly equal to the harm done to rightholders; nor are the fines enough to deter future piracy. The current level of fines available is 1,000-2,000 Litas (US\$378-\$756) in copyright piracy cases, although the courts tend to levy fines for only ten percent of that amount, so for 100-200 Litas (US\$38 to 76), hardly enough to act as a deterrent. Efforts to increase both the statutory amounts in the Parliament (including multiple fines for repeat infringers), and to get the courts to impose higher fines in actuality, have failed in the past several years. IIPA and its members believe that the level of fines, and the actual amounts levied, remain too low to deter infringers.

Procedural hurdles—"expert opinions": The Lithuanian courts will not apply a presumption of ownership for seized copyright material, which results in a burdensome evidentiary hurdle. 6 In order to prove that a suspect product is pirate, an "independent specialist" must reach a conclusion, which is then presented as evidence. The police have reported numerous instances where even after they conducted raids, suspects were never prosecuted because the police were required to get an expert opinion to determine proof of ownership for every single copy seized. Private citizens, even though expert in this area of the law, are barred from rendering opinions; only designated experts are allowed to serve this function, keeping those cases from moving forward.

The recording industry has to provide cumbersome expert reports to pursue administrative actions. For example, every single CD seized by the police 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. Another problem is the General Prosecutor's Office, which requires all titles international album and film titles seized to be translated into Lithuanian before a case can commence. These burdensome requirements were recently confirmed by the police during a U.S.-funded training program (in January 2005). When the authorities and industry officials complete a large seizure (for example, in the tens or hundreds of thousands of units), the burden to complete such reports is onerous and thus acts to block enforcement actions. According to regulations, the plaintiff has six months to prepare an expert report; the recording industry tries to complete its works within three months, but the judiciary still tends not to accept the opinions of the music industry in

⁶ 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.

some cases. The recording industry believes that legislative reforms are necessary to establish a presumption of ownership, in order to resolve this enforcement roadblock and to expedite cases.

Here is one example of the types of enforcement hurdles that must be overcome: 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 was not sufficiently competent. IIPA was told the report did not answer the court's legal questions, which are not even the subject of an expert report. A second report from the local music industry group FGPA was ignored by the Appellate Court on the grounds that FGPA is an interested party. The Supreme Court then noted that the statutory fines for copyright infringements are too high and sent the case back to the Appellate Court. No action was taken on the case in 2004. This case commenced in 2000, when the Tax Police seized 888 music CDs. The procedural labyrinth described above illustrates the incompetence and ineffectiveness of court procedures in copyright cases.

The business software industry (BSA) advises that following the introduction of new criminal procedures (in May 2003), expert statements in software cases by private experts pertaining to the nature of each pirated software copy have been accepted as sufficient evidence in criminal and administrative cases. BSA therefore believes that the law is satisfactory, although not ideal (because of the continued need of detailed expert reports, albeit by private, not public, experts).

Expensive civil court fees: The Civil Procedure Code, after its revision, 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) with the civil code rules on intellectual property rights (which had been 100 Litas). The new rule as it pertains to IPR cases must be clarified because applying a 5% civil claim rule would impose an excessive financial burden on rightsholders and could impinge on their ability to bring a case. The government of Lithuania has urged the copyright industries to bring more civil cases to lower piracy rates. This is evidence of two misunderstandings by the government: first, that civil cases can be effective against commercial pirates, including organized crime syndicates, the prime culprits of piracy—this is not so; second, that the prohibitive fees in those instances where civil cases can be effective—against certain end-user businesses, such as in software cases—will not be hampered by the prohibitive fee structure. Until this fee structure is made clear, civil IPR cases will not proceed. A flat fee of 100 Litas is a reasonable amount that IIPA recommends should be adopted and applied.

COPYRIGHT LAW AND RELATED REFORMS

Criminal Code reform: The Criminal Code and Criminal Procedures Code were substantially revised, effective in 2003. In 2004, a panel of Supreme Court judges ruled that the protections in Article 192 of the Criminal Code applies not only to works, but to sound recordings as well. This resolved a major concern of the 2003 revisions. Article 192(1) of the Criminal Code provides penalties consisting of fines, restriction of liberty, arrest, and imprisonment of up to two years assessed against anyone who illegally reproduces a literary, scientific, artistic or other work or part of it, imports, exports, distributes or retains illegal copies for commercial purposes of such works, if the total value of the copies (retail price) exceeds 100 MGL (minimum living standard), which is approximately 125 Litas (US\$47).

Copyright Act

Since 1999, Lithuania has enacted a number of significant copyright law reforms. In 1999 (effective June 9, 1999) Lithuania adopted a new comprehensive Copyright Act (Act No. VIII-1185), which replaced the antiquated Soviet Civil Code. The 1999 copyright law, though a major step forward, also contained some serious deficiencies. Between 1994 and 2002, Lithuania joined many of the key international copyright and neighboring rights conventions, including the Berne Convention, the Geneva Phonograms Convention, and the Rome Convention. It also acceded to the two WIPO Internet Treaties, and last, became a member of the World Trade Organization.

In 2003, additional revisions to the copyright and related laws were adopted (effective March 21, 2003) in order to comply with the WTO TRIPS obligations, the WIPO treaties, and the various EU directives. At the time, the copyright industries expressed concerns and reservations about several of the amendments which were (and are) inconsistent with Lithuania's bilateral and multilateral copyright obligations. Unfortunately, those concerns went unheeded by the Ministry of Culture which was unwilling to consider or accept the industries' proposed revisions. IIPA understands that, as part of Lithuania's accession to the EU, additional revisions are contemplated in 2005, for example, for compliance with the EU Enforcement Directive. (Directive 2004/48/EC on Enforcement of Intellectual Property Rights).

The 2003 amendments made some improvements to the copyright legal regime of Lithuania (described in detail in earlier IIPA reports). For example, the law is now explicitly clear that the right of reproduction covers direct and indirect, temporary and permanent copying in any manner or in any form [Article 2(1)]. However, many deficiencies remain, including:

• Article 79, which weakened, or at least left unclear, the formulation for the recovery of damages in Lithuania. The remedy was apparently supposed to model similar "preestablished" damages provisions on U.S. law, namely, that a right holder could elect recovery of compensatory damages in lieu of actual damages to represent actual damages in a fixed range of approximately US\$35 to US\$3,500. However it is unclear whether the damages are assessed for each act of infringement (i.e., times number of copies), or for each work infringed; if the latter, and if such remedies are the only compensatory damages, they would be much to low to properly compensate for piracy. For example, the business software industry (BSA) did file two claims in criminal cases consistent with these provisions. Damages were assessed for each copy of illegal software as a preliminary matter, but the judgments have not been finalized, leaving this matter unclear at present.

⁷ To review a more detailed history of Lithuanian copyright law reform efforts starting in 1999, see IIPA's February 2003 Special 301 report at http://www.iipa.com/rbc/2003/2003SPEC301LITHUANIA.pdf.

⁸ 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 according 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).

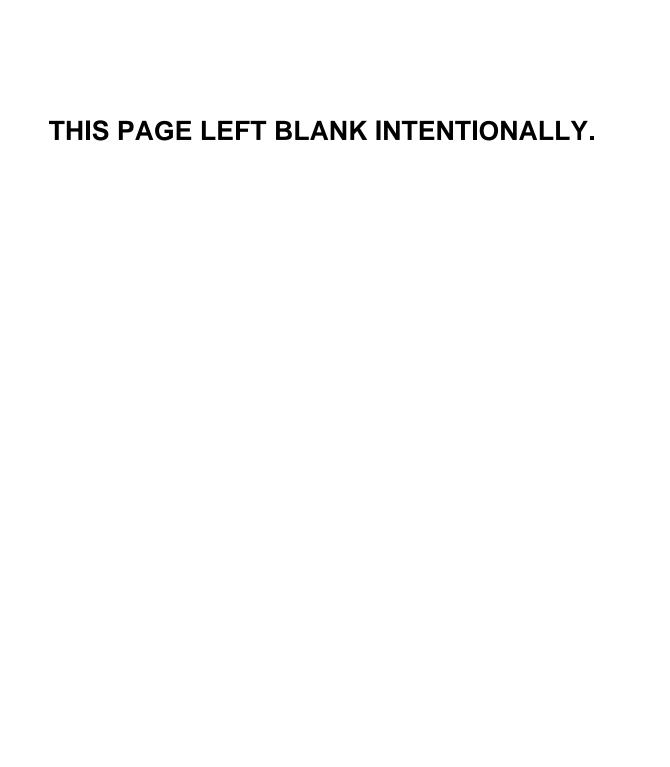
- The right of communication to the public does not clearly apply to all disseminations as it should; rather, it appears to apply only to "transmissions" (also, the law must be clear that a transmission should not exhaust the distribution right).
- Over the copyright rightholders' strong objections, the law contains a private copying exception to the rightholders' application of technological protection measures. The much-too-broad exception allows each consumer to make one analog or digital copy for "private purposes," which completely eviscerates copyright owner's rights for digital dissemination. This provision will hamper rightsholders' initiatives to provide digital services such as music streaming.
- Producers of sound recordings are not vested with exclusive rights with respect to broadcasting and communications to the public. (The law should make it clear that the remuneration claim does not substitute for an exclusive right.) In addition, broadcast royalty payments owed to U.S. phonogram producers and performers must be paid.
- The term of protection is too short; it should be extended to provide for a term of 95 years from first publication in the case of audiovisual works, or where the author is a legal entity.
- The economic rights in an audiovisual work should vest initially in the producer of the work, subject to agreements to the contrary, to facilitate licensing of films.
- The definition of an "author" of an audiovisual work is too broad.
- The act does not clearly apply to works or phonograms first and/or simultaneously published in Lithuania.
- The limitations on exclusive rights of copyright owners and producers of sound recordings remain too broad—beyond what is permissible in TRIPS. For example, the law needs to: track without exception the TRIPS Article 13 tripartite test, and clarify the vague scope of the "fair practice" definition; narrow the "personal use" exception; limit levies on blank tape and recording equipment to analog material; and, properly protect the copyright owner's use of copyright protection technology.

Customs Code reform: In 2001, the customs code was amended to provide customs officials the authority to: (1) conduct searches on their own initiative, that is, *ex officio* (with or without a judicial order), all persons, objects, and vehicles that enter or leave Lithuania; (2) seize infringing copies of all works and phonograms, including parallel imports; and (3) detain all persons in possession of such illegal copies. But even with this authority the record of the last four years is one of poor enforcement because of inadequate training and execution.

Optical media regulations: IIPA and its members have been pressing the Lithuanian government for a number of years, without success, to draft and implement optical media regulations. One possible breakthrough on this matter is a scheduled roundtable discussion that the government has set for April 2005 with interested industry representatives. IIPA urges the government to seriously consider the key elements (eleven in total) of what is considered the international model for optical disc regulations. These are fully outlined in the IIPA 2003 Special 301 report available at www.iipa.com and were presented by IIPA to the Government of Lithuania.

Government software legalization: In recent years, there have been three Lithuanian government orders issued to compel the state institutions to buy and use only licensed software programs. The two orders before 2004—one in 2001 and the other in 2003—were deemed too weak or ineffective, which was why a new order was initiated in February 2004. The 2004 order was broader than the prior orders, covering all public administration

institutions—both state and municipal, and also established an Information Society Development Committee (ISDC) under the control of the Government of Lithuania to serve as a coordinating institution for the acquisition by government institutions of hardware and software. However, ISDC's attempts to implement government legalization programs stalled in 2004.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT MALAYSIA

Special Statement of Condolence Regarding Recent Events in Malaysia: The copyright industries collectively express our deep sadness over recent events surrounding the devastating *tsunami* and the enormous loss of life, and extend our condolences to the families of those in Malaysia who have lost loved ones, and sympathies to those who have been displaced or have otherwise suffered as a result.

EXECUTIVE SUMMARY

Special 301 Recommendation: Malaysia should be maintained on the <u>Watch List</u>, and an <u>out-of-cycle review</u> should be conducted to evaluate progress on the actions IIPA has proposed must be taken (see below).

Overview of Key Achievements/Problems: The copyright industries note cooperation from the government in Malaysia in 2004 in the form of continued raids, including against optical disc plants, retail stores, copy shops, and companies suspected of using illegal software. Some of the raids have netted impressive seizures. Post-raid, the courts, while remaining backlogged (reports indicate that over 600 cases remain pending), have succeeded in meting out several severe criminal penalties, sending a message to those still engaged in piracy in Malaysia about the punishment that may be forthcoming. The overall effect of these developments is, for some industries, lowered piracy levels (e.g., 50% for motion pictures, down from 75% in 2002), and increased revenues for motion pictures and recorded music.

Notwithstanding these notably positive developments, there remain some disturbing trends. Malaysia remains a significant source of production and export of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs, etc.), including what is certain to be a more than doubling of pirate DVD exports leading all around the globe (see table below). Malaysia remains the most significant producer/exporter of pirate optical disc entertainment software in the world. The domestic piracy situation for business software remains bleak, presents difficulties for book publishers, and continues to harm the recording industry, as sound recording piracy began to tick up at the end of 2004. The judicial system is marred by substantial backlogs and far too many acquittals. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Malaysia were <u>US\$188.4 million</u>.

U.S. Trade Representative Robert B. Zoellick and Malaysia's Minister of International Trade and Industry Dato' Seri Rafidah Aziz signed a Trade and Investment Framework Agreement (TIFA) on May 10, 2004, establishing a bilateral forum to address trade issues, including intellectual property rights. The TIFA should be understood in the context of the Bush Administration's "Enterprise for ASEAN Initiative (EAI)" announced in October 2002, by which the United States offered the prospect of bilateral free trade agreements with ASEAN countries that are committed to the economic reforms and openness inherent in an FTA. We look forward

Copyright 2005 International Intellectual Property Alliance

2005 Special 301: Malaysia

¹ There were even signs that, despite the enormous enforcement efforts in 2003, the "pirates were back" as early as March 2004. Jacqueline Ann Surin, *Coffee Break: Return of the pirates*, The Edge Malaysia, March 15, 2004 ("it took only six months before the pirated CD, VCD and DVD vendors came back on the streets").

to the TIFA forum to act as a catalyst for the changes necessary to the legal and enforcement infrastructure in Malaysia.

Actions to be Taken in 2005

Enforcement

- Tackle the optical disc pirate production problem, through an enforcement campaign aimed at licensed and unlicensed factories, seizing pirate materials and equipment, and forwarding significant numbers of cases to prosecutors.
- Investigate factory owners and inspect factories which may be involved in the production of
 pirated products in off-hours, and who may otherwise be circumventing the optical media
 regulations by keeping stampers, equipment and documentation offsite. Where appropriate,
 cases should be brought against the owners of factories involved in such illegal operations.
- Intercept pirated products/materials at the borders (KLIA, Johor Port, and other control
 points), monitor exports, and take measures to address the problem of false documentation;
 obtain cooperation from Malaysia Airlines Cargo to tackle pirate exports; allocate adequate
 manpower to tackle the export problem; purchase necessary equipment to help detect illegal
 shipment, e.g., more x-ray scanners; and establish a government reward scheme for
 targeting export syndicates.
- Continue enforcement efforts against piracy occurring domestically, focusing on book piracy, end-user piracy, Internet café piracy, and illegal use of all copyrighted materials at universities.
- Thoroughly investigate links between piracy and organized crime, and prosecute syndicate members under copyright and other appropriate laws.
- Raise public awareness by publicizing cases and seizures, giving press conferences and
 interviews, launching public awareness campaigns to educate the public about protection of
 intellectual property rights, issuing articles in the press about the importance of copyright,
 and issuing strong statements stating that all offenders will be criminally prosecuted.
- Evoke sufficient government will to exercise the discretionary powers provided for enforcement authorities under the optical disc law.

Courts

- Establish specialized IP courts and assign all piracy cases to prosecutors and judges trained and experienced in copyright.
- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers.
- 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.
- Ensure that all cases taken on appeal have a prosecutor assigned to avoid stagnation in the court process.
- Decrease or ease documentary requirements imposed on right holders.
- Swiftly prosecute high-profile cases against licensed as well as unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offenses.
- Swiftly prosecute businesses and business owners/managers/directors using unauthorized software or other copyrighted materials, photocopy shops making illegal copies, etc.
- Issue a directive on the need to impose deterrent sentencing on infringers, and issue sentencing guidelines.

Laws

- Join and implement the WIPO Treaties and make changes (e.g., copyright term extension) to meet the latest international standards or trends of copyright protection.
- Modernize the optical disc statute to (1) cover "burning" of recordable discs; and (2) ensure that inspection authority is available and used in any place where optical media production activity may be occurring.
- Adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A good example of such legislation is Hong Kong's Organized and Serious Crimes Ordinance (OSCO).

In January 2005, USTR concluded an out-of-cycle review, to evaluate whether Malaysia has made progress in reducing the manufacture and export of pirate optical discs, deciding to keep Malaysia on the Watch List.

For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.html.

MALAYSIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ²										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	36.0	50%	38.0	50%	42.0	75%	40.0	80%	41.0	80%
Records & Music	55.5	52%	40.0	45%	110.2	70%	148.9	70%	15.6 ³	65%
Business Software Applications ⁴	74.0	63%	77.0	63%	79.2	68%	75.0	70%	75.4	66%
Entertainment Software ⁵	12.9	91%	NA	90%	NA	NA	56.4	93%	NA	98%
Books	10.0	NA	9.0	NA	8.3	NA	8.2	NA	8.0	NA
TOTALS	188.4		164.0		239.7		328.5		140.0	

PIRACY IN MALAYSIA

The following piracy phenomena prevail in Malaysia:

Optical Disc Pirate Production for Export: Pirate exports of optical discs remain the most damaging form of piracy to the copyright industries. The Malaysian government reports the existence of 32 optical disc plants producing finished content; however, IIPA believes there may be as many as 43 total optical disc production plants and 126 production lines (93 of

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, at www.iipa.com/pdf/2005spec301methodology.pdf.

³ Statistics for 2000 represent estimated pirate sales revenue in the pirate market (i.e., pirate profits).

⁴ BSA's final 2003 loss and level numbers consist of the U.S. publishers' share only of its global piracy losses in Malaysia, as broken out in October 2004 (based on the July 2004 BSA/IDC Annual Global Piracy Survey, at http://www.bsa.org/globalstudy/). In previous years, the "global" number did not include many computer applications such as operating systems and consumer applications such as PC gaming, personal finance, and reference software. In 2004, for the first time, these applications are included in the estimated losses, resulting in a significantly higher loss estimate (\$129 million in estimated losses in 2003, \$77 million of which is the U.S. publishers' share). IIPA notes for clarity that the \$91.1 million and 75% piracy rate posted on the IIPA website in May 2004 were based on the older

methodology which is why they differ from the new numbers.

⁵ ESA's reported dollar figure reflects the value of pirate product present in the Malaysian marketplace as distinguished from definitive industry "losses."

which produce pre-recorded product). That calculates to a capacity of 441 million discs per year, including 325.5 million pre-recorded discs. Even with legitimate/licensed production in Malaysia of sound recordings, motion pictures, entertainment software and blank recordable CDs of an estimated 50 million discs per year, it is clear that Malaysian optical disc plants massively over-produce. The resulting massive exports of pirated materials (e.g., seizures of pirate DVDs emanating from the Malaysian plants more than doubled in 2004 over the previous year, according to the latest statistics) should not be surprising. Pirate discs from Malaysia have, either directly, or through elaborate and highly sophisticated transshipment routes, landed in at least 23 countries on five continents, including the United States. The Malaysian government continues to face a massive problem. The problem must be solved by dealing with licensed factories as well as unlicensed ones.

• Retail Piracy of Digital and Traditional (Hard Goods) Media: After the crackdown of 2003, in which MDTCA ran thousands of raids, yielding seizures of millions of pirate optical discs, piracy levels in the domestic market decreased temporarily. However, it is surprising how quickly pirates filled the void once enforcement waned in the early part of 2004. MDTCA Minister Datuk Shafie Apdal even admitted that usage of pirate "software" (and, we assume he meant, other copyrighted materials) increased in 2004, basing his assumption on the number and size of seizures. We applaud the Minister's recognition of the growing scope of the problem, and while the raids documented below demonstrate enormous will on the part of the government to tackle the piracy dilemma, the government simply must adopt an even more aggressive approach to eradicate piracy in Malaysia, especially with respect to prosecution of those responsible for the source of piracy — i.e., the producers, the distributors (exporters). There is also increasing evidence that pirates have simply shifted tactics, becoming more mobile, or, in some cases, even attempting to pay Malaysian police officers to leave them alone. The producers is also increasing evidence that pirates have simply shifted tactics, becoming more mobile, or, in some cases, even attempting to pay Malaysian police officers to leave them alone.

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⁶ IIPA's calculation of disc capacity is explained in the methodology statement cited above. Even a Ministry of Domestic Trade and Consumer Affairs (MDTCA) official (Mr. Dahuri) estimated, at a public conference in October 2004, that Malaysian optical disc producers have a total capacity of 500 million discs per year.

⁷ MPAA reports, for example, seizures in the UK of pirate materials from Malaysia of 856,210 units in 2004, compared with 224,931 in 2003.

⁸ Australia, Austria, Belgium, France, Germany, Sweden, Spain, Portugal, Tunisia, Romania, Singapore, Thailand, United Kingdom, Indonesia, Philippines, India, Nepal, Turkey, Kuwait, South Africa, Nigeria, Bolivia, and the United States. Seizure statistics provided by UK Customs/UKFACT indicate that Malaysia is by far the Asia-Pacific region's biggest exporter of pirate DVDs to the UK.

⁹ Jacqueline Ann Surin, *Coffee Break: Return of the pirates, The Edge Malaysia*, March 15, 2004. The article gave Mel Gibson's movie, *The Passion of The Christ*, as an example of "just how efficient the piracy machinery has become since its return." The movie was released on February 25 in the United States. Less than two weeks later, not-very-clear VCD copies were available in Malaysia for only RM6 (US\$1.58). Clear DVD copies wrapped in crisp plastic wrappers complete with a poster cover flooded the open market for just RM11 (US\$2.89) in the Klang Valley right after. To date, the "Passion" has not been approved for viewing in Malaysia.

^{10*} See Ioannis Gatsiounis, *Malaysia's CD pirates make a comeback*, Asia Times Online, March 18, 2004, at http://www.atimes.com//atimes/Southeast_Asia/FC18Ae01.html. The article points out that, while the crackdown in 2003 did seem to make a dent in blatant piracy, one could still find pirate materials in March 2004 "in the shopping malls, on night-market tables, from Kota Bharu to Penang to Kuala Lumpur." The article notes the increasing mobility of pirates, evidenced by "more empty (original) covers on display," more "walkie-talkies" radioing orders to a clerk who brings the requested disc. The article also highlights possible corruption, noting that "several vendors interviewed for this article admitted to paying bribes to law-enforcement officials, before [October 2003] and after. One vendor operating in a popular mall in the capital said the fees varied, 'depending on how many officers show up for a 'check'," but said about RM100 (\$26) per officer usually 'keeps them moving'." The evidence indicates that many vendors have moved to fixed premises, with two to five pirate shops in each location. Pirate vendors are also reducing the profile of infringing product by displaying only original products in the shops. In some cases, pirated products are available in behind-the-counter catalogs, while the pirated discs are stored in nearby shops or parking lots. Major shopping complexes that remain a concern are Sg. Wang, Low Yat Plaza and Imbi Plaza in Klang Valley and the Holiday Plaza & City Square in Johor.

- **Book Piracy:** Book publishers report regular cooperation from the Ministry of Domestic Trade and Consumer Affairs (MDTCA) with raids against commercial photocopy centers near university campuses, especially in the Klang Valley. However, the scourge of photocopying on a commercial scale continues. Publishers report that, in response to the expectation of raids on commercial off-campus centers, photocopying operations are moving underground or into on-campus facilities such as libraries, student centers and academic buildings. The problem is being perpetuated further through the active involvement of lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for the photocopying. Institutions of higher learning should be monitored closely to ensure that these practices are not tolerated.
- End-User Piracy: The unauthorized use of copyrighted software in businesses end-user piracy is an increasing global problem, including in Malaysia. End-user piracy of business software causes the greatest percentage of losses to that industry. The breadth and extent of the problem can be seen from the response the Business Software Alliance received from the public when it announced a reward campaign for information on end user infringers. Over a two month period BSA received over 400 reports. Based on BSA's previous experience with such campaigns, the figure is very high and reflects the severity of the problem.
- Internet Café Piracy: The entertainment software industry in particular notes the continued prevalence, despite some raids and seizures in 2004, of Internet cafés in Malaysia (it is believed that there are over 2,000 Internet cafés in the country, about 80% of which are unlicensed) which, in addition to providing Internet access, serve up unauthorized copyrighted materials on computers for a consumer's use. It is extremely important that all unlicensed Internet cafés be made to license the use of copyrighted materials.

It should be noted that not only do foreign right holders suffer due to piracy in Malaysia, but Malaysian artists also suffer, leading in November of this year to a delegation of Malaysian filmmakers going to India to complain about piracy of Malayalan films in the state of Thirucananthapuram in India. Out of those meetings, Thirucananthapuram Chief Minister Oommen Chandy assured the delegation that steps would be taken to curb the video piracy of Malayalan films in the State. ¹¹ It is clear that it is in Malaysia's own self-interest to eradicate piracy.

Organized Crime in Malaysian Piracy Operations Requires Appropriate Legal/Enforcement Response

For many years, IIPA has received anecdotal evidence indicating a high level of organization and sophistication among the pirate groups operating in Malaysia. Indeed, prior to the outbreak of massive piracy in Malaysia, such organization could be seen only in places like Taiwan, Hong Kong, China, and Macau. IIPA believes that, in part as a result of good enforcement of IPR laws in places like Hong Kong and Macau in the late 1990s, piracy, especially optical disc pirate production, migrated to Malaysia, but under the same ownership groups as in China, Taiwan, Hong Kong, etc. Recent years' reports have highlighted arrests in Malaysia and elsewhere in Southeast Asia of foreign nationals — often illegal immigrants recruited by criminal syndicates — at optical disc plants producing pirated materials for export.

¹¹See http://www.newindpress.com/NewsItems.asp?ID=IER20041119222440&Title=Kerala&rLink=0.

The level of sophistication of these groups makes it highly likely that these factories' ownership can be traced to organized criminal elements. Unfortunately, IIPA and its members' resources, informational and otherwise, can only go so far to trace the illegal activities involving piracy to other illegal activities and the organizational structure of these syndicates.¹²

The Malaysian government must develop a comprehensive strategy to weed out such elements from its society. Right holders continue to develop cases that demonstrate the involvement of organized criminal groups. However, to date, the Malaysian authorities have generally been content with raids and seizures, rather than investigating and bringing to justice those entities which control such piratical activity. The copyright law and the optical disc law, for example, are not adequate to tackle this challenge. Other laws, such as those criminalizing money laundering, fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime problem in Malaysia. IIPA requests USTR to obtain from the Malaysian government copies of all relevant laws, and then to work with Malaysia to establish a comprehensive approach to organized crime and organized piracy, with the aim of obtaining some key prosecutions of chief financiers and owners of criminal enterprises engaged in copyright piracy in 2005.

ENFORCEMENT AND THE COURTS IN MALAYSIA

Factory Raids Occurring, but Licensed Factories Still Off-the-Hook

In 2004, MDTCA officers raided 11 licensed factories (5 registered factories and 6 unregistered ones), resulting in seizure of 10 VCD lines and 2 DVD lines. ¹³ As a result of these raids, dismantled replication lines were moved to government controlled warehouses. In addition, during 2004, MDTCA conducted two raids on CD-R burner facilities, one on a printing facility and one against cassette replication facility. There are 16 factory cases currently in court

¹² See Suspected CD Pirate Crashes Van Fleeing Authorities, Bernama.com, August 12, 2004, at http://www.bernama.com/bernama/v3/news.php?id=85994 (in which it was reported that a suspected member of a syndicate distributing pirated optical discs crashed his van into several vehicles while attempting to escape MDTCA officials; the man was apparently unloading 250,000 discs of local and international artists worth RM1.5 million from his van when he noticed the presence of enforcers).

¹³ E.g., *RM3 Million Processing Machine, 84,000 Pirated VCDs Seized*, Bernama.com, July 10, 2004 (pirate VCD processing operational for four months, located behind a steel factory on the same plot of land to evade the authorities' attention).

- On February 9, 2004, MDTCA enforcement officers raided a licensed VCD factory, and found it illegally replicating pirated copies of U.S. motion pictures; only one machine was sealed, as the mould was found to be without any SID codes. Examples were taken from both lines for forensic examination.
- On July 6, 2004, MDTCA officers conducted a raid on a suspected DVD factory in Kajang Technology City, Selangor, seizing one VCD replicating line, one printing machine, one compressor, two VCD players, two television sets, 500 music VCDs and 30 stampers; the equipment seized alone was estimated to be worth RM1.5 million (US\$394,774). Significantly, 2,000 pirated CDs of local musicians, including Siti Nurhaliza, Raihan, Search, Wings, Saleem, Liza Hanim, Alleycats and Jamal Abdillah, were seized. Two men believed to be in the factory at the time of the raid reportedly escaped through the ceiling.
- On October 5, a team of five enforcement officers from Kuala Lumpur raided a licensed optical disc factory in Johor. After a 30-minute wait, upon entry, the officers found two DVD replicating lines, one of which was broken down into pieces. No DVD products were found in the factory, but the officers extended their search within and outside the building and discovered discs lying on the ground at the back of the building within the factory compound. Observing a long pipe connecting the factory to an adjacent building, the officers decided to check the second premises. They used force to gain entry and found bags of DVDs (SID Codes erased), stampers, order forms and title lists. The pipe connecting the two premises, which looked like a drainage culvert, was actually a PVC tunnel about 8-10 inches wide that had been used to transport DVDs from the factory into the second premises for packing. Two factory workers were arrested and one DVD replicating machine was seized, along with 4,115 DVDs, 90 stampers, and 29 silk-screens, infringing U.S. motion pictures.

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proceedings and another 26 cases awaiting registration before the courts. For reasons unknown, the MDTCA have yet to fully exercise their powers under the Optical Disc Law against errant licensed factories. ¹⁴ In fact, there is much concern over the apparent relaxation by MDTCA of restrictions on issuing new manufacturing licenses to plants claiming to be CD-R/DVD-R producers. The MDTCA must utilize their powers to issue warning letters and eventually cancel licenses in the case of licensed factories violating the law.

The Malaysian Government Chemist (KIMIA) Optical Disc Forensic Laboratory, which became fully operational in 2004, is being underutilized. In particular, the government facility is only being employed reactively, for corroborative post-raid evidence, rather than pro-actively, in order to direct enforcement personnel towards copyright infringing producing facilities. It is vital that the forensic laboratory facilities produce worthwhile results. The lab has yet to be put to proper use.

Retail Raids Continue in Malaysia, and Arrest Numbers Up in 2004

Obtaining retail raids in Malaysia has not been a major issue; usually, hundreds of raids are run against retailers each year. ¹⁵ Nonetheless, since the 2003 Copyright Law amendments

¹⁴ In what was expected to be a very important raid against a major syndicate, a licensed optical disc factory was inspected in late October 2004. Unfortunately, nothing was found except some stampers of Indian movies and karaoke music discs. Indications are that the factory was tipped off, e.g., the factory had no hesitation allowing the inspectors in and were casual about the inspection. It is suspected that pirate factories now keep all stampers, order information, and incriminating evidence offsite. A follow-up raid occurred later in the year against the suspected distribution entity tied to this factory. At that time one million discs, stampers, and manuals were found in the raid. Unfortunately, reports thus far indicate that the MDTCA is only going to charge the "fall guy"-not the owner of the syndicate—with one count of violating the Optical Disc Act. We also understand that the store (in Ampang) is apparently open again and continues to sell pirated goods. The MDCTA still has not provided results of its forensic testing and other follow-up it was going to do in relation to this raid. In addition, it has been suggested to right holders that it is necessary for them to conduct further surveillance and investigation linking the operations and owners clearly a high risk proposition for private, non-law enforcement entities. In another case, a licensed factory was caught in the act of producing pirate products and machines in the factory were sealed after positive forensic testing. However, two subsequent visits to the factory by the MDTCA enforcement officers revealed that the seals had been removed and production continued as normal. Despite such a blatant act, no action was taken against the factory. ¹⁵ The following is a sampling of some of the major raid results in Malaysia in 2004:

- March 31: As part of *Ops Tulen* enforcement program, about 12,000 copies of pirated software and CDs worth more than RM1 million were seized in raids at two shopping complexes (Subang and Petaling Jaya) in operations by the Selangor enforcement division of MDTCA; suspects were to be charged under Trade Descriptions Act 1972, liable for a fine of up to RM 100,000 (US\$26,313) if found guilty. See http://thestar.com.my/news/story.asp?file=/2004/4/9/nation/7729688&sec=nation.
- June 16: A team of nine enforcement officers from the MDTCA G17 squad assisted by six enforcement officers from the MDTCA (Penang), MDTCA (Butterworth) raided an infamous 24-hour VCD outlet (the operator is known as Blue King) and four of its stores in Bukit Mertajam, Penang. Total seizures amounted to 85,000 discs, 2 television sets, 2 VCD players, 2 speakers, 1 amplifier and numerous VCD display racks. Estimated value of the total seizure is about RM716,300 (approximately US\$188,500).
- October 3: UK Customs seized 42,900 pirate U.S. motion pictures and other pornographic discs at the Dover Channel crossing in a German-registered van from a town near Frankfurt. The driver was detained but claimed he did not know what the 40-plus boxes contained and that it was his first week on the job. The discs were unaccompanied by paperwork indicating place of origin, but on examination proved identical to previously seized discs that originated in Malaysia and were transshipped through Singapore.
- November 2: A syndicate notorious for dealing in pirated DVDs and pornographic VCDs was the target of Home
 Affairs Ministry raids. Four teams of six enforcement officers each simultaneously raided pirate operations in
 Banting, Sepang, Kuala Selangor and Klang. In all, 21,334 DVDs and 624 pornographic VCDs valued at
 RM350,000 (US\$92,091) were seized. A 40-year old man believed to be the mastermind behind the syndicate's
 operations was arrested at one of the locations, and in the Banting raid, two duplicating machines worth about
 RM12,000 (US\$3,157) each were seized.

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providing MDTCA officers with the power of arrest, there has been a significant increase in the number of arrests in 2004. ¹⁶ It also appears that many of the raids caught the pirates by surprise, and MDTCA showed no hesitation in 2004 in using necessary force to enter the premises involved. ¹⁷ MDTCA also seems to have taken aggressive steps to stamp out retail piracy by devoting greater manpower to "public" places to deter piracy. ¹⁸ Finally, MDTCA seems to be willing to go to great lengths to shut down retail piracy in Malaysia. ¹⁹ Notwithstanding these positive results, the Malaysian government continues to be unable to finally shut down recidivist targets; in one egregious example, a "licensed" distributor of VCDs was raided in 2004 for the 78th and 79th times! ²⁰ In addition, some irregularities continue to occur, including tipoffs of raids. ²¹

More Effort Needed to Stop the Flow of Pirated Exports from Malaysia

It is critical that the Malaysia government take more aggressive action in 2005 to monitor and seize exports of pirated products on the way out of Malaysia. ²² It is helpful that the Kuala Lumpur International Airport (KLIA) authorities now allow industry representatives to maintain a permanent staff at the airport to monitor the post and cargo center, but simply put more must be done. IIPA urges the Malaysian government to establish a dedicated government reward scheme specifically targeting the export of pirated discs, and to incorporate this into the government's outreach campaign to educate the general public about the protection of intellectual property rights. In particular, the Malaysian government must recognize and take into account the correlation between pirate syndicates' involvement with people smuggling, pornography, and other organized crimes.

During "Operation Eradicate," a special initiative launched by the motion picture industry in early December 2004 and lasting through
the year-end holidays, enforcement authorities undertook more than 65 separate surveillance and raid operations, resulting in the
seizure of 25,847 VCDs, 68,526 DVDs, and 18 arrests.

The motion picture industry reported 661 retail-related arrests between October 1, 2003 to January 6, 2005.

¹⁷ For example, on February 17, 2004, in an unprecedented move, MDTCA "cleaned" a shopping mall in Penang of all 12 pirate disc outlets at the Prangin Mall. A team of 15 officers, tired of "tip-off[s] from 'tontos' stationed at the entrance and various exits of the mall," proceeded to use crowbars, screwdrivers, cutters and other tools to force open shuttered outlets, in many instances, forcing the pirates to offer to open the shops themselves. More than 10,000 pirated discs stashed in the ceiling, including computer games and software, were seized from the 12 outlets, as well as VCD and CD players, TV sets and other equipment, totaling more than RM80,000 (US\$21,049).

The press reported that in August 2004, the Malaysian government had begun "assigning two enforcement officers to each shopping complex." See Sangeetha Nair, *Pirated disc peddlers on 'forced holiday'*, Sept. 4, 2004, The Malay Mail, at Penang Online, at http://penang.thestar.com.my/content/news/2004/8/26/8757712.asp.

¹⁹ The Star reported that MDTCA Minister Datuk Mohd Shafie Apdal has threatened to use the Internal Security Act against pirates of CDs, VCDs and DVDs who are using youngsters to peddle their wares; such a move would empower the Minister of Home Affairs to order the detention or restriction of such persons without trial.

²⁰ On December 6, 2004, MDTCA officers raided a four-story building in Jalan Masjid India, Kuala Lumpur for the 79th time. In April 2004, MDTCA officers had seized pirated VCDs worth about RM10 million (US\$2.6 million) from the same premises. A target of anti-piracy raids since the 1980s, in the December raid, the building yielded 30,000 pirated VCDs and DVDs worth about RM150,000 (US\$39,471). Also seized were more than 100,000 VCD inlay cards. Authorities searched the building for around four hours before finding the pirated discs and other materials hidden in two secret compartments. The raided company is a licensed distributor of VCDs and is believed to have used its license as cover for its pirate activities.

²¹ On December 13, 2004, a team of 30 MDTCA enforcement officers from Penang raided a shopping center popular with cruise ship passengers who visit the island, seizing 14,197 pirate DVDs, VCDs and CDs with an estimated value of RM105,709 (US\$27,818). The retailers appeared to have been tipped off about the raid and were found closing their shops when the raid teams arrived. The indication by enforcement officers that they would use force to gain entry to the outlets persuaded the retailers to allow the officers access

entry to the outlets persuaded the retailers to allow the officers access.

22 On February 18th, just over one hundred boxes containing 75,000 pirate DVDs were seized at Pos Malaysia at the KLIA. All of the shipments were declared as education material. The boxes were destined for distribution in the Philippines. This was the biggest reported seizure of an outbound shipment of pirated discs from Malaysia in 2004. Titles seized included: *The Lord of the Rings: Return of the King; Pirates of the Caribbean; Brother Bear, The Twin Effect, Internal Affairs*; and *Good Boy*.

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Malaysian Customs should continue to work with the freight forwarding companies, the postal authority, and other export-related entities in the country to create a solution to the problem of pirated products being shipped from the country despite being supported only by false documentation (including falsely declaring the type of goods contained in the box, providing false name and address for the exporter/shipper). This loophole is problematic not only with respect to pirated products, but also on security-related grounds.

One positive indication that the Malaysian government at least recognizes the severity of the export problem is the visit in October 2004 of a delegation of six senior government officials to the United Kingdom and France in an effort to address Malaysia's optical disc export piracy problem. The delegation was led by MDTCA Secretary General Dato Talaat Bin Haji Hussain. During the trip, the delegation met with enforcement, trade and economics officials from both the U.K. and French governments, seeing for themselves the extent of export of pirated products originating from Malaysia. At the conclusion of the trip, the delegation began brainstorming for solutions, agreeing that an immediate step will be increased factory and airport inspections

Campaign Against Book Piracy Yielding Mixed Results

While MDTCA has taken action against illegal photocopying, publishers reported continuing problems during 2004. While authorities regularly raid off-campus copy shops, shops that are raided simply close up and move to alternate locations or change their mode of operations. In some instances, the alternate locations are not proper storefronts, but rather underground operations based in residential areas or on the university campuses themselves. Commercial operations set up, for example, in an apartment or condominium — an arrangement which offers the additional benefit of an exterior guard house or front desk clerk. who can alert the infringers if authorities arrive to inspect or raid. Furthermore, these underground operations undertake their activities only at night, making it even more difficult to detect and enforce against, and often produce on a "print to order" basis to avoid keeping infringing stock on the premises. They deliver the infringing goods at a designated spot on campus, often in a parking garage or the like, through use of private cars and commercial vans. Van drivers know to return to a legitimate store after making their deliveries if they suspect they are being tailed. Authorities need to be mindful of these changed practices, to raid at night and to devote resources toward ferreting out these underground operations. MDTCA needs to receive adequate resources and training to be able to conduct thorough and effective investigations.

Consistency in enforcement remains a problem as well. While MDTCA is quite helpful in their willingness to cooperate with industry representatives on raids, there seems to be no consistent set of instructions to individual officers regarding seizures and procedures. Officers receive no guidance, for instance, on the numbers of machines and infringing copies to seize in a given raid, so results vary widely. Furthermore, industry representatives accompanying MDTCA officers on raids are often asked to submit names and identification numbers to defendants. This sort of practice has been brought to the attention of MDTCA and the agency has promised to remedy it. IIPA will be monitoring progress in this area.

Likewise, university campus facilities are themselves being used for pervasive illegal photocopying, especially during high-volume copying periods such as the beginning of the academic term. These activities take place largely after hours, often under an informal arrangement for the appropriate personnel to "turn a blind eye" when locking up. The campuses

are being treated as "safe havens" by infringers. IIPA encourages involvement by MDTCA as well as appropriate university administrations and education administrators in working to eradicate this serious problem.

New Campaign Against Business Software Piracy Seems to be Effective

In late 2003, the Malaysian authorities announced a new campaign, called *Rondaan Tulen*, a campaign that follows up on *Ops Tulen*, ²³ specifically to target business software enduser piracy. In late May, the government made public announcements that businesses had one week to stop using pirated software after which enforcement officers, working closely with watchdog Business Software Alliance, would begin raiding offices. Raids began soon after the deadline with some impressive results. ²⁴ The operation was not limited to businesses engaged in end-user piracy, and seizures included not only software but many other pirated materials. ²⁵ Business software right owners report that they do not experience difficulty obtaining *ex parte* civil search orders.

Approaches to Internet Café Piracy May be Working

Some entertainment software publishers, with the help of local law enforcement authorities, have achieved some success in converting certain cafés to legitimate operations. Right holders have sent cease-and-desist letters to café owners, sometimes leading to settlements (and licenses), or, where the owner has refused to halt the illegal practices, local authorities have conducted raids and seized the café computers. However, the actions against unlicensed cafés must be sustained and continuous so that there is no backsliding by cafés that are already licensed and so that they will have a deterrent effect on those that have not yet sought to legitimize their operations.

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²³ The *Ops Tulen* campaign was launched nationwide in 2002, during which the Business Software Alliance (BSA) and MDTCA sent 24,000 warning letters to companies suspected of using pirated software. 300 companies were visited, following up on 1,600 investigations, and resulting in payments of RM100,000 (US\$26,315)to informants. In 2004, about 10,000 warning letters were sent to suspected companies from January to April. See <a href="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec="http://www.utusan

Home News&pg=hn 05.htm.

24 Pirated Software, Hardware Worth More Than RM300,000 Seized, Bernama.com, June 2, 2004 (enforcement officers of MDTCA raided an oil and gas industry data exchange in Jalan Tun Razak and seized thousands of ringgit worth of pirated and unlicensed software; 10 computers worth RM30,000 (US\$7,894) and 100 pirated software discs worth RM297,000 (US\$78,150) comprising Adobe, Autodesk, Macromedia, Microsoft and Symantec were confiscated)

confiscated).
²⁵ Malaysia Closes Karaoke Bar in Crackdown, June 9, 2004, at http://www.nytimes.com/aponline/international/AP-Malaysia-Piracy-Crackdown.html (authorities shut down a karaoke bar in Kuala Lumpur for allegedly keeping thousands of unlicensed songs in its computer system; more than 5,000 pirated songs were found on a computer hard drive; in a related raid, MDTCA officers seized eight computers and pirated software worth about RM75,000 [US\$19,735] from two retail stores in Kuala Lumpur's suburbs).

²⁶ M K Anwar & Lyna Mohammad, *Internet café raided over copyright infringement*, July 22, 2004, Borneo Bulletin, at http://www.brunet.bn/news/bb/thu/jul22h1.htm (Internet café located in the Serusop Commercial area believed to be using game software without authorization was raided by a team of 10 police personnel from the Commercial Crime Unit; two of the games used in the Internet café belonged to Vivendi Universal Games: *Half-Life and Warcraft III: The Frozen Throne*).

Post-Raid: More Criminal Convictions in 2004

The courts in Malaysia meted out some impressive criminal convictions in 2004.²⁷ The motion picture industry, in particular, is encouraged by the progress shown by MDTCA in prosecuting more cases in the courts, resulting in more court decisions and greater deterrent sentencing. In addition, terms of imprisonment are more regularly being meted out, especially in cases involving Internet piracy (in which the average penalties were RM20,800 or US\$5,473, forfeit of seized materials, and 13 days in prison). In other cases, the average penalties are less impressive (optical disc plants: RM100,000 or US\$26,315 and forfeiture of replicating machines; street vendors/retail: RM36,000 or US\$9,472; and warehouses/distributors: RM26,000-30,000 or US\$6,843-7,896; commercial photocopy shops: RM 12,500 or US\$3,300). 28 In June 2004, one VCD pirate was sentenced to 12 months in prison for possession of 22 pirate copies, while another was sentenced to 10 months' imprisonment for the first charge of possessing over 300 pornographic VCDs, and 6 months' imprisonment for the second charge of possessing 10,270 pirated VCDs (the sentences are being concurrently served). In May 2004, an offender was sentenced to 16 months in prison for possession of 12 VCDs and selling 8 VCDs. In two other retail cases in April 2004, fines of over US\$500 per infringing copy were imposed.²⁹

Nonetheless, there still remain areas that must be addressed. The backlog of unresolved cases remains substantial and far too many cases result in acquittals (and the leaders of syndicates involved in piracy operations appear never to be prosecuted). In addition, the Business Software Alliance noted that they lost the one end user case that reached judgment in 2004; thus a contested software end user piracy case has never succeeded in Malaysia.

Specialized IP Court and Prosecutors Needed

The increasing activity on the raiding front, while commendable, will not result in deterrence unless and until the courts (including the prosecutors) are equipped to handle the enormous number of cases to be brought in an expeditious and expert manner. Between 2002 and 2004, for example, there has been a huge increase of cases registered in court, e.g., in 2004, 235 motion picture cases have been brought to the court for criminal proceedings. resulting in 30 favorable decisions with 205 cases still pending. Depending on which office is handling a criminal case, prosecutions can be slow and/or ineffective (i.e., when MDTCA officers act as prosecutors, which remains the case in all but the major cases, which are handled by the Attorney General's office).

IIPA recommends several corrective steps or actions to begin the process down the road to meaningful judicial reform:

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²⁷ E.g., on November 29, 2004, the Petaling Jaya Court sentenced a 29-year-old man to three years in prison for possessing pirated VCD movies. The defendant, who was arrested in a raid conducted on November 14, 2003, was charged under section 41.1 (D) (possession of infringing copy) of the Copyright Act 1987. The defendant's counsel requested the defendant not be fined, resulting in the three-year jail term, which the defendant is now serving.

This is actually a marked improvement over previous averages of RM1,000-3,000 (US\$263-789).

²⁹ On April 15, 2004, in Shah Alam, a man was charged with possession of 22 copies of infringing VCDs of U.S. motion pictures, and was fined RM44.000 (US\$11.579) or four months in iail. In another case on April 16 in Penang. a defendant was fined RM4,000 (US\$1,053) for possession of two infringing VCD copies of the motion picture Rundown. On January 7, a judge in Ampang sentenced two defendants to an 18 month jail term and a fine of RM 3.6 million for unlawful possession and distribution of pirated optical discs.

- The Malaysian government should follow the lead of several countries in the region by establishing and developing a specialized IP court, with requisite attention paid to judicial reform and training for the judges to be appointed to such a court.³⁰
- The Malaysian government should devote the resources necessary in 2005 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. In the interim, IIPA recommends that prosecutors from the Attorney General's chambers be made available where the scale of the case warrants such involvement, including in cases involving large-scale infringement at CD plants and warehouses.
- 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,³¹ in line with the Chief Justice of Malaysia's announcement in April 2003 that copyright piracy cases should be handled as "Priority Cases," there should be fewer postponements and judges should hear these cases within two months of a case being registered in court and should conclude trials within three months.³² The courts should also be empowered to try defendants and convict them in absentia. Further, defendants released on bail should 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 (recommending custodial sentences and high fines) 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).

The entertainment software industry has reported continuing burdensome documentary requirements in order to bring an infringement case, including the requirement to execute statutory declarations, including detailed information on copyright ownership for all titles infringed upon, and the requirement to provide genuine copies of each title involved in the case. Section 42 of the Copyright Act allows the acceptance of statutory declarations to be submitted as *prima facie* evidence of copyright subsistence without the declarant having to be called into court. Reforms must be such to address this problem for the entertainment software industry.

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³⁰ 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. IIPA understands that MDTCA is now seriously considering establishing such a court. See Ministry mulls intellectual property court—Shafie, August 17, 2004, at the website http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0818&pub=Utusan_Express&sec=Home_News&pg=hn_04.htm (in which Minister Datuk Shafie Apdal is quoted as saying MDTCA plans to set up a special court to speed up disposal of backlogged intellectual property cases).

³¹ In a development in 2002 that was intended to avoid the situation of a defendant running away before being

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.

³² Under the Chief Justice's Directive, appeals must be completed within two months of the conclusion of a trial.

HOLOGRAM STICKER PROGRAM

In January 2003, the Ministry of Domestic Trade and Consumer Affairs implemented the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82), requiring the affixation of "originality stickers" on audio, audiovisual, and other optical media distributed in Malaysia (e.g., for entertainment software, on the product's jewel case, beneath the shrinkwrap). However, certain deficiencies in the scheme have emerged at this point, including: the lack of an adequate computer system to process the tedious application requirements and resultant delays in issuing stickers; serious compromises including stickers being issued to pirates (including pirate importers); and stickers being issued to unauthorized distributors. IIPA discourages the Malaysian government from using a hologram, as it adds an additional bureaucratic layer and increases distribution costs (and costs to consumers). It is hoped that the scheme will be further refined to properly rectify those deficiencies.

COPYRIGHT AND RELATED LAWS

Copyright Law in Need of Further Revision

Copyright protection in Malaysia is afforded under the Copyright Act, 1987, as amended through 2003. The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003) strengthened criminal penalties (allowing offenders to be jailed for up to five years and fined 20,000 ringgit for each infringement) 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. 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 very positive development.

The amendments did not, however, otherwise address issues raised by IIPA in past filings, e.g., they did not:

- Impose mandatory minimum jail sentences for piracy;
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright;
- Permit disclosure by enforcement authorities to copyright owners of evidence:
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.³⁴

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

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³³ We understand that since these amendments went into force, MDTCA has made more than ten retail arrests, all of which have been registered in court as offenses under the Copyright Act

³⁴ Please see the 2003 Special 301 report on Malaysia, at the website http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf for a full discussion of needed amendments to the Malaysia Copyright Act.

Phonograms Treaty (including by full implementation of TPMs, expressly protecting temporary copies) and then should join these important treaties,³⁵ and make other changes consistent with international standards or practice (e.g., term extension to "life plus 70" and 95 years from publication for films and sound recordings etc.). We understand that MDTCA officials have been working on a draft to fully implement the Treaties, but that the draft has not yet been tabled with the Cabinet.

Finally, with the involvement of organized criminal syndicates in piracy operations in the country, Malaysia should be encouraged to adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A particularly good example of such legislation is Hong Kong's Organized and Serious Crimes Ordinance (OSCO) which allows Hong Kong authorities to (1) employ more extensive investigative powers into organized criminal operations involved in piracy and into the proceeds derived from this illegal activity; (2) to seize records, freeze assets and confiscate illicit proceeds; and (3) to impose higher penalties on those convicted of engaging in pirate operations. Also, as noted, the Malaysian government must develop a comprehensive strategy to weed out such elements from its society. Other laws, such as those criminalizing money laundering, fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime problem in Malaysia. Malaysia must establish a comprehensive approach to organized crime and organized piracy.

IIPA is pleased that the Attorney General's Chambers, after much urging, decided recently to review Malaysia's intellectual property laws by setting up a special Copyright Law Revision Committee headed by the AG's chambers.

Optical Disc Law Needs Further Strengthening

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, including the following:

- Cover "burning" of copyrighted content of others onto recordable discs;
- Ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are stored, and close other loopholes which allow pirates to continue to operate optical disc pirate production outside the boundary of the current OD law;
- 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;

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³⁵ 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 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.

- 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;
- The Act should make it an offense to engage in "disc gouging" or "disc scouring."

Price Controls Must Not be Imposed

Finally, IIPA notes that, while Malaysia decided not to impose price controls on entertainment product during 2004, MDTCA retains the authority to impose price controls since the *Gazette* of the Order "Price Control [Price Controlled Goods] 2004" (in effect from January 12, 2005) was never superseded by a subsequent public issuance canceling price controls, (meaning the order was simply never implemented). The Malaysian government should remove the order from the *Gazette* (we assume, by a notice in the *Gazette*), or provide the U.S. government with assurances that the order will never be implemented.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT MEXICO

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Mexico remain on the Special 301 <u>Watch List</u> in 2005.

Overview of Key Problems/Achievements in 2005: Mexico is one of the most important markets in this hemisphere and one where, notwithstanding improved efforts by Mexican law enforcement authorities, piracy levels and losses remain unacceptably high. Estimated trade losses due to copyright piracy topped US.<u>\$870 million</u> in 2004.

Although the Office of the Attorney General (PGR) has notably increased its commitment to seize pirate product from street markets, effective case preparation, indictments and prosecutions are still far below the level needed to have any significant effect. In addition, there are well known pirate marketplaces that remain largely outside the reach of law enforcement—most notably the district of Tepito. Without a government-initiated, sustained campaign against well known pirate marketplaces like Tepito, the situation in Mexico is unlikely to change dramatically, regardless of the otherwise fine intentions and work of PGR.

While anti-piracy actions taken by administrative authorities remains generally positive, there have been recent problems in pursuing inspections, and gaps remain in the law and regulations which require improvement in order to give copyright owners with a similar level of protection afforded trademarks. In particular, Mexico should adopt changes granting the government *ex officio* authority with respect to copyright violations. Less than 1% of all criminal raids in 2004 resulted in a sanction (including fines and jail terms). Mexico also should consider undertaking a more comprehensive effort to modernize its 1996 Federal Law on Copyright in order to fully implement the WIPO Internet Treaties. The government must make intellectual property protection and enforcement a priority.

Actions Which Could be Taken by the Mexican Government in 2005

Enforcement

- Improve police coordination between federal and state enforcement;
- Significantly improve investigations and raids against pirates involved in commercial distribution and street piracy;
- Encourage prosecutors to act swiftly on complaints, and to recommend maximum sentences to the courts in order to improve deterrence;
- Improve administrative enforcement by the Mexican Industrial Property Institute (IMPI), for example, IMPI agents should be accompanied by police to assist them to gain entry during inspections;
- Improve judicial training efforts on copyright enforcement;
- Improve border enforcement;

- Sustained and aggressive anti-piracy involvement by the tax authorities is also needed:
- State and municipal governments should take a proactive role in fighting piracy at the street level:
- Issue mandatory sentencing guidelines, or at a minimum, suggested guidelines;
- Issue deterrent sentences for criminal copyright infringement;
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.

Legislative

- Issue copyright regulations of the 2003 amendments to the 1996 copyright law;
- Pass penal code amendments on anti-circumvention of technological protection measures:
- Pass penal code amendments on ex officio authority for police:
- Improve legislative and regulatory schemes to fill gaps in enforcement measures and to equalize treatment of copyrights with trademarks;
- Fully implement WIPO Treaties' obligations (including establishment of notice and takedown provisions, ISP liability, clear temporary copy protection, provision of a making available right as well as criminal sanctions and civil remedies on anticircumvention and rights management information.

MEXICO Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ¹										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	326.0	60%	360.0	61%	459.0	68%	366.8	61%	300.0	63%
Entertainment										
Software ³	132.2	76%	136.9	66%	NA	NA	202.5	83%	NA	90%
Business Software 4	230.0	65%	220.0	63%	168.9	55%	146.9	55%	145.7	56%
Motion Pictures	140.0	70%	50.0	45%	50.0	40%	50.0	40%	50.0	40%
Books	42.0	NA	40.0	NA	40.0	NA	40.0	NA	30.0	NA
TOTALS	870.2		806.9		717.9		806.2		525.7+	

International Intellectual Property Alliance

The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

RIAA reports that the 2000-2004 estimated losses due to recording piracy in Mexico reflect losses experienced by

the overall industry, including both U.S. and Mexican record companies.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Mexico, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 resulting in a significantly higher loss estimate (\$369 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

COPYRIGHT PIRACY

Several key trends in piracy have affected Mexico, including continuing high levels of optical disc piracy, an increase in Internet piracy, illegal commercial-scale photocopying of books, and the longstanding problem of street sales of pirated products.

Survey of Industry-Specific Concerns

Filmed entertainment: The Motion Picture Association (MPA) reports that optical disc piracy rates in Mexico are some of the highest in the world, and getting worse. Since mid-2003, the piracy rate and losses to the audio-visual industry have increased dramatically. Currently, for each DVD a studio sells, pirates sell at least two copies, and usually more for top titles. According to MPA market surveys, in early 2003, 30% of the DVD market was pirate, but by March 2004, just 12 months later, the piracy rate had risen to over 65% of the optical disc market. The piracy rate has continued to increase through 2004. This dramatic increase in such a short time is due to the tremendous surge of pirate product available in the nation-wide system of street markets. Because of this growth, annual losses to the U.S. motion picture industry due to audiovisual piracy in Mexico have risen significantly to \$140 million in 2004.

Although some of the total street market system is licensed by federal or local authorities in legal street markets (tianguis) or semi-legal permanent covered markets, growth has occurred in street markets that are unregulated and politically protected by local authorities for political or financial interests. This unregulated market provides a constant supply of piracy. For example, MPA has found 1,877 wholesale points-of-sale in 85 large, permanent markets, with a daily available stock of 679,000 pirate optical discs. In addition, there are an estimated 1,500 (and growing) smaller, less permanent or rotating, street markets not surveyed by MPA that each have one to three booths that carry pirate audio-visual product. Pirate points-of-sale easily outnumber legitimate DVD sell-through points-of-sale and total theatrical screens, while providing a convenient, direct competition. The main distribution centers for optical disc piracy are well known to law enforcement authorities: Tepito, Plaza Meave, Eje Central, Lomas Verdes in Mexico City; CAPFU in Puebla; and San Juan de Dios in Guadalajara. One single black market distribution area deserves specific mention: the Tepito Bazaar in central Mexico City. One of the world's largest centers of pirate product and contraband sales (as well as of drugs and weapons). Tepito has over 400 permanent booths specializing in optical disc piracy at wholesale prices. The market is well organized and politically protected, primarily by the Mexico City government and police.

Sound recordings and music: For the recording industry, Mexico is one of the top ten pirate markets in the world. Pirates have moved from cassette format to a variety of CD-based media. Recording piracy in Mexico represents \$326 million in losses and covers approximately 59.8% of all units sold in the country. The neighborhood of Tepito in Mexico City has been a major problem for the recording industry for too many years, and accounts for approximately 65% of the pirate music product manufactured and distributed in the country. In addition, over 50,000 points of sale in street and covered markets around the country offer pirate product. Unit by unit they are putting the legitimate industry at serious risk.

Business software: The estimated level of piracy for business software applications in Mexico has remained basically the same over the past few years, with the 2004 piracy level placed at 65%. Preliminary estimated trade losses due to software piracy in Mexico rose to \$230 million in 2004. The Mexican federal government is among the most "legal" in all of Latin

American with respect to its software licensing efforts. However, Mexico has never issued a government legalization decree. Mexican states and municipalities should make further progress on legal software use and a federal decree could serve as a model for the States. In addition, the Business Software Alliance (BSA) remains very concerned with continuing end user piracy, which is not deterred by relatively weak IMPI enforcement; see more detailed discussion below. A bright spot in the enforcement firmament is a BSA System Builder Campaign called *Integrando un Mexico Legal*, or "Building a Legal Mexico," a program in which the PGR (criminal justice authorities) has taken the lead in carrying out investigations all over Mexico to detect computer integrators/assemblers that load their systems with illegal software. During 2004, the campaign had a strong nationwide impact, with more than 50 actions conducted throughout Mexico, and the arrest of 52 persons who face criminal charges for piracy and organized crime activities. More than 42,000 CDs with infringing software have been seized. Lists of legal system builders are published regularly as a means to encourage the use of legitimate software.

Book publishing: The Association of American Publishers (AAP) reports that illegal photocopying of books continues unabated in Mexico. The bulk of these activities takes place in and around institutions where books are most used as textbooks. These schools have photocopy machines in their libraries, in addition to private on-campus photocopying businesses, and selected contents of books (rather than entire books) are regularly copied. This copying routinely surpasses permissible levels under the copyright law. Copy shops in and around the UNAM (national university) in Mexico City can charge as little as 2-3 US cents per page, allowing producers of illegal copies to undercut the market for legitimate materials. Universities are tacitly, and sometimes actively, condoning infringing activity on campus. In some cases, materials taken from U.S. books are posted on the institution's intranet for classroom use, without permission and without payment to the publishers.

The Mexican copyright law is deficient in that it allows students to copy one complete copy of every work, provided it is not done for profit; this violates TRIPS and should be revised. The local reprographic rights organization (RRO), CEMPRO (*Centro Mexicano de Protección y Fomento a los Derechos de Autor*), established in mid-1998, started collecting small amounts of licensing royalties in 2001, but payments remain voluntary, and are thus not a good source of revenue for legitimate companies. Most Spanish language books sold in Mexican universities are published in Mexico by wholly-owned subsidiaries of U.S. companies. Others are translated from the English under license, so lost royalties are significant as well. Both enforcement officials and education/university officials should take a more active role in fighting this unauthorized photocopying, especially on campus. Universities should implement policies discouraging this activity, complete with consequences for those who engage in it. APP estimates that book piracy losses in Mexico rose to \$42 million in 2004.

Entertainment software: Videogame piracy on all platforms (from cartridges to CD-ROMs) continues to be widespread in Mexico. Pirated factory-produced (silver) CD-ROMs for PlayStation® are shipped from Asia (at times through the U.S.), making this entire market in Mexico pirate. Pirate CD-ROM games for PlayStation2®, all made in Asia, have taken over half the Mexican market (50% piracy). For PC-based games, the biggest piracy challenge is local CD-burning. There have also been reports of counterfeit cartridge-based games being assembled in Tepito. Nintendo has received multiple customs seizure notices from U.S. and Luxembourg identifying Mexican importers and involving large numbers of counterfeit cartridge components for in-country assembly. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Mexican marketplace was \$132.2 million in 2004, with a 76% piracy rate.

The street vendor piracy problem and efforts to "convert" street vendors of illicit products to legal sales

A huge problem in Mexico involves some 50,000 sale points offering pirate products. This estimate includes wholesale points-of-sale in large permanent markets as well as smaller, It is imperative that any anti-piracy campaign by the less permanent street markets. government include as a top priority reducing this enormous distribution network. There have been recent efforts by the federal and local governments in Guadalajara to "convert" street vendors away from the sale of piratical goods and towards the sale of legitimate articles. With respect to the commercial side of street sales, the Mexican government is creating small "commercial centers" to relocate street booths and to encourage self-employment (autoempleo). This project is moving forward with federal funding in various states, and the copyright industries salute this important initiative. It is our understanding that the State of Jalisco government is providing seed funds to guarantee the purchase of legitimate articles by street vendors in Guadalaiara. This represents a real win-win situation for all concerned-street vendors stop violating the law, copyright owners gain additional points of sale, and the government collects tax revenue from a no longer "informal" part of the economy. In fact, the Mexican government should expand this conversion program to Mexico City.

Nevertheless, while the visions of these conversion programs should be applauded, it is imperative to call upon the Mexican government to adopt zero-tolerance policies with respect to converted markets and streets in the nearby vicinity. These conversion programs will only succeed if they are accompanied by an aggressive zero-tolerance campaign to ensure that street vendors operate under the rules and do not revert to the sale of pirate materials. It is essential, therefore, that the Mexican government adopt measures to ensure that these centers do not end up serving as distribution points for pirate product, and that their activities are controlled by the PGR, and subject to administrative enforcement. If the Mexican government is going to fund, assist or encourage such centers, there should be an effective enforcement method made specifically available in the contractual arrangements and a strong government effort to keep piracy out of new centers and eradicate it from current centers (for example, Plaza Meave, Pericoapa, Lomas Verdes, Plaza Venuslav, all in Mexico City metro area, San Juan de Dios, Medrano and El Parian in Guadalajara, and CAPU y Cuchilla in Puebla). For this program to succeed, more raids in Guadalajara are needed, especially in the San Juan de Dios and Parian markets, in order to clean out the pirate stands and give converted merchants the opportunity to sell legitimate product.

The option of state and municipal control has recently developed because the growth of unregulated markets is now a political, economic and public security concern to local authorities. Previously, street markets provided a political and financial benefit to these authorities, but they are now growing beyond control. There is now no counterweight to their growth and many authorities believe that the street markets need local control, both on the municipal and state levels. MPAA reports that on the municipal level, for example, the Jalapa, Veracruz Mayor has worked to take administrative licensing action against markets selling pirate audio-visual goods. The effort has been very successful. At least two other cities, Cuernavaca and Irapuato, have taken similar action. On the state level, the Governor of Jalisco and his Secretary of Economic Development are working with copyright industry groups, home video distributors, music wholesalers and PGR to establish a "legal commerce" effort in street markets, displacing piracy with original DVDs and CDs and licensing these outlets by legally requiring that they sell only

legitimate product. Whether or not this commercialization works, the model is designed to require that street sales be limited to legal products with systematic licensing, inspections, and sanctions. The Jalisco governor's recognition of the problem is significant and provides precedent for other states in developing efforts that reduce piracy in street markets.

COPYRIGHT ENFORCEMENT

In order to bring down piracy levels in Mexico, it is essential to attack manufacture, distribution, sale and importation. Copyright owners have been working, and will continue to work, closely with law enforcement authorities with respect to manufacture and distribution. However, at the same time, it is critical that the Mexican government address the issue of ongoing sale of pirated goods. Unless the Mexican government deals with the strong market for pirated goods in Mexico, the industries believe they will be largely wasting their time dealing with production.

Police raids result in large seizures but piracy remains high.

The industries continue to report generally good cooperation with police in various jurisdictions around Mexico. To strengthen the anti-piracy fight, other Mexican agencies, including the federal tax authorities as well as state and municipal authorities, need to become much more involved in anti-piracy activities. Some industries also turn to the Federal Preventive Police (PFP) for assistance in raiding activities.

Interactive coordination between the PGR and the private sector has improved. The Assistant Attorney General for the Mexico City area meets regularly with private sector representatives to review anti-piracy actions, and by order of the Assistant AG for Regional Offices, each state PGR office has specific anti-piracy goals for the year (investigations, seizures, but notably, not arrests or indictments), including monthly meetings with the local private sector affected by piracy.

Getting seizures has not been the problem in Mexico; obviously, there is a lot of pirate product out there, and there is always room for more seizures. For example, in mid-June 2004, the PGR was involved in a raid that netted the seizure of 7,600 CD-R burners—the largest seizure of CD-R burners in the world, at least to the knowledge of the Recording Industry Association of American (RIAA). Another encouraging action took place in November 2004 when customs seized 15.8 million units of blank CD-Rs as contraband in three coordinated raids against a major importer. In a separate action, press reports on June 17, 2004, indicate that Mexican officials began destroying 63 million copies of pirated CDs and DVDs which have been seized in recent years. The problem is that seizures alone, if not followed by deterrent penalties, do not result in lowering the piracy rates and deterring individuals and enterprises from the lucrative business of copyright piracy.

In September 2004, MPA reported its largest black market raid this year. Over 500 police officers raided pirate distribution centers just outside Mexico City, seizing over 70,000 illegal optical discs, many featuring products in current theatrical release. This early-morning September 3 raid in Cuernavaca involved three distribution centers and one optical disc lab. The raid is important because it took place in a black market that, until now, has been completely protected by local politicians. MPA also advises about large seizures in Monterrey, where the PGR seized 168,000 pirate discs in August and September. The actions seized

101,200 pirate discs from the city's largest permanent street market and an additional 67,629 in two smaller street markets. The majority were product in current theatrical release. However, despite these large raids, MPA points out that these numbers pale in comparison to the numbers of pirate movies sold every day in Mexico City's Tepito market, where nearly 400 permanent booths sell pirate movies on digital discs. The PGR has not taken effective action against piracy there. On January 4, 2005, a precedent-setting operation coordinated by MPA and the PGR resulted in the seizure of CD-Rs containing a total of 2,500 films, most of them of titles currently being exhibited in local cinemas. Aside from their retail function, the metro stop locations served as distribution centers for vendors who ply their pirated wares inside metro trains. The vast Mexico City metro system has 192 stations and serves a city of more than 20 million people, many of which use it as their primary means of daily transportation.

ESA reports that two raids coordinated through the Attorney General's Office and the Federal Investigation Agency at Bazaar Pericoapa and Plaza Meave resulted in the seizure of 20,000 counterfeit GameBoy® cartridges. An ESA member company reports that, as in past years, there were incidents of violence against law enforcement officers and accompanying company representatives occurring during raids against vendors of counterfeit and pirated products.

The PGR interacts directly with the industry through its anti-piracy coordinating committees, especially at the state level. These committees have proved effective in several states, including Nuevo Leon, Morelos and Puebla, in allowing the private sector both to communicate and to direct some PGR action against street piracy. However, it is premature at this point for all the industries to evaluate fully how this new PGR infrastructure is working. It does appear that the PGR is making an effort to keep agents who are already familiar with IPR matters on-staff.

Training to support effective investigation and prosecution remains imperative. IIPA and its members support the August 2004 State Department/INL announcement to devote \$150,000 to train Mexican law enforcement officials in the capital as well as regional anti-piracy units in Monterey, Puebla and Guadalajara. The problem remains that deterrence against piracy is lacking in Mexico

Prosecutions are too Few and Criminal Judgments are Not Deterrent.

One of the most longstanding and disturbing problems in Mexican criminal copyright enforcement has been that so few criminal prosecutions are brought by the PGR. In 2004, less than 1% of all raids (counting both criminal and administrative actions) resulted in a sanction (including fines and jail terms). This percentage rate declined from 2003 to 2004 (see chart, below).

The copyright industries report that the Mexican judiciary continues to view copyright infringement as a minor offense, and issues very few deterrent sentences, given the high level of piracy in the country. The one measure under the revised penal code that has shown some teeth is that the possibility of bail has been removed for those indicted for criminal copyright infringement.

Mexico should consider adoption of mandatory sentencing regulations, or the Supreme Court itself should set out recommended guidelines. In the absence of deterrent sentencing, prosecution is a futile exercise. The good news is that as a few individuals have been sentenced

to lengthy jail terms. Unfortunately, the piracy situation remains dire and these sentences, while recognized as a step in the right direction, underscores the need for Mexican authorities to intensify efforts to create real deterrents against piracy.

Administrative copyright enforcement by IMPI.

Administrative enforcement through the Mexican Industrial Property Institute (IMPI) has remained weak on copyright-related enforcement matters, and is notably less deterrent than it was several years ago. For example, BSA highlights the following challenges it has encountered in its administrative actions: (1) IMPI inspectors are frequently denied entry by corporate pirates, and yet make no attempt to invite the police to accompany their inspections, which would prevent such denials. Given that the applicant for provisional measures has already posted a bond to respond to any damages that could be caused to visited parties, this weak enforcement regime should be fixed. (2) When entry is denied, the pirates have time to erase illegal intellectual property (such as computer software) or to falsify invoices proving purchase. IMPI is too willing, during return inspections, to bless the pirate's cleaned-up situation, without any attempt to recognize what happened in the weeks (or months) since the initial inspection was denied. No presumptions in favor of the plaintiffs are made by IMPI, despite the fact that such presumptions are permitted by law. (3) IMPI inspectors are excessively cautious, and those in charge of the operational level resist technological improvements (such as effective system detection software demonstrated by the BSA) that would produce much better reports about piracy within a given target enterprise: IMPI inspectors sometimes fail to detect pirate products when searching computers manually. (4) In litigation, IMPI continues to maintain the untenable position that the BSA members' copyrights only protect the names of their software programs but not their content, apparently confusing copyright with trademark principles. Once Mexico recognized computer programs as literary works, as presently set forth in Article 102 of the Lev Federal del Derecho de Autor, and in consequence of Mexico's adherence to the Berne Convention for the Protection of Literary and Artistic Works, Article 15,⁵ it is clear that the name of a copyright holder appearing on a copyright certificate creates a presumption of ownership of the entire computer program, and not just the name of the program. IMPI's criteria also violate Article 41(1) of TRIPS, in that they deny an "effective action against any act of infringement of intellectual property rights." Because of IMPI's odd legal positions, a growing percentage of BSA's budget is now spent litigating against IMPI in the courts. IMPI often rules in favor of putative pirates. BSA raised these issues in a private document provided at a meeting with IMPI in the summer of 2004. At the end of 2004, BSA received a legalistic defense by IMPI of its positions, in which it was alleged that BSA's concerns about inadequate enforcement (which have been raised in numerous meetings with top IMPI officials over the years) have not been documented by the BSA in IMPI's files, that IMPI inspectors are seldom denied entry (and when they are it is because of BSA errors), and that copyright certificates do not give any presumption about the ownership of the underlying computer program. What the defense really illustrates is lack of will to provide deterrent-level enforcement.

Other industries report that IMPI is helpful, but it takes a long time to see results. MPA uses administrative agencies to attack optical disc piracy at the retail level through INDAUTOR (the Copyright Office) and IMPI. Ironically, while these agencies do not have the immediate

⁵ Article 15 (1) states: In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual

impact that the criminal process has, they do ultimately result in sanctions (monetary fines) that are close to deterrent levels, although it takes as long as two years for the sanction to be imposed and another 6-12 months to be collected. ESA notes that while IMPI administrative actions have been helpful, there continue to be many problems with the agency, especially in certain trademark counterfeiting actions. In 2004, it was learned that IMPI would begin working with the police and thus have the necessary manpower to accompany IMPI officials on enforcement raids. It is hoped that these agencies begin to coordinate on enforcement actions and that such cooperation continue.

Border enforcement needs improvement.

There has been increased cooperation between certain copyright holder groups and Mexican customs, but this conclusion does not apply across-the-board. The recording industry in particular recognizes and thanks customs for their tremendous efforts in seizing raw materials destined for the production of pirated products. The action that netted over 15 million units of blank CD-Rs is a positive sign that Mexican customs is willing to act.

However, ESA and its members report that there continue to be problems with stopping and seizing pirate and counterfeit product at the border. Formal requirements to initiate actions are onerous. Customs does not seize infringing product entering the country without an official order from IMPI; this is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country because Customs does not have authority to detain the shipment for more than a few hours. There must be greater cooperation between these two agencies in order to improve border enforcement, and to expedite the procedures by which customs may make immediate seizures of clearly infringing products.

Border efforts to track blank optical grade media must continue.

Given the growth of optical discs (OD) piracy in Mexico, it is important to track imports of blank ODs. To this end, the recording industry negotiated an agreement in 2002 with the Mexican finance ministry (which includes Customs) to address the problem of pirate CD-Rs. This agreement called for reducing the number of ports of entry for CD-R and CD burners, to 15 (down from 52) as well as providing training and assistance to Customs authorities. The recording industry reports that this agreement, along with additional support from IMPI actions with Mexican Customs, have contributed very positively to the seizures of large shipments of blank CD-R products (IMPI coordinates actions with customs under the Industrial Property Law, and customs conducts the actual confiscations). Approximately 36 million blank CD-Rs were intercepted from 2001 through 2003, and 11 million during 2003—from strictly border operations. Over 500 million blank CD-Rs entered Mexico during 2003.

The disturbing consequences for anti-piracy enforcement of the adverse decision in the CCC case

In June 2004, IIPA brought to the U.S. government's attention a pending case on appeal involving member companies of the Business Software Alliance (BSA). On March 23, 2004, the Eighth Court of Appeals of the Superior Court of the Federal District ordered four BSA member companies to pay moral damages to *Consultores en Computación y Contabilidad, S.C.* ("CCC") for actions relating to a criminal search and seizure operation run by a Mexican federal

prosecutor in 1998. This ruling was substantially upheld by the Third Collegiate Court (federal) in Civil Matters in September of this year, which instructed the Eighth Court of Appeals to once again condemn the BSA member companies to pay moral damages in an amount to be determined by the original trial court (the amount requested by the plaintiffs is "at least US\$100 million"), which the Eighth Court of Appeals did in October 2004, in a final sentencia, or judgment. Essentially, the courts, in judgments that BSA believes are untenable based on the facts and the record and disturbing in their implications, ruled that BSA sued CCC knowing CCC was innocent.

The IIPA and its members are very concerned about this precedent: only in Mexico have private parties such as the BSA members faced personal liability when it was the criminal justice authorities, and not the BSA members, who acted against a defendant, as this was a criminal proceeding (not a private civil action) conducted by the Mexican attorney general's office (PGR) and police authorities. Indeed, the criminal justice authorities (and not the BSA members) then conducted their own internal investigation, asked for and obtained a search warrant from a judge, and then carried out the search and seizure operation. Moreover, only in Mexico has any party seeking anti-piracy enforcement faced potential liability of this magnitude. The final judgment in the CCC case sends a message to all companies that antipiracy enforcement in Mexico can lead to seemingly unlimited liability against the private party that merely asked the authorities to act, which will chill all anti-piracy activity in Mexico.

Con	NADIOUT ENEODOEM	ENT CHAMAD	v IN MENIOS ESP 200	4	
COF	MOTION PICTURE ASSOCIATION CASES	BUSINESS SOFTWARE ALLIANCE CASES	RECORDING INDUSTRY (LOCAL AND U.S.) CASES	2004 TOTAL	Compare 2003
TOTAL NUMBER OF RAIDS	1,026	84	1,377	2,487	2,071
CRIMINAL RAIDS	793	50	1,375	2,218	1,742
ADMINISTRATIVE RAIDS	233	34	2	269	329
Number of Persons Held IN Pre-Trial Detention	34	52	157	212	224
NUMBER OF INDICTMENTS	50	0	74	124	75
NUMBER OF CASES RESULTING IN FINES OR JAIL TERMS	0	0	22	22	37
LEVEL OF SENTENCES IMPOSED	NONE	0	6 MONTHS TO 6 YEARS	(SEE LEFT)	
RATIO OF CONVICTIONS/ FINES TO NUMBER OF CRIMINAL RAIDS CONDUCTED	0%	0%	1.6%	0.9%	1.8%
PIRATE COPIES SEIZED	3,991,039	102,000	8,034,348	AT LEAST 12.1 MILLION COPIES	AT LEAST 14.9 MILLION COPIES
OTHER MATERIALS RELATED TO INFRINGING ACTIVITIES WHICH WERE SEIZED (ITEMIZED)	794 BURNERS	N/A	27.8 MILLION BLANK CD-RS AND 8,834 BURNERS		

COPYRIGHT AND RELATED LAWS

Delay in issuing implementing regulations to the 2003 Copyright Law amendments.

Amendments to Mexico's 1996 Federal Copyright Law entered into force on July 24, 2003. The copyright industries worked diligently to shape some of the more troubling parts of this legislation. Two bright notes in these 2003 amendments included the extension of the terms of protection for works and objects of related rights, and the deletion of a deleterious private copying levy.

More than a year later, regulations to implement the 2003 amendments have not yet been adopted. Implementing copyright regulations were drafted in the summer and fall of 2003, in a very non-transparent manner. Draft regulations were published in December 2003, but were rejected by the legal advisor to President Fox. Another version of these regulations, which appear to address concerns of the copyright industries, were issued again in the Spring of 2004, but have still not yet been officially promulgated. Some reports suggest that these regulations might be issued sometime in the Spring 2005, two years after the copyright law amendments were adopted.

Mexico still needs to fully implement the WIPO Treaties.

The 2003 copyright law amendments failed to address the comprehensive reform needed by Mexico to: (1) effectively implement the obligations of the WIPO Treaties (of which Mexico is a member), and (2) correct existing deficiencies in the law with respect to Mexico's obligations under the NAFTA Intellectual Property Chapter and the WTO TRIPS Agreement.

Mexican government officials have indicated that that it is possible that they might consider initiating a long-term process to revise the Mexican Federal Copyright Law, perhaps starting in 2005. The copyright industries request that any such initiative involve public comments and that the process be as transparent as possible.

Organized crime law amended to include copyright piracy

On December 3, 2002, the Mexican Chamber of Deputies approved legislation to amend the Mexican organized crime legislation to include copyright piracy. The law (which appears in Article 424*bis* of the Federal Penal Code)was finally signed on April 4, 2004, entering into effect on May 12, 2004. This means more power and local resources to fight copyright piracy. Copyright pirates could face 20-40 years in jail, in addition to the penalty for the underlying IP crimes, if organized crime elements in piratical behavior are proved; this would represent an increase from the prior 12-year maximum. (Note: the maximum imprisonment penalty for software piracy is 10 years.) We also understood this reform to give Mexican police three new enforcement tools: holding suspects under house arrest for up to 30 days; tapping phones; and protecting witnesses (without the suspect/defendant knowing the witness's identity).

The PGR has empowered its Organized Crime Division to investigate piracy and has developed systematic coordination with the private sector. The Organized Crime Division has some of the PGR's best investigators and attorneys and has resources that the other divisions do not have, such as paid informants, wire-tapping authority and witness-protection programs. However, the lack of concrete anti-piracy action by this division through late 2004 casts some doubt on its potential.

Bill on ex officio copyright actions still pending

A bill to amend the criminal code to increase criminal penalties for copyright infringement and to give *ex officio* authority to the police to pursue copyright infringement actions has been presented to the Mexican senate. This bill is still pending, and has the support of the recording and film industries.

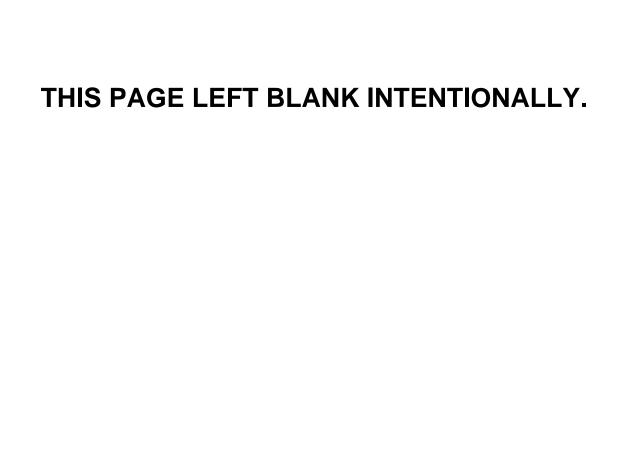
Interestingly, in May 2004, a law was adopted that gave the Attorney General of Consumer Affairs (PROFECO) the power to take *ex officio* actions against black market and informal markets. Also included were powers to seize product, close markets, and issue sanctions. These powers are not new; they simply allow PROFECO to seize goods that do not comply with official standards. PROFECO's powers could be used to address widespread street piracy. In fact, the local recording industry has used PROFECO operations in Guadalajara and San Juan De Dios.

Criminal code reform to establish sanctions for anti-circumvention

A bill to amend the Mexican criminal code to establish criminal sanctions for the circumvention of technological protection measures (TPMs) was introduced in 2004, and was pending in the lower house's Justice Commission. Further work was needed on this bill to better reflect the scope of what the industries view as an effective anti-circumvention bill. We understand that additional amendments have been proposed to better capture the kinds of acts which could circumvent TPMs (including devices, components and services). (The current Mexican copyright law does provide some civil anti-circumvention measures but these are only applicable to computer software, not other copyrightable subject matter; this is why further amendments to the criminal code as well as to the copyright law are required for full WIPO Treaties' implementation.)

Bill on a private copying levy to be opposed by the content industries

Another proposal to implement a private copying levy on analog and digital products and blank media was contained in earlier drafts of copyright amendments in 2004. Such a proposal in the 2003 Copyright Law package was strongly opposed by the copyright and technology industries for a variety of reasons. Ultimately it was stricken from the final legislation. The Mexican performing groups have reintroduced private copy levy legislations, and we again oppose adoption of this misguided proposal. The Mexican group of AIPPI (an intellectual property bar organization) has strongly opposed these bills, saying that it is not true that the local IP community favors levies. The issue has been also addressed by the local group of the Internet Society and the Mexican Internet Association (AMIPCI), among others, condemning levy legislations. Fortunately, the Mexican Senate rejected two separate bills to implement private copy levies, and we are hopeful that these initiatives will remain dormant.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT NEW ZEALAND

EXECUTIVE SUMMARY

New Zealand should follow through on its long delayed copyright law reform effort, but only after making substantial changes to the recommendations in its 2003 Cabinet Paper. These changes are needed to bring the New Zealand law up to the minimum standards embodied in the WIPO Internet Treaties, as well as to enable an effective response to a rising level of digital piracy within the New Zealand market. In particular, New Zealand should refrain from codifying exceptions for time and format shifting that could undermine innovative channels for delivering music and other copyrighted materials online. To encourage sound copyright law reform in New Zealand, USTR should place the country on its Special 301 Watch List for 2005.

New Zealand has not appeared on a USTR Special 301 list since 2002, and was last the subject of an IIPA filing in 1999.

COPYRIGHT AND RELATED LAWS ¹

In 2005, New Zealand enters the fifth year of its effort to reform and modernize its Copyright Act. While to date no legislation has been formally introduced, a Cabinet Paper issued in June 2003 outlines the government's recommendations, at least as of that time. Although this blueprint included several positive features, following the blueprint would leave New Zealand short of meeting global minimum standards, as embodied in the WIPO Internet Treaties, for a 21st century copyright law. While IIPA encourages law reform and modernization in New Zealand, it urges the drafters to re-examine a number of issues before the legislation is brought forward. These include:

- 1. <u>Exceptions to protection.</u> The Cabinet Paper endorses a number of broad exceptions that clearly threaten to exceed the permissible limits set by treaties to which New Zealand belongs (e.g., Article 13 of TRIPS). For example:
 - Format shifting of sound recordings. The recommendation to allow unauthorized copying of sound recordings into an unlimited number of formats threatens the roll-out of new formats and the development of innovative consumer delivery mechanisms for such recordings. It could also undermine current efforts to curb unauthorized copying of CDs in New Zealand, through means such as unlicensed CD-R burning machines available in supermarkets.

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¹ Because this filing focuses exclusively on law reform issues, we have not compiled information regarding piracy losses or levels in New Zealand. However, IIPA member associations do report growing digital piracy problems there. For example, the Motion Picture Association of America (MPAA) reports an increase in local pirate disc burning operations (along with continued piratical imports, mostly from Asia) and thousands of illegal downloads of movie files online. Entertainment software companies also report quite a bit of piracy via the Internet, as well as through other channels such as retail flea markets, small Internet cafés, and unauthorized copying of rental copies onto Xbox[®] consoles before sale (hard disc loading).

- <u>Time-shifting</u>. Allowing unauthorized time-shifting of all works communicated to the public (except for "some on-demand services") would virtually eliminate the ability of right holders to experiment with diverse approaches to meeting consumer demand for electronically delivered materials, from permanent downloads, to temporary streams, to everything in between. Reduced access and choice for New Zealand consumers would appear to be the inevitable, though surely unintended, result.
- <u>"Making available" by libraries.</u> A blanket statutory rule that libraries may make digital
 materials available to remote users without permission risks distorting the licensing
 marketplace for these materials. The likely result would be to reduce the practical
 availability of such materials to library patrons.
- <u>Temporary copies.</u> Any exception to the reproduction right recognized in this area should not apply to the reproduction of copies that have themselves been made or placed online without the authorization of the right holder.
- 2. <u>Internet service provider liability</u>. The statutory regime should clearly spell out the pre-conditions for any remedial limitations; the availability of injunctive relief in all cases; and expeditious procedures for identifying ISP subscribers who are engaged in infringement. The mechanics of a notice-and-takedown system should also be addressed.
- 3. <u>Technological protection measures</u>. Reform legislation needs to cover access control technologies, and to clearly prohibit the act of circumventing such measures. Exceptions to the prohibitions on trafficking in circumvention devices or services must be carefully limited, lest they swallow the rule altogether.
- 4. <u>Rights management information</u>. RMI should be protected against deliberate tampering, even if the data serves "tracking functions."

Prompt adoption of copyright reform legislation reflecting these changes should be a top priority for New Zealand, as it will enable the government to grapple more effectively with a growing digital piracy problem within the country, as well as to advance toward accession to the WIPO Internet Treaties.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT PERU

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Peru remain on the Special 301 Watch List in 2005.

Overview of Key Achievements/Problems: Copyright piracy and inadequate enforcement are the major challenges adversely affecting the copyright industries in Peru. Over the last few years, the legitimate recording industry in Peru has nearly disappeared because of the high levels of piracy. Optical disc piracy is on the rise, and adversely affects almost all the copyright industries. Illegal photocopying on university campuses continues to plague the book publishing industry. 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. Peru also needs to improve its border controls to halt the importation of pirate materials. Following the software legalization decree of February 2003, the Peruvian government approved the governmental software management guide on March 17, 2004, which should help ensure effective and legal software administration in the public sector.

Bilateral Free Trade Agreement (FTA) negotiations between the U.S. and the Andean nations, including Peru, started in mid-2004. Reports suggest that negotiations on the IPR chapter are nearing completion. While the IPR chapter of the FTA will undoubtedly include high levels of substantive copyright and enforcement obligations, 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.

Actions Which the Peruvian Government Should Take in 2005

- Conduct regular and concerted anti-piracy actions on the different black markets in Lima, specifically Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados;
- Conduct regular and concerted anti-piracy actions on the streets of high-traffic areas. Attention should also be given to Miraflores, San Isidro, and other middle class neighborhoods as well as other key cities in the rest of the country;
- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses:
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including retailer actions;

- Support more administrative enforcement efforts by INDECOPI against business software, entertainment software, video/cable, and music piracy;
- Support SUNAT, working jointly with other government entities to fight piracy in corporate settings (such cooperation has begun with INDECOPI);
- Create a specialized IPR court which handles both civil and criminal copyright infringement cases;
- 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 specializing in IPR issues).

PERU Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ¹										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	68.0	98%	87.0	98%	70.2	98%	57.8	97%	55.0	96%
Business Software ³	18.0	67%	19.0	68%	14.7	60%	11.2	60%	12.6	61%
Motion Pictures	4.0	75%	4.0	45%	4.0	50%	4.0	50%	4.0	75%
Entertainment Software⁴	NA	NA	NA	NA	NA	NA	NA	NA	3.8	70%
Books	8.5	NA	8.5	NA	8.5	NA	9.0	NA	9.5	NA
TOTALS	98.5		118.5		97.4		82.0		84.9	

The U.S. began FTA negotiations with Peru in May 2004, as part of the first round of Andean country negotiations which included Colombia and Ecuador. 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)

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 www.iipa.com/pdf/2005/spec301methodology.pdf. For more information on the history of Peru under Special 301 review, see **Appendix** (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and **Appendix** (http://www.iipa.com/pdf/ 2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

The lower loss amount is due to the fact that the average sale price per legitimate CD is lower; the number of pirate

The lower loss amount is due to the fact that the average sale price per legitimate CD is lower; the number of pirate units remains unchanged from last year.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Peru, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$31 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁵ See Press Release 2004-35, Office of the U.S. Trade Representative, "Peru and Ecuador to Join with Colombia in May 18-19 Launch of FTA Negotiations with the United States," May 3, 2004, *available at* http://www.ustr.gov/Document Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document-Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document-Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document-Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document-Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document-Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 https://www.ustr.gov/Document-Library/Press Releases/2004/May/Peru Ecuador to Join With Colombia in May 1 <a href="https://www.ustr.gov/Docum

as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in the criminal, civil and customs context.

Peru also is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA).⁶ These programs contain intellectual property protection standards which must be afforded to U.S. copyright owners.⁷ It is essential that Peru take immediate steps to improve its poor enforcement record (exemplified in the case of recorded music), and that it not wait until negotiations are concluded to begin to address this problem.

COPYRIGHT PIRACY

The audiovisual industry reports tremendous growth in pirate optical discs over the last year, with the estimated piracy level (combined video and optical disc) now at 75%, a result of the overwhelming surge in optical disc piracy in Peru. Pre-theatrical release pirate product in Peru is distributed in street markets, street vendors, home delivery, newspaper stands, and black market distribution centers. The main concern is the large black markets such as Polvos Azules, which are especially difficult to address because of their political protection they receive and their tendency to resort to violence in raids. The piracy situation in street markets and in local galleries is so pervasive that thousands of pirate discs are being sold. Local video distributors report that, in addition to street sales, 80% of Peru's estimated 800 video stores rent pirate videos and are beginning to rent pirate DVD-Rs. Cable TV piracy (including operators' and subscribers' piracy) in cities outside of Lima is rampant too. Losses to the U.S. motion picture industry due to audiovisual piracy in Peru are estimated to be \$4 million in 2004. However, this figure is very conservative, not taking into account Internet piracy and other forms of piracy.

Piracy of sound recordings in Peru is an especially severe problem. In 2004, the estimated piracy level was an astronomical 98%, one of the highest music piracy rates in the world, resulting in the near total collapsed of the legitimate recording industry in that country. In fact, Sony Music and Warner Music essentially closed operations during 2004. 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. Customs figures have indicated that there were more than ten blank CD-Rs legally imported into the country for every single CD sold. Thousands of blank tapes and CD-Rs are smuggled into the country through Tacna in Chile (Iquique-Arica) each week and then distributed for illegal duplication around the country. COPERF, the Peruvian Recording Industry Association, continues to run an anti-piracy campaign which results in some police raids and the seizures of pirate product. However, these isolated actions are not sufficient to serve as real deterrents against piracy, or to restore the market.

International Intellectual Property Alliance

⁶During the first 11 months of 2004, \$96 million worth of Peruvian goods (or 3% of Peru's total exports to the U.S. from January to November) entered the U.S. under duty-free GSP code, representing a decrease of 4.3% over the same period in 2003. During this same time frame, an additional \$1.4 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 25.6% increase in ATPA benefits from the same period in 2003.

⁷ See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 1, 2004 at http://www.iipa.com/rbi/2004_June1_IIPA_ATPA_trade_filing_for_USTIC.pdf.

The business software industry continues to report problems with illegal duplication of business software within Peruvian private sector companies of all sizes. Additionally, reseller piracy remains a very significant problem. 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.

Little has changed over the last year with respect to book piracy. Large scale photocopying (the most damaging form of piracy) remains at high levels. Furthermore, trade books of U.S. origin now appear in pirated translations. Estimated trade losses due to book piracy in Peru stayed constant at \$8.5 million in 2004.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) is also widespread in Peru.

COPYRIGHT ENFORCEMENT

Enforcement difficulties remain serious. In June 2003, the Attorney General created an Intellectual Property and Contraband Prosecutors Unit. This unit, along with the National Police, has cooperated with INDECOPI to take effective action against optical disc piracy. However, in November 2003, the Attorney General removed the specific designation and funding for this unit until March 2004. At that time, the unit was appointed an "ad hoc" Prosecutor's Office for Intellectual Property and partially recovered its specialized function. Reportedly, two special prosecutors operate today in Lima, with sufficient funds to maintain their offices.

The Director of the Copyright Office (*Oficina de Derecho de Autor*) continues to lead a campaign (*Cruzada Antipirateria*) which encourages the IP industries to work together on public relations matters and raids against centers of production and distribution of counterfeit products. The audiovisual sector, recording industry, and business software industry, participated in the *Cruzada Antipirateria* in 2004.

Police actions: The copyright industries continue to report that the Peruvian police still 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 has an active campaign in Peru. While the greatest cooperation and coordination comes through the *Cruzada Antipirateria* initiative with INDECOPI, the Federal Police in an independent action in May 2004 seized two trailers filled with 750,000 blank DVD-Rs which had entered Peru as contraband from Taiwan. These trailers passed almost 20 checkpoints from northern Peru and almost entered Lima.

During 2004, the local recording industry's anti-piracy unit cooperated in seizing 5.3 million pre-recorded music CD-Rs, 5 million blank CD-Rs, and produced 8 sentences, all with no deterrent jail time. Some of these actions have taken place with the support of INDECOPI.

Although the level of seizures increased, it is still not sufficient to discourage pirate sales. Close to 20 million units of pirate CDs continue to be sold in Peru. The recording industry does not bring administrative enforcement cases in Peru.

INDECOPI and motion picture actions: MPA continues to report positive antipiracy developments in cooperation with INDECOPI. In 2004, for example, MPA reports that INDECOPI organized 41 raids against large black market distribution points, including Polvos Azules, Polvos Rosados, El Hueco and Mesa Redonda, resulting in the seizure of counterfeit goods worth an estimated \$20 million. 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 (19 cases were still pending at the end of 2004), however, then 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 and educational activities: BSA reports that INDECOPI has given steadfast support to special business software campaigns to fight end user and reseller piracy. Furthermore, during 2004, BSA participated with INDECOPI in educational activities addressed at judges and prosecutors. INDECOPI also drafted the government guide for software management that was approved by the government on March 17, 2004. 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. The recording industry reports that it likewise worked with INDECOPI on anti-piracy activities in 2004.

Notwithstanding some positive results, INDECOPI has no authority to force an inspection when the defendant denies it access. 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 defendants to deny access to INDECOPI, with the expectation that the amount of the fine to be imposed for such denial would be smaller than the compensation and fines faced had the inspection occurred. INDECOPI must impose deterrent sanctions to avoid this conduct in the future. Some deterrence has resulted from INDECOPI imposing fines on end-users that failed to comply with their settlement agreements with BSA.

Criminal prosecutions still rare: Prosecutors have been unable to move copyright cases along and judges have issued only a small number of non-deterrent sentences. For example, in June 2004, a judge in Lima released the head of the largest pirate blank CD operation soon after it was raided.

Non-deterrent results in the criminal courts, and the hope of a specialized IPR court: Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences; most are suspended. No copyright pirate has received a <u>deterrent</u> sentence for criminal copyright infringement in Peru, despite the fact that the copyright law contains adequate penalties. Before mid-2004, the Criminal Procedures

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⁸ 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 were not actually imposed as a matter of practice by Peruvian judges.

Code permitted sentences of four years or less to be suspended. As a result, the courts usually suspended the defendant's sentence in copyright cases.

In 2004, amendments were made to the criminal code which provided an increase of minimum sentencing to four or more years for copyright infringements (see discussion below). This is a clear message to judges that they will have to consider copyright infringements serious crimes, and therefore issue deterrent sentences, rather than suspend them. Recently, judges have issued orders to detain some suspects involved in piracy cases. Sixteen people are currently in jail awaiting trial, some have been detained for over five months. We hope this change marks a new beginning for the Peruvian judiciary in the fight against piracy.

Customs: Some industry participants indicate that border measures have improved somewhat over the last few months and Customs now checks imports of blank CD-Rs coming into the country. The inspections include verifying correct amounts and prices. Local industries will work with Customs to ensure that the invoices being processed are also legitimate. Unfortunately, these actions still don't prevent the smuggling of many products that ultimately become pirate goods on the streets of Lima. Some participants suggest that Customs has not improved as much as it could, pointing to the fact that currently, Customs coordinates primarily with INDECOPI as opposed to the police or other criminal enforcement authorities. Law No. 28,289 which amended the criminal code in 2004 (see comments below) also contains provisions dealing with customs crimes and piracy.

Cooperation between INDECOPI and SUNAT: INDECOPI and SUNAT (Superintendency of National Tax Authority), (which has jurisdiction over tax and customs issues) signed an agreement of mutual cooperation and support on August 18, 2004. Both agencies agreed to coordinate actions to enable customs authorities to identify infringing products more efficiently and to prepare joint anti-piracy media campaigns. The Copyright Office reports that the agreement is being implemented and should help to get information on pirated goods imports to rightholders. Unfortunately, this agreement was never made public and therefore, and, as a result, its implementation cannot be supervised by the private sector.

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). The Peruvian law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. However, it does not contain certain provisions which would fully comply with the WIPO Internet Treaties (e.g., treatment of temporary copies, technological protection measures). 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 the FTA, Peru should be on notice that additional reforms will be needed to its copyright law in order to fully comply with these treaties. Additional reforms to the copyright law should also include statutory damages, ISP liability, and notice and takedown provisions, and provisions against the removal or alteration of Electronic Rights Management Information (ERMI).

Criminal code amendments and customs provisions in 2004: Peru's criminal code was amended by Law No. 28,289 which took effect in July 2004. Sanctions were

increased to a minimum of four years of prison and a maximum of eight years of prison for those who commit copyright infringement (e.g., unauthorized reproduction or distribution of a copyrighted work) when the value of the work(s) infringed exceeds a commercial value of U.S. \$1,800. The law seeks to provide deterrent sanctions in copyright cases and to restrict the power of judges to suspend criminal sentences.

The criminal code also contains several provisions to address customs crimes and piracy. First, the law created a permanent commission to fight customs crimes and piracy, designating SUNAT as the secretary of this commission. Some of the commission's goals are: the creation of a national plan to fight customs crimes and piracy; the coordination of actions and recommendations to fight customs crimes and piracy; and the recommendation of new provisions to improve the law and sanction these crimes. In addition, Law No. 28,289 orders Customs officials to give INDECOPI all necessary support to help it fulfill its mission. Finally, the Law created an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register. The registry is administered by SUNAT. Copyright industries will monitor the effects of these provisions during 2005.

Copyright industries report that although penalties have not been imposed under the new criminal code, a judge has ordered detention for the head of an organization, raided in August 2004, which was illegally distributing movies. Since then, more than ten individuals have been prosecuted with detention orders.

High level multi-sector commission against contraband and piracy: In July 2004, this commission, operating under the direction of the Production Ministry, and with IP enforcement as part of its mission, oversaw two major anti-piracy raids—one in Arequipa and the other in Lima (Polvos Azules district).

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, establish effective controls to ensure such legal use. 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, giving an organization's chief technology officer or other designated official responsibility for certifying 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. Under the decree, INDECOPI is required to publish a guide to ensure efficient software administration in the public sector. INDECOPI drafted the government guide for software management, and, on March 17, 2004, the Peruvian government approved the guide to ensure effective and legal software administration in the public sector.

Finally, in September 2004, the *Contraloría General de la República* (the national budget office) approved a guideline to compel its audit units, located in various public administration entities, to carry out an obligatory software licensing audit in 2005.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT POLAND

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Poland remain on the Special 301 <u>Watch List</u> in 2005.

Overview of Key Problems/Achievements: Over the past year, the Polish government made progress in the areas of copyright law reform and heightened enforcement. The copyright industries acknowledge the several notable achievements Poland made in 2004. Several industries note that progress was made in reducing piracy in the Dziesieciolecie (Warsaw) Stadium. Amendments to the copyright law were adopted, and the implementing decree regarding optical disc manufacture was also passed.

Unfortunately, longstanding problems related to significant piracy levels and effective enforcement remain. Optical disc (OD) production within Poland continued to grow in 2004, and the production capacity of over 597 million units/year still far exceeds local demand. Given this excess production, it is imperative that Poland enforce its regulations on the production and distribution of optical media (such provisions 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. Continued effort and vigilance is needed to properly implement the new optical disc decree as well as to improve enforcement against both hard goods piracy and Internet piracy.

Industry cooperation with police agencies throughout Poland remains generally good. Customs activities increased in 2004. Cases continue to be initiated but few full 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 to IPR cases). Prosecutors and judges need to improve their performance by expeditiously moving cases forward and issuing deterrent sentences. The presence of organized criminal elements in the Warsaw Stadium and around the country remains a significant concern. Estimated trade losses due to piracy in Poland were US\$355 million in 2004.

Actions Which the Government of Poland Should Take in 2005

Legal reform

- Refrain from over-regulating collective management of copyright and neighboring rights;
- Withdraw Poland's reservation to Article 12 of the Rome Convention;
- Strengthen enforcement provisions by affording *ex officio* powers to authorities in copyright infringement cases;
- Consider introducing criminal sanctions in the optical disc regulation;

 Add the unauthorized downloading of copyrighted files onto personal computers to Article 118 of the Copyrights and Related Rights Act.

Enforcement

- Continue to consult with rightsholders regarding the execution of the law and regulations on optical disc manufacture;
- Continue to 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;
- Evaluate how DAMIS (administrator of the Warsaw Stadium) meets the obligations of its contract to enforce IPR rights at the Warsaw Stadium;
- Improve border enforcement to halt the flow of pirate products, especially at the eastern
 and northern borders (Belarus, Ukraine, Russia), by ensuring that sufficient resources
 (both technical and personnel) of 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;
- Continue to conduct and support training seminars for police, prosecutors, and judges on copyright enforcement.

POLAND Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Records & Music	36.0	37%	34.0	45%	45.0	45%	37.0	30%	31.0	30%
Entertainment										
Software ²	109.3	94%	NA	NA	337.7	91%	115.8	90%	103.1	85%
Motion Pictures	30.0	35%	30.0	30%	25.0	30%	25.0	27%	25.0	25%
Business Software ³	175.0	58%	171.0	58%	107.9	54%	77.1	53%	82.7	54%
Books	5.0	NA	5.0	NA	5.0	NA	6.5	NA	7.0	NA
TOTALS	355.3		240.0		520.6		261.4		248.8	

On May 3, 2004, USTR announced its decision to place Poland on the Special 301 Watch List and conduct an out-of-cycle review later in 2004. IIPA participated in the review, recommending that Poland remain on the Watch List. On January 19, 2005, USTR issued its out-of-cycle-review decision to maintain Poland on the Special 301 Watch List.

COPYRIGHT PIRACY IN POLAND

The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf. For more details on Poland's Special 301 history, see Appendix D (https://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) and refer as well to Appendix E (https://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission. Previous IIPA Special 301 fillings on Poland are posted at http://www.iipa.com/countryreports.html.

² ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Poland, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$301 million) that was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ <u>See</u> Office of the U.S. Trade Representative, May 3, 2004, posted at the website http://www.ustr.gov/assets/Document Library/Reports Publications/2004/2004 Special 301/asset upload file16 59 95.pdf. Specifically: "The United States will conduct an out-of-cycle review in the fall to ensure that Poland continues and even reinforces its efforts to strengthen IPR protection and enforcement and addresses remaining concerns. Results of the out-of-cycle review will be based on Poland's taking action in all the following areas: 1) strengthening anti-piracy and anti-counterfeiting measures at the Warsaw Stadium and continuing effective raids and prosecutions against piracy and counterfeiting activities across the country; 2) strengthening the protection of test data submitted by innovative pharmaceutical companies; 3) taking substantive steps to implement a coordination mechanism between the Health Ministry and the patent agency; 4) strengthening border enforcement; 5) signing into law and implementing new copyright amendments and optical disc regulations; and 6) taking concrete, effective steps to strengthen domestic enforcement of IPR. Other significant developments related to IPR will also be considered during the review."

⁵ See IIPA, Letter to USTR on Poland's out-of-cycle review, November 4, 2004, posted at the website http://www.iipa.com/rbi/2004 Nov4 IIPA301 OCR Recommendation Poland.pdf.

⁶ <u>See</u> Office of the U.S. Trade Representative, "U.S. Announces Results of IPR out-of-cycle reviews for Poland and Taiwan," May 3, 2004, posted at

http://www.ustr.gov/Document_Library/Press_Releases/2005/January/U.S. Annuonces_Results_of_IPR_Out-of-Cycle_Reviews_for_Pol_Taiwan.html.

Optical Media Production in Poland and the Need for Enforcement

Domestic production in Poland: In 2004, there were 9 optical disc (OD) plants in Poland, with 101 production lines (excluding CD-R production). The estimated capacity is 597.2 million discs per year. (In 2003, IIPA members reported an estimated capacity of 385.6 million discs in 2003, a 20% increase from the estimated 316 million discs in 2002.) There is one dedicated DVD plant with 41 lines (Technicolor). In addition, there are a total of 19 DVD lines in other plants. To provide a sense of this large capacity, the sales of legitimate music CDs in Poland in 2004 was 11.5 million units (not including the sales of cover mounts and inserts which is a big market). Moreover, some CD production is destined for export, for example, the production at Technicolor is strictly export (100% for the EU market outside Poland) and approximately 45% of the production at Takt is destined for the EU market (outside Poland). In sum, an estimated total of 321.4 million optical discs manufactured at Technicolor and Takt is destined for export.

OD PLANTS IN POLAND	ESTIMATED TOTAL MAXIMUM ANNUAL CAPACIT					
OPERATIONAL PLANTS (9)						
DigiPress	14,724,950					
Digi Records	7,358,400					
GM Records	93,129,750					
MEGAUS	22,403,700					
PM / SNAKE'S MUSIC	9,887,850					
Takt	191,187,000					
TECHNICOLOR HOME ENTERTAINMENT SERVICES (FORMERLY THOMSON MULTIMEDIA)	235,425,000					
VEGART	16,960,000					
Codic	6,200,000					
TOTAL	597,276,650					

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 and music DVD 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. Pirated entertainment software products are imported from Russia (games for play on personal computers), and from Ukraine and Malaysia (games for play on consoles) and China (cartridge-based games). 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 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 into 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.

Piracy levels in Poland remain high.

Entertainment software piracy remains very high. 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, or manufactured locally through CD-R burning operations. The predominant form of entertainment software piracy for console-based product continues to be factory-produced silver CDs and DVDs, most of which are manufactured in Russia, Ukraine and Malaysia, and are readily available throughout Poland. Games for play on personal computers appear to be moving toward "burn" operations. 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. 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 Stadium. Trade in entertainment software products in the stadium has not decreased at all, though it has gone underground (i.e., pirated products are no longer on open display but are easily found mixed in among counterfeit goods). There is no evidence at this time of pirate entertainment software being produced within Poland in any of the OD plants. Piracy at Internet cafés is also a problem; of the 600 cafés in the country, only about 3% are licensed. ESA estimates that the value of pirated videogame product in the Polish marketplace was \$109.3 million in 2004, with a 94% piracy rate.

Music piracy remains high but some improvement was noted in 2004. The estimated piracy levels for international/U.S. music repertoire is 37%, and estimated trade losses due to piracy of sound recordings were \$36 million in 2004. The major problem facing this industry is still the huge amounts of pirate music CD imports (amounting to about 85% of the pirated music) that 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 local recording industry organization ZPAV reports that the total number of pirated sound recordings seized in Poland in 2004 was 577,417 units, with an estimated value of 16,363,233 PLN (US\$5.3 million). Pirate music DVDs have been appearing more commonly—in 2004, 25,693 units were seized which accounts for 4% of all seizures. The amount of seized CD-Rs and CD-RWs with music was 35,196 units, which represents about 6% of all sound recordings seized in 2004 in Poland. In addition, 81,478 albums in MP3 format were seized (either on physical copies or on computers); this is 14% of all seizures made. In 2004, 335 proceedings have been instituted related to CD-R and CD-RW piracy and 222 cases related to MP3 piracy. The problem of CD-Rs and MP3s 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 insufficient given the scale of the phenomenon. Pirate CD-Rs are mostly distributed at markets along Poland's western border. The problem was explicitly pointed out in the appeal of the Anti-Piracy Coalition sent to the Minister of Culture (and also to the head of the Government Committee for the Prevention of Copyright and Neighboring Rights Infringement) in July 2004. The letter urged the Minister to take immediate steps to act against this phenomenon. ZPAV reports that no such action was undertaken. Further, it appears that the committee has either failed to disseminate this message downwards, with instructions on how to tackle the problem, or it has not disseminated it across the board. The net result is that the market activity of summer 2004 highlighted by ZPAV to the Minister has been continuing unabated, and continues now. In criminal cases involving CD-R piracy, computer hardware (including CD burners) was seized both in private users' apartments and state institutional premises. The total value of the seized equipment is 209,500 PLN (US\$67,568). In one case the prosecutor qualified the crimes as organized crime group activity.

Pirated DVD imports remain 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 discs began to appear in substantial numbers at the end of 2002 and volumes have continued to increase in 2004. FOTA (the local audiovisual anti-piracy organization, in which the Motion Picture Association participates) seized over 123,000 DVDs in 2004 (compared to 481 in 2001, 17,000 in 2002 and 51,000 in 2003). The discs contain subtitling options in Polish, as well as for 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. CD-R piracy is also a major problem, and FOTA estimates that CD-Rs represent between 50% and 55% of the pirate optical discs in the local market. 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 2004, FOTA has seized over 80,000 pirate discs containing movies. The level of cable television piracy in Poland is estimated to be 10%, a decline from prior years. 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. 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.

End-user software piracy and retail problems. The Business Software Alliance (BSA) 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 challenges 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 predominantly uses criminal enforcement and relies on good police cooperation to carry out raids. Additionally BSA supports and promotes initiatives aimed at the implementation

of voluntary auditing procedures to be applied by corporate end-users. The number of such audits carried out by Polish businesses has dramatically increased from 2003 to 2004, with many businesses being responsive.

Unauthorized photocopying of books continues. The Association of American Publishers (AAP) reports steady levels of 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.

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. 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. As a follow up to the campaign, the coalition organized two training seminars in June 2004 in Gdansk and Warsaw for representatives of large corporations and academic institutions in the country. The main topics of the seminars were the risks of Internet piracy on computer networks, liability for copyright infringements, and the management of IT resources. The seminars were attended by representatives of the largest companies and academic institutions in Poland.

Music files are still distributed through the websites and FTP-servers; however, the main focus of Internet users lies in peer-to-peer services such as KaZaA, e-Donkey, Bit Torrent and Direct Connect. In 2004, nine raids against Internet pirates were carried out by the police upon ZPAV (the music industry) initiative. In these cases charges were pressed against 16 individuals offering CD-Rs on the Internet and making available unauthorised music files on FTP-servers. It has to be emphasised that more and more often the police scour the Internet at their own discretion in search of illegal music, film files and software and conduct raids where necessary. In 2004, 67 Internet criminal cases, where computer equipment together with pirate CD-Rs had been secured, were instigated by the police. In September 2004, a criminal group of computer hackers operating in Poland, the United States, Australia, the United Kingdom and Slovakia has been closed down by the police unit combating economic crime in Gorzow Wielkopolski (western Poland). The offenders hacked into computer systems of Polish and foreign academic institutions and used free space of their in house computers. They stole new releases of computer games, software, films and music and distributed them on a large scale on the Internet and at local marketplaces. The police in Gorzow arrested eight prime players of the group. The evidence discovered allowed prosecutors to press charges against particular individuals. Hackers face penalty of up to 8 years imprisonment. The case is pending.

In general, the relations with ISPs are satisfactory. They react promptly to ZPAV's cease and desist letters and remove the infringing content. In 2004, 104 www sites and ftp servers with 9,160 files were removed from the Internet upon ZPAV's notification.

The motion picture industry also reports that Internet piracy for its products appears to be somewhat contained. With respect to filmed entertainment, Internet piracy is primarily focused on the sale of hard goods through web pages and auction sites. MPA indicates that, in 2004, FOTA conducted 119 successful investigations and raids, mostly against Internet pirates who were offering burned CD-Rs on their web pages or through auction sites. Although 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 continues to report 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 continue to be increase.

COPYRIGHT ENFORCEMENT IN POLAND

Mixed Progress in Reducing the Levels of Piracy at the Warsaw Stadium

The Dziesieciolecie (Warsaw) 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. Progress in many, but not all, areas has been in process over the last two years.

Governance of the stadium has been a critical issue over the years. DAMIS, the administrator of the Warsaw Stadium, has again won the bid for marketplace administration. The administration contract (awarded July 1, 2004) now includes detailed provisions and obligations which DAMIS must undertake to regulate the stadium marketplace, including enforcing a total ban on the trade of optical discs. This provision gives DAMIS security employees the authority to remove individuals trading pirate carriers from the marketplace premises, secure pirate goods and pass them to the enforcement agencies. Reportedly DAMIS security, working with local police, is in fact taking action to ban trading in optical discs—a significant improvement over the situation preceding the new contract. In addition, Polish police, customs and border guard officers continue their activities at the Warsaw Stadium, disclosing storage places for pirated products (see enforcement discussion, below). It remains imperative to continue to evaluate how DAMIS meets the obligations of its contract; if it fails to do so, then its contract should be terminated.

The copyright industries have mixed reports on the levels of piracy at the stadium affecting their particular industries. FOTA reports that DAMIS employees and law enforcement authorities (police, customs and border guards) have coordinated actions to enforce the new regulations at the Warsaw Stadium (also known as Jarmark Europa) and this has resulted in a significant drop of the number of stalls carrying optical discs, from over 300 to approximately 10. However, FOTA also reports that consumers are still able to purchase DVDs by finding peddlers who roam the stadium carrying catalogues of their stock. In addition, FOTA confirms the recording industry report that illegal trade has now expanded at "bazaars" and public markets in other parts of the city; for audiovisual materials, this especially includes the electronic market Wolumen in Warsaw, and in other regions of the country (such as ŁKS Stadium in Łódź, Balice market in Kraków, Hala Ludowa in Wrocław, city market Berna Str. Dolna Wilda district in

Poznań, and bazaars located along the Polish-German border). The illegal trade taking place in these public markets is highly organized and controlled by criminal gangs. FOTA has provided a list of all problematic locations to the governmental group that deals with copyright infringement.

The entertainment software industry reports that there has been little change in the industry's situation at the stadium. Pirated entertainment software products are still widely available, though no longer on open display. Pirated video game products can still be found through the stadium's roaming vendors or through those that sell at stalls throughout the stadium (at times hidden among the vendors' other counterfeit products). Much of the pirated CD-based game products are burns, not industrial-producer ("silver") products. In recent years, silvers produced in Russia and Ukraine have flooded the Polish markets; pirates also appear to be shifting their operations to local burning. The Entertainment Software Association (ESA) shares the concerns of the other copyright industry associations that piracy is becoming widespread in "bazaars" and "mini-Stadiums" across the city and in other regions of Poland.

The recording industry reports that the situation regarding the distribution of optical discs with music content at the stadium has radically changed, for the better in recent months. In 2004, 150 proceedings were instigated against distributors of pirate music products at the stadium (31,563 CDs with Polish repertoire and 77,327 CDs with international repertoire, 5,727 music DVDs, 5,770 albums in MP3 format and 193 CD-Rs were seized). Since May 2004, the industry (IFPI and ZPAV, the local industry anti-piracy association) has observed that pirate disc distribution at the stadium has been largely limited, though not eliminated. DAMIS has been informing ZPAV about any changes introduced in their mode of operation—for example, a video camera monitoring system of the top of the stadium has been installed and is available to enforcement authorities. The number of security employees was increased. Although such continuous monitoring has eliminated the open trading in pirate products, the copyright industries question the deterrence of these security patrols as pirates appear simply to go through the motions of hiding their discs until the patrol has passed. However, the local recording industry estimates a decrease of 80% in the supply of pirate discs in the stadium. Activities undertaken by law enforcement agencies at the stadium led to the movement of distributors to other marketplaces such as Wolumen in Warsaw and bazaars located along the Western border. Noticeable pirate distribution of pirated sound recordings (as well as pirate movies) now appears in marketplaces and bazaars in Szczecin, Świnoujscie, Kostrzyn, Gubin, Slubice and Sieniawka, and at a computer marketplace in Wroclaw, WILDA marketplace in Poznan and Balice in Krakow.

The Business Software Alliance (BSA) also reports that anti-piracy and anti-counterfeiting measures have improved at the Warsaw Stadium since the new DAMIS contract was issued. BSA has noticed a decrease in the number of retail distributors selling pirated software. However, room for improvement at the stadium remains. In addition, police and prosecutors should take action against other large flea markets across Poland.

Border enforcement is improving, but needs much more strengthening.

The copyright industries report also mixed results with the Polish government efforts to strengthen border enforcement practices. In 2004, reports indicate that Polish Customs conducted 105 actions at borders and inside the country, resulting in the seizure of over 31,000 pirate discs. ZPAV reports that a total of 12,156 pirate units (including CDs, albums in MP3 format, CD-Rs and music DVDs) were seized by customs and border guard officers at Poland's

eastern border in 2004 (this accounts only for approximately 2% of all seizures made in Poland). Only 20 cases were instigated by customs and border guards.

MPA reports that Polish border enforcement has been strengthened in two ways. First, at the beginning of the year, Polish Customs created special mobile groups in the regional customs houses to investigate and conduct raids inside the country. These mobile groups are quite active and are coordinating actions with the audiovisual industry. Second, the manpower at the Eastern borders has been reinforced by approximately 1,000 customs officers reassigned there as a result of Poland's accession to the EU. FOTA reports that the quantity of seized pirate audiovisual products at the eastern border has remained at a constant level.

However, the recording, business software and film industries all report that the eastern border remains a problem, despite recent legislative customs reforms made by Poland in order to accede to the European Union. BSA also sees continued ineffective border controls with much pirated and counterfeiting software products continuing to enter Poland, especially in the East. Legal regulations, such as the use of simplified customs procedure resulting from the EU Customs Code, do not have any practical impact in combating organized smuggling of pirated materials.

The recording industry reports that, based on results of forensic examination conducted by IFPI, over 85% of seized pirated sound recordings come from Russia and Ukraine. The majority of pirate discs coming from Russia and Ukraine are seized within the country, which indicates organized smuggling. They have observed that the quantity of seized pirate recording along the Eastern Polish border has dropped considerably. The fact that Eastern border of Poland has been also an EU border since May 1, 2004, has not brought any positive changes in limiting access to pirate sound recordings on Polish territory. However, on a brighter note, the regional customs houses within the country have become more active in this field—they carry out activities coordinated with rightsholders of sound recordings, e.g., actions at marketplaces in Poznan and Wroclaw, following the agreements of particular customs houses with the local recording industry (ZPAV).

While the software industries have continuing concerns with border enforcement, members of the ESA report that there has been much improvement in the operations of Polish Customs during the last year. The customs authorities have responded positively to the anti-piracy training provided by some ESA member companies, and cooperative efforts with industry have resulted in an increase in the level of seizure activity at the borders. The industry is pleased with the level of cooperation its members have received from the customs authorities.

Enforcement of the New Optical Disc Regulations

The 2004 copyright law amendments (discussed below) require the Ministry of Culture to issue regulations to implement the optical disc production provisions of the copyright law. This decree was officially published on June 2, 2004. Right now, the Polish OD Decree appears sufficient to control the production of optical discs. However, the lack of criminal sanctions remains a troubling concern. If the OD plants do not adequately observe the provisions of the decree, it may become necessary to introduce criminal sanctions. Publication of the OD Decree

⁷ As a matter of comparison, the Polish optical disc decree is much more minimalist than the kind of comprehensive OD regulations which IIPA members and the U.S. government have pressed in other territories in Asia, Russia and Ukraine, for example.

was the first stage of implementation; enforcement of the regulations, and their usefulness in combating piracy, are the more critical elements.

Because the OD plants use different information technology systems, a universal format allowing for further data processing was prepared, and reports indicate that this system was finalized a few months ago. Independently of that effort, the local recording industry (ZPAV) continues its program of co-operation with particular CD plants on the basis of modified Memoranda of Understanding (MOUs) with each plant. ZPAV has accompanied the inspectors in some plant visits and noted a resistance in the GM plant.

Efforts to create the register for OD machines, their implements, the businesses which own them, plus other information required in the decree, have commenced. The Ministry of Culture already has called for the operational optical disc plants to register lines and equipment. All OD plants, except Technicolor, positively responded to the appeal of the Ministry of Culture to submit data to the register. A two-person team of inspectors has been established at the Ministry of Culture to control optical disc production.

To date, inspections have been carried out in five (5) OD plants and there have been no negative reports issued yet. ⁸ ZPAV prepared inspectors of the Ministry of Culture to conduct inspections and provided the ministry with a database for storing information required in the Decree. Also, a ZPAV representative participated in inspections in selected CD plants. The first inspection last fall indicated the necessity for amendments to the Copyright Law, including the introduction of criminal sanctions for ignoring the provisions on submitting information on pressing equipment and production details, such as locations of manufacturing stampers. This recommendation already has been submitted to the Government Strategy for the year 2005.

Even before the adoption of these OD regulations, criminal investigations and prosecutions had been brought by Polish authorities against several CD plants.⁹

In practice, the inspection pr

⁸ In practice, the inspection procedure generally tracks the following: (a) The legal department of the Ministry of Culture sent information to particular OD plants about obligations resulting from the amended law and a decree of the Ministry, such as submitting information about the production of optical discs and 'movement' of pressing equipment and accessories. The inspectors of the Ministry of Culture are authorized by the legal department and act upon a "Letter of Authorization to Conduct Inspection" signed by the Deputy Minister of Culture. This letter of authorization covers the scope of inspection, according to the provisions of the Decree of the Ministry of Culture in this field. The letter of authorization is issued for a limited period. (b) During and after the inspection, inspectors prepare an inspection report, which contains a description of activities undertaken, location of the inspection, and documentation on collected samples. Inspectors make an inventory list of pressing machines and accessories. A report on collection of samples is prepared and signed by the inspector of the Ministry of Culture and the owner/board member of the OD plant. A report on collection of samples is certified by the Ministry of Culture. (c) The inspection report together with recommendations for further action is forwarded to the inspected entity.

There are 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 Wroclaw, 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 constantly urges the police to speed up the investigation and clarify the situation as swiftly as possible.

Criminal investigations reflect inadequate deterrence despite good cooperation with industry.

The industries continue to report generally good cooperation with Polish enforcement agencies on investigations and raids. The problem remains pressing forward with cases through prosecution, in order to gain effective deterrence.

The recording industry views the level activity of enforcement agencies with regard to the instigation of criminal proceedings as unchanged from previous years. However, the quantities of seized pirated sound recordings are much smaller than before. Pressed pirate CDs and music DVDs, most often smuggled from Russia and Ukraine, dominate the market. Also visible is growing distribution of CD-Rs. Furthermore, there is a lot of pirate activity involving pirated music on the Internet. Activities conducted by police, such as identification and detention of individuals organizing illegal distribution of pirate recordings on the Internet as well as securing servers with stored music files, are praiseworthy. However, only a few police units are ready to undertake such Internet actions, due to lack of professional equipment and lack of necessary knowledge to prosecute intellectual property infringements on the internet. Unfortunately, a recommendation in the government's 2003 strategy plan to create specialist positions in particular police units to monitor the Internet in search of intellectual property infringements has not been implemented. Officers to deal with Internet crimes were appointed at police headquarters at the regional level (viovodships). Furthermore, the judicial practice of calling experts in obvious cases is still a matter of concern, especially to the recording industry, because this practice causes higher costs for the courts and delays prosecutions.

The motion picture industry (FOTA) reports that the number of raids involving audiovisual products in Poland has increased by roughly 15% compared to last year, resulting in an increase of seized DVDs (51,000 in 2003 and over 123,000 in 2004). Very recently, the Regional Police Units in Radom, Kielce and Rzeszow conducted raids (based on FOTA investigations) on an individual who operated pirate disc labs and distributed pirate discs in street markets and via an Internet website. Over 5,000 pirate CD-Rs and DVD-Rs and 450 pirate DVDs were seized, and five people were arrested. The film industry shares the recording industry's concern about Internet piracy enforcement (above). On December 23, 2003, the Council of Ministers approved its government anti-piracy strategy plan and made statements regarding increased inter-disciplinary cooperation and prioritization for IP crimes. The Council called for the National Public Prosecutor to appoint two prosecutors in every office to assist and advise on IP crimes, and also reiterated the need for intensified actions using all resources within Poland such as the police, border guards, and customs. FOTA notes that the implementation and realization of these plans is proceeding, but slowly.

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. Additionally, BSA has seen positive and effective action taken by the national police, and even local police units, against Internet piracy. With respect to hard goods cases, BSA reports that the Polish police remain active and cooperative in BSA cases in general, and in fighting software piracy throughout Poland. Many of these cases often are started *ex officio* by the Polish police. For example, in 2004 police in Gorzów, Poland, conducted a raid against 100 hackers and pirates selling pirated software as well as music and films and using academic computer systems for storage. The suspects face up to eight years in prison.

With respect to videogame enforcement, one member company of the ESA reports that in a three-month period (April-June 2004), 22 new cases resulted in seizure of 341 pirated ODs containing company products and 75 copies of company products found on hard drives at Internet cafés. A majority of these pirate ODs were seized in Warsaw and Bydgoszcz. Overall, the entertainment software industry has been pleased with the level of cooperation its members have received from local law enforcement authorities.

Continuing need to improve prosecutorial and judicial deterrence in copyright cases.

For years, the copyright industries have identified a longstanding problem experienced by all the copyright industries—the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases in an expeditious manner. Many elements of Poland's enforcement regime remain incompatible with its TRIPS enforcement obligations, including the failure to impose deterrent criminal penalties in commercial piracy cases and the lengthy delays in bringing and completing copyright 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.

Expert reports add a bureaucratic layer. The recording and software industries continue to report the problem of courts appointing independent experts to secure proof of ownership even in the simplest copyright cases, where neither the defendant nor his attorney calls for submission of additional evidence. In practice, the independent expert's opinion is identical to the one provided by the rightsholders' representatives, but this procedure 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, because the costs of appointing independent experts is too high. Despite many meetings with judges and prosecutors this has not changed.

Delays at the judicial level: From the perspective of the film industry, the Regional Court of Warsaw seems to handle many long, unresolved cases. FOTA reports the following example: in eight (8) cases heard by the Warsaw Court within the three weeks during October 2004, FOTA's expert opinions were provided in 1998 for three cases, in 2002 for two cases and in early 2003 for the remaining three cases. However, FOTA notes that the backlog is not specific to copyright cases and is a common problem throughout the Polish court system. This is due to the lack of human resources, few judges, and the lack of investment in new equipment and technologies. The lack of deterrent sentencing is also a very common problem. Prison sentences are almost always suspended and the fines for copyright infringement are very low (from US\$50 to \$1,000). Unfortunately, this is also true.

The recording industry has at least two examples of excessive delays they have encountered with the Polish judicial system. First, the Regional Court in Warsaw, 7th Criminal Division, in a decision issued February 13, 2003, turned to the Court of Appeals with a request to transfer one of its cases to a different court of an equal level due to the fact that the case may soon be barred by the statute of limitations and the Regional Court has too many other cases to examine. An additional reason given by the court for the transfer was that the refurbishment/ reconstruction occurring in the building where the court is seated also prolonged the court's proceedings. The indictment in this copyright case was made in 1998 and referred to a criminal act which took place in 1996. In other words, about 7 years passed between the infringement and the court's request to transfer the case. In another case, the Regional

Prosecutor's Office in Koszalin decided (on June 9, 2003) to discontinue its copyright case proceedings because of "insignificant damage to society." The criminal act took place in 1998; after five years passed in which the court in Warsaw failed to examine the case, it then returned the case to the Regional Prosecutor's Office in Koszalin, requesting some additional acts to be carried out. It was then that the prosecution discontinued these proceedings.

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 these 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. But these tough penalties are not imposed in practice. In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases. There were three improvements: first, copyright cases can be heard summarily, thereby providing for a faster hearing; second, courts can conduct cases even in the absence of the defendant; and third, courts can order the confiscation of pirate product even when the cases are dismissed. Unfortunately, BSA continues to see weak sanctions, and it is not clear whether these improvements have had a practical affect. For example, in a recent 2004 case in Lublin, an end-user involved in extensive piracy received a one year suspended prison sentence although a vast amount of pirate software was found during a raid.

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 use of computers and trained support staff) so as to improve overall productivity in the court process. ZPAV reports 5,011 criminal cases are currently pending; in 2004, 1,208 cases were instigated, and of that 1,127 are still pending. For the motion picture industry, FOTA had over 3,663 cases pending in the criminal courts at the end of 2003; in 2004, FOTA initiated 1,280 new criminal cases and only 115 were resolved by the courts. BSA reports 282 cases are still pending.

CRIMINAL COPYRIGHT E	NFORCEMENT STATISTIC	s in 2004								
POLAND										
		Business	Sound							
Actions	MOTION PICTURES	APPLICATIONS SOFTWARE	RECORDINGS							
Number of Raids Conducted	1,445	307	1,208							
LED BY POLICE	1,340	307	1,003							
LED BY CUSTOMS	105	0	181							
Number of Cases Commenced	1,280	184	1,208							
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	79	47	50							
ACQUITTALS AND DISMISSALS	36	307	56							
Number of Cases Pending	4,528	282	5,011 (1,127 of those instigated in 2004)							
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	43	40	21							
Suspended Prison Terms	43	40	21							
MAXIMUM 6 MONTHS	7	7	7							
OVER 6 MONTHS	24	7	10							
OVER 1 YEAR	12	26	4							
TOTAL SUSPENDED PRISON TERMS	43		21							
Prison Terms Served (not suspended)	0	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	36	38	24							
Up to \$1,000	36	35	24							
\$1,000 TO \$5,000	0	3	0							
Over \$5,000	0	0	0							
TOTAL AMOUNT OF FINES LEVIED	\$11,500	\$17,650	\$6,850							

Civil copyright enforcement in Poland not yet a viable remedy. BSA did not carry out any civil actions in Poland during 2002, 2003 or 2004. Instead, BSA has relied on criminal enforcement to address its piracy problems in Poland mostly because of effective and efficient police cooperation. Procedural delays in obtaining civil orders 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. In prior reports, BSA and IIPA had previously recommended the *ex parte* provisions be further clarified so that judges could begin to implement such procedures. It can take up to five years for a civil copyright infringement case to be heard.

COPYRIGHT LAW IN POLAND

Copyright Law amended in 2004. Amendments to the 1994 Polish Law on Copyright and Neighboring Rights were officially published on April 30, 2004, just in time for Poland's accession to the EU. The goal of this 2004 legislative package was to implement certain aspects of the WIPO Internet Treaties, and of the EU Copyright Directive, which were not already accomplished in the Polish law. In general, the amendments contained several improvements, especially on the definition of technological protection measures and temporary reproductions, which had been proposed made by the various copyright sectors in recent years.

MPA, for example, still views the provisions, including the definition and sanction, on technological measures, as inadequate, and remains concerned that the private copy exception is too broad. These amendments also included provisions regarding the regulation of optical disc production; ¹⁰ the Ministry of Culture published implementing regulations regarding the optical disc provisions of this law on June 2, 2004. However, even after the adoption of these 2004 amendments to the Polish copyright law, there remained a fair number of issues not addressed in these amendments on which industry sectors have long requested redress.¹¹

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 entered into force on March 23, 2004.

Reports suggest that the Ministry of Culture is currently preparing a list of issues subject to future copyright law reforms. These issues include amendments concerning collective management of rights and the implementation of the EU Enforcement Directive. At this stage, there is no specific draft proposal on the table and no draft is expected within next six months. Continued vigilance will be needed as it is possible, indeed likely, that the Polish collecting societies may try yet another run at introducing/passing legislation which would likely be opposed by IIPA members.

Withdrawal of Poland's reservation to the Rome Convention: Poland currently has taken an exception to Article 12 of the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), permitting it to discriminate against U.S. and other foreign nationals with respect to rights connected to broadcasting. Discriminatory regimes connected to reservations under Article 12 of the Rome Convention are objectionable in principle. The dismantling of discriminatory regimes connected to the communication of signals is one of the recording industry's primary objectives, and these unfair, and now economically fundamental, discriminatory regimes need to be addressed. Poland should be urged to revoke its reservation to Article 12. Also, Poland should be encouraged to give performing artists and phonogram producers an exclusive right instead of merely a claim for remuneration. 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

¹⁰ For example, the new OD chapter established 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 (the Ministry of Culture and National Heritage); the ministry will establish and maintain an accurate registry of information regarding OD plants and their production; 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; and 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.

¹¹ For example, issued unaddressed/unresolved in the 2004 copyright law amendments include: (a) the need for

¹¹ For example, issued unaddressed/unresolved in the 2004 copyright law amendments include: (a) the need for broader exclusive rights for producers of phonograms and for performers; (b) the need to strengthen enforcement provisions, such as affording *ex officio* powers of authorities in copyright infringement actions; improving the scope of injunctive relief; enhancing criminal liability; providing presumptions of ownership; and affording stronger criminal penalties (the EU's issuance of its Enforcement Directive may ameliorate some of these inadequacies, though separate and additional work will be needed to increase the criminal sanctions under the law); (c) the narrowing of an overly broad exhaustion rule providing that the imports of copyrighted products that were put into circulation in any country with which Poland has free-trade zone agreements is not an copyright infringement (this conflicts with exhaustion in the EU Copyright Directive and the EU Rental and Lending Directive).

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 2005 SPECIAL 301 REPORT ROMANIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2005.

Overview of Key Problems: Poor enforcement remains an ongoing problem resulting in high piracy levels in Romania. Optical disc piracy is widespread; pirated products enter from Russia and the Far East, often via the Ukraine border, and are subsequently found in all major cities. CD-R piracy is growing rapidly and is controlled by organized criminal groups. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Also in 2004 for the first time, high quality pirated software was discovered, entering Romania through its western border. Romanian antipiracy efforts are often uncoordinated and a low priority for the police, prosecutors, and courts. For years the Romanian government has pledged to raise the level of commitment for criminal cases to target large-scale operations and impose deterrent penalties. Instead, the police conduct raids, but largely against small targets, and prosecutors often refuse to follow through with indictments or fail to press for deterrent sentences in those cases they do decide to The software industry reported fewer dropped cases in 2004, and, in a positive legal reform development, copyright amendments added clear civil ex parte search authority, a TRIPS requirement. IIPA looks forward to decreases in software piracy levels (along with new criminal penalties) if these provisions are properly implemented. Other copyright industries were less sanguine about new enforcement provisions because they contradict existing provisions (which will confuse the courts), and contain other provisions which over-regulate collective management. The copyright industries are generally frustrated with the constant reassignment of police, including those trained by the industries, and often after taking action against pirates.

In 2004, the Romanian government published a national intellectual property strategy which seeks to strengthen local law by harmonizing it with European Union and international standards, enhancing the government's administrative capacity to protect IPR, and raising public awareness of the importance of IPR. Border enforcement must be made a priority because pirate products easily enter the country for sale in the local market. All of these issues have seriously undermined the effectiveness of numerous industry and U.S.-funded training programs.

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¹ The National Strategy is available at http://www.orda.ro. Copyright 2005 International Intellectual Property Alliance 2005 Special 301: Romania

Actions which the Romanian Government Needs to Take in 2005

Regarding Enforcement

- High-level government officials must instruct 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.
- Encourage the economic police (including anti-fraud departments) to increase substantially the number of anti-piracy raids especially against larger-scale targets and to extend their actions to the distribution networks supplying illegal street sellers, and bring more cases to the prosecutors.
- Provide training to police officers in order to improve the quality of the investigation 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 those 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.
- Ensure that the General Prosecutor directs prosecutors to move criminal cases to their completion and push for deterrent penalties, especially aimed at large-scale operations and repeat offenders. Some positive steps undertaken in 2004 need to continue: appointing lead prosecutors for IPR enforcement in each county, authorizing prosecutors with executive powers, and establishing a special IPR department in the General Prosecutor's office.
- 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.
- ORDA needs to focus its resources on a number of specific areas—in particular on proper and effective enforcement of the hologram decrees and providing expert reports. In addition, ORDA needs to ensure that it makes more thorough checks on companies before providing holograms, and that it substantially improves its inspections and verifications of the end-use of holograms.
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are too overburdened to handle IPR cases.
- Impose 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.

Legislative Activity

- Further amend the 1996 Romanian copyright law to meet Romania's bilateral, TRIPS and WIPO treaties obligations (and obligations arising from EU directives). This includes revising the Romanian copyright law amended effective August 1, 2004 (No. 285/2004) to delete the counterproductive provisions regarding enforcement and collective management of rights (noted later in this report).
- 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).
- Abolish the "musical stamp" tax.
- Introduce and enforce a general prohibition of street sales of optical discs.

 Refrain from introducing changes in the criminal code that would lower the level of penalties, including imprisonment provided for copyright infringements.

ROMANIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ²										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	8.0	55%	8.0	35%	6.0	55%	6.0	65%	6.0	60%
Records & Music	18.0	78%	18.0	80%	15.0	75%	14.0	70%	11.0	55%
Business Software ³	32.0	74%	28.0	73%	20.7	70%	15.7	75%	17.1	77%
Entertainment Software⁴	NA	65%	NA	NA	35.2	97%	NA	95%	6.9	91%
Books	2.0	NA								
TOTALS	60.0		56.0		78.9		37.7		43.0	

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. 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.

COPYRIGHT PIRACY

The Growing Problem of Optical Media Piracy

The copyright industries in Romania are increasingly 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

International Intellectual Property Alliance

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Romania, as

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Romania, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$49 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁵ For more details on Remania's Special 201 bistory and Appendix D (http://www.iii.e.gov/appendix).

⁵ For more details on Romania's Special 301 history, see Appendix D (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) as well as Appendix E (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission. Previous IIPA Special 301 filings on Poland are posted at http://www.iipa.com/countryreports.html. During the first 11 months of 2004, \$199 million worth of Romanian goods (or 25.3% of Romania's total exports to the U.S. from January to November 2004) entered the U.S. under the duty-free GSP code, representing a 93.1% increase over the same period in 2003.

⁶ 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=20031209163752osnhojac1.789492e-02&t=xarchives/xarchitem.html.

pirate music CD material comes from Russia, shipped through Moldova and Ukraine, and is sold throughout Romania. The share of CD-Rs containing illegal music in the Romanian pirate market is rapidly growing. The main entry points for pirate material are Siret and Dornesti (by truck and train) on the Ukrainian border, Calafat and Giurgiu on the Bulgarian border, and Albita, Giurgiulesti and Lasi on the Moldovan border. In 2004, the recording industry identified two cases of illegal transshipment through Romania where pirate product was shipped from Bulgaria to Moldova. In both cases the quantity of illegal product exceeded 100,000 units; this appears to be a growing trend. Another problem, relatively recent, is the increasing availability of high quality pirate copies imported to Romania by the organized criminal groups from the former Soviet republics (CIS), including Moldova. The Entertainment Software Association (ESA) continues to report that pre-recorded CD-ROMs of entertainment software (particularly PlayStation® games) are produced in or shipped mostly from Russia and Ukraine, while pirated Game Boy® products mostly come from Asia.

Local pirate optical disc production is not the main problem of the copyright industries in Romania. There is, however, one known optical disc plant in Romania; the plant has two lines and an annual capacity of 7 million discs per year. 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 primarily comprises 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. Internet café piracy remains a problem, although there has been some improvement in the café situation because the police have cooperated and stepped up their enforcement efforts directed against unlicensed cafés. A few ESA companies have taken enforcement actions against smaller establishments, some of which have resulted in settlements. Online anti-piracy efforts have also been undertaken by companies sending takedown notices to Romanian Internet service providers, but there are no estimates as to the compliance rate at this time. Despite these efforts, Internet piracy continues to grow. 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.

⁷ See, for example, Eryka Lang, "PC games market, invaded by pirates," Dec. 30, 2003, available at www.expres.ro/afacerti/?news_id=141534.

The recording industry faces the constant problem of large quantities of illegal material (CDs and cassettes) continuing to enter Romania due to weak border enforcement, from Russia as well as previously produced inventory from Ukraine. 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 78%, representing trade losses for the U.S. industry of around \$18 million. The estimated overall piracy level for sound recordings (local and foreign) is 52%, which is down slightly from 2003. 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 is increasingly confronted with problems caused by local CD-R burning of recorded music. Illegal CD-Rs are burned (and converted to MP3 files) in private apartments. The pirate catalogue is then advertised on the Internet and distributed via regular postal services upon individual order, or physically distributed by network of youngsters (underage to avoid prosecution) in markets and commercial zones controlled by organized criminal groups. Payment is made via postal service due on delivery. Prices of these CD-Rs vary a great deal and range between 10% and 90% of the genuine product. Prosecution of these illegal traders is extremely difficult due mainly to privacy laws, since enforcement authorities cannot enter private premises without a court order. Without jeopardizing privacy rights, some simplification of the procedures for searches is needed, perhaps in the current package of amendments to the copyright law. An emerging problem is the uploaded and downloaded of files on the Internet via computers in Internet cafés; however, it is estimated that Illegal file-sharing is currently low overall. In 2004, the recording industry identified 315 websites containing illegal files and offering illegal CD-Rs for sale. Of these, 160 are based on servers of Romanian ISPs. The music industry (UPFR) contacted or sent cease and desist notices to these websites and was successful in getting the content removed, or the sites closed down after the notification.

The recording industry reports a small increase in 2004 in the number of raids undertaken, 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 competence 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. Furthermore, the recently amended copyright law provides that illegal distribution cases should be subject to administrative proceedings and a fine — which needs to occur twice before a case can be recognized as a criminal action. Thus, the new amendments make it harder to deter crimes; plus, the system does not have any technological set-up or registry capable of monitoring administrative infringements, so it is unlikely to work.

Despite many positive legislative developments in 2004, the Business Software Alliance (BSA) continues to report high levels of piracy in Romania. Computer shops continue to install unlicensed software on PCs sold to customers (known as "hard disk loading"); the police have only recently began to take action against this form of piracy. To date, only a few HDL targets have been raided. In principle, the police continue to focus on small companies suspected of using unlicensed software (known as "end-user" piracy). However, larger end-user targets remain completely safe from enforcement. Internet piracy (reselling CD-Rs) is increasing, with online advertisements and potential customers submitting orders via e-mail, or it is operated

through websites promoting pirated software for downloads. Although the number of prosecuted cases and convictions has increased, there are, unfortunately, still several public prosecutors who refuse to prosecute software infringement cases because there is a "perceived lack of social harm." BSA is very pleased to report that the Romanian enforcement agencies are finally starting to make progress with reseller enforcement. Further, BSA praises the government for taking significant steps to legalize its own software use and reports that government ministries have undergone training to develop software asset management policies to promote legal software use within government entities.

The motion picture industry (MPA) 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. Additionally, the motion picture industry reports that Poland has become a new source of pirate DVD-Rs. According to the MPA, DVD piracy has increased to a level of over 80% 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. Internet cafés, which are present all over Romania, also allow their customers to download and burn movies. The local anti-piracy organization, ROACT, is gathering information to organize raids on Internet cafés and private locations. Due to ROACT's collaboration with the Transport Police and the Bucharest police, about 110,000 DVDs were confiscated in the first six months of 2004. ROACT is also increasing its focus on border areas and airports. The level of videocassette piracy in Romania has dropped to about 20%, and 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 major problem. Most cable systems retransmit satellite television programs intended for Germany, Italy, and other Western European countries, dubbing them into Romanian; some stations also broadcast pirate videos. MPA estimates the combined OD/video piracy rate in Romania at 55%. Estimated annual losses to the U.S. motion picture industry due to audiovisual piracy in Romania have increased to \$8 million in 2004.

MPA 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 almost 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 2004.

COPYRIGHT ENFORCEMENT

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 and courts have failed to impose such sentences. The Romanian government should allocate more human and financial resources to support ORDA's activity (which needs to do a better job of monitoring illegal products according to some industries), and efforts in enforcing the law. Constant staff changes within 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.

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. Reports indicate, however, that in 2004, the General Prosecutor's Office kept a prosecutor (appointed in 2003) to coordinate IPR cases, and did appoint specialized IPR prosecutors in each district. The central IPR prosecutor was very active in various training programs organized with the U.S. Embassy in 2004. However, very few IPR cases were actually prosecuted—the recording industry has noted only one significant case concerning parallel import in Deva. In September 2003, the police raided the premises of a company TopTrade and seized 10,400 illegal CDs and audiocassettes with international repertoire. The pirate product originated from Austria; its destination was unclear. The case is ongoing.

The state body responsible for copyright enforcement, ORDA, has direct reporting lines to the National Control Authority. ORDA needs to start using its resources in a concentrated manner by refocusing its activities on a limited number of specific areas, in particular on proper and effective enforcement of the holograms' decrees as well as providing expert reports. ORDA reports that it has increased its staff size to 50 or 60 persons with the aim of being responsible for everything relating to IPR. This is an impossible task, and one which diminishes ORDA's effectiveness. Instead of being effective in copyright enforcement, ORDA has created an unnecessary bureaucracy frustrating the relevant enforcement authorities and copyright organizations. The recording industry reports that ORDA continues to pursue its prior policy aimed at excluding the local recording industry association (UPFR) from joint enforcement actions with the police.

ORDA reports that through September 2004, it took a total of 278 actions to combat sound recording and audiovisual piracy, down from 288 in 2001, but up from 240 in 2003. Similarly, 23,179 pirate products were seized through September 2004, down from 24,294 in 2001 but up from 15,310 in 2003. A grand total of 9.4 billion Romanian lei (ROL) (US \$324,696) in fines were imposed through September 2004, up from 6.8 billion ROL (US\$234,886) in 2003, and 5.8 billion ROL (US\$200,344) in 2001.

ORDA likewise reports that in April 2004, it publicly destroyed 60,000 pirated products seized by Romanian authorities in 2003. In November 2004, media reported that over 150,000

pirated CDs and DVDs seized by authorities through October 2004 and containing music, films, computer software and games, were destroyed in Bucharest at the Obor market. The business software industry reports that in 2004, ORDA did undertake raids against street pirates resulting in misdemeanor fines (and favorable public awareness on piracy). However, since ORDA does not involve the copyright industries in its actual raids, there is little additional information available on the specifics of its actions. The industries do report considerable delays b ORDA in preparing expert reports—anywhere from 3 months to 14 months, which delays criminal enforcement proceedings.

Police conduct 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 (although raids usually only take place after industry complaints). Unfortunately, despite such cooperation, piracy levels remain high and raids are not being initiated against larger companies and organizations involved in piratical activities. Police ineffectiveness is caused by several factors: (1) police are under-equipped and under-financed; (2) internal reassignments of personnel are high, diminishing the effectiveness of training; (3) inconsistent anti-piracy activity; (4) prosecutorial bottlenecks hampering follow-up of police actions (undermining police motivation); and (5) a centralized and burdensome enforcement bureaucracy created by ORDA, which confuses and undermines police activity. Last, it is unfortunate that the specialized anti-organized crime group in the police (created in 2000) has reportedly been instructed to limit its actions against copyright crime.

In 2004 (as in 2003) the police continued to exclude IPR actions among the criteria they used in internal orders to gauge their effectiveness. The copyright industries again request that intellectual property criteria be included, both the quality and quantity of cases investigated, as a criteria for police evaluations, 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 2004 for the software (but not the music) industry, 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 as well as in other regions (e.g., Craiova and Timisoara) did not pursue any cases in 2004. Ineffective prosecution is caused mostly by procedural restrictions, such as limited search and investigative authority, and the need for a court ruling before undertaking most steps. Further, there continues to be a lack of general prosecutorial knowledge about copyright cases and piracy. Against this backdrop, the small number of cases, their constant dismissal and the overall absence of criminal convictions is easily explained. Perhaps the large number of training programs in 2004 will yield better results in 2005. The business software industry reports that despite a high number of police raids against end-user companies, there has to date been only a single case sent to a court in Bucharest. The motion picture industry (ROACT) reports that ten criminal files have been sent to the courts in 2003, compared with only one in 2002. Two convictions were obtained in 2003 that resulted in fines. ROACT initiated 60 criminal cases in 2003.

BSA 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

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⁸ Medifax News Brief Service, "Thousands pirate CDs and DVDs destroyed in Obor market" (Nov. 3, 2004).

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, (although such communication is mandatory, according to the Criminal Procedure Code), thus not allowing them to file a complaint against the decision in due time.

As noted, the prosecutor charged with IPR (Mr. Dragos Dumitru) retained his position in 2004 and has been lauded by the industries for appointing, as promised, at least one IPR prosecutor in each county and training these prosecutors, and notably re-opening some of the previously closed files (i.e., cases dismissed by other prosecutors for lack of social harm). This positive trend needs to be enhanced: Mr. Dumitru needs to be vested with sufficient executive power to enforce IPR cases; he currently lacks the necessary authority — for example, he could not re-open the files himself, but merely proposed such. Despite the prosecutor's efforts, many obstacles remain — most notably a general attitude that IPR cases are not a priority (i.e., do not cause "social harm").

Concerns over corruption: Corruption among enforcement officials remains a severe problem in Romania. Moreover, there is minimal prosecution of corrupt acts. Indications 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, or against other (larger) targets.

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 several years have begun to receive additional cooperation from the police to conduct raids and seizures of infringing product, as well as some support from public prosecutors in promoting the cases to court, and in spite of recent amendments to the law (which increase penalties for software piracy offenses).

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. Unfortunately, the Prosecutor General claimed the decision to be in compliance with procedural rules and refused to file an extraordinary appeal, which is the proper next step under the Criminal Procedure Code. The recording industry could not take any further actions and lost the case.

Another important case illustrating the complete lack of understanding and the arbitrary approach of some prosecutors to copyright crimes, is a case launched on July 5, 2002 after police raided a warehouse in Slatina in Olt County. UPFR (the local music industry's anti-piracy

organization) filed a claim for approximately US\$157,800 in damages. On February 21, 2003, the Prosecutor's Office in the Olt Court dismissed the case based on the incomprehensible argument that the pirate products were found in a warehouse, not in a specialized music shop! UPFR filed an immediate appeal (complaint) and the criminal case was reopened. However, in October 2004, the Prosecutor's Office weighed in by noting that the prosecution had been fully compliant with procedural rules (in favor of the defendant). UPFR filed a subsequent complaint to the more senior Prosecutor's Office at the Craiova Appeals Court, and is currently awaiting a response.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 ROMANIA								
Actions	Business Software	Sound Recordings						
NUMBER OF RAIDS CONDUCTED	372							
By ORDA	NA	340						
LED BY POLICE	372	5,778 (for all industries)						
LED BY CUSTOMS	0	7 (thru June)						
NUMBER OF CRIMINAL FILES PRODUCED (COMPARE WITH NUMBER OF CASES ACTUALLY COMMENCED)								
Number of (New) Cases Commenced	245	150						
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	42	8						
ACQUITTALS AND DISMISSALS	~70	1						
Number of Cases Pending	~500	4						
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	12	2						
SUSPENDED PRISON TERMS	12	2						
MAXIMUM 6 MONTHS	8	2						
OVER 6 MONTHS	0	0						
OVER 1 YEAR	4	0						
TOTAL SUSPENDED PRISON TERMS	All (8 yrs, 7 mos)	2						
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	30	6						
UP TO \$1,000	30	6						
\$1,000 TO \$5,000	0	0						
Over \$5,000	0	0						
TOTAL AMOUNT OF FINES LEVIED	ROL 108.1 million (~US\$3,700)							

Civil Ex Parte Search Authority

IIPA applauds the Romanian government for finally adopting copyright amendments, effective August 1, 2004, expressly providing civil *ex parte* search authority. Such a provision is a requirement of TRIPS and especially important for the business software community. With this added capability, IIPA looks forward to seeing strengthened copyright enforcement in Romania, if the provision is properly implemented. To date, no such civil *ex parte* searches have been conducted.

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.

In January 2005, the Customs Administration was transferred from the National Control Authority to the Ministry of Finance. In 2004, a protocol was signed by the business software (BSA), motion picture (MPA) and recording industry (IFPI/UPFR) adopting steps for cooperation in a Memorandum of Understanding with the National Control Authority. No concrete steps were reported to have resulted from this agreement.

Still inconsistent enforcement by ORDA of the Hologram Decrees.

Almost five years ago (in 2000), two decrees were issued requiring the affixation of holograms to certain copyrighted products; the various copyright industries have different views on the usefulness of these hologram decrees.

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 21,168,943 holograms in 2004, compared to 17,928,781 in 2003. 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, in 2003 the industry 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 current manpower focused on 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 is essential that UPFR, the local recording industry group, remain in control of the administration of the hologram program as the recording industry initiated this program and must be permitted to continue to administer it.

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. ⁹ 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.

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Copyright Act of 1996 Amended in 2004

In June 2004, Romania passed amendments to its 1996 copyright law which sought to bring it into compliance with European Union law¹⁰ and the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonogram Treaty (WPPT), which Romania ratified in February 2001.¹¹ The new law, effective August 1, 2004, seeks to amend a number of deficiencies that IIPA had identified in previous 301 submissions.¹²

The amendments include:

 Within the right of reproduction for works, protection for temporary copies. However, there is an exception for transient copying;

International Intellectual Property Alliance

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.

stickering regime to business software, such a measure did not move forward.

10 Directive 96/9/EC (data bases); Directive 92/100/EEC (renting/lending); Directive 2001/29/EC (copyright directive); Directive 2001/84/EC (resale right directive); Directive 93/98/EEC (term of protection); Directive 93/83/EEC (satellite, broadcasting and cable retransmission).

broadcasting and cable retransmission).

11 See Law no. 285/2004 for the amendment and supplement of the Law No. 8/1996 on copyright and neighboring rights, published in the Official Journal No. 587/30.06.2004.

For example, see IIPA's 2004 Special 301 Report on Romania, available a http://www.iipa.com/rbc/2004/2004SPEC301ROMANIA.pdf.

- Full reproduction rights for producers of audiovisual works and sound recordings, including for temporary copies;
- Civil ex parte search authority;
- An exclusive right of communication to the public, including a right of making available, for works and audiovisual, as well as for sound recording producers;
- Exclusive rental and lending rights for works and for producers of audiovisual works and sound recordings;
- Technological protection measures (including remedies and sanctions). These are tools that rights holders use to manage and control access to and copying of their works in the digital environment. Implementation of this requirement needs to include a prohibition on the manufacture, importation, sale, distribution, or other trafficking in devices or services aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. A new provision in the law provides some anti-circumvention protection, but it is not as comprehensive as it should be for effective enforcement. For example, there are no criminal penalties for the act of circumventing technological protection measures;
- Protection, albeit limited, for "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. However, this provision could be
 strengthened.

Further reform of the copyright law is still needed in Romania, particularly with respect to

- Transient copying: while the reproduction right now clearly includes temporary copies, the new law exempts from the reproduction right the act of making "transient" copies, that is, copies made in the process of enabling transfers between third parties, or for a lawful use of a copyrighted work, and which have no separate economic value. This provision may weaken enforcement of the reproduction right for temporary copies, which would severely hamper effective protection of rights in the digital environment;
- Exclusive rights for sound recording producers: the new law does not give sound recording producers exclusive rights of broadcasting or communication to the public, but rather a limited right of remuneration;
- Cable retransmission: while unclear, the new amendments appear to exclude cable operators from the obligation to pay royalties for cable retransmission; 13
- Pre-existing sound recordings: the law needs to clearly provide full protection for preexisting sound recordings, as required by Article 14.6 of the TRIPS Agreement;¹⁴
- Statutory license fees: the law needs to delete the maximum levels of the statutory license fees for the use of rights as set in Article 131(2) of the new Copyright Law. The international norms are that 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

¹³ See Law No. 285/2004 Article 121.

¹⁴ 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.

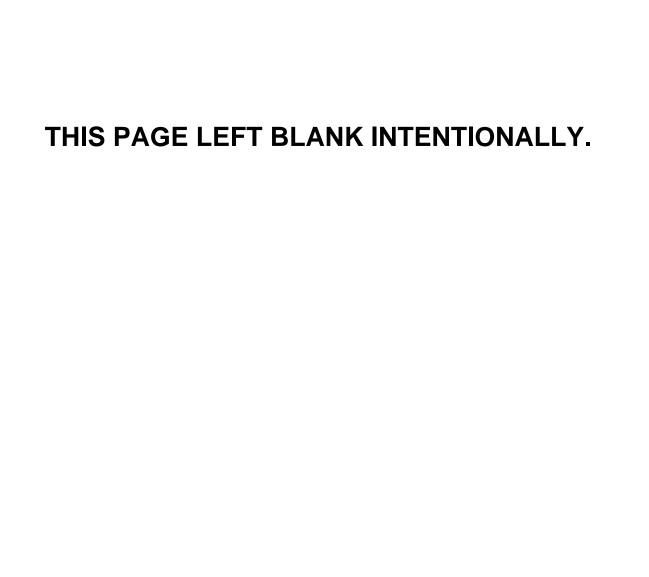
- distribution in Romania. A second provision unfairly divides performance royalties and will further hurt the film distribution business, and will have an adverse market impact.
- Regarding collective management: the new law forces representative organizations
 of different right holders to jointly collect for cable retransmission, private copying
 and public performance royalties and sets a limit of 30% in administration fees for all
 collecting societies. Such an over-regulatory statutory system is against the basic
 principles of collective management (and the principles of freedom of association).
- The new law requires that illegal distribution cases in public should be processed through administrative proceedings and fines—which must be applied two times before a case can be recognized as a criminal matter. As noted, there is no technology or registry to even monitor this otherwise non-deterrent system, making it completely unworkable.

With regard to enforcement-related reforms, the 2004 amendments strengthened penalties for copyright infringement. The new provisions provide varied criminal fines and imprisonment for different activities. For example, the law provides criminal fines ranging from 25 million Romanian ROL to 400 million ROL (US\$864 to US\$13,817) and imprisonment of one to four years (Article 139) for the unauthorized making available of copyrighted works or works protected by neighboring rights. Unfortunately, Romanian judges have interpreted these sanctions as requiring fines for first offenses, and imprisonment only for subsequent offenses. ORDA reports that these penalties have increased and will thus deter piracy. The criminal procedure code provides police with the proper (*ex parte*) search authority, but these searches have not been undertaken as needed. BSA commends the government (ORDA, and the Commission for Culture, Arts and the Media) for its cooperation with proposed legislative reforms.

The copyright industries continue to advocate a few miscellaneous actions to improve the current dearth of prosecutions and absence of deterrent sentences. Fines should be tied to more stable figures to avoid the effects of hyperinflation. ORDA's "exclusive" authority to investigate and identify pirate product in both criminal and administrative cases [Article 137(1)] needs to be revoked since it is not applied in practice and is thus counterproductive to effective enforcement. As noted, ORDA has a small staff (ten 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 (as well as providing expert reports for criminal cases). 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. Last, 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 copyright enforcement activities to organizations other than ORDA to officially act in IPR enforcement activities; these proposals have been ignored.

Criminal Code

In 2004, a total overhaul of the criminal code was enacted, effective in July 2005. The provisions concerning the copyright crimes were copied verbatim from the copyright law, including the level of penalties and prison sentences. If these provisions are applied by the courts in actuality, these provisions will serve as deterrent penalties. One highlight of the revision are the provisions establishing criminal liability of legal entities (companies and institutions). There are lingering problems: the criminal code does not sanction the possession of infringing materials, including the possession of the equipment used to make infringing material. In addition, for certain actions (software piracy), a private complaint is need as a precondition for starting an enforcement action and subsequent prosecution. This will have a detrimental impact on effective enforcement which has already been weak due to overall poor implementation of IPR enforcement by the judiciary.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT SAUDI ARABIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Saudi Arabia should remain on the Watch List.

Overview of Key Achievements/Problems: The enforcement system in Saudi Arabia remains 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 identifying and cataloguing (for inventory purposes) the seized product (e.g., on an aggregate, by format basis), and have no ability to verify final disposition of seized items. Judicial results on specific cases have to date never been publicized, and fines imposed are low and non-deterrent. Right holders have yet to see a single pirate sentenced to imprisonment despite other neighboring countries routinely issuing such judgments. The Ministry of Interior must become systematically involved on an ex officio basis against copyright offenses. Without the active involvement of the police, the entire chain of pirate distribution, including duplication, distribution and storage sites, remains untouched. Only the police have the jurisdiction, expertise and authority to effectively combat piracy against all sources.

Piracy continues in the streets and compounds, being imported into the Kingdom, home-"burned" onto recordable discs, and produced in local factories. Illegal redistribution of pay television services without authorization continues to occur in compounds. Book piracy remains a significant problem in Saudi Arabia. IIPA has recently learned of two previously unknown optical disc production plants in the Riyadh area, and a third plant in Damman. That increases the total number of known plants in Saudi Arabia to at least four. In addition, much has come to light in 2004 about trade in pirate optical discs between Karachi (Pakistan) and Riyadh.

The Saudi copyright law (which went into force on March 14, 2004) strengthened penalties available in piracy cases, and gave right holders hope that the administrative and judicial system would be more transparent. Unfortunately, while the drafters made some positive changes, the law fails to meet some basic minimum standards of the TRIPS Agreement and the standards set by the two WIPO "digital" treaties (the WCT and WPPT). The law also fails to provide detailed provisions on the protection of sound recordings and omits protection for musical works entirely — egregious deficiencies — and while the Saudi government has indicated to the U.S. government that U.S. sound recordings are protected, implementing regulations that are TRIPS-compatible and WPPT-compatible are now nearly a year overdue and should be issued immediately 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

Article 5 contains a consultation mechanism by which intellectual property issues can be raised by the United States.

Copyright 2005 International Intellectual Property Alliance 2005 Special 301: Saudi Arabia

¹ The TIFA sets the stage for continual talks on 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,

commitments and bring its copyright system up to adequate standards — both substantive and enforcement — before it should be rewarded with WTO accession and the favorable trade treatment that comes from such membership.

Actions to be Taken in 2005:

Transparency

- Give right holders an opportunity to identify pirate copyright product, if they choose.
- Improve overall transparency in the enforcement, prosecutorial, and judicial processes, including informing right holders of judicial processes, allowing them to make representations before the adjudicators, and providing accurate information or announcements regarding copyright infringement actions, and outcomes for each specific case, including verification of the final disposition of seized items.
- Allow rights holders to plead their cases directly before the MOI Adjudication ("Breach")
 Committee and to be informed of all proceedings.

Deterrent Enforcement

- Have the Breach Committee issue verdicts in piracy cases, routinely resulting in deterrent fines and imprisonment, and leading to a significant reduction in piracy rates.
- Ensure systematic involvement of the police in copyright enforcement, initiated through a request from the Ministry of Information (MOI), or through a specific "decree" from the MOI to the Ministry of Interior.
- Continue sustained inspections and raids on retail establishments, storage areas, distribution hubs, and duplication sites, and run enforcement "up the chain" toward the sources of production (i.e., importers, distributors, duplication sites).
- Engage in a complete clean-up of street vendor piracy.
- Raid compounds engaging in unauthorized sale of pirate DVDs and redistribution of pay television services, and report results from raids, including imposition of penalties and cessation of illegal activities.
- Intercept pirate imports at the borders through a more robust customs enforcement program.

Ensuring Legal Use of Copyrighted Materials

- Order universities to regulate procurement practices to ensure purchases of authorized copies of books (and other copyrighted materials), following up where necessary to ensure that those universities comply with the law.
- Continue to follow up on enforcement of the software usage directive.

Structural Changes (to Law and Law Enforcement)

- Issue implementing regulations to the Saudi copyright law to provide for TRIPS-compatible (and WPPT-compatible) protection for sound recordings and musical works.
- Establish an anti-piracy "task force" consisting of Customs, MOI, municipalities, Ministry of Interior (Police), Ministry of Commerce, etc., with a centralized plan providing for responsibilities, objectives and time frames. The task force should routinely meet with right holders.
- Speed up establishment by the Ministry of Information of an anti-piracy association involving right holders.
- Consider passage of comprehensive optical disc regulations.

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.

For more details on Saudi Arabia's Special 301 history, see IIPA's "History" Appendix to this filing.² Please also see previous years' reports.³

SAUDI ARABIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ⁴										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	20.0	40%	20.0	40%	20.0	35%	30.0	45%	40.0	65%
Records & Music	15.0	35%	16.0	40%	16.0	42%	12.0	42%	8.0	40%
Business Software ⁵	85.0	56%	76.0	54%	13.3	50%	16.4	52%	17.7	52%
Entertainment Software ⁶	NA	68%	64.0	83%	NA	NA	115.7	83%	28.0	NA
Books	14.0	NA	14.0	NA	14.0	NA	14.0	NA	14.0	NA
TOTALS	134.0		190.0		63.3		188.1		107.7	

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Optical Disc Pirate Production in the Kingdom?

IIPA understands that two previously unknown CD plants may have been identified in Riyadh, as well as one new plant in Damman. Thus, Saudi Arabia now has a total of at least four plants with seven production lines, having an annual estimated capacity of 24.5 million discs. In addition to the increase in the number of optical disc production plants in Saudi Arabia, for several years, the Kingdom has experienced greater amounts of pirate "burning" of copyrighted content onto recordable optical discs such as CD-Rs and DVD-Rs.

Retail Piracy Continues to Harm U.S. Copyright

Optical discs (CDs, VCDs, DVDs, CD-ROMs, and "burned" CD-Rs, and DVD-Rs) of a cornucopia of copyrighted content (videogames and entertainment software, music, movies, business software, and published materials) remain available for retail sale in Saudi Arabia, whether imported (e.g., music and film piracy is being imported from Pakistan and Indonesia), "burned" on recordable discs domestically, or produced in optical disc production plants in Saudi Arabia. Saudi Arabia ranks worst in the Gulf region in terms of piracy of console-based videogames of all kinds, regardless of content (over 90% of console-based games are pirate, while games for personal computer are 75% pirate). Console-based videogames are imported

² http://www.iipa.com/pdf/2005SPECIAL301HISTORICALSUMMARY.pdf.

http://www.iipa.com/countryreports.html.

The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Saudi Arabia, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$120 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁶ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁷ 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.

from Malaysia and transshipped through Dubai (UAE), while personal computer-based (PC) games apparently are coming from Russia, Syria, and Pakistan (sometimes transshipped through these latter two). Cartridge-based games continue to be imported from Taiwan and China. Pirated sound recordings are imported from Pakistan, Malaysia and elsewhere.

Such pirate products are sold openly in retail markets and increasingly in the street markets (*sougs*). 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.

Specific Sectors

- Optical Disc Piracy: Street vendors openly sell pirate discs. Since the police are not systematically involved in copyright enforcement, the entire chain of pirate distribution, including duplication, distribution and storage sites remains immune from active enforcement.
- Pay Television Piracy: Illegal distribution of "Pay TV" (i.e., cable television) signals on compounds continued to be a concern for the audiovisual sector in 2004. The Kingdom's prohibition against cinemas makes the pay TV market particularly lucrative, and many 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. Despite the numerous raids against the compounds, including four during 2004, almost all of the compounds are illegally redistributing Pay TV signals without proper authorization.
- Book Piracy: Saudi Arabia's publishing market continues to experience significant piracy, especially in the Western Province. Pirate commercial offset prints as well as illegally photocopied books, especially textbooks and English language teaching (ELT) 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), and recent changes in practice by the King Adbulaziz University in Jeddah have helped to reduce piracy losses for some U.S. companies. However, piracy losses increased for other companies, such that the industry estimates its overall losses to be the same for 2004. IIPA is pleased to see more universities legalizing their adoption processes by buying centrally and encourages the remaining universities to follow suit. Failing to do so invites an overrunning of the market by pirate photocopies, completely supplanting legal purchases.
- 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-sized and small enterprises in Saudi Arabia.
- Internet Piracy: Internet piracy, namely, download and peer-to-peer sharing of copyrighted materials over the Internet, is slowly increasing in Saudi Arabia, but since the Internet is

⁸ Almost all PlayStation2[®] consoles on the market have been modified to allow the play of pirate entertainment software.

under strict control of the government, Internet piracy has not yet become a substantial problem.

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Some Raids Run by MOI and Customs in 2004; No Police Involvement

IIPA notes some enforcement actions in 2004, mainly carried out by the Ministry of Information (MOI), but these actions are usually not seen through to the imposition of deterrent penalties, or if so, right holders do not know the specific outcomes. MOI continues to be understaffed and under-funded. Some raids were also carried out with the cooperation of Customs against pirate imports of optical discs from Pakistan.¹⁰

Working with the Business Software Alliance, the MOI carried out some copyright awareness efforts in 2004. Hundreds of letters were sent directly to suspected end-user pirates by MOI. Also, the MOI continued to carry out inspection visits against end user targets identified by the BSA, with the purpose of encouraging software self-auditing. Also, educational letters from MOI were sent to hundreds of system builders about the new copyright law.

A chief problem in Saudi Arabia is that the police have yet to become involved with copyright enforcement against street vendors or with investigations against sources of piracy. Also, most raids are initiated by right holders, i.e., there are no investigations being conducted by the authorities on an *ex officio* basis against the entire chain of pirate distribution, including duplication, distribution and storage sites. The increased presence of locally produced and/or burned pirate discs reinforces the need for the police to become immediately involved, and to act on an *ex officio* basis. Police involvement could be initiated through a request from MOI, or through a specific "decree" from MOI to the Ministry of Interior. Police involvement is crucial because of the need for investigations into the entire supply and distribution chain of pirates, ¹¹

⁹ The MOI's actions included:

A raid successfully carried out against a major distribution center of counterfeit CDs in Saudi Arabia. The Ministry
of Information undertook the raid against six warehouses (apartments) of street vendors based on leads provided
by and in cooperation with the Business Software Alliance. In total, 135,920 CDs of illegal software products
were seized. Five persons were arrested inside some of the apartments.

[•] Hundreds of raids were conducted by Ministry officials against reseller pirates identified by the Business Software Alliance in several cities throughout the Kingdom.

¹⁰ Industry has become aware of shipments from Karachi to Riyadh, and in 2004, shipments seized by Customs at the airport in Riyadh included a shipment early 2004 of 22,000 pirated CDs and DVDs (including audio, movies, and games) including inlay cards, as well as a shipment early 2004 of about 41,000 pirated CDs and DVDs. Other examples of raids include the following:

On October 17, 2004, a major sting operation was initiated by industry against street vendors. Three Yemeni and two Saudi nationals were arrested and more than 15,000 pirate DVDs were seized in a three-day sweep against street vendors in and around Souk Al Kayal. The operation was the largest ever conducted against pirate street vendors in Saudi Arabia.

[•] In the end of March 2004, right after the copyright law went into force, a series of raids, initiated by right holders, were conducted in Jeddah (Western Province) against apartments used as storage centers by street vendors, resulting in the seizure of around 90,000 pirate discs and the arrest of nine individuals.

The recording industry reports that from January to November 2004, Saudi Customs seized 210,162 music cassettes, 26,969 CDs, 3,457 VCDs, and 75 CD-R burners or cassette duplication equipment.

¹¹ The police are well equipped to lead anti-piracy operations and weed out the supporting distribution network. For example, where CDs are being illegally smuggled into Saudi Arabia, centrally stored in warehouses and then distributed to smaller caches that are used to replenish street vendors, the MOI is not the best equipped (or even empowered) to investigate the complete piracy chain leading to subsequent raids, arrests, etc. against the up or down chain. The police, on the other hand, have the expertise to conduct interviews with street vendors, investigate,

their availability 24 hours a day, 7 days a week, ¹² and the stronger message that such involvement sends to the pirates (involvement of the police has also proven to be successful in other countries). ¹³

Lack of Transparency = No Deterrence

Unfortunately, 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. IIPA understands that some raids are being publicized in the press, without any mention of specific information concerning the pirates. Right holder representatives are sometimes brought in for the raid, but are rarely informed about cases after the raid. The piracy problem simply will not be solved without solving the fundamental transparency problem, and recognizing that right holder cooperation is one key ingredient in the fight to eradicate piracy in the Kingdom. 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:

- At least, inform right holders of all enforcement activities being carried out or planned.
- Give right holders an opportunity to identify, inspect, inventory by format, catalog, and analyze pirate copyright product that has been seized in a raid/action, if they choose.
- 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.

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"

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obtain intelligence, arrest other affiliated parties, operate undercover, and only the police have the authority to conduct raids in homes and warehouses that are suspected of containing illegally copyrighted material.

12 In IIPA's members' experience, only the police have scheduled 24-hour patrols throughout all of Saudi Arabia. The

¹² In IIPA's members' experience, only the police have scheduled 24-hour patrols throughout all of Saudi Arabia. The MOI does not have the resources (even if they have the authority) to dedicate to constant street patrols in all parts of the Kingdom.

¹³ In IIPA's experience, police involvement in battling piracy immediately sends a strong deterrent message to pirates. The United Arab Emirates is a good example of a country in which police involvement directly created a deterrent in the market, driving piracy out and bringing piracy rates down to some of the lowest in the Middle East.

(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 SR100,000 or revocation of a business license must be referred to the BG by the Minister of Information.

IIPA had hopes for this BRC and the BG, namely, hoping that reporting mechanisms regarding ongoing proceedings and results in specific cases would be regularized and made transparent. Unfortunately, IIPA understands that the litigation process in Saudi Arabia remains shrouded in mystery, with no right holder representation. ¹⁴ It is imperative that copyright owners be called upon to assist the BRC in the development of cases (through forensic and other analysis of evidence), and that greater transparency lead to right holders being compensated, as the new law provides, for damage they have suffered as a result of infringements. Such changes are needed to bring Saudi Arabia's system closer to compliance with TRIPS requirements in the area of enforcement. 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 (also international requirements).

IIPA members have reported to the Ministry of Information many cases that warrant criminal action/civil relief in the form of adequate compensation. It is highly arguable that the failure to include right holders in these court processes, particularly as they pertain to civil damages under the new law, may be TRIPS-incompatible. The lack of transparency in court proceedings, to the extent it is denying right holders the civil and administrative remedies promised under TRIPS, must be addressed before Saudi Arabia should be considered for entry into the WTO. IIPA members have heard that MOI is considering increasing the staffing of the BRC, and MOI has assured industry representatives recently that the processes of the BRC will

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¹⁴ IIPA further understands that right holders can seek representation in the Grievance Committee, should penalties be high enough to seek review there; however, to our knowledge, no copyright cases have made it to the grievance committee.

¹⁵ One industry group representative, the Arab Anti-Piracy Alliance (AAA), has reported 15 actions taken by MOI in 2004 as ripe for criminal prosecution/compensation either on account that the raided targets were repeat offenders or yielded large seizures. Examples of repeat included video shops in Jeddah and Riyadh that had been raided three times each. Examples of large seizures included a video outlet in Jeddah where 40,000 units were seized in one raid, a residential apartment in Al Beled, Jeddah where 100,000 CDs were seized in one raid, and a video outlet in Riyadh where 14,216 units were seized. In each of these cases, follow-up letters were sent to MOI. However, due to lack of transparency (or we fear, lack of action), no case information has been provided and there is no way to track cases brought, including sentencing. In the rare cases in which industry was able to learn about the results of cases, fines imposed were non-deterrent, and there were no sentences of imprisonment to IIPA's knowledge meted out in 2004. While Article 10 of the new law provides for the availability of "compensation" to the right holder for damage arising out of infringement, since right holders have no opportunity to present their claims in a court, and since there is no transparency, in fact there is no effective civil remedy.

The Committee may award damages to a copyright owner who has filed a complaint to report an instance of alleged copyright infringement. The damages shall be proportionate to the extent of damage deriving from the infringement against his/her copyright.

However, right holders, in fact, have no way other than an initial complaint to MOI, to seek redress, either through injunctive relief, provisional measures, including *ex parte* civil searches, and seemingly have no way to seek adequate compensation for the injury suffered due to infringement except under that complaint. Such blatant lack of transparency in the court process, and the fact that in practice, right holders are not being adequately compensated, indicates that Saudi Arabia's current system is TRIPS-incompatible.

be reformed, allowing for more transparency. IIPA hopes these promises will be put into action in 2005.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law Strengthens Penalties, But Remains TRIPS-Incompatible and Leaves Unclear Protection of Sound Recordings

The past year has seen two major developments in Saudi Arabia's substantive copyright landscape. First, Saudi Arabia's new copyright law went into effect on March 14, 2004. Second, Saudi Arabia joined the Berne Convention, effective March 11, 2004. The new copyright law resulted in some improvements over the 1990 law, many of which were intended to bring the law closer to compliance with the TRIPS Agreement. These improvements include the following:

- Increase in Criminal Penalties: Maximum criminal penalties are increased. Fines are up to SR250,000 (US\$66,662) 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. 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. 18 It must be confirmed,

works, including U.S. works, were first protected in Saudi Arabia. The U.S. and the IIPA had been pressing Saudi

¹⁷ 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. In its accession, the Saudi government attempted 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. A reservation of this sort is impermissible under the Berne Convention, since nothing in the Berne Convention allows the complete non-recognition 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.

18 It was not until July 1, 1994 (when Saudi Arabia acceded to the Universal Copyright Convention [UCC]) that foreign

probably in implementing regulations (but preferably through a simple amendment to the law) that all sound recordings remain protected in 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. Other TRIPS deficiencies include:

- 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). As noted above, this is a problem in practice, since right holders have no forum to seek such measures.
- 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

Arabia 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 required protection for sound recordings from UCC member countries as well, retroactive for a full TRIPS-compatible term of protection.

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, as the UAE and Jordan did in 2004, of joining these treaties which are the latest international standards for copyright protection.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT SERBIA & MONTENEGRO

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Serbia & Montenegro be added to the Special 301 <u>Watch List</u> in 2005.

Despite some successes in combating piracy in 2003, the situation in Serbia & Montenegro got worse in 2004. The bulk of criminal copyright cases remain stuck at the prosecutorial level, thus rarely resulting in convictions or sentencing. In a positive development, the first two criminal convictions against software infringers were issued. Unfortunately, overall enforcement remains poor. Although a new copyright act was passed in December 2004, it has not resulted in effective enforcement. The level of piracy experienced by the industries is still at unacceptably high levels.

Overview of Key Problems: Though there were some encouraging signs in 2003, with legitimate sales showing a marked growth, piracy increased in 2004. Enforcement of copyright is generally still weak, inefficient and ineffective; the newly enacted Copyright and Neighboring Rights Law has just begun to be applied. While we have not had an opportunity to review the law in detail, we understand it solves many of our legislative concerns. Thus, legislative deficiencies can no longer stand as an excuse for poor enforcement in Serbia & Montenegro. Certain elements of the police do take action (for example, the BSA reports that police increased the number of actions in the second half of 2004, in cases reported to them) but prosecutors generally fail to commence cases against copyright infringers and customs officials lack the necessary equipment and expertise to provide any meaningful border enforcement. Indeed, one of the most serious rightholder concerns remains poor border enforcement. In the last week of 2003, a government decree on IP border measures was issued. According to reports, in 2004, the first enforcement action occurred with encouraging results. The long term effects of this measure remain to be seen, as Serbia & Montenegro is regularly experiencing an inflow of pirated product.

In 2003 the government created a special inter-ministerial anti-piracy 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 steam and most points of the action plan (including adoption of a much-needed optical disc regulation) remain unfulfilled. This group was inactive throughout 2004.

Copyright 2003 International Intellectual Property Alliance

The Copyright and Neighboring Rights Law, enacted by the Parliament in December 2004, took effect on January 1, 2005. Though IIPA has not had an opportunity to review the amendments as passed (except in summary), if, in large measure, it is the draft prepared in 2003, then the new law is a substantial improvement of the copyright system in Serbia & Montenegro. For example, the copyright law and the criminal code previously covered the same criminal act, resulting in a conflict with respect to both procedures and penalties. Reportedly, the new copyright law does not contain criminal provisions; criminal copyright infringement is now solely covered by the criminal code. Thus, the conflict no longer exists. Furthermore, we understand that the government of Serbia has approved amendments to the criminal code. IIPA has not had an opportunity to review an English-language version of these amendments, which are awaiting review by Parliament. One significant shortcoming at present is that the Market Inspectorate still remains without the necessary legislative authority to enforce copyright law.

Actions Which the Government of Serbia & Montenegro Should Take in 2005: In order to improve its copyright regime, the government should take the following actions—

- Adopt without delay strong criminal copyright provisions, including the addition of deterrent prison sentences;
- Instruct all levels of the judiciary to prioritize criminal copyright prosecution;
- Improve judicial training on copyright matters so that courts expeditiously and effectively enforce all aspects of the copyright law;
- Adopt strong optical media regulations to prevent illegal optical media production and distribution;
- Instruct the enforcement agencies to make combating piracy a priority and set goals to ensure active criminal investigations, raids and prosecutions;
- Improve administrative anti-piracy efforts to close down and fine kiosks and other retail operations which engage in the selling and distribution of pirated materials;
- Give customs and border police a clear mandate and legal competence to act *ex* officio against cross-border trade in infringing goods;
- Instruct customs and border police to stop importation and exportation of pirated goods, including optical media product;

¹ Under the previous CRL, the offense could not be prosecuted *ex officio*, but under the PCRS the offense 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.

Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ²								
INDUSTRY	2004							
INDUSTRI	Loss	Level						
Records & Music ³	12.0	80%						
Entertainment Software ⁴	NA	NA						
Business Software ⁵	NA	NA						
Motion Pictures	NA	85%						
Books	NA	NA						
TOTALS	12.0							

SERBIA & MONTENEGRO

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Piracy and Its Impact on the Market

The markets in Serbia & Montenegro are swamped with pirate products of all sorts. Illegal copies of music, films, business and entertainment software on optical discs and cassettes are openly offered for sale in kiosks, and in open markets throughout the country. Although the number of retail outlets that exclusively sell legitimate product has increased, huge numbers of street sellers with illegal materials are seriously undermining the development of a legitimate market. International repertoire as well as local copyright products are massively pirated. Several years ago, during the Milosevic era, the government openly encouraged the infringement of foreign copyrights as an act of anti-Western patriotism. The current government, especially in Serbia, increasingly speaks out against piracy, but the heritage of the recent past is

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

³ Estimated trade leaves for the control of the contr

³ Estimated 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.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Serbia & Montenegro, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

still strongly felt. A campaign to promote anti-piracy is being launched in early 2005 with government support.

International recording companies, as well as local labels, saw their sales grow in 2003 after the government launched an anti-piracy campaign. Unfortunately, the subsequent government failed to take the piracy issue seriously and large numbers of illegal traders returned to the streets. Soon thereafter, legitimate sales started to drop again and the promising developments of 2003 were reversed in 2004. The widespread availability of illegal copyrighted materials, the shortcomings of the law, and the lack of meaningful enforcement, especially at the prosecutorial level, make it extremely difficult for legitimate commercial interests to survive in Serbia & Montenegro. Sadly, the country, with more than 10 million inhabitants, could support a promising legitimate market. As it stands, the recording industry reported a piracy level of at least 80%, with losses to the U.S. music industry amounting to \$12 million in 2004.

Copyright piracy in Serbia & Montenegro is not limited to distribution and retail sales. The country hosts at least one optical disc plant, which was involved in large-scale pirate production (see below), not only for the local market, but also for export to other countries in the region. The bulk of illegal material in this market is available on cassettes (MC ("Music Cassettes") and VHS) and industrially produced optical discs. This includes pirate VCDs and DVDs imported from the Far East. However, CD-R (CD-Recordable) piracy is clearly increasing. Pirate cassettes and CD-Rs are primarily replicated locally in underground "burning" facilities. The extent to which local plants contribute to unauthorized pressed CDs cannot be ascertained at present, without a comprehensive set of exemplars from the optical disc lines present in the country. In addition, a certain number of illegal CDs are imported, mainly from Bulgaria, Ukraine, Russia, and most likely, Bosnia. Rightholders' investigations revealed, beginning in 2001, that there is also an increase in Internet piracy by illegal sites hosted in Serbia & Montenegro. For the entertainment software industry, these illegal "warez" cites provide not only video game software to download for free but also serve as a source of video games for burn-to-order operations.

Kiosks and street traders selling illegal copyright materials can be found in large numbers in every town in Serbia & Montenegro. For example, several kiosks selling pirated materials can still be found near the Serbian Ministry of Trade, Tourism and Services in front of the SKC (Student Cultural Center) on the Generala Zdanova in Belgrade. The main piracy problem is caused by large numbers of street vendors with bags and stalls with low quality CD-Rs. The network is well organized. All vendors have the same titles and type of product, which suggest the presence of a network of centrally run sources of pirate product. The most frequently used carrier for pirated music, movies, and software is CD-R. Overt piracy, with dozens of kiosks selling pirate CD-Rs, is decreasing, as pirates are adjusting their techniques and becoming more mobile.

The motion picture industry reports that piracy remains a major problem, severely limiting the ability of legitimate companies to distribute their products. The country's attempts to create a legitimate market are plagued by piracy levels estimated at 85%. Similarly, television piracy continues to be a problem, with an estimated 300 illegal stations operating in the country, sometimes broadcasting legitimate DVDs for programming. The Ministry of Culture has drafted a new broadcasting law which has been adopted by the Assembly. Although we have not had an opportunity to review an English language version of the law, we understand it restructured the Broadcasting Council, though new members have not yet been elected. In addition, the law

would require Broadcasting Council to work in coordination with the Telecommunications Council, specifically on broadcast spectrum allocation.

The publishing industry suffers from illegal commercial-scale photocopying, primarily of academic materials such as textbooks and reference books. This activity takes place on an ad hoc basis or by commercial establishments located in and around university and school campuses. IIPA urges the government to encourage university campuses to take an active role in promoting the use of legitimate materials by their students and lecturers.

Optical Media Manufacturing Piracy

The absence of an optical disc regulatory scheme is leading to an uncontrolled increase in the number of plants and lines, completely incommensurate with a legitimate increase in demand. Indeed, Serbia & Montenegro could be on the verge of developing into a major producer of pirate CDs.

There are at least four known CD plants in Serbia: Grand Production; RTS Records (soon to have two new lines); Digital System (a new plant with three lines, including two DVD lines); and General Disc Technology. All of these plants are located in Belgrade.

General Disc Technology (GDT) is still the subject of an investigation (dating from 2002) concerning massive unauthorized production and distribution. There is no means of ensuring that the plant ceased its activities after that date. Of the four plants in Serbia, GDT is the only one without a SID code.

One other plant, which has been issued a SID code, continues to improperly use it, producing discs that do not contain appropriate codes. Of the remaining two plants, one has not applied its codes (acquired in 2000) and the other has not applied codes to all of its lines. This scenario severely undermines any possible confidence in correct application of the SID code system and illustrates the urgent need for a strong optical disc regulation.

COPYRIGHT ENFORCEMENT

Criminal/Administrative Enforcement

As mentioned above, the recently passed Copyright and Neighboring Rights Act no longer contains criminal provisions. Rather, the criminal code now covers all criminal copyright infringement, resolving one problem where a single infringing was covered by two different procedural and penalty provisions. It remains to be seen, how, in practice, these criminal provisions will be applied in the wake of the new copyright law.

Some enforcement activities were reported in 2004 and the beginning of 2005. In October 2004, seven suspects in Belgrade were arrested in connection with the operation of teodivx.com, one of the main hard goods sites in Serbia. The pirates ran DVD-burning facilities in their homes from which the police seized a sizable amount of equipment, including over 22,000 masters used to create pirate product. Serbian authorities originally arrested these pirates under a provision of the Serbian criminal code, which provided penalties of up to eight years in prison for organized piracy crimes. Unfortunately, the courts did not agree with this legal characterization and are instead, trying each pirate separately. The first of the seven

cases concluded with the suspect being found guilty of piracy, but given only a suspended sentence of five years probation. Nonetheless, reports indicate that the remaining suspects will receive prison sentences.

Furthermore, the motion picture industry reports that a raid was conducted on February 6, 2005 at Belgrade's SKC (Generala Zdanova) which netted 18,000 items and 55 arrests. Reportedly, the Market Inspectorate participated in this raid.

Besides rampant illegal optical disc manufacturing (e.g., the CD plant referred to above and the undoubted presence of a large number of underground illegal CD-R replication facilities), distribution and retail of pirated goods are widespread in Serbia & Montenegro. Retail sale of pirate materials in kiosks and by street sellers is highly visible and could easily be the target of sustained enforcement by police and trade inspectors. Unfortunately, not much has happened, despite the fact that local and foreign rightholders have regularly and increasingly urged the relevant enforcement bodies to take action.

It should be noted that the Serbian Ministry of the Interior and certain police units have taken action. However, hiding behind perceived inconsistencies in the law and suffering from a general lack of interest and experience, prosecutors in Serbia have dramatically failed to follow up on the many police raids and seizures that did take place. In fact, the police took some 600 actions against pirate activity in 2004, most of them against street vendors. However, only 10 (i.e., 1.5%) of these ended up in court. The bottleneck and backlog at the prosecutorial level is so large that the Ministry of the Interior had to instruct police to suspend raids against pirate sellers, because the judiciary could not process the resulting case files. The lack of political will from the highest levels within the national and the Union governments are to a large extent to blame for this unacceptable situation.

LEGAL REFORM AND RELATED ISSUES

Copyright Law

IIPA understands that a new Copyright and Related Rights Act (hereafter "CRRA") was passed in December 2004 by the Parliament. As noted, IIPA has not had an opportunity to review it. However, local industries are reporting that the CRRA is generally adequate and will provide a foundation for effective prosecution of piracy cases. In general, as reported, the new law appears to comply with Serbia & Montenegro's international obligations under the TRIPS agreement and the two WIPO Treaties, the WCT and the WPPT, both of which Serbia & Montenegro ratified through deposit in 2003.

Provisions on copyright crime are left to the national and criminal codes of the Republics of Serbia and Montenegro respectively. Reportedly (IIPA has not yet been given a draft), the government of Serbia has approved amendments to its criminal code, which contain appropriate sanctions for copyright crime. These amendments must now urgently be adopted by the Parliament of Serbia. Likewise, similar provisions should be adopted in Montenegro, where there are some concerns that the piracy levels may be greater.

The former copyright law [the 1998 Copyright Act for the Federal Republic of Yugoslavia (hereafter YCA)] failed to provide rightsholders with the necessary legal framework to enjoy copyright protection in line with international standards. The following brief comments are based

on the major deficiencies of the YCA, and where possible include preliminary comments on the new CRRA in parentheses. Therefore, many of the deficiencies may have been corrected.

Protection of foreign rightsholders (YCA, Article 139): The points of attachment for protection of phonogram producers and performers under the YCA do not provide a basis for effective enforcement as regards foreign repertoire. For phonograms, protection is limited primarily to releases first produced in Serbia & Montenegro. Otherwise, protection is given as far as required under the international agreements to which Serbia & Montenegro has acceded. The law of Serbia & Montenegro should unconditionally provide full protection to foreign rightsholders. In order to achieve this, Serbia & Montenegro should, within the framework of its accession to the treaties and conventions referred to above, refrain from taking any reservations. (We understand that CRRA Articles 106 and 145 protect foreign rightholders to the extent required by the international agreements to which Serbia & Montenegro has acceded).

The right of reproduction (YCA, Article 20): The reproduction right for authors in Article 20 is unnecessarily complicated, giving rise to uncertainty detrimental in the market place, and in particular, for new digital uses of works. The provision should be redrafted along the lines developed as an international standard: "Authors shall enjoy the exclusive right of authorizing the direct or indirect, temporary or permanent reproduction of their works, in any manner or form." The same formulation should be introduced for producers of sound recordings and performers. (IIPA understands that CRRA Article 20 provides a reproduction right in line with international standards, including protection for temporary copies, as well as prohibitions on indirect copying.)

<u>Protection of software (YCA Article 1):</u> To provide adequate protection for software and to bring the YCA into compliance with TRIPS and the WIPO treaties, the YCA should be amended to explicitly enumerate computer programs as a category of literary works. Furthermore, the inclusion of preparatory design material in the definition of a computer program is necessary to clearly delineate the scope of protection in accordance with international treaties. (IIPA understands that the CRRA protects computer programs as literary works).

Rental and Lending rights: The YCA lacks exclusive rental and lending rights for copyright holders. The lack of this provision facilitates illegal copying and the YCA needs to be amended to provide for an exclusive right. (IIPA understands that the new law contains a rental right for works and a lending right for computer programs).

Possession of infringing copies: In order to effectively deter infringement of copyright, the YCA must be amended to criminalize possession of infringing goods for commercial purposes. The GDT case described above shows the necessity to add the possession of infringing goods for commercial purposes to the list of criminal acts of copyright infringement. For reasons of consistency and as a technical change in the course of providing protection for technological measures and rights management information, the corresponding violation of the new provisions protecting technological measures and rights management information should also be made a criminal offense.

Making available right (YCA, Article 27(6): The two WIPO Treaties (the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) require that

authors, performers, and phonogram producers be granted an exclusive right designed to cover emerging services, particularly on the Internet. This is to be a separate right, clearly distinguished from broadcasting, and drafted as a separate exclusive right under the Yugoslavian Copyright Act: "Authors shall enjoy the exclusive right of transmitting works by wire or wireless means to members of the public including ways in which members of the public can access the works at a time and place individually chosen." The same solution should be introduced for phonogram producers and performers. (IIPA understands that the new law includes a separate making available right for authors, and for neighboring rights owners, making it compliant with the WCT and WPPT).

Currently, the YCA does not provide the full catalogue of economic rights required for performers and phonogram producers. As a minimum standard, performers and producers have to enjoy a reproduction right, the distribution right, the rental right, a separate and fully exclusive making available right, and rights covering communication to the public and broadcasting. For phonogram producers, as a bare minimum the right of making available should be added to the list in Article 119. The making available right should not be subject to any existing or new exemptions and statutory licenses and should have the exclusive character prescribed by the 1996 WIPO treaties. (We understand that the CRRA contains provisions on these economic rights, although some concerns remain with respect to broadcasting rights).

<u>measures</u>: The protection of rights management information and technological protection requirement introduced by the WIPO treaties and is essential for the protection of creative content in the digital environment. The YCA provides for meaningful protection of rights management information in Article 174(2). The protection afforded in the same article to technological measures is, however, deficient, and needs to be redrafted in line with the requirements of the treaties. In particular, protection needs to be extended to cover the act of circumventing technological protection measures as well as activities relating to circumvention devices. Effective remedies have to include criminal sanctions for the violation of the provisions protecting technological protection measures and rights management information. (Article 180 of the CRRA reportedly includes protection of rights management information and technological protection measures consistent with the requirements of the WIPO treaties).

Ex officio action in criminal proceedings (YCA, Article 186): Article 186 currently makes the criminal offenses provided in the YCA subject to a private action. This fundamentally undermines the efficiency of the criminal procedures provided in the law. For criminal procedures to be efficient, it is essential that the enforcement authorities and public prosecution services be under a legal obligation to investigate and prosecute criminal copyright infringements *ex officio*. Rightholders in the private sector have neither the appropriate investigatory powers, nor are they given standing in court. The networks and information resources of public authorities and in particular those used by the public prosecution services are a necessary basis for effective enforcement.

Copyright infringement is a serious crime often conducted in an organized manner and as a means to fund other criminal activities. To create the basis for pirates to face conviction for copyright crimes, and to harmonize prosecution of copyright infringement with prosecution for other intellectual property crimes in Serbia & Montenegro (trademark, patent and industrial

design) criminal actions for copyright under Articles 182 through 185 must be subject to *ex officio* action. Article 186 should be deleted.

<u>Damages (YCA, Article 172):</u> Under Article 172(1) Nr 5, copyright holders and related rightsholders can claim indemnity for material damage and under Article 172(1) Nr 6, the publication of the judgment at the defendant's expenses. These provisions, however, do not meet the requirements under Article 41 and Article 45(1) and (2) of the TRIPS Agreement for several reasons—

- <u>No pre-established damages</u>: The YCA does not provide rightholders with preestablished (i.e., "statutory") damages as an alternative to actual damages. Preestablished damages are essential for effective enforcement.
- No aggravated damages: The YCA does not provide specific damages where pirates are found to have been engaged in particularly egregious infringing activity, over long periods of time, or when the violation has been particularly blatant. In such cases, mere compensation for the rightholders for the direct economic injury or financial loss is not only insufficient to remedy the total harm caused but does not satisfy the requirements under the TRIPS Agreement and the WIPO treaties calling for deterrent remedies. A provision on aggravated damages should be added to the YCA in order to fulfill the requirement of deterrence. (IIPA understands that a new Article 178 introduced treble damages in cases of intentional or grossly negligent copyright infringement.)
- No provision on the burden of costs: The YCA does not require an infringer to pay the rightholder's expenses, which may include attorney's fees as provided under Article 45(2) of the TRIPS Agreement. Article 172(1) Nr 6 therefore needs to be amended. Covering expenses and attorney's fees is essential for effective enforcement of rights. Infringement proceedings are extremely expensive and often exceed the amount of damages awarded by the courts. Without the ability to recover their actual costs for infringement proceedings, rightholders are discouraged from enforcing their rights.

<u>Presumption of ownership</u>: An additional section on the presumption of ownership should be included in the YCA to effectively address widespread piracy in Serbia & Montenegro. Provisions of this kind have become the standard in many jurisdictions, recognizing that proving a chain of ownership can be an extremely time-consuming process, hindering the expedient and effective enforcement of rights. The TRIPS Agreement (by application of Article 15 of the Berne Convention) requires presumptions as to existence and ownership of copyright and related rights. As there is no justification to distinguish between author's rights and related rights, the provision should apply to both rights alike. (Articles 9 and 179 of the new law reportedly solve this deficiency.)

Provisional measures: Provisional measures are an essential tool in the effective enforcement of copyright. They allow enforcement authorities, under certain circumstances, to hold evidence while a criminal investigation and trial can proceed. The provisions in this regard in YCA Articles 173, 175-178, are not clear enough and there remains concern that they do not provide sufficient basis for immediately available and meaningful measures, including those issued in the course of *ex parte* proceedings. This concern is based on reports that provisional measures are not widely used in Serbia & Montenegro as yet. Also, to enable rightholders to

effectively use provisional measures, the deadline for filing a lawsuit after an official request for provisional measures has been filed must be extended. The current time period (15 days from the time of filing for provisional measures, not execution thereof) is much too short both to enable proper evaluation of the results of the provisional measures and sufficient preparation for effective enforcement. The time period should be extended from 15 days to at least 30 days from the date the provisional measures have been executed. (According to reports, the new law does not fully address deficiencies with respect to provisional measure in Serbia & Montenegro. CRRA Article 182 does not provide for ex parte proceedings and is therefore not in compliance with TRIPS Article 50.2.)

Offenses and penalties: Copyright and related rights infringements amount to a criminal offense under the YCA. Under Article 183(1), the unauthorized exploitation of a copyrighted work or a work subject of related rights constitutes a criminal offense and can be punished with up to one year in prison. Under Article 183(2), copyright infringement for financial gain can be punished with up to three years in prison. Both penalties are below average compared to other countries and cannot be considered as deterrent within the meaning of Article 61 of the TRIPS Agreement, and should therefore be increased to at least five years.

The YCA also provides for financial penalties. Under Article 187(1) any enterprise or other legal entity may be fined up to 45,000 to 450,000 new Dinars if it exploits a copyrighted work or a work subject to related rights. Furthermore, it appears that this fine is imposed in cases of secondary infringement. According to Article 187(3) the responsible person in the enterprise or entity shall also be fined between 3,000 and 30,000 new Dinars for any of those acts. The fines are roughly equal to US\$774 to US\$7,740 for the enterprise and US\$52 to US\$516 for the responsible person. The fines inflicted on the infringer are, however, not deterrent because they are unacceptably low compared to the profit that can be gained by dealing with pirated goods. To ensure that copyright piracy does not remain a lucrative "business" in Serbia & Montenegro and to provide the deterrent remedies required under TRIPS and the WIPO Treaties, the fines need to be substantially increased. (IIPA understands that the new law is likewise deficient in this respect. According to CRRA Article 190, the applicable fines are to be set by regulation of the member states. Until this happens, these provisions are essentially inapplicable.)

Inconsistencies Between Federal and Republic Laws

The legislature in Serbia & Montenegro should ensure that the specific laws at the republic level (Serbia and Montenegro, respectively) are entirely in line with the federal laws, such as the Copyright Act. This may not be easy to achieve. For example, there are some concerns that the former YCA and the new copyright law are not fully enforceable in the Republic of Montenegro. The judiciary and courts reportedly use existing conflicts and inconsistencies between federal and republic laws as an excuse not to act or dismiss clear-cut cases of piracy. As noted above, this problem has been ameliorated, to some extent, under the new copyright law, which does not include any criminal provisions. Thus, criminal copyright infringements are now subject only to the criminal code.

OPTICAL MEDIA REGULATION

The strategic location of Serbia & Montenegro in a region where neither copyright enforcement nor border enforcement are strong makes the country an appealing site for pirate

optical media production. The relatively high number of CD manufacturing facilities (four) and the fact that one out of four CD plants have been caught producing hundreds of thousands of pirate optical discs call for the immediate introduction of an effective optical disc plant law in Serbia & Montenegro. The joint capacity of the four CD plants in Serbia & Montenegro is conservatively estimated at over 25 million CDs per annum, which is substantially more than local legitimate demand.

The government of Serbia & Montenegro should craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following 11 points:

- 1. Licensing of facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including, among other things, the following requirements: production must take place only at the licensed premises; a license can only be granted to one who has obtained a "manufacturer's code" (e.g., SID code) for optical discs and production parts; and the licensee must take measures to verify that customers have copyright/trademark authorization from the relevant rightholders.
- 2. Licensing of export/import of materials: Centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials, and manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3. Requirement to apply manufacturer's code: Requirement to adapt manufacturing equipment or optical disc molds to correctly apply the appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code; prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mould for the purposes of forging a manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a production part not marked with manufacturer's code, etc.).
- 4. License record keeping requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5. Registration requirement for commercial optical disc duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," including giving the names and addresses of the responsible persons, and the address of the premises at which the duplication takes place.
- 6. Plenary inspection authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for rightsholder organization to assist, etc.
- 7. Search and seizure authority: Plenary authority: to enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a

violation of the law; forcibly enter when necessary; prohibit the removal of seal applied, etc.

- 8. Government record-keeping requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available, etc.
- 9. Criminal penalties for violations: Violation of any significant aspect of the regime is subject to criminal sanctions, including individual liability (fines and/or imprisonment).
- 10. Possibility of withholding, suspending, or revoking a license for prior copyright infringement, fraud in the application process, or violation of the Optical Disc Law.
- 11. Possibility of closure of an infringing plant.

The copyright industries look forward to working with the authorities of Serbia & Montenegro to draft, implement and enforce comprehensive optical disc regulations.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In September 2004, the U.S. Government began a review to consider Serbia & Montenegro for designation as a beneficiary developing country under the Generalized System of Preferences (GSP) trade program.⁶ While IIPA did not file any comments in this review, we note that a necessary precondition for recognition as required by U.S. law is the passage of an adequate and effective copyright law, which will also bring Serbia & Montenegro into compliance with its international obligations under the TRIPS Agreement, the WCT, and the WPPT.

⁶ See Notice and solicitation of public comment, 69 Fed. Reg. 54,825 (Sept. 10, 2004).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT TAIWAN

EXECUTIVE SUMMARY

Special 301 Recommendation: With passage of amendments in the Legislative Yuan's Special Session in August 2004, the deficiencies in the 2003-passed amendments were, for the most part, repaired. With Taiwan's enforcement actions remaining at a high level, IIPA recommended in November 2004 that Taiwan be upgraded to the <u>Watch List</u> at the end of the U.S. government's <u>out-of-cycle review</u> investigation announced in May 2004. On January 18, 2005, USTR announced Taiwan's upgrading to the <u>Watch List</u>. Even though enforcement continues, for most sectors, at a high level, some critical problems remain. Therefore, IIPA recommends that Taiwan remain on the <u>Watch List</u>.

Overview of Key Problems: With the exception of piracy rates for business software, piracy rates continue to remain high in Taiwan (though rates in some sectors are — finally beginning to come down). Raiding remains at a high level and penalties have become more deterrent as a result of the 2004 amendments to the copyright law and greater awareness of the need for deterrence among prosecutors and judges. While exports of pirate OD products have virtually disappeared, and illegal factory production appears to have diminished significantly, the organized criminal syndicates that control most of the piracy business in Taiwan have moved their operations increasingly to CD-R and DVD-R "burning" and to the Internet. Taiwan has moved aggressively to raid "burning" operations and recent raids have resulted in huge seizures. New ex officio authority granted to the police by the 2003 amendments (with respect to OD piracy) has resulted in considerable headway being made against piracy in the night markets. Taiwan continues, however, to be world's largest supplier of blank recordable media to pirate operations globally and, to date, Taiwan has not prosecuted factories that "knowingly" supply blank product to affiliate pirate operations abroad. While IIPA hopes that these aggressive enforcement actions continue and result in a welcome lowering of the piracy rates in 2005, Taiwan must now focus on new policies and actions which continue to threaten the domestic and international copyright industries. The first of these challenges is the Internet. With over 12.7 million Internet users and among the highest broadband penetration in Asia, piracy threatens to dominate unless (a) new legislation is enacted clarifying secondary liability of ISPs and establishing an effective statutory notice and takedown system and (b) immediate action is taken to halt the illegal activities of the notorious P2P operations — Kuro and Ezpeer. These two services were indicted by Taiwan authorities over a year ago and still no action has been taken to slow down their income stream or their continued offering of infringing music and other files. Taiwan also continues to be plagued by two historical problems: off-campus, and now increasingly on-campus, photocopying of textbooks and journals, and the continuing production of pirate chips exported from Taiwan for assembly in China into pirate videogames used in Nintendo handheld game players. Enforcement against end

¹ For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf. Please also see previous years' reports at http://www.iipa.com/countryreports.html.

user piracy continues to improve and piracy rates have held steady at 43% from 2003 to 2004. The government has taken laudable action, most in 2003 and early 2004, against organized crime syndicates engaged in software counterfeiting. If these remaining issues can be resolved and deterrent enforcement continues, Taiwan stands poised to once again be viewed as an Asian success story, as it was in the late '90s, when piracy rates were down significantly.

Actions to be Taken by the Government of Taiwan

In order to lower the piracy rates which still persist in most copyright industries, and in order to deal with the growing problem of Internet piracy, commercial photocopying on and off campus and the production of pirate Nintendo chips, the government needs to take the following actions immediately:

- Continue a sustained copyright enforcement campaign throughout 2005 against all types of piracy, and particularly against the organized criminal syndicates that control piracy in the manufacturing, distribution, and retail sectors, and impose truly deterrent penalties;
- Bring more effective enforcement against Internet piracy generally, make significant
 enforcement inroads against peer-to-peer piracy, beginning with the immediate
 closing/conviction of the notorious P2P pirate services, Kuro and Ezpeer. Adopt further
 copyright law amendments to clarify secondary liability of ISPs and other intermediaries
 and establish an effective statutory notice and takedown system and ensure that current
 provisions prohibiting the circumvention of technological protection measures, both through
 illegal acts and via illegal devices or services are fully effective;
- Adopt effective policies, through the Ministry of Education and other government agencies, to ensure that (a) government-owned servers or other computer facilities are not used for the illegal trading of infringing files containing protected material, (b) universities work with enforcement authorities to initiate crackdowns against on-campus photocopying, and (c) appropriate guidelines are issued to elementary and secondary school administrators concerning the use of copyright materials in the classroom;
- Continue the effective enforcement against corporate end user piracy of business software and against software counterfeiting by organized criminals;
- Take immediate action to limit the use of the US\$30 daily "buy-out" of jail terms of six months or less. We understand this is within the authority of the prosecutors and it is essential that this discretion be used to impose deterrent penalties for piracy;
- Issue an executive order on software legalization in government agencies—one of the larger markets for software;
- 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/DVD-Rs, and by ensuring that deterrent penalties, including immediate license withdrawal, are imposed;
- Further amend the copyright law to extend the term of protection of works, sound recordings and performances in line with growing international trends.

TAIWAN
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004 ²

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	40.0	40%	42.0	44%	42.0	44%	35.0	30%	30.0	30%
Records & Music	49.4	36%	58.0	42%	98.6	47%	51.7	48%	60.5	44%
Business Software ³	83.0	43%	83.0	43%	91.2	43%	106.8	53%	123.9	53%
Entertainment Software ⁴	123.0	63%	261.8	42%	596.1	56%	119.4	70%	319.3	90%
Books	20.0	NA								
TOTALS	315.4		464.8		847.9		332.9		553.7	

COPYRIGHT PIRACY IN TAIWAN

Pirate factory production of optical disks, "burning," and Internet piracy

Over the last year, the Taiwan authorities, under the leadership of Justice Minister Chen, Interior Minister Su, Director General Tsai of TIPO and TIPO's Jack Lu⁵ have begun to make a dent in the massive OD and other types of piracy that have grown out of control in the last five years. OD piracy in Taiwan is now characterized primarily by CD-R and DVD-R burning activity in clandestine labs and in retail shops. This "burned" pirate product now makes up the majority of pirate product being traded in Taiwan; factory pirate production (including export) — due to aggressive raiding and more deterrence — has diminished significantly. IIPA members report that many of the same criminal operations responsible for factory production and distribution continue to be involved in highly organized "burning" activities.

In 2004, Taiwan has done a much better job of inspecting suspected OD plants, closing down lines and reducing overall factory production of pirate product. Non-factory OD piracy has also been reduced through 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. This more aggressive enforcement has unfortunately caused the pirates to adjust their activities and move their distribution networks increasingly underground — in harder to detect burning operations and onto the Internet, where "hard goods" sales, downloading and streaming activities have grown significantly. In IIPA's 2004 report, we noted this phenomenon of increased "underground" and Internet-based piracy. Finally, over the last year, we have begun to see overall OD piracy rates begin to dip. However, this can only continue through sustained enforcement. It

International Intellectual Property Alliance

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at http://www.iipa.com/pdf/2005spec301methodology.pdf.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Taiwan, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$139 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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 Thanks also are extended to Commander Vic Liao of the IPR Police and Lee Hsiang Chin, Chief of the 9th Investigation Bureau and others too numerous to name.

was the failure to sustain aggressive enforcement after piracy was significantly reduced in the late '90s that caused a major drop in legitimate sales and sent piracy rates skyrocketing again.

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 were 12 dedicated DVD lines. In 2004, there continue to be 17 owner groups but they have reduced the number of plants producing content ODs to 44 from 61. However, the number of lines at these 44 factories totaled 315 in 2004, an increase of five lines from 2003. This appears to indicate that the owner groups have in fact not reduced capacity to produce content OD, but simply consolidated production lines in a fewer number of plants. If blank CD-R plants are added to the 44 content plants, the total is 93 total plants. The estimated capacity of the content OD plants is up slightly to 1.1 billion units annually (1.085 billion units in 2003 and 990.5 million in 2002). Total production capacity, including blank CD-R and DVD-R production, is estimated at a staggering 9.86 billion units annually, which is reportedly up two billion units from 2003. This is over three times greater than any other country in the world! As can be seen, Taiwan continues to be the world's largest supplier of blank OD media product, including to pirate syndicates worldwide. IIPA members continue to be concerned over organized crime operators and factory owners intentionally selling 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.

The enforcement pressure on the factories producing pirate disks has led to the major growth in CD-R "burning," reported above, much of it carefully organized and managed from the production through ultimate sale cycle. MPA reports that 96% of the seizures in 2004 of pirate OD product were of "burned" CD-Rs/DVD-Rs. This "burned" pirate product, including movies, compilations of music (including MP3 audio files), computer programs, console-based entertainment software, etc., continues to enter the domestic markets in Taiwan. The entertainment software industry also reports the continued import of its pirate product from other key pirate producers in Asia.

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 five years, which has threatened the viability of Taiwan as a vibrant market. RIAA/IFPI reports that sales have dropped off 10% in 2003, with revenues dropping from \$306 million in 1999, to US\$170 million in 2001 and to US\$131.9 million in 2003. As of 2003, Taiwan had dropped from the second largest music market in Asia in 1999 to the fifth largest today, after Japan, South Korea, India and China. 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 few years, but has finally dropped back to 40% in 2004.

While factory piracy and sales in the night markets are down, the usual piracy techniques continue, though the Internet has now become a major factor in distribution of pirate OD product. Increased pressure through *ex officio* raids (authorized by the 2003 amendments to the copyright law) has made it more difficult to sell product in the night markets and piracy is now more "burning to order" and over the Internet. The use of juveniles continues. Mail order and Internet advertising of hard goods for sale has increasingly taken over the video, audio and videogame marketplace. The same techniques continue from 2003: Advertisements are regularly placed in newspapers or

on the Internet. Courier services are also used to deliver pirate product and collect payment.⁶ 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 2004, increasingly the Internet, where enforcement continues to remain 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 all copyright sectors, and has become far more prevalent and serious in 2004. The absence of clear secondary liability of Internet service providers has severely hampered enforcement in this area as well as against Internet downloading, primarily of music but other products as well. The entertainment software industry suffers from hard good piracy and downloading from *warez* sites on the Internet, plus, as discussed below, the industry faces piracy at "cyber-cafés," and in the online gaming market, which is rapidly growing.

The continued operation of Kuro and Ezpeer remains one of the most vexing irritants in the relations among the copyright industries, the U.S. Government and the Taiwan government. Both these pirate P2P services were indicted in December 2003 and Kuro was again indicted in early November 2004 for allegedly transferring music files to CDs for uploading onto Kuro's site. It has now been over a year since this first indictment and no significant action has been taken to halt their illegal activities. Both these services charge their customers — Kuro charges a monthly fee of NT\$99 and EzPeer NT\$100 (about US\$3). As reported in last year's submission, both these P2P software and download services continue to operate openly, advertise publicly and generate huge profits from their illegal conduct. And, in an action that can only be termed outrageous, 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 and film industries and the U.S. government protested this inexplicable action vigorously. RIAA/IFPI reports that together Kuro and EzPeer generated estimated income of close to NT\$1 billion (US\$31.6 million) in 2004 (about the same as in 2003), 90% of which is generated by these monthly charges permitting unlimited downloads of illicit MP3 music files. Total users of both these services increased even after they were indicted. The local legitimate market in Taiwan in 2003 was only NT\$4.4 billion (US\$139.1 million), down precipitously from NT\$12 billion (US\$379.4 million in 1997, when piracy rates were under 15%). These two illegal services alone continue to 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 and colleges over TANet, a government-owned network dedicated to research and education only, it is critical for the Ministry of Education to respond quickly with policies preventing their servers from being used for illegal activities and for the enforcement authorities to continue aggressive criminal actions.

⁶ In 2003, the Taiwan Minister of Justice has specifically told courier companies that they will be arrested as accomplices. 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.

⁷ In a positive sign, however, three Taiwan telecom companies, Chunghwa Telecom, Taiwan Cellular and FarEasTone Telecom have stopped collecting Kuro's monthly subscription fees from their subscribers. Another telecom, Hinet, had also refused to collect Kuro's fees, causing it to lose over half its subscribers. However, it has been recently reported that Kuro's subscriber base is once again back up to 500,000, which it was before the Hinet action occurred. *Taipei Times*, September 15, 2004.

Piracy of business software by corporate end users continues as a serious problem, but the piracy rate dropped significantly in 2003, and remained steady in 2004, due to improved enforcement. Taiwan continues to be a hub for software counterfeiting.

BSA reports that the piracy rate for business software remains at 43%, the same as 2003. Taiwan announced its intention to seek to reduce software piracy rates below 40% and initiated a "software protection action plan" in August 2004 to accomplish that result in 2005. BSA remains pleased with the cooperation it is getting with Taiwan enforcement authorities and particularly, from prosecutors, who have had a number of successful convictions of corporate end use infringers. BSA has also praised the government for endorsing the legalization campaign targeting corporate end users and for conducting a number of training seminars in 2004. BSA continued its own enforcement and educational activities in 2004 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. In 2004, IIPA reported on two key actions 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 2005 and will require the long-term investment of enforcement resources to halt them 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 university campuses, continues to cut heavily into sales by both foreign (primarily U.S.) and Taiwan 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 usually shown strong reluctance to enter the campuses to raid on campus photocopying facilities where such illegal conduct is now rampant.8 The Ministry of Education should adopt policies prohibiting this kind of illegal conduct, backed with internal sanctions for violations. University officials should also build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those caught engaging in infringing conduct. Publishers also wish to partner with the Ministry of Education in educational and incentive-based initiatives and have recently put forward specific proposals for Ministry consideration. IIPA hopes that Justice Minister Chen's recognition of the

⁸ In a speech before the Taiwan Amcham, Minister of Justice Chen recognized and spoke to this problem. "The ministry will work with the Ministry of Education on how to enter school campuses to effectively enforce the law Although the law does not stipulate which places are off-limits for law enforcers to search, authorities will handle the situation with tact when entering such places as school campuses, the Legislative Yuan or military barracks to avoid controversy," Chen said. BBC Monitoring Asia Pacific, August 31, 2004. Thereafter, the Ministries of Justice and the Interior, TIPO and industry representatives have regularly communicated with the Ministry of Education and asked for further assistance, but delays continue.

on-campus photocopying problem will result in a significant degree of cooperation in bringing about a drop in this type of piracy.

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. Orders are also often taken just before the close of business and produced at night with no receipts taken or records kept. 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.

Publishers are also experiencing some problems with piracy over the Internet. Academic journal publishers report a high level of unauthorized access, and P2P file sharing of scanned academic texts is on the rise. The industry will continue to monitor these problems and is asking for the Taiwan government's cooperation in ensuring that these problems do not spiral out of control.

Finally, public and business misunderstanding of the limits of fair use and other exemptions in the copyright law have continued through 2004 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. When the Legislative Yuan adopted new copyright amendments last August, it also requested TIPO to review and issue "fair use guidelines" for educators, libraries and with respect to distance education. TIPO has issued two drafts of such guidelines for educators and libraries and has indicated that it may also put out draft guidelines on distance education at a later time. The Taiwan Book Publishers Association (TBPA) has commented on the drafts issued to date. Publishers remain concerned that these guidelines may exceed the narrow limits and appropriate context for application of fair use. It is as yet unclear when final guidelines will be issued.

Piracy of PC, console and cartridge-based entertainment software

As a result of improved OD-related enforcement, there appears to have been a drop in the piracy rate for PC entertainment software products as compared to prior years. Piracy of console and cartridge-based entertainment software, however, remains very high as does piracy at Internet cafés (or "cyber-cafés"), where the use of pirated or unlicensed entertainment software is prevalent. Of the 3,000 Internet cafés in the country, only about 30% are licensed. Much of the console product is made in factories outside Taiwan in locations such as Malaysia, but controlled by syndicates with operations in Taiwan and easily imported into the country. However, some production still appears to be taking place in Taiwan. Pirated console products are sold in retail shops, where catalogues are furnished to customers looking for "cheaper" product and pirated copies are then either pulled from a back room, under the table, or burned to order and delivered shortly thereafter. The police continue to actively raid retail shops that sell pirated products. In addition to being plagued by downloading and sales of pirate product from *warez* sites (particularly

for PC-based games), unlicensed operators of servers dealing in pirate online gaming divert traffic and potential subscribers from the legitimate site by emulating a publisher's online game.

China continues to be the primary source of pirated videogame cartridges coming into the Taiwan market, though much of this production is believed to be controlled from Taiwan. There is incontrovertible proof that key components of infringing *Nintendo* products continue to be manufactured in Taiwan and exported to China for assembly. Over 1,800 infringing semiconductor chips and PC boards bound for Shenzhen in Guangdong Province were seized by Taiwan Customs, with support from the Aerial Policy Bureau (APB), in mid-December, 2004. In addition, analysis of infringing products sold in the United States under the name Power Player established that the semiconductor chips, which contain illegal copies of *Nintendo* copyright games, embedded in the products were designed and manufactured in Taiwan, demonstrating once again that the export of infringing products from Taiwan remains a current and damaging problem to Nintendo.

In late 2004, the Taiwan Government abolished the Export Monitoring System (EMS), with the stated goal of re-allocating EMS funds to operations against optical disc piracy operations and cybercrime targets. While these are laudable goals, the entertainment software industry notes that not all its members are adequately served through anti-piracy efforts aimed solely at producers of pirated materials on optical disc formats. Component parts of counterfeit cartridge-based games, such as those manufactured for Nintendo handheld devices, continue to be exported from Taiwan, and the EMS then provided the means by which counterfeit component parts could be prevented from exiting the country. Now that the EMS has been abolished, the ESA hopes that (as pointed out in USTR's announcement of the results of the 2004 out-of-cycle review) the measures adopted by Taiwan to monitor the exports of copyrighted materials are as or more effective than the EMS. While the Taiwan government also promised that it would provide its Customs authorities with the requisite training so that it may adequately assume the functions of the III (which was formerly charged with EMS functions), recent experience indicates that whatever training has thus far been provided is far from sufficient. In December, a shipment of over 1,800 counterfeit Game Boy Advance PC boards, die and integrated circuits passed through the Chang Kai-Shek Airport destined for China's Guangdong Province, the international center for assembly and manufacture of infringing cartridge-based video game products. Customs officers at the airport showed no interest in the package and approved it to be shipped by air to China, though the only information on the package identifying the shipper was "Spider." Only when the Aerial Police Bureau (APB) noticed the incomplete information was it suggested that the package be examined, whereupon it was discovered that it was full of infringing product. Thus far, only the APB have been effective in preventing shipments of infringing material out of the country, and it is essential that this agency remain involved in anti-piracy enforcement, particularly as Customs officers have yet to be provided the full and necessary training to identify infringing cartridge-based products and components.

Unauthorized performance of pirated motion pictures in classrooms

The exhibition of pirated CD-R copies of motion pictures, frequently involving titles that have not yet been released in theaters in Taiwan, has become a form of entertainment for students in elementary and secondary school classrooms and is a problem that also needs increased attention. The Ministry of Education should prepare and disseminate appropriate guidelines (highlighting that such uses are impermissible) for the use of copyrighted materials in the classroom.

COPYRIGHT ENFORCEMENT IN TAIWAN

Taiwan must significantly increase and improve actions against all types of piracy now occurring in Taiwan, including growing Internet piracy. It must conclude pending factory and other large cases, continue to increase penalties to deterrent levels (including limiting the "buy-out" of six month jail sentences) and complete its welcome plans to create an IPR court which should have authority over both civil <u>and</u> criminal cases.

Taiwan must also 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 — and now must be updated and amended — the government has promised to use it effectively, and, for the most part, has sought to do so. The year 2004 saw continuing 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.

MPA reports that 11 of its factory cases (down slightly from 12 at the beginning of 2003) remain pending in the courts, and two of these from 2000-2001 have either not been filed or had a first instance decision. In 2004, MPA conducted five DVD and one VCD factory raids, one of which resulted in the seizure of MPA titles and the sealing of two DVD lines (the other factories were replicating pornography at the time of the raids). A total of 662 stampers were seized along with 114,581 pirate discs; one VCD production line and seven printing/packaging machines were sealed. JODE reported 1067 inspections through December 2004, with 417 of these at night (a welcome tenfold increase over 2002). The addition of three new warehouses in 2003 resulted in a reported seizure of 11 lines through December 2003 and another three in 2004.

RIAA/IFPI reports that it was involved in 20 raids against factories and large CD-R labs in 2004 and received a total of 166 convictions (including guilty pleas) involving pirate music product. MPA reports one factory conviction in 2004, with 11 factory cases still pending following the recent Digi-Gold conviction. While not yet satisfactory, the record is certainly improving. This must continue in 2005.

The recording industry ran a total of 278 raids against night markets, street vendors, mail order centers, distribution centers, retail shops and OD factories and CD burning labs in 2004; 210 raids were against retail piracy and 20 against such factories and labs. In 2004, as in 2003, the number of juvenile offenders far exceeded the number of adult offenders, continuing a very disturbing trend: Out of the 278 cases brought by the recording industry in 2004, 134 involved juveniles and only 144 involved adults. Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them.

Because DVD-R and CD-R burning remains so rampant, raiding activity in which MPA's local program participated was extremely active, particularly in the second half of 2004. Actions included a raid, in August 2004, of one of the largest "burning labs" in Asia. This lab was capable of producing \$47 million worth of pirate movies and music CDs annually. 228 CD-R "burners" and 49 DVD-R burners were seized in the raid; in May 2004, an even larger bust was made, netting 367 CD-R and 49 DVD-R burners. These and similar raids (close to one per day during the month

⁹ This underground plant was located in Wai Pu in Taichung county.

of November) netted hundreds of CD and DVD burners and thousands of CD-Rs and DVD-Rs. Many arrests were made. MPA also regularly reported how much "profit" these labs, retailers and Internet sites would have made had they stayed in operation for a year. All in all, MPA conducted 608 raids (versus 655 raids in 2003), and initiated 425 cases, including 293 street vendor cases, 28 were retail shops cases, 21 cases against distributors, one against a factory, 23 against CD-R labs, 18 customs cases, and 45 Internet cases (vs. 33 in 2003). All in all, the authorities seized 662 stampers, 110,000 VCDs, 115,551 DVDs, 17,294 DVD-Rs and 1,078,474 CD-R pirate copies in 2004.

AAP and the Taiwan Book Publishers Association (TBPA), with the cooperation of the Ministry of Justice, initiated two large raids against hundreds of commercial photocopy shops in 2004 as well as a number of smaller scale raids in Taipei and Tainan counties. These raids resulted in 14 cases against copyshop owners (of which 10 are still pending) and the seizure of 214 different titles, sometimes with multiple copies of each title.

The publishing industry remains disappointed, however, by failures at the trial level in the courts. 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. U.S. publishers currently have 28 cases pending in the courts as a result of actions commenced in 2002-2004, and the government should take immediate action to bring these cases to completion in an expeditious manner.

Taiwan must urgently increase enforcement against Internet piracy — now a significant percentage of the pirate market in Taiwan.

Internet piracy is quickly becoming the dominant form of piracy in Taiwan, primarily using sites to sell "burned" pirate product, but also offering product for downloading. MPA, RIAA/IFPI and BSA have increased their raiding activity in cooperation with the Taiwan authorities but enforcement through notice and takedown is still not at the ISP compliance level that it should be were there legal clarity on secondary liability of intermediaries.

The Kuro and Ezpeer cases are now at the center of the recording industry's enforcement efforts. In 2004, the recording industry issued a total of 95 warning letters that were sent to infringing FTP sites and websites, as well as 62 letters to related ISPs. As a result, 41 sites were closed down, compared to 176 sites in 2003.

The motion picture industry conducted 55 raids in 2004, compared to 36 raids in 2003, against pirates distributing infringing works via the Internet, resulting in the seizure of 126 pirate DVDs, 4,891 pirated CD-Rs, 825 pirated DVD-Rs, 50 CDR-burners, 16 DVD-R burners, 107 computers, and the arrest of 53 individuals in 2004. Prosecutions resulted in five convictions in 2004 vs. seven convictions in 2003. MPA also reports an increase — to 367 — in Internet takedown actions in 2004.

BSA reports assisting the Taipei police and prosecutors in taking action against two websites in 2004 (http://members.tripod.com and http://home.kimo.com.tw/ watteau2003/index.html) in which more than 200 pirate CD-Rs containing software were seized. Many more such actions will be needed to deal with this growing problem.

The entertainment software industry continued to report low compliance rates with Taiwan ISPs, reflecting the need for an amendment to the copyright law on secondary liability.

Criminal and civil enforcement against corporate end-user software piracy has succeeded in keeping the piracy rate for 2004 the same as 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 2004. All in all, two convictions were rung up in 2004. Fines were around NT\$100,000 (US\$3,164) and the salutary results in the end user cases went a long way to convincing businesses to legalize their software use. There was one conviction which involved the judge imposing a jail sentence of 10 months, but unfortunately this sentence was never actually served.

In IIPA's 2004 report, 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.

Since these actions, prosecutions have proceeded and the defendants in the Maximus case were indicted in January 2005, and the E&J case is still pending before the prosecutor's office. While the industry is appreciative of the strong cooperation shown by MOJ, MJIB (Investigation Bureau) and the National Policy Agency of Taiwan as part of Taiwan's larger effort to enhance protection for IPR, it will require the sustained investment of enforcement resources, in addition to deterrent penalties, to defeat these criminal syndicates.

BSA and business software companies also continued to file civil actions against pirates in 2004, many in connection with accompanying criminal actions. BSA reports that damages totaling \$54,094 were assessed in all the actions concluded in 2004. Statistics for civil cases in 2003 appear below.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 TAIWAN										
Actions	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING	TOTALS					
Number of Raids Conducted	608	4	278	4	894					
Number of VCDs Seized	110,000	0	9,992	0	119,992					
Number of DVDs Seized	115,551	0	435	0	115,986					
NUMBER OF CDS AND CD-RS SEIZED	1,078,474	253	308,332	0	1,387,059					
NUMBER OF BOOK TITLES SEIZED	NA	NA	NA	214	214					
NUMBER OF INVESTIGATIONS	1116	5	155	14	1290					
NUMBER OF VCD/CD LAB/FACTORY RAIDS	34	0	20		54					
NUMBER OF CASES COMMENCED	425	5	166	14	610					
NUMBER OF INDICTMENTS	256	2	24	8	290					
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	269	3 ¹⁰	171	2	445					
ACQUITTALS AND DISMISSALS	0	0	13	2	15					
Number of Cases Pending	209	13 ¹¹	100	10	332					
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	63	1	69	0	132					
SUSPENDED PRISON TERMS		1			1					
MAXIMUM 6 MONTHS	0	0	0		0					
OVER 6 MONTHS	0	0	5		5					
OVER 1 YEAR	15	0	28	1	44					
TOTAL SUSPENDED PRISON TERMS	936 months	10 months	33	2 yrs						
PRISON TERMS SERVED (NOT SUSPENDED)		0			0					
MAXIMUM 6 MONTHS	38	0	0		38					
OVER 6 MONTHS	2	0	0		2					
OVER 1 YEAR	8	0	36		44					
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	345 months	0	36							
NUMBER OF CASES RESULTING IN CRIMINAL FINES	0	2	3	2	7					
UP TO \$1,000	0	0	1	0	1					
\$1,000 TO \$5,000	0	2	2	2	6					
OVER \$5,000	0	0	0		0					
TOTAL AMOUNT OF FINES LEVIED (IN US\$\$)	0	US\$6,710	US\$6,000		US\$12,710					

CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2004									
TAIWAN									
Actions	MOTION PICTURES	Business Applications Software							
NUMBER OF CIVIL RAIDS CONDUCTED	0	2 ¹²							
Post Search Action	0	15 ¹³							
Cases Pending	0	5							
Cases Dropped	0	0							
Cases Settled or Adjudicated	0	10							
VALUE OF LOSS AS DETERMINED BY RIGHTHOLDER (\$USD)	0	US\$511,633 ¹⁴							
JUDGMENT AMOUNT (\$USD)	0	US\$54,094 ¹⁵							

Represents the number of defendants convicted in 2004, regardless of when such criminal cases were commenced.

Represents the number of cases pending in 2004, regardless of when such criminal actions were commenced.

Represents the number of civil complaints filed during 2004.

Represents the number of post search actions in 2004, regardless of when such cases were commenced.

Represents the figure of the total losses (not actual losses) as stated in the civil complaints filed in 2004.

Represents the total amount for which judgments were rendered in the year 2004, regardless of when the cases were commenced.

Effective criminal enforcement continues to be hindered by numerous procedural hurdles.

The government in Taiwan must continue to work to solve the 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; ¹⁶ continued challenges to powers of attorney (POAs) and copyright ownership of U.S. right holders in court (though this situation has improved for some industries) and in raids; ¹⁷ raiding authorities' failure to seize all pirate product and tools and implements used in piracy; ¹⁸ and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids.

PASSAGE OF CORRECTIVE AMENDMENTS TO THE COPYRIGHT LAW IN AUGUST 2004 WAS A MAJOR POSITIVE STEP; HOWEVER, FURTHER AMENDMENTS ARE NEEDED, AS ARE AMENDMENTS TO THE OPTICAL MEDIA LAW

In June 2003, effective July 2003, Taiwan's Legislative Yuan (LY) failed to adopt certain key recommendations made to it by the Executive Yuan (EY) and passed a number of copyright law amendments that either failed to advance protection and enforcement or significantly undermined it. For example, the LY

- eliminated provisions recommended by the EY preventing the circumvention of technological protection measures which are critical to safeguarding transmission of content on the Internet and trading in digital products, like DVDs, videogames and business software;
- 2. eliminated a provision allowing Customs authorities to act ex officio;
- 3. decriminalized certain activities which were criminal under the prior law and established unnecessary and unreasonable thresholds to what is a criminal activity for other acts;
- 4. eliminated provisions that established minimum penalties and included provisions that would permit judges to impose only fines and not jail time.

¹⁶ 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.

¹⁷The publishing industry continues to experience these problems in some districts, particularly Tainan District, where five cases were dismissed in 2004 due to unjustified POA and ownership issues. Due to the industry practice of publishing under a number of different names or "imprints," especially after mergers, publishers have been asked to provide certified copies of merger documents in order to show ownership of imprints that don't match their company name. Affidavits should suffice, but do not.

¹⁸ One console-based video game software make 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.

Through the extraordinary efforts of the EY, through MOEA and TIPO, the LY, in a short August 2004 special session, was persuaded to adopt amendments correcting many of the deficiencies in the June 2003 amendments. While it had been hoped that the EY version of the provisions covering the issues noted above would be adopted, the LY made certain changes which, while not what industry or the USG had asked for, substantially followed the EY's recommendations. The notable exception to this conclusion, referring to point 4 above, is that the LY did not change the provisions eliminating most minimum penalties and did not restore many of the provisions which would have required jail time. In general, however, particularly when viewed in the light of TIPO's explanation of some of the amendments more controversial provisions, IIPA views these amendments as positive. The following are the highlights of the 2004 amendments, along with concerns that remain:

- Protection for TPMs was reinserted even though the provision differs from the EY Bill's version in that additional exceptions are created, applying to both acts and trafficking in devices and services, without statutory standards. TIPO has indicated that it intends to follow the DMCA in fashioning, in interpretations or regulations, the scope of the exceptions. This will require careful monitoring to ensure that exceptions are kept narrow and that they do not apply to devices and services. Both civil and criminal liability attaches.
- 2. The "intent to profit/no intent to profit" distinction was completely removed and the structure returns to that in the EY Bill.
- 3. The amendments restore the EY Bill's version of the exception for temporary copies.
- 4. The last paragraph of Article 26 (old Article 26.4) mandating that performers share in royalties with record producers regardless of contracts was removed.
- 5. The amendments restore the right of Customs to act *ex officio* but with the addition of statutory timetables, which IIPA hopes will not be prejudicial to some copyright industries and companies.
- 6. The amendments restore most of the criminal penalty provisions of the EY Bill. However, the EY Bill had mandatory minimum fines and jail terms for various offenses. Few of these were retained in the new law as amended in August 2004.
- 7. While TIPO fortunately maintains that an amendment to Article 91*bis* continues criminal penalties for the sale or rental of parallel imported products (the act of importation itself is not criminal, however, based on the 2003 LY amendments), such remedy, even for OD products, must be commenced with a complaint (e.g., the offense is not a public crime).
- 8. The amendments remove the knowledge test from the provision of Article 87 dealing with civil liability for end user software piracy.
- 9. At the last minute, a provision was added to Article 91 stating that personal copying and acts deemed fair use are "not infringements." This provision remains of great concern, even though TIPO, in an administrative interpretation, states that this adds nothing of substance to existing law.

On December 2, 2004, TIPO issued its promised "interpretations" of the new amendments to guide judges, enforcement officials and the public. Upon review, many of the concerns IIPA had initially noted about the amendments were removed based on these interpretations.

IIPA continues to remains concerned, however, that the weakened criminal penalties will send the wrong message and that Taiwan may slip again into a situation where pirates do not receive deterrent sentences, and particularly do not receive jail time in cases where this would be the only means to deter the type of organized criminal activity which has characterized the piracy landscape in Taiwan.

At the same time that the LY adopted these amendments, it instructed TIPO to draft guidelines on educational fair uses. TIPO has stated that the guidelines will be based upon the U.S. "Guidelines for Educational Uses of Music", "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes" and "Fair Use Guidelines for Educational Multimedia," as well as Hong Kong's "Guidelines for Photocopying of Printed Works by Not-for-Profit Educational Establishments." TBPA provided background materials to TIPO as it was engaged in preparing draft guidelines and the public and industry were permitted to provide comments on the initial draft. We now await further drafts and opportunities to engage on these issues.

While these amendments are welcome, Taiwan's task of upgrading its copyright law to modern standards is still not complete. As IIPA has noted previously, the law must be amended to clarify the secondary liability of ISPs and should contain a statutory notice and takedown regime which is effective and provides incentives for ISPs to comply, both with respect to traditional websites and FTP sites but in the new P2P environment as well. The term of copyright protection should also be extended to 70 years *post mortem auctous* and to 70 years at least for sound recordings and other works of juridical entities.

As we noted in our November submission on Taiwan's OCR proceeding, IIPA greatly appreciates the efforts made by Director General Tsai, Deputy Director Jack Lu, and Ms. Margaret Chen to achieve the passage of these corrective amendments.

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 brought 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 weakened 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 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.

Some of the key deficiencies in the Optical Media Management Statute that must be addressed in amendments

- 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);

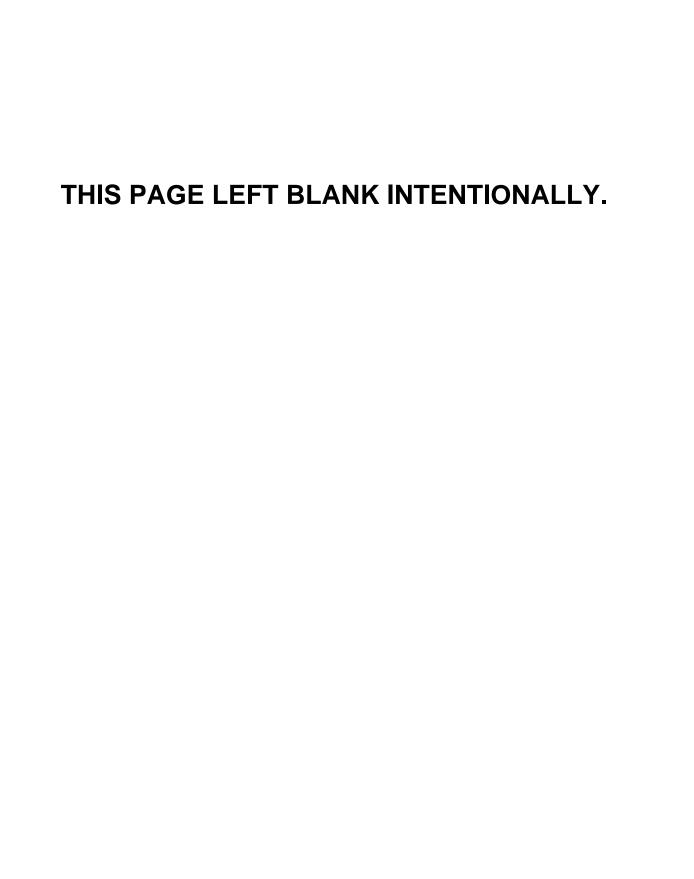
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¹⁹ For example, even after a third offense, imprisonment for manufacturing prerecorded optical discs without a license can be avoided merely by ceasing at that point and "applying" for such license. As another example, even after a third offense of 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.

- 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 (Article13), or other administrative agencies appointed (Article 14);
- Reports of administrative fines and/or criminal penalties meted out against persons/entities under Articles 15-23; also, reports of any seizures of optical discs and machinery and tools under those articles;
- Customs reports of activities with respect to prerecorded optical discs, stampers/masters, and machinery and tools (cf. Article 24); and
- Applications or recordations pursuant to Articles 26 and 27.

The Taiwan authorities, realizing that the law as passed has many flaws, have informally indicated that they 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 in an earlier iteration; the newest version will be provided in the near future.

To date, we understand that 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 apply the full licensing requirement to plants producing blank CD-Rs, to strengthen the authority to seize and forfeit all equipment used in the production of pirate OD product, and to adopt a registration requirement for those that engage in the commercial burning of CD-Rs, DVD-Rs etc. 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 2005 SPECIAL 301 REPORT TURKEY

EXECUTIVE SUMMARY

Special 301 Recommendation: We recommend that Turkey remain on the Watch List.

Overview of Key Problems: Turkey remains a market replete with book piracy, in the form of large-scale commercial photocopying and highly organized print piracy. In recent years, right holders have been shocked by the increasing amounts of optical disc piracy in Turkey, mainly in the form of "burned" CD-Rs and DVD-Rs. A difficult enforcement environment, coupled with reluctance on the part of judges to impose deterrent sentencing in copyright cases, called for a change in the legal system. That change came in the form of Law No. 5101 on Amendments to Various Laws, published in the Official Gazette on March 12, 2004. While the law lowered criminal penalties to address the judges' concerns, the amendments also banned the street sale of copyrighted works, granted *ex officio* powers to law enforcement authorities, subjected pirates to possible prosecution under the Organized Crime Law, deleted conflicting provisions of the Cinema Law, and provided for an ISP notice and takedown procedure, among other features. The effect of the new law was almost immediate, with major campaigns carried out against street piracy in mid-2004. Court cases in 2004 also demonstrated an increased willingness to impose higher penalties. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Turkey were <u>US\$187 million</u>.

Actions to be Taken in 2005:

Enforcement

- Follow the MOCT plan to shut down all pirate street vendors.
- Establish specialized units responsible for IPR crime within the Turkish Police and give these units the necessary competence and mandate as well as the operational means to carry out sustained enforcement actions *ex officio* throughout the country.
- Ensure that other agencies run sustained enforcement, for example:
 - The Ministry of Finance should take action against those individuals who are evading the payment of income tax related to undisclosed illegal activities, including pirates of books and other copyrighted materials.
 - The Ministry of Justice should ensure that key pirates are brought to justice, found guilty and punished.
- Close down printers and copy shops engaged in piracy of published materials.
- Enforce copyright at the borders through customs' efforts to stop pirate imports and exports.
- Invigorate activities of Inspection Committees, by empowering them with adequate resources; create better cooperation with prosecutors to bring cases to final conviction.
- Have Ministry of Education carry out a comprehensive program to legalize use of publications and other copyrighted materials in schools throughout Turkey.

Judicial

- 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.
- Streamline and ease procedural requirements for proof of ownership and similar issues, ensuring that defendants can no longer cause undue delays by triggering overly onerous evidentiary burdens.

Legislative/Regulatory

- Introduce, without delay, essential changes to the copyright law and related enforcement legislation, and join the WCT and WPPT.
- Enact optical disc regulations, including coverage of CD-R "burning," and then investigate sources of production of optical discs/"burned" CD-Rs.
- Improve the banderole system so that it decreases fraud and ensures that right holders are not increasingly burdened by such a system.

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

TURKEY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004 ³											
	2004 2003 2002 2001 2000										
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	
Motion Pictures	50.0	45%	50.0	45%	50.0	45%	50.0	40%	50.0	50%	
Records & Music	15.0	70%	15.0	75%	18.0	75%	3.5	35%	4.0	40%	
Business Software ⁴	99.0	66%	81.0	66%	38.5	58%	22.4	58%	78.6	63%	
Entertainment											
Software ⁵	NA	NA	NA	NA	NA	NA	23.7	90%	116.2	96%	
Books ⁶	23.0	NA	25.0	NA	25.0	NA	27.0	NA	28.0	NA	
TOTALS	187.0		171.0		131.5		126.6		276.8		

¹ http://www.iipa.com/pdf/2005SPECIAL301HISTORICALSUMMARY.pdf.

http://www.iipa.com/countryreports.html.

The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁴ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Turkey, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate (\$127 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁵ ESA's reported dellar figures reflect the united and the content of the c

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.

⁶ Local estimates of book piracy in Turkey range from 90% (photocopying) down to 40%. The Turkish Publishers' Association assesses the piracy level at 53% for "cultural" books (general trade titles); 50% for imported books (ELT and college) and 50% for local textbooks.

COPYRIGHT PIRACY

Turkey Is One of World's Worst Book Piracy Markets

Book piracy continues to be a major problem all over Turkey, severely affecting the markets for both Turkish and foreign publishers. Illegal commercial photocopying (at up to a 90% piracy rate) and organized printing of books (with lower piracy levels than photocopying but still hovering at or above 50%) combine to give Turkey the region's lead in book piracy. Virtually all types of books are affected, including local fiction, non fiction and school books, as well as local and imported college texts and imported English language teaching (ELT) texts. Pirates are well connected and highly organized. While significant enforcement action led by right holders, combined with currency stabilization factors, increased sales and reduced piracy somewhat in 2004, Turkey remains the worst pirate market in the region. Clearly, there is much to be done.

Print piracy primarily affects the markets for commercial bestsellers, professional materials such as medical texts and English language teaching materials. Pirate printing of books is a highly organized activity and is funded and managed by people who are quite knowledgeable about the publishing market in Turkey, and who protect their "market share" almost on principle. ⁹ Sidewalk vendors sell poor-quality pirate editions on the most crowded streets and intersections, and in marketplaces and overpasses. This is the most common channel for pirated books. Public markets such as Kadiköy Carsisi and Beyazit Meydani are full of these versions, as are street stalls throughout the country. Pirates also employ door-to-door marketing schemes, selling illegal copies in homes and work places. These entities often operate using fake names and other deceitful tactics, and employ vulnerable or desperate people to take the fall. ¹⁰ It is also common to find pirated books in second-hand bookshops. Many pirated course books are sold in this way. Finally, pirates take advantage of small-town bookshops, where investigations are rarer than in the cities.

Illegal commercial photocopying is common in and around university campuses and thus obviously affects the university textbook market most severely. Students purchase one copy of an adopted text and then order further copies, or chapters, at any one of dozens of photocopy

2005 Special 301: Turkey

⁷ The current economic stability is helping legitimate sales, and publishers are hopeful that the recent changes to the currency will help end-users to understand the small price differential between original and pirated books.

⁸ This is obviously a consideration as the EU is considering Turkey's accession proposals, as publishers are concerned about possible flooding of EU markets with pirate materials originating in Turkey. Local publishers' groups have noted that vigorous enforcement against copyright piracy should be listed as a primary, short-term objective during the EU accession talks.

As an example, in 2004, the legitimate publisher of a best-selling title claimed one million copies sold, mainly because of the low price – around TL3m (just over US\$2). The book was treated by the legitimate publisher as a "loss leader," meaning it was released with little anticipation of profit in order to establish the publisher's brand in the market. Despite the lack of an apparent, attractive market for a pirate edition, the title was pirated in large numbers. Local observers agreed that the pirates couldn't have made any money, but they simply did not want to give publishers the satisfaction of having released a book free of the pirate menace. This phenomenon is not limited to foreign publishers. Local non-fiction titles are also regularly pirated, as are locally produced translations.

¹⁰ As print pirates selling pirate books in open book shops began to be punished in 2004, they began putting books into boxes or suitcases in front of the book shops. When an investigation commenced into that store, the pirates told the police that the suitcases and boxes did not belong to them. Therefore, the books were seized but nobody was arrested. Another tactic used by pirates is to find young persons in need of money to carry around bags of pirated books on the street, perhaps to deliver on demand, thereby acting as the "fall guy" should an arrest be made. Finally, pirates frequently rent cars and use the trunks to store pirated materials. The lessee of the car is invariably a child or an elderly person, with no traceable chain to the pirates. Clearly such abuses, not only of the copyright system, but of vulnerable members of society, must be stopped.

establishments lining universities. They then sell the illegal copies to their fellow students. Professors at public universities often endorse these practices, even further facilitating it by having students purchase "bound notes" for their classes, containing unauthorized copies of entire sections of books.¹¹

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. IIPA asks the Ministry of the Interior to take a more active role in combating the commercial piracy plaguing the book industry, and asks the Ministry of Education and university administrations to demand use of legitimate materials on campuses, putting systems of consequences into place for breach of these demands.

Optical Disc Piracy Remained Dominant Form of Piracy in Turkey, Although Enforcement of New Law Curtailed Piracy Somewhat

Optical disc piracy continued to harm right holders in 2004, although government efforts to enforce the 2004 law resulted in significant decreases in the visible presence of pirated materials on the open market, especially in Istanbul and Ankara. The sale of "burned" pirate CD-Rs by street vendors, often selling from catalogs, still remains a serious problem, especially in other big cities such as Izmir and Antalya. 12 Burned CD-Rs constituted over 90% of music optical discs in Turkey in 2004, and most movie discs are burned CD-Rs and some DVD-Rs, with only a few of the discs being imported from abroad as masters. These "burned" CD-Rs/DVD-Rs are produced locally in small- to medium-sized facilities, "workshops," and in private residences. Other optical discs are 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 again in 2004). 13 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/DVD-Rs, sold by street vendors in Turkey and sometimes "under-the-counter" in retail shops, although, as noted, enforcement actions in 2004 after the implementation of the 2004 law banning street sales of copyrighted materials began to make headway into this pirate trade.

On top of domestic production of pirate CD-Rs/DVD-Rs and import piracy, the growth in optical disc production capacity in Turkey must not escape notice. In 2004, sources indicate that Turkey had eight known optical disc plants in operation, with 23 known production lines, for a

¹¹ There are exceptions, of course. Some professors have taken an active role in fighting piracy, demanding that students bring legitimate versions of books to their classes. We commend these efforts and urge MOE and universities to create a climate in which it easier for other professors to follow suit.

¹² The audiovisual industry notes that street vendors are directly supplied by local networks operating in complete secrecy. Istanbul still appears to be the center of the illegal production and wholesale distribution of imported and locally produced pirate product. "Under the counter" piracy also exists in some retail outlets and the average number of pirate CD-Rs varies between 50 and 100 per retailer. All new titles are available prior to and/or together with their theatrical release at an average price of US\$1.50 per title.

theatrical release at an average price of US\$1.50 per title.

13 Pirate DVDs of newly released titles with Turkish sub-titles can be found in retail stores for about US\$8 to US\$10. 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. In one raid in Germany, product being transshipped to Turkey from Asia was seized. The entertainment software industry continues to report that Malaysia exports pirate product to Turkey. Recently, some DVDs for which the source cannot be identified have been found in the Turkish market with only English and Turkish subtitles.

total optical disc production capacity of at least 80.5 million discs, ¹⁴ well above legitimate demand for discs in Turkey. Given this potential overcapacity, the government should pass and implement an effective optical disc law; included in such a law should be measures to collect exemplars from all plants to verify whether they produce licensed content. ¹⁵

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, auction sites, or newsgroups). ¹⁶ In general, Internet piracy, including peer-to-peer piracy, is growing in Turkey. Other problems for the motion picture industry include unauthorized public performances of new and popular films (25% piracy level) using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers, inter-city coaches, and unlicensed video theaters, ¹⁷ and broadcast piracy (15% piracy level). ¹⁸ There is also music broadcast piracy in Turkey, with only a small minority of over 1,500 radio and television broadcasters having a proper license agreement with the 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 "harddisk loading") are found in Turkey.

COPYRIGHT ENFORCEMENT

The biggest development in Turkey by far in 2004 was the crackdown on street vendors that commenced on March 1, right around when the 2004 amendments (to several laws) went into force. However, most actions still stop after regular business hours, when pirates return to the streets. Therefore, the law enforcement agents should also carry out their actions beyond regular business hours.

The motion picture industry group, AMPEC participated in raids leading to seizure of 723,183 pirate CD-Rs and 206 CD burners by the end of 2004. 19 As a result of sustained

International Intellectual Property Alliance

¹⁴ 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.

¹⁵ Article 44 of the 2004 law provides that specific implementing regulations will be issued for a new certification system. These implementing regulations (which IIPA understands are currently on the Prime Minister's desk) will require all optical disc producers and distributors to obtain a special certificate from the MOCT to produce, sell or show optical discs in public performances. In order to obtain such a certificate, the production facilities will have to meet some criteria set by the MOCT, and facilities without a certificate will not be permitted to operate. It is hoped that these regulations will facilitate the inspection and monitoring of the known production facilities.

The motion picture industry enforcement group in Turkey has organized raids with the police against the homes of such Internet pirates. As a result of actions taken against Internet piracy, a total of 10,754 Divx Cds, 2,190 CD-Rs, 8 PCs, 10 CD-Writers, 6 DVD-Writers, and 4 DVD-ROM writers have been confiscated, and legal actions initiated.
 Certain inter-city coach services also show films during journeys without authorization. The motion picture industry

[&]quot;Certain inter-city coach services also show films during journeys without authorization. The motion picture industry group in Turkey, AMPEC, is very active in this area and is regularly sending cease and desist letters and organizing raids with the police.

¹⁸ 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.

¹⁹ For example:

raiding throughout 2004, according to at least one industry group, pirate street vendors almost completely disappeared from the streets of Ankara, piracy having gone underground with the pirates becoming extremely cautious about the individuals to whom they sell. Other industries obtained raids as well, with one raid netting 40,000 products from a warehouse.

The recording industry group MÜ-YAP carried out 311 operations in 28 towns and reports seizures of over 630,000 pirated CDs and over 18,000 music cassettes (clearly showing the ratio between illegal optical discs and cassettes in favor of optical discs). In addition, 37 pieces of replication equipment (such as CD burners) were seized in 2004; over 900 suspects were arrested. It should be noted, however, that these results were achieved largely because the private sector initiated and supported raids that led to the seizures. The relevant law enforcement bodies, including the Inspection Committees, have generally failed to take *ex officio* action. With a country as vast as Turkey and piracy present everywhere this places a very heavy burden on the copyright industries in terms of human and financial resources.

- On March 1, 2004m On March 1st, the Istanbul Inspection Committee and the Istanbul Police conducted coordinated raids in various notorious pirate locations in the city, resulting in the seizure of around 18,000 "burned" CD-Rs. Most of the discs contained U.S. motion picture titles, like *The Last Samurai, The Lord of The Rings: The Return of The King, Mona Lisa Smile; Runaway Jury,* and *Brother Bear.* Although many of the street vendors ran when the police showed up, they left their street stalls and pirate CD-Rs behind. Fourteen individuals were arrested and detained for questioning. The estimated street value of the seized discs was around US\$34,000. In order to amplify the deterrent effect of the operation, local police were accompanied by 20 journalists during the entire operation, resulting in extensive reports by the major national TV channels and newspapers.
- From April 28 to May 12, 2004, AMPEC coordinated with the record industry group in Turkey, MUYAP, and the Istanbul Inspection Committee to conduct systematic raids in the areas of the city most affected by street vendor sales. Eleven raids were conducted against five video shops, four storage warehouses and one pirate CD-R duplication lab, resulting in the seizure of 121,400 pirate optical discs (76,000 CD-Rs with movies, 1,900 pirate DVDs, 36,000 music CDs, 7,500 discs containing game and software), 15 CD burners, 7,400 inlay cards, and in the arrest of 128 persons.
- In October 2004, AMPEC secured additional raids in Istanbul against major distributors and storage areas, resulting in the seizure of nearly 12,500 pirate optical discs containing movies and the arrest of 6 individuals.
- Between October 6 and 19, 2004, AMPEC and the Ankara Police conducted multiple raids against retail shops, street vendors and storage areas in Ankara, resulting in the seizure of more than 14,000 pirate discs containing movies (13,712 CD-Rs and 457 pirate DVDs), 305,000 inlay cards, 4 CD-R burners and the arrest of 11 persons.
- On November 23, 2004, AMPEC secured a raid in Istanbul against a major distributor in the Kadikoy district, resulting in the seizure of 2,085 CD-Rs with movies, 450 CD-Rs with interactive games, 500,000 printed inlay cards for movies, 4,500 inlay cards for PlayStation[®] and PC games, and resulting in the arrest of one individual. This individual was selling CD-Rs to be used as masters and the corresponding inlays to trusted sub-distributors. The sub-distributors were then using the master CD-Rs to duplicate many more copies and were using the purchased inlays for the packaging.
- On November 19, 2004, AMPEC and the Istanbul Inspection Committee raided a CD Shop in the Kadikoy district of Istanbul called "The End," resulting in the seizure of 2,435 pirate DVDs and 2,600 pirate CD-Rs. It is suspected that the source of most of the seized DVDs is Russia and/or Ukraine. It is estimated that the total market value of the seized materials is around US\$22,000. A legal action was initiated.
- On November 10, the Istanbul Security Department raided a cine-cafe called "Kafika" which shows U.S. motion picture DVDs without authorization. The café had been raided on five prior occasions over the past few years., with the latest raid, in March 2003, resulting in the café's closure. However, the club reopened in July 2004. After the raid, the Istanbul Security Department closed the café in September 2004, but it quickly resumed its illegal activities. All of the prosecutions resulting from the previous raids are still pending. The latest raid resulted in the seizure of 88 original DVDs used for public performance and 210 pirate music CDs. After the raid, six rooms that were used as small theaters with big screens and comfortable armchairs were sealed by the police for an indefinite period and criminal actions were initiated. The café was sealed due to absence of the appropriate license, and then the café reopened upon a re-application.
- On December 23, the Istanbul Inspection Committee organized a public destruction of pirate discs and books with the involvement of the Vice-Governor and the head of the Inspection Committee. The discs destroyed were ones seized in cases that have come to a conclusion. A total of 45,988 CD-Rs and DVDs, 2,371 books and 263,611 inlay cards were seized from 108 defendants.

Book publishers continue to find that they too must self-initiate raids, and various companies run hundreds of raids against pirate photocopy shops and print pirates per year. Unfortunately, the Turkish government remains reluctant to tackle the problem of piracy on university campuses, i.e., 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.²⁰ For example, the MOE often changes prescribed books on extremely short notice, giving publishers little or no opportunity to import legitimate versions of books. These practices, which have the incidental effect of promoting piracy, must be re-evaluated.

Inspection Committees in Major Cities Effective in 2004

The Inspection Committees, first established in 2002,²¹ played a part in the fight against street piracy in 2004. However, these Committees rarely took any ex officio action. In most cases right holders had to initiate actions and provide support. As a result of the March 2004 amendments the Inspection Committees formed in most provinces were annulled (with the exception of Istanbul, Izmir and Ankara). Although the Committees should not be abolished altogether, the core task of anti-piracy law enforcement should be shifted to specialized IPR units within the Police. These units should be established as a matter of priority. They would, provided they are given the necessary competence, mandate and operational means, quarantee a country-wide involvement of a key law enforcement body in the fight against piracy. At the same time, it would free up the remaining Inspection Committees to refocus their activities on other important enforcement-related tasks, such as optical disc plant inspections, in conjunction with private sector representatives, under the forthcoming optical disc regulation.

Courts Meting Out Larger Penalties Under New Copyright Law

IIPA hoped that the 2004 amendments to various laws, including the copyright law, would result in administration of deterrent sentences by the courts.²² At long last, two decisions were reached in late 2004. In the first, on September 22, 2004, a video shop owner from Ankara was sentenced for piracy to a fine of TL60 billion (nearly US\$45,000) by the Ankara Specialized IP Court. The case arose from a police raid conducted on March 17, 2003, against a video retail outlet that resulted in the seizure of 1 CD burner, 600 pirate CD-Rs, 50 blank CD-Rs and 400 inlay cards.²³ The decision is important since the judge resisted applying the lowest possible penalty, imposing an unsuspended fine. In December, a second favorable decision was rendered by the Izmir Specialized IP Court. A local warehouse owner was fined TL50 billion

²⁰ For example, on August 28, 2003, the *Talim Terbiye Kurulu (TTK)* wrote to the provincial governors revoking the approval for a number of imported course books to be used in schools. This only paves the way for pirate supply of the market. In addition, foreign publishers are required to pay at least double the standard fee to have books approved by the Ministry of Education (MOE) and the TTK. Decisions such as these are made without adequate transparency or explanations as to reasoning. Finally, to the best of IIPA's knowledge, MOE has never taken any steps to discourage students from bringing pirated books to school.

21 Eighty one "Inspection Committees," one for each province in Turkey, were officially established in 2002.

²² IIPA notes that judges trained abroad (in the U.K. and elsewhere) were appointed to the specialized IPR courts in major cities; this move, along with the 2004 amendments, will hopefully make the courts more effective in combating copyright piracy in Turkey in 2005.

Despite the seizure of only one CD burner, the Judge classified the activity as running an illegal production facility (which carries a prison term of from two to four years, or a fine of from TL 50 billion or over US\$37.500 to TL150 billion or nearly US\$112,500, or both) rather than only as a sale of pirate products (subject to a prison term of from three months to two years, or a fine of from TL5 billion or US\$3,750 to TL50 billion or nearly US\$37,500, or both). Finally, the judge decided that the fine would not be suspended, given the pirate's propensity for recidivism.

(more than US\$37,500). The decision followed a raid conducted by AMPEC and the police on March 19, 2004 that resulted in the seizure of 50,000 PlayStation inlay cards and 70,000 CD inlay cards. The decision is significant because despite the fact that there were no production materials seized in the raid, the inlay cards alone were regarded as proof of pirate reproduction. In another case dating back to 1999, a defendant received 27 months in prison; unfortunately, the defendant appealed (on a technicality) and thus, that case continues.

It is hoped that the above cases are indicative of what right holders can expect from specialized IPR courts in Turkey.²⁴ IIPA is also hopeful that the Supreme Court will not overrule the decisions taken by the First Instance Courts. It is, however, at this early stage, difficult to predict whether the few recent case decisions are a trend or an exception. Most cases initiated under the amended law are still in process. Toward the second half of 2005 these cases are expected to reach a final verdict, at which point in time conclusions can be drawn as to the effect of the changes in the court system and the attitude of the judiciary toward IPR crime. IIPA notes that historically the courts have been marred by many procedural hurdles²⁵ and largely non-deterrent results in copyright cases.²⁶ 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);²⁷ the courts still do not provide presumptions of ownership to right holders, but instead impose burdensome documentary requirements on right holders to prove ownership;²⁸ copyright cases are given low priority by prosecutors and courts; the Attorneyship Law requires that a private copyright owner

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, and IIPA understands that there are currently three criminal and two civil specialized IP courts available in Istanbul.

25 The publishing industry reports onerous burdens on copyright holders to prove ownership, often in the form of

The publishing industry reports onerous burdens on copyright holders to prove ownership, often in the form of notarized translations of original contracts between authors and publishers for each title. The notary fees alone act as a deterrent to copyright owners wishing to defend their rights.

26 There were six first-instance court decisions issued under the 2001 copyright law. The defendants in the first two

There were six first-instance court decisions issued under the 2001 copyright law. The defendants in the first two cases appealed to the Supreme Court. In both cases, 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 the defendant. 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.

27 Copyright infringement cases generally take two years to adjudicate in the first instance, and up to one year further

Copyright infringement cases generally take two years to adjudicate in the first instance, and up to one year further to appeal. Since 2002, the local record industry group, 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. Some cases have languished in the courts for five years.

²⁸ In cases brought by 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. The police and the courts have often introduced complex and expensive requirements on U.S. publishers; for instance, they have required publishers to produce the original author's contract to prove that copyright lies with the publisher. Since this contract is in English, it is sometimes necessary to translate the contract and notarize it as an accurate translation. The notaries in Turkey have apparently added to the burden by charging inordinate fees. The audiovisual industry has experienced similar problems. Judges and public prosecutors often ask for the proof of copyright ownership and sometimes even request the establishment of "chain of title" by presenting all the relevant contracts, despite the presumption in Article 15 of the Berne Convention and Articles 11 and 80 of Turkish Copyright Law (which provide presumptions of ownership). In addition, Article 13 of the Copyright Law provides for a registration system in Turkey for movies that will be distributed theatrically in Turkey, but there is no such registration for movies not distributed theatrically, causing chain of title problems for such titles (note that this represents most titles that are legitimately distributed in Turkey). When regulations for Article 13 of the law are issued, it will be possible for film companies to register their works with the Minister of Culture, which hopefully, will relieve right holders of this burden.

representative hire a local lawyer to be an intermediary for many aspects of a copyright case;²⁹ and the use of "court experts" and, specifically, defendants' use of objections and experts, has led to excessive delays and even wrongful acquittals.³⁰ A fundamental problem is the amount of time cases take to move through the system; for example, the entertainment software industry has cases pending from as far back as 1999. Such time frames cannot provide the deterrent needed for an industry whose product has a short shelf life. Another problematic feature of judicial enforcement in Turkey involves the difficulty of obtaining *ex parte* civil searches, as required by TRIPS.³¹ Finally, courts must make reasonable costs and fees available in Turkey in civil and administrative actions.

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. Additionally, pirates are often inserting pirate discs into original jewel cases that have already used banderoles to make them look "legitimate." Publishers report various problems with the banderole system, including fraudulent purchases of banderoles by pirates, and fraudulent local production of banderoles. 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).

The recording industry reports some improvement in the administration of the banderole system in 2004. The MOCT has increased transparency, sharing detailed banderole information with MÜ-YAP on a weekly basis. However, banderole reports for 2004 show a massive increase in sales of banderoles for international repertoire, which is not compounded by a corresponding increase in actual sales of international repertoire. This could indicate that fraudulent banderole purchase is continuing.

²⁹ 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.

courtroom to obtain a conviction.

30 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.

in the past.

31 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.

COPYRIGHT LAW AND RELATED ISSUES

2004 Amendments

Modern-day copyright law in Turkey dates back to a 1951 copyright law (Law No. 5846), which was amended by Law No. 4630 (2001), and further amended in 2004 by Law. No. 5101 (amending several laws including the copyright law). The 2001 amendments 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. Soon after the law's passage in 2001, it became apparent that judges in Turkey would not take the initiative to fully implement the very high criminal penalties contained in the 2001 copyright law, and were ruling that only administrative fines were available in cases of copyright infringement (relying on inconsistent provisions in the Cinema Law).

As a result of these problems, a new set of amendments were drafted and passed in 2003, coming into force on March 12, 2004, in Law No. 5101. While the amendments substantially reduced the level of criminal penalties and gave wider sentencing discretion to judges, ³⁴ they also banned the street sale of copyrighted works, granted *ex officio* powers to law enforcement authorities, subjected pirates to possible prosecution under the Organized Crime Law, ³⁵ deleted conflicting provisions of the Cinema Law and provided for an ISP notice and takedown procedure. ³⁶ The law also calls for the establishment of special courts to hear piracy and counterfeiting cases, and these should be set up as soon as possible. In addition, the law provides that Turkish Customs officers must now act *ex officio*, and premises reproducing, distributing and communicating works to the public must be certified by the Ministry of Culture and Tourism (MOCT). The MOCT has, in the meantime, issued a regulation on classification of users of copyrighted materials. It is still expected to issue regulations implementing the certification system for premises reproducing copyrighted materials (the OD regulation) and the notice and takedown procedure for Internet infringements. These are generally positive steps

³² 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 circumvention devices; the Turkish Criminal Code, Article 525 *et seq.*, provides limited protection against circumvention of computer encryption), Turkey should, as soon as possible, seek immediate accession to the WCT and WPPT, and swift deposit in Geneva.

³³ In two different cases, the Supreme Court in December 2002 ordered the Istanbul Specialized IPR Court (court of

³³ In two different cases, the Supreme Court in December 2002 ordered the Istanbul Specialized IPR Court (court of first instance) to send the case files to the appropriate municipalities for the application of administrative fines. In the first case, the Supreme Court ruled that the Cinema Law was a "more specific law" compared to the Copyright Law such that the Cinema Law should be applied where there is an infringement of copyright related to a motion picture. In the second case, the Supreme Court ruled that if a pirate does not personally manufacture pirate goods but is only engaged in the sale and distribution of such goods, the Cinema Law which as the "more specific law" should be applied. Thus, the Supreme Court has made a distinction between the manufacturing of pirate goods (which it has ruled is subject to the Cinema Law)

Cinema Law).

34 The new penalties included up to TL250 billion (some US\$187,000) or a prison term of between three months and six years. Those caught offending a second time can be tried on charges of "organized crime," according to the law. The new legislation also stipulates a fine of up to TL150 billion (about US\$112,500) or a prison term of between two and four years for hackers.

³⁵ Piracy is a scheduled offense for the application of Law No. 4422 on the Struggle Against Organized Crime Aimed at Unlawful Gain and Benefit.

³⁶ Under the law, ISPs are required to remove infringing content within three days of notification by a right holder. If an infringement continues, the right holder may apply to the public prosecutor to take action. The detailed implementation of this notice and takedown procedure is to be determined by ministerial regulation.

and the copyright industries are eager to see effective and efficient implementation of these new provisions.³⁷

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 (including "burning" of CD-Rs) 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.³⁸ The MOCT reportedly has a draft regulation of optical disc plants in the form of a Directive, which is currently subject to inter-ministerial consultation (although IIPA has heard that the draft may be on the Prime Minister's desk awaiting approval). The following elements are understood from initial information:

- Only plants with injection mold machines will be certified (CD-R burning studios do not qualify and will not be permitted to produce copyrighted materials);
- Only plants with comprehensive facilities qualify (i.e. with pressing, printing, packaging and quality control facilities);
- Capacity reports must be regularly submitted;
- Use of SID Code is obligatory;
- A commission, including private sector representatives, reviews all certification requests;
- Regular controls are foreseen;

³⁷ Some concerns do remain, however, about vague language in certain provisions of the new amendments. For instance, Articles 34 and 35 cover educational and instructional uses as well as quotation of works, employing language that could be interpreted quite broadly. Article 34 allows uses "...for the purposes of education and instruction *within the necessary limits of the purpose*." This language is apparently not qualified by the three step Berne test for permissible exceptions to copyright protection, except as it applies to certain photographic works. This is a peculiar aberration and should be clarified. Likewise, Article 35 allows for quoting of "a few sentences or passages," also without benefit of the Berne three-step test. The Article 47 right of expropriation, which may apply to foreign-published works authored by Turkish writers, is vulnerable to abuse and therefore of concern to the publishing industry. Finally, given the industry's current problems with requirements as to proof of copyright ownership, it is concerned that Article 75's requirement of documentary evidence of title will be interpreted in such a way to add great cost to right holders protecting their rights in court. These provisions should be clarified at the first available opportunity.

³⁸ 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.

- Surprise inspections are possible, with participation of Inspection Committees and, thus, private sector representatives; and
- Sanction for breach of regulation and/or copyright under the regulation is cancellation of the certification.

If these elements are all included, IIPA believes that would represent a positive start. The government of Turkey should, therefore, craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following points:

- Licensing of Facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID Code) for optical discs and production parts, and with the licensee taking measures to verify that customers have copyright/trademark authorization of the relevant right holders.
- Licensing of Export/Import of Materials: Centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- Requirement to Apply Manufacturer's Code: Requirement to adapt manufacturing
 equipment or optical disc molds to apply appropriate manufacturer's code, and to cause
 each optical disc and production part to be marked with manufacturer's code, and
 prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including
 making, possessing or adapting an optical disc mould for forging manufacturer's code;
 altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a
 production part not marked with manufacturer's code, etc.).
- License Record Keeping Requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- **Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- Search and Seizure Authority: Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- Government Record-Keeping Requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- **Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

- Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.
- Possibility of Closure of a Plant.

The copyright industries look forward to working with the authorities of Turkey to draft, implement and enforce comprehensive optical disc regulations.

Generalized System of Preferences

In 2003, the U.S. government formally announced that in 2001, it had closed the investigation into whether Turkey remains eligible to enjoy benefits under the Generalized System of Preferences (GSP) trade program. Nonetheless, IIPA considers the lynchpin of that petition, enforcement, not to have been fully resolved. 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 2003, almost \$722.6 million in goods from Turkey were imported into the United States duty free under the program, accounting for over 19.1% of its total imports to the U.S. In the first 11 months of 2004, over \$886.3 million in Turkey's imports to the United States benefited from the GSP program, accounting for almost 19.6% of its total imports to the U.S.



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT VENEZUELA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Venezuela remain on the Special 301 Watch List in 2005.

Overview of Key Problems: Copyright protection in Venezuela is poor. To make matters worse, the copyright industries are particularly alarmed by proposed radical copyright legislation introduced into the National Assembly in November 2004. This legislation would severely undercut the current 1993 law and violate Venezuela's obligations under the Berne Convention. Furthermore, the proposed legislation fails to implement Venezuela's bilateral obligations as well as those required by the WTO TRIPS Agreement. If this law were to be adopted as originally drafted, the U.S. government should bring a TRIPS case against Venezuela.

Continuing economic and political instability in Venezuela has fostered a high level of copyright piracy. In recent years, the copyright industries' ability to engage in commercial distribution and conduct anti-piracy campaigns safely and effectively have been quite limited. The streets are flooded with pirated products. CD-R burning is widespread. As a result, the legitimate music industry in Venezuela has almost disappeared. The high piracy level, coupled with the proposed copyright legislation, creates the bleakest scenario the music industry has faced in its history. In fact, the Venezuelan market decreased by 87% in the last five years, going from 4.4 million units in 1999 to 700,000 in 2003. To add to this troubling situation, in December 2004, Venezuela's Congress passed a general broadcasting law that creates specific quotas for domestic music repertoire. The quotas require that at least 50% of all music being broadcasted be from local Venezuelan repertoire. The law represents a serious commercial barrier to all international music by limiting its exposure to consumers and restricting the potential revenues it can generate through broadcasting fees.

The rise in DVD-R and CD-R piracy in 2003-2004 has overtaken video piracy as the predominant form of hard-goods piracy harming the film industry. The audiovisual industry also is concerned that pay television and cable piracy may increase in the weak economic and legal environment. The business software industry reports that the most devastating form of piracy remains the use of infringing or unlicensed software by legitimate businesses and government agencies; pirated and counterfeit software is also easily available on the streets. Pirated videogames are widespread, with most imported from Taiwan, Hong Kong and China, transshipped through Paraguay. Book publishers continue to battle unauthorized photocopying, especially at secondary schools and universities. Estimated U.S. trade losses due to copyright piracy in Venezuela were US\$92 million in 2004.

Copyright 2005 International Intellectual Property Alliance

2005 Special 301: Venezuela

Actions Which the Venezuelan Government Should Take in 2005

- Stop legislative consideration of the government's proposed copyright "reform" bill, the LDAADC, because its provisions would undermine Venezuela's TRIPS obligations as well as its bilateral copyright obligations with the U.S.;
- Repeal music quotas required by the recently passed general broadcasting law;
- Complete deposit with WIPO of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
- Significantly increase enforcement against copyright piracy. Instruct the enforcement agencies to make anti-piracy enforcement a priority in order to foster the growth of local content industries and encourage local investment.

COPYRIGHT LAW

The 1993 Venezuelan copyright law, while relatively comprehensive in many respects, needs to be revised to reflect the modern standards found in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Unfortunately, Venezuela is taking backwards steps regarding even basic copyright reform.

On November 4, 2004, a group of deputies from President Chavez's political movement (*Cambio*) formally introduced a copyright "reform" bill, *Ley del Derecho del Autor y la Autora y Derechos Conexos* (LDAADC), into the Venezuelan National Assembly. This astonishingly radical reform bill was approved in the first reading on February 2, 2005, essentially without discussion and without ever having been first assigned to any committee. It has now been assigned to the Permanent Committee of Interior Politics, Justice, Human Rights, and Constitutional Guarantees, which will generate recommendations for the second reading in the National Assembly. Given current political dynamics there, it is possible that this bill could pass in 2005. This bill would reverse two decades of progress in copyright protection in Latin America as well as violate Venezuela's Berne Convention and TRIPS obligations and its bilateral IPR obligations. In the legislative history section (*Exposición de Motivos*) of the bill, proponents state that this effort arises from the earlier "political distortions" and "state of social and economic injustice" that gave rise to the existing 1993 copyright law.

Among its many troubling deficiencies, the bill proposes the following:

- Deleting all rights for phonogram producers and broadcasters (violation of TRIPS, the WPPT, the Rome Convention and Andean Community Decision No. 351);
- Requiring mandatory registration for works and performances;
- Lowering the term of protection from 60 to 50 years;
- Removing presumptions of owner ship in favor of movies and software producers;
- Lowering criminal penalties from one–four years to one–two years;
- Making it very difficult to assign or transfer works;
- Removing all ex parte injunctions and actions:

¹ Venezuela is a beneficiary under the U.S. Generalized System of Preferences (GSP) trade program, which requires beneficiary countries to afford "adequate and effective" intellectual property rights protection to U.S. copyright owners. For the first 11 months of 2004, \$746.8 million worth of Venezuelan goods (or 3.4% of Venezuela's total imports to the U.S.) entered the U.S. under the duty-free GSP code, representing a 33.1% increase from the same time period in 2003. For more information on the history of Venezuela under Special 301 review, see Appendices D and E of this submission.

- Requiring a mandatory royalty in favor of natural authors of 50% of all earnings from commercialization of work;
- Limiting all transfers of rights to commercialize a work to ten years for cinematographic, scientific, and technological works, and only two years in the case of certain classes of works, such as artistic and musical, audiovisual and literary works;²
- Providing very broad and expansive exceptions to protection;
- Providing an unclear making available right;
- Not covering point-to-point transmission, ISP liability, or notice and takedown provisions;
- Not establishing an importation right, which would provide statutory civil damages or criminal penalties for unauthorized parallel import of copyrighted works;
- No civil or criminal remedies against the alteration or circumvention of Electronic Rights Management Information (ERMI) or against circumvention of technological protection measures (TPMs);
- No efficient border measures;
- Giving the State the right to seize certain works by eminent domain for reasons of "collective benefit," such as information related to public health, maps, artistic and musical works; and
- Eliminating work-for-hire provisions.

Provisions such as these also fail to further the legal exploitation of copyrighted products, either by national or international companies. In fact, SAPI (the Copyright, Patents and Trademarks Office) held a public seminar in October 2004, presenting this bill as focusing on the positive "social role of pirates in society."

Full ratification of the two WIPO Internet Treaties remains a regional priority for the copyright industries. We urge President Chavez both to ratify the WCT and complete ratification of the WPPT.

PIRACY AND ENFORCEMENT

Enforcement of the copyright law by Venezuelan government authorities remains poor. Enforcement against street sales is non-existent and piracy there flourishes. COMANPI, the antipiracy brigade which was once well regarded in the region, had its budget cut years ago and copyright actions declined dramatically. In 2003, the National Guard (Guardia Nacional) attempted to fill this gap by working with the copyright industries, but in 2004, the industries reported no antipiracy actions. The Copyright Office (SAPI) has no real enforcement powers, but has helped the software industry by issuing administrative notifications to suspects and providing public support for the software industry enforcement campaigns. The single specialized IPR prosecutor is overburdened with both IP and human rights cases. Customs authorities do not have ex officio authority to inspect shipments on their own initiative; a judicial order is required. The courts continue to issue non-deterrent penalties and inadequate damages. A new system which distributes civil cases to judges randomly often delays the process because some judges are not familiar with the copyright law and its application. Frequent public demonstrations and court strikes and closings continue to make efforts to enforce the law difficult. The Special Law Against Electronic Crimes (Ley Especial contra Delitos Informáticos) passed in December 2001, but has not been applied in practice.

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² We understand that transfers are also limited in term based on whether the contracting party has made a financial investment in the project for which the transfer is sought.

Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracv:

INDUSTRY	2004		2003		20	02	2001		2000	
INDUSTRI	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁴	31.0	80%	29.0	80%	29.3	75%	54.0	62%	30.0	62%
Business Software ⁵	36.0	75%	33.0	72%	27.1	52%	25.7	55%	16.9	58%
Motion Pictures	25.0	NA	25.0	50%	25.0	65%	25.0	65%	25.0	65%
Books	NA	NA	NA	NA	18.0	NA	20.0	NA	22.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	47.0	78%
TOTALS	92.0		87.0		99.1		124.7		140.9	

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf. For information Venezuela the history of under Special 301 review, see Appendix D (http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf) Ε and **Appendix** (http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf) of this submission.

Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Venezuela, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate (\$55 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

306 MONITORING

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT PARAGUAY

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA commends Paraguay for having adopted a new and meaningful approach to the protection of intellectual property, and expresses its admiration for the initiatives undertaken by the Duarte-Frutos Administration. While much remains to be done, we are hopeful that these initiatives will bear fruit. We recommend that USTR not place Paraguay on any list, and that it continue its monitoring under Section 306 of the U.S. Trade Act of 1974.

Overview of Key Achievements/Problems: Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. In December 2003, Paraguay entered into another Memorandum of Understanding on Intellectual Property Rights with the U.S. Officials in the new Paraguayan administration have exhibited a great interest in tackling copyright piracy in-country and at its borders. IPR issues were also discussed by the U.S. and Paraguayan officials during regular JCTI (Joint Council on Trade and Investment) meetings. Draft laws have been submitted which would increase the penalties for violations of intellectual property rights. The Specialized Technical Unit, created by decree in 2003, along with conducting raids and seizures, has established a Statistics Center to collect data on IPR cases, and should now be operational.

There have been significant positive developments in 2004, including:

- Seizure of over 11 million blank CD-Rs and 1,600 burners:
- Detention of eight suspected pirates:
- Indictment of three people for organized crime violations;
- Indictment of 22 people for tax evasion in connection with piracy;
- Indictment of 28 people for forging import documents related to the importation of raw materials for piracy;
- Cancellation of 73 import licenses from companies found to have engaged in forgery and/or in predicate offenses related to piracy;
- Increase in the minimum declared price of CD-Rs from \$.15 to \$.18, and the adoption of a minimum declared price for DVD-Rs of \$.60:
- Limited entry of blank media to seven customs ports;
- Maintained and monitored CD-R register to establish better controls on the importation of raw materials:
- Appointment of a person to run, and fully operationalize, the special IP task force known as the UTE; and
- Sentencing of six people to prison for between 100 and 500 days, and three people for between six and seven years.

In all, the Government of Paraguay has demonstrated a real resolve to try to address a problem that has for too long hindered the country's economic development, and we recognize that effort today.

Having said that, and despite the renewed energy by the Paraguayan government to combat piracy, the piracy situation in Paraguay remains relatively dire. Enforcement efforts taken by Paraguayan authorities, while well intended, continue to be largely ineffective in deterring widespread piracy there. One of the key items contributing to the lack of deterrence is weak criminal penalties for IPR that deter judicial authorities from issuing sentences that require effective jail time. One notable exception was the recent conviction of three major pirates for IPR violations. One received a seven and half year sentence, while the other two received six year sentences. Despite this laudable action, organized crime elements remain intimately involved in the production and distribution of pirated products and/or raw materials for the manufacture of pirated products, thus making enforcement even more difficult. There are still too few criminal investigations, raids, and prosecutions against copyright pirates. We believe part of this enforcement deficiency will be ameliorated by the recent grant of \$320,000 by the U.S. State Department to Paraguay for IPR enforcement purposes. Unfortunately, the copyright law and criminal code work 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.

Priority Issues in 2005

- Enactment of legislation to amend the criminal code to increase penalties for copyright infringement (designating IPR violations as major crimes), establishment of ex officio actions, and the criminalization of the circumvention of technological protection measures:
- Improving border enforcement, including the interception and seizure of piratical goods and contraband PC hardware, as well as the inspection of blank optical disc media:
- Imposition of deterrent remedies against pirates, including criminal penalties;
- Controlling the points of entry for the importation of CD-Rs into Paraguay;
- Auditing of large-scale importers of blank CD-Rs who are suspected suppliers of pirate organizations for possible tax evasion. Pursue audits of customers to those importers, particularly if the importer failed its tax audit;
- Improving training for prosecutors and judges, with the objective result being that the Paraguayan system provides deterrence to copyright piracy; and
- Adoption of legislation to establish administrative procedures to fight piracy, including: creating rules for "fast-track" administrative actions; imposing administrative penalties; and coordinating with other authorities.

PARAGUAY Estimated Trade Losses Due to Copyright Piracy

(in millions of U.S. dollars) and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
INDUSTRI	Loss	Level								
Records & Music ²	127.8	99%	154.6	99%	204.4	99%	253.6	99%	200.0	90%
Motion Pictures	2.0	95%	2.0	80%	2.0	80%	2.0	80%	2.0	80%
Business Software ³	6.0	83%	5.0	83%	2.2	71%	3.5	72%	8.5	76%
Entertainment Software⁴	NA	9.7	99%							
Books	2.0	NA	2.0	NA	2.0	NA	3.0	NA	3.0	NA
TOTALS	137.8		163.6		210.6		262.1		223.2	

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). The text of the IPR MOU was made publicly available in April of 2004. The new agreement contains seven articles and an annex setting out the Government of Paraguay's Action Plan for IPR improvement. The MOU includes elements on legislative, administrative, and enforcement issues designed to strengthen the government's ability to effectively fight copyright piracy and trademark counterfeiting, and to improve its overall intellectual property system.

Specifically, the MOU requires Paraguay to implement TRIPS compliant legislation by "develop[ing] and implement[ing] effective enforcement mechanisms and practices to significantly reduce the levels of copyright piracy and trademark counterfeiting in its territory, including through the imposition of deterrent penalties." One element of this is to increase criminal sanctions for those convicted of copyright and trademark violations. Additionally, the MOU requires Paraguay to improve transparency and reporting with respect to the enforcement of intellectual property rights, and to work with the U.S. government to jointly "develop and implement a program of mandatory professional training for all Paraguayan officials who have a role in the development and maintenance of an effective intellectual property system." The

International Intellectual Property Alliance

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

² PIAA reports that its activated in the statement of
² RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay and estimated losses caused by transshipment. The decrease in 2003 and 2004 estimates are due to lower average prices of recorded music and currency devaluation.

³ RIAA first 2003 f

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Paraguay, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at http://www.bsa.org/globalstudy/). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$9 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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.

definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

The full text of Paraguay's 2003 IPR MOU is available on the U.S. Department of Commerce's website at http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:1:185.

MOU also requires regular review of Paraguay's progress throughout the term of the agreement, which is set to terminate on December 31, 2005.

COPYRIGHT PIRACY

Optical Media Piracy: Transshipment and CD-Rs

In 2004, Paraguay continued to serve as a favorite destination for much of the pirated optical media product being produced in Southeast Asia (e.g., Malaysia, Macau, Hong Kong, Singapore, and Taiwan). As a result of this sourcing problem, Paraguay continued its 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 optical disc product to importing blank recordable CDs (CD-Rs) into Paraguay. In 2004, approximately 240 million units were imported versus 119 million units in 2003, compared with approximately 100 million units in 2002 and 104 million in 2001.

These statistics represent a significant increase from the 34 million units imported in 2000. Paraguay 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 methods. Now, hundreds of labs using CD burners have replaced the previous underground illegal CD plants. Nonetheless, it is obvious that those burning facilities are supplied by pirate kingpins who coordinate their work and provide the small labs with blank CD-Rs. These "sprayed" plants serve Paraguayan, Argentine, Uruguayan and (mostly) Brazilian illegal CD-R duplicators.

Organized Crime Elements Still Control Piracy in Paraguay

Organized criminal groups remain involved in the production and distribution of pirated and counterfeit product, and/or in the importation and distribution of raw materials. 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. Paraguay continues to be a transshipment point for areas throughout Latin America, for the large amounts of surplus optical media product manufactured in Southeast Asia. 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 is pervasive.

Domestic Piracy Remains Widespread in Paraguay

The entertainment software industry reports that Paraguay continues to be a hub for the assembly, 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. In 2004, the police conducted twelve raids at warehouses and retail stores, and seized a total of 240,000 pirated videogame cartridges. The customs authorities, in early 2004, seized three 40-

foot containers, originating from China, which contained 92,500 infringing products, among them multi-game cartridges and Super Nintendo controllers. The containers were bound for Ciudad del Este.⁶

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 inflict the most economic harm on the potential growth of a legitimate software base in Paraguay. Furthermore, the software industry is concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice.

The motion picture and recording industries report that their primary concern is Paraguay's position as a transshipment and organization hub for optical disc piracy. 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. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Paraguay are estimated at \$2 million in 2004 (this figure is for in-country market losses only; the damage inflicted on neighboring countries is not calculated). The recording industry reports losses of \$127.8 million based almost exclusively on the sale of pirate product with a nexus to Paraguay but intended for consumption outside the country.

AAP reports increasing amounts of photocopied materials being used in place of legitimate books in institutions of higher learning. Suspicions regarding presence in the market of pirated versions of trade books and English language teaching materials continue as well. Estimated trade losses due to book piracy remained at \$2.0 million for 2004.

COPYRIGHT ENFORCEMENT IN PARAGUAY

Despite longstanding enforcement challenges in Paraguay, new initiatives are underway to strengthen the fight against copyright piracy. In 2004, the U.S. State Department announced an allocation of \$320,000 to Paraguay to be used for "training and technical assistance" in support of Paraguayan IPR enforcement units.⁷ This represents a significant contribution to enforcement in Paraguay and is part of the Department of State's broader, \$2.5 million initiative to fight piracy through international training programs. The MOIC has named a person to take charge of the UTE and should be taking more aggressive actions soon.

Paraguayan border measures should be strengthened: Not surprisingly, many piracy problems in Paraguay are centered in the border cities. While the Paraguayan Government has improved its efforts, much remains to be done, and the government needs to further its customs

⁶ In addition to pirated cartridge-based video games, the sale of "PolyStation" controllers is also of concern to Nintendo of America (NOA). These PolyStation controllers come with pre-loaded or built-in Nintendo video game software—none of which are licensed by Nintendo. In December 2004, highly publicized raids were conducted against several warehouses which resulted in the seizure of almost 20,000 PolyStation units.

⁷ See U.S. Department of State, Press Release, Intellectual Property Training Programs Funded (Aug. 10, 2004), available at http://www.state.gov/r/pa/prs/ps/2004/35078.htm. See also U.S. Department of State, Fact Sheet, Intellectual Property Training Programs (Oct. 6, 2004), available at http://www.state.gov/g/inl/rls/fs/36830.htm.

procedures to combat cross-border piracy and corruption of its agents. 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.

Customs operations and industry coordination with the Ministry of Industry and Commerce (MIC) have greatly improved during 2004. In September 2003, the recording industry reached an agreement with customs and the MIC 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 11 million blank CD-Rs with false or questionable invoices have been seized from January 2004 to December of 2004. In addition, 53 criminal complaints were filed and 73 import licenses were revoked for false statements and documentation.

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 has continued to provide information for prosecutors to conduct raids. In 2004, the recording industry conducted 141 raids, which resulted in the seizure of over 725,000 units of infringing products (mostly music CDs) and the closure of 26 manufacturing facilities, most of them small to mid-sized CD-R replication facilities, and 41 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 11.2 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by APDIF Paraguay.

As for business software enforcement, during 2004, BSA conducted five civil end-user actions, as opposed to four in 2003. In addition, in 2004, BSA assisted the Prosecutor's Office in 26 criminal raids against software resellers in Ciudad del Este and Asunción compared to six criminal raids in 2003. Agents of the Revenue Service participated in these raids. Despite evidence of tax evasion, the Paraguayan authorities have refused to criminally charge the defendants with any tax related offenses. In some of these cases, minor administrative fines were imposed.

The need for effective prosecution and deterrent sentencing: There are six specialized IPR prosecutors (each unit usually consisting of one prosecutor and two assistants) in Paraguay, three in Asunción and three in Ciudad del Este. The prosecutors now have, at least 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.

Even in this area, there has been some progress. In early 2004, three major IPR pirates were sentenced to lengthy jail terms involving the fraudulent import of over U.S. \$10 million in contraband, counterfeit goods, and blank optical media. The leader of the group engaged in these illegal acts received seven and a half years imprisonment, while his two accomplices each received a six year prison sentence. In addition, in late 2004 another international ring was dismantled after the seizure of 3.2 million blank CD-Rs and DVDs were discovered as "computer parts" during inspection by MIC and APDIF personnel. Follow-up investigation determined that the ring would "clone" containers prior to their arrival at the designated customs

inspection point. Two Chinese nationals were indicted, one is under arrest, and the other is a fugitive. Three Paraguayans were also arrested and the investigation is ongoing.

The recording industry reports that in 2004, Paraguayan courts issued 36 criminal judgments against pirates of sound recordings. Sentences included imprisonment of up to two and a half years, but 16 were suspended, 20 became fines and the rest were granted probation. The recording industry initiated 30 judicial actions in 2003.

BSA reports that in 2004, no convictions against resellers of illegal software were issued. 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 2004, BSA conducted five civil copyright infringement actions (compared to four inspections conducted in 2003). Two of the cases conducted in 2004 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 deficiencies in the 1998 Copyright Law in prior Special 301 filings. 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.

Need to amend the Copyright Act: To mitigate the obstacles above, and in order to bring Paraguay into compliance with its MOU requirements, the copyright industries have been working on a bill which calls for the following reforms:

 Increase criminal penalties for intellectual property rights violations to between two years and eight years (ten years in some enumerated cases). Fines would be added to prison terms;

⁸ Problems in the 1998 copyright law include: a term of two to three years' imprisonment (with levels of fines

author's death remains; terms of protection for various works vary 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.

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 vary throughout the law—industry had argued for longer

- Specifically make these criminal provisions "public" offenses;
- 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.

Criminal Code and Administrative Remedies

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, few people go to jail, greatly undermining the deterrent effect of otherwise well intentioned law enforcement efforts. 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 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 six 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 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 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.

In 2004, MPA proposed establishing administrative procedures designed to help effectively fight piracy. Among other things, this included creating rules for fast-track administrative actions, imposing administrative penalties, and coordinating with other authorities on anti-piracy matters. The proposal was presented to the Director of the Intellectual Property Office of the Ministry of Industry, who is preparing a similar bill to present in Congress.

FTA DISPUTE SETTLEMENT

International Intellectual Property Alliance 2005 Special 301 Report DISPUTE SETTLEMENT BASED ON FREE TRADE AGREEMENTS CONCLUDED WITH THE UNITED STATES

The U.S. government's negotiation of regional and bilateral free trade agreements (FTAs) offers an important opportunity to persuade our trading partners to further modernize their copyright laws and enforcement regimes. The FTAs have set new global precedents in copyright protection and enforcement, providing further impetus to e-commerce and to global economic growth and employment. However, these beneficial impacts of the FTAs will not be realized unless the obligations they create are rigorously fulfilled in the national laws of our trading partners. The U.S. government should be generous with advice and technical assistance in helping our FTA partners to fully implement the terms of the FTAs; but the government also should not hesitate to invoke the dispute settlement procedures of the respective FTAs whenever our partners decline to live up to the obligations which they have voluntarily undertaken and which constitute the commercial benefits of the deals for U.S. copyright industries. In this section of the report we identify outstanding FTA implementation issues with two of our partners—Jordan and Singapore—which we believe should be the basis for dispute settlement proceedings unless they can be promptly and satisfactorily resolved on an informal basis.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT DISPUTE SETTLEMENT SINGAPORE

While the U.S.—Singapore Free Trade Agreement (USSFTA) entered into force on January 1, 2004, the copyright and enforcement obligations which it contains did not become fully operative until January 1, 2005. On that date, extensive revisions to Singapore's Copyright Act, in the form of the Copyright (Amendment) Act 2004, took effect. (One USSFTA copyright obligation—extended terms of protection—took effect on July 1, 2004, under separate legislation.)

Singapore's copyright law amendments made numerous changes and succeeded in bringing the country's law into compliance with USSFTA requirements in most areas. Singapore should also be commended for the relatively transparent process which it followed in drafting these amendments. A draft of what became the Copyright (Amendment) Bill 2004 was posted for public comment in late July, with a comment deadline of August 18. While IIPA believes that a comment period of longer than three weeks would have been advisable for such a complex piece of legislation (which also included many significant statutory changes that were not required for USSFTA compliance), we recognize that this procedure offered far greater opportunities for public input than Singapore had offered in the past. It was also apparent that Singapore authorities seriously considered the comments they received, since many changes were made to the legislation before it was formally introduced and then rapidly approved by the Parliament.

However, despite these amendments, there remain some critical areas in which Singapore's law, at least as of the date of this filing, fails to fully comply with the USSFTA. We hope that ongoing bilateral dialogue will succeed in resolving these problems, some of which will require further amendments to Singapore's law. If, however, these efforts fail, IIPA urges USG to initiate the dispute settlement procedures of the USSFTA during 2005 to require Singapore to fully meet its FTA obligations. A non-exhaustive list of areas of current non-compliance includes the following.

Service Provider Liability

The Copyright (Amendment) Act 2004 made significant changes to Singapore's law regarding the liability of network service providers. However, the resulting law, even when supplemented with proposed implementing regulations that are now pending, falls short of full compliance with USSFTA Article 16.9.22. For example:

- The law shelters from full liability a service provider that is receiving a financial benefit from infringing activity, under circumstances not recognized in Article 16.9.22.b.v.;
- When a service provider has not received a notice of claimed infringement from a right holder, the law provides a safe harbor even if the service provider has actual knowledge of infringement, or is aware of facts or circumstances from which infringing activity is apparent, but

- nevertheless takes no action to remove or disable access to infringing material, in contravention of Article 16.9.22.b.v.;
- Contrary to Article 16.9.22.b.x., the law completely immunizes a service provider who restores
 access to material at the request of a subscriber, without granting the copyright owner (at
 whose request the access was originally disabled) a reasonable period of time to initiate legal
 action, and perhaps without even notifying the right holder of the "put-back" request;
- Singapore law lacks an expeditious procedure through which the right holder may learn the identity of the alleged infringer, as required by Article 16.9.22.xi.

Exceptions to the Reproduction Right

The Copyright (Amendment) Act, in sections 38A and 107E, created a new exception to the reproduction right that exceeds the bounds permitted under USSFTA Article 16.4.10. The exception applies to all copies that are "incidental" to the technical process of receiving a communication, even an infringing communication, or one that would have been infringing if made in Singapore. The Act also left undisturbed an even broader exception for "user caching" in Section 193E. The combined result is to give broad legal sanction to unauthorized copying within Singapore in connection with transactions carried out over the Internet. These exceptions must be substantially narrowed in order to meet the USSFTA standards (as well as those of the Berne Convention and the TRIPS Agreement).

Statutory Damages

Although the USSFTA Article 16.9.9 requires that Singapore provide right holders with an option for "pre-established" damages, amended section 119 of the Act creates a system in which the court may, in all cases in which statutory damages are elected, award merely nominal, or even zero, damages. This frustrates the goals of predictability and deterrence which statutory damages aim to achieve. The S\$200,000 (US\$122,000) ceiling on statutory damages in a single lawsuit should also be increased in order to achieve deterrence.

Technological Protection Measures

USSFTA Articles 16.4.7 and 16.9.5 have not been fully implemented because, among other reasons:

- The Singapore law gives the government the authority to categorically immunize all trafficking in devices and services that are aimed at circumventing effective technological measures to be listed in a future regulation;
- Deterrent criminal and civil remedies have not been provided for trafficking violations;
- The law only covers technological measures that have been "applied to copies";
- The proposed implementing regulations would permit the circumvention of certain software access controls (dongles) that are not damaged or defective, or for which a functioning replacement can readily be obtained in the market.

IIPA encourages the U.S. and Singapore governments to continue dialogue aimed at resolving these and similar problems with the FTA implementing legislation.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2005 SPECIAL 301 REPORT DISPUTE SETTLEMENT JORDAN

The United States-Jordan Free Trade Agreement went into force on December 17, 2001, ¹ triggering due dates for the government of Jordan to meet various requirements to protect intellectual property (as contained in Article 4 of the FTA). Jordan joined the WTO effective on April 11, 2000 and the Berne Convention effective on July 28, 1999, making it subject to those international obligations as well. The triggering dates for Jordan's FTA obligations were as follows:

- December 17, 2003: WIPO Copyright Treaty Articles 1-14 and WIPO Performances and Phonograms Treaty Articles 1-23;² national treatment [Article 4(3)-(5)]; and the substantive obligations in Article 4(10)-(16) of the FTA.³
- December 17, 2004: The enforcement obligations in Article 4(24)-(28).

IIPA urges the U.S. Government to initiate immediate dispute settlement consultations under Article 16 and 17 of the U.S.-Jordan Free Trade Agreement, and to take all steps necessary to resolve the dispute by bringing Jordan into compliance with the FTA as soon as possible. In IIPA's view, FTA deficiencies in Jordan include the following:

• Communication to the Public, Making Available, Broadcast Right for Sound Recordings and Performances [FTA Article 4(12)]: This FTA requirement has not been met by Jordan. The Copyright Law of Jordan (2003) (the "Law") provides producers of sound recordings with the right "[t]o make available to the public the phonogram, by wire or wireless means, in such a way that members of the public may access the phonogram at a time individually chosen by them," which is identical to the WPPT Article 14 right of "making available." The FTA requires Jordan to provide sound recording producers with an exclusive right to broadcast and communicate to the public of their phonograms by wired or wireless means, with the possibility of exceptions for analog transmissions and free over-the-air broadcasts (and the possibility of a statutory license for non-interactive services such as subscription or pay services). The government of Jordan has recognized that there is a deficiency in Jordan's law and has agreed to fix it in amendments.

¹ The FTA went into force when the United States formally notified the government of Jordan that it had taken necessary procedures to ratify the Agreement (Jordan had already ratified the Agreement in 2000).

² The FTA expressly states that the obligation to implement the WIPO Treaties does not apply to Articles 1(4) and 6(2) of the WCT, and Articles 5, 8(2), 12(2), and 15 of the WPPT.

³ Jordan also needed to accede to the WCT and WPPT by December 17, 2003; it missed this deadline, but joined the WCT on April 27,

Jordan also needed to accede to the WCT and WPPT by December 17, 2003; it missed this deadline, but joined the WCT on April 27, 2004 and the WPPT on May 24, 2004.

⁴ The Government of Jordan has apparently indicated that it will provide at a later stage an exclusive right of communication to the public for phonograms and performances, and that different options are being considered regarding the scope of the right and the exceptions that should apply to it in light of prevailing practices in Jordan.

- Anti-Circumvention and Technological Protection Measures ("TPMs") [FTA Article 4(13)]: There are several noted deficiencies:
 - IIPA's interpretation of the translations we have reviewed is that Article 55 of the Law may fail to cover all forms of "circulation" as required by the FTA regardless of whether there is a financial motive (Article 55 prohibits "Imlanufacturing, importing, selling, offering for sale, renting ... distributing or advertising in connection with the sale and rental of" circumvention devices). The U.S. Government should seek an amendment to provide for express language that is FTA-compatible.
 - The current law remains ambiguous on its face with respect to coverage of all components (i.e., "any part thereof") as required by the FTA; the law covers "any device, service or process" which only arguably could cover components. 6 Article 55 should be amended to expressly cover component parts (and code).
 - Under IIPA's translations, the current law prohibits activities "primarily designed, produced or used for the purpose of circumventing, deactivating or impairing" TPMs; FTA Article 13 also requires Jordan to prohibit activity "performed or marketed" for engaging in such prohibited conduct, and requires Jordan to prohibit activity "that has only a limited commercially significant purpose or use other than enabling or facilitating" circumvention. The Jordan law does not provide these other two objective tests. The language "performed" or marketed" and "limited commercially significant purpose" should be expressly added.
- Government Legalization of Software [FTA Article 4(15)]: The Jordan copyright law does not address the FTA requirement that Jordan must provide that all government agencies must use legitimate software, and must adequately manage government software usage. Such implementation may exist in other laws, regulations or decrees, but IIPA is not aware of them.
- Exceptions and Limitations [FTA Article 4(16)]: Exceptions and limitations were left untouched in the Jordan Copyright Law, as amended. A few exceptions may go beyond what is permitted under the Berne Convention, TRIPS, and the FTA. For example, it must be confirmed that Article 17(c) of the Law would never permit anthologizing of full articles to create textbooks, 8 and that Article 20 of the Law would never permit photocopying of entire books, including entire textbooks without authorization, since that would certainly "[damage] the copyrights of the author" and "interfere with the normal exploitation of the work." Specific

⁵ The Government of Jordan has apparently claimed that all forms of "circulation" of circumvention devices are covered because Article 55 of the Law prohibits inter alia the activities of distribution, and that such term is broad enough to encompass all forms of trafficking,

whether or not done with the purpose of financial gain or profit.

6 The Government of Jordan has apparently indicated that while Article 55 does not expressly cover "part" of any device, service or process, the words "device, process or service" include, under "normal rules of interpretation," any parts thereof. The U.S. Government should seek to clarify what is meant by "normal rules of interpretation" as to coverage of components (i.e., judicial interpretation).

The Government of Jordan has apparently indicated that a correct translation of Article 55 is "designed," not "primarily designed" to circumvent, deactivate or impair TPMs. The government has also apparently indicated that under "proper rules of interpretation," it may be inferred from the fact that any device, service, or technology has only a limited commercially significant purpose or use other than enabling or facilitating the prohibited conduct, that such device, service or technology is in fact designed to perform the prohibited conduct. Thus, the Government of Jordan claims, as presently worded, Article 55 is in compliance with the FTA. IIPA urges the U.S. Government not to permit the Government of Jordan to rely on so-called "proper rules of interpretation" to satisfy the FTA on such

⁸ The Government of Jordan has apparently indicated that Article 17(c) is intended to implement Article 10(2) of the Berne Convention, and should definitely not allow for "anthologizing" of full articles to create textbooks. The government has indicated that Article 17(c) permits the utilization of work only by way of illustration, which should lead to the utilization of fragments or parts and not entire works. The government has said that an amendment to Article 17(c) of the Law will provide that such an exception will apply only to the extent that the utilization is compatible with fair practice, as provided in Article 10(2) of the Berne Convention.

The Government of Jordan has apparently indicated that Article 20 of the Law allows photocopying in educational institutions provided

such practices do not cause damage to author's rights and do not conflict with the exploitation of the work, and indicated that this article

exceptions [including Article 17(c) of the Law] should be narrowed through amendments to comply with the FTA [as required by FTA Article 4(16), as well as TRIPS and the Berne Convention]. The Government of Jordan could also expressly provide the three step test language in the chapeau to Article 17 of the Law, as well as to other exceptions as necessary.

- Coverage of Sound Recordings in Criminal Provisions [Article 51(a)(2) of the Law]: Article 51(a)(2) of the Law¹⁰ only expressly applies to works but not expressly to phonograms (or performances). Article 51(a)(2) must be amended to expressly apply to sound recordings (and performances) as well as works. 11
- First Sale Provision May Impinge Upon Exclusive Rights (Article 15 of the Law): Article 15 of the Law provides that the owner (purchaser) of copies of a work has a "right to show them to the public." IIPA believes there may be an issue with translation from the Arabic in this instance, because, read on its face, this provision would violate TRIPS and the FTA (i.e., the ability to show or "publicly perform" a work without authorization after purchase of a physical copy would violate exclusive rights of the copyright owner). Assuming the translation (or the alternative translation, "right to make available to the public") is correct, this clause must be deleted. It should also be confirmed that transfer of ownership of the original or a copy of the work in Jordan would not entitle the person possessing such copy to further commercially rent it or import it into Jordan.
- Compensatory Damages [FTA Article 4(24)]: Article 49 of the law (not amended in 2003) does not appear to comply with Article 4(24) of the FTA, and may leave Jordan in immediate violation of its TRIPS obligations. The FTA is a more detailed enumeration of the TRIPS standard in Article 45 with respect to civil compensatory damages. Article 4(24) of the FTA fleshes out what is meant by the TRIPS text, by, among other things, requiring "the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement and any profits of the infringer that are attributable to the infringement that are not taken into account in computing such damages." In addition, the FTA confirms, "[i]njury to the right holder shall be based upon the value of the infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods." Article 49 of the Jordan law only refers to "a fair compensation," and states that "adjudicated compensation for the author shall in this case be considered a privileged debt with respect to the net price of the sale of the objects which were used to infringe his rights and the sum of money seized in the lawsuit." Article 49 appears to impose a calculation of the infringer's profits plus actual amounts seized from the infringer. Such damages could not possibly be adequate on their face to adequately compensate a right holder, and leave Jordan's law short of compliance with TRIPS and the FTA.
- Deterrent Statutory Maximum Fines [FTA Article 4(25)]: Statutory maximum fines were doubled, from JD3,000 (US\$4,250) to JD6,000 (US\$8,500). These maximum fines should be

should not condone the photocopying of entire books.

¹⁰ Article 51(a)(2) of the Jordanian Copyright Law provides that anyone who "offers for sale, distribution or rental a counterfeit work or copies thereof, transmits a counterfeit work to the public in any manner, uses a counterfeit work for material gain, brings counterfeit work into or out of Jordan, knowing or having adequate reason to believe that the work is counterfeit" commits a crime.

11 The Government of Jordan has apparently indicated that Article 53 of the Law (which applies various provisions, mutatis mutandis, to

sound recordings/performances) will be amended in order to apply also to infringement of sound recordings and performances.

increased to at least JD10,000 (US\$14,200). The FTA Article 4(25) test is whether penalties "deter future acts of infringement with a policy of removing the monetary incentive to the infringer." TRIPS Article 61 requires availability (and imposition) of "monetary fines sufficient to provide a deterrent."

- Seizure of Documentary Evidence [FTA Article 4(25)]: There is also no express provision in Jordan's law as amended for seizure of documentary evidence, as is required by Article 4(25) of the FTA.
- Ex Officio Enforcement Authority [FTA Article 4(26)]: The FTA sets forth that Jordan must "provide, at least in cases of copyright piracy or trademark counterfeiting, that its authorities may initiate criminal actions and border measure actions ex officio, without the need for a formal complaint by a private party or right holder." Jordan must do this by December 17, 2004. There is nothing in Jordan's copyright law that authorizes ex officio action.
- Presumptions [FTA Article 4(27)]: The Berne Convention requires a presumption as to authorship, and the FTA goes further to require presumptions as to ownership and subsistence of copyright for works, performances and phonograms. The Jordan law does not expressly provide even the Berne presumption. Jordan must amend its law to provide presumptions of ownership and subsistence of copyright that are consistent with the FTA.
- Criminalization of Piracy for "No Direct or Indirect Motivation of Financial Gain" ("Net Act"/Not-For-Profit) (FTA Article 4(27)): Article 61 of the TRIPS agreement requires the criminalization of copyright piracy on a commercial scale. Since piratical acts (such as those occurring over the Internet) can cause devastating commercial harm regardless of any profit motive, TRIPS requires criminalization even of acts that may not have a motive of financial gain, but cause significant commercial harm. Article 4(27) of the FTA recognizes this fact in requiring Jordan to "provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain shall be considered willful copyright piracy on a commercial scale." Jordan's legislators have apparently also recognized the nexus between the FTA provision and TRIPS, since they enacted changes to Articles 9 and 23 of the Law, which are unclear but could be interpreted broadly to result in the criminalization of acts taken even without profit motive. The amendments removed the phrase "for financial gain" from the enumerated exclusive rights for works and sound recordings (and performers). Since Article 51 of the Law criminalizes the exercise of exclusive rights without authorization (without regard to motive of financial gain), it may now be interpreted as criminalizing infringers who infringe without "direct or indirect motivation of financial gain," as required by the FTA. Nonetheless, it would be helpful for guidelines issued in relation to this Article to clarify that there need be no profit motive in order for a defendant to be criminally liable under Article 51 of the Law.
- Altering Features in Seized Materials Impinging on Exclusive Adaptation Right [Article 47(a)]: Article 47(a) of the Law provides that, as an alternative to destruction of infringing goods found in a seizure or raid, a court may "order the features of the copies, reproductions and equipment to be altered," which is not permitted under the FTA enforcement text. Alteration of copyrighted works in this way without approval of the copyright owner would be a violation of the author's adaptation right [Article 9(b) of the Law], and would violate the TRIPS Agreement and the Berne Convention (and the FTA).

• **Customs/Border Provisions:** There are no customs/border provisions in the Jordan copyright law. In addition to being an FTA requirement [e.g., Article 4(26) of the FTA requires border measures to be carried out by authorities on an *ex officio* basis], border measures are required under TRIPS. The government of Jordan should enact statutes that deal with these requirements as quickly as possible.

In addition to failing to meet various requirements set forth above, the Government of Jordan introduced a new regulation in which the censorship fees for all audio-visual carriers were substantially increased. IIPA believes these new censorship fees in Jordan violate GATT rules on national treatment and GATT Article VIII on Fees and Formalities.

COUNTRIES DESERVING SPECIAL MENTION

International Intellectual Property Alliance 2005 Special 301 COUNTRIES DESERVING SPECIAL MENTION

AZERBAIJAN

As the U.S. Trade Representative noted when Azerbaijan was placed on the <u>Watch List</u> in 2004, there are many steps remaining for Azerbaijan "to fully implement the 1995 U.S.-Azerbaijan Trade Agreement and address deficiencies in its IPR laws." In fact, Azerbaijan obligated itself to fix these deficiencies over ten 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 which need to be corrected in order to bring the country into compliance with the Berne Convention (to which it adhered in 1999) and the Geneva Phonograms Convention (which it joined in 2001). The long delay in the protection of sound recordings has 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 obligations under the bilateral trade agreement, the Berne Convention, and the WTO TRIPS Agreement. Also unclear is whether Azerbaijani law provides civil *ex parte* search provisions as required by TRIPS.

Article 158 of the Azerbaijani Criminal Code (2000) provides liability and sanctions 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.

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).

Enforcement deficiencies: There is currently no "adequate and effective" enforcement in Azerbaijan. There is no meaningful police, customs, or prosecutorial activity, as required by the bilateral trade agreement and the WTO TRIPS Agreement. There are administrative sanctions (Article 186-1) providing for fines of 20 times the minimum monthly wages for copyright

infringements. However, these fines are only imposed if the infringement causes damages that equal more than 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. An estimated 11.8 million pirate copies of audio carriers including 8.6 million cassettes and 3.2 million CDs were available in the Azerbaijani market in 2004. Piracy rates for the music market writ large were an estimated 81.6%, and as for international repertoire — over 90%. Losses suffered by American rightholders amounted to US\$12 million and overall losses of international rightholders exceeded US\$17 million.

There were no reports on cases resulting in either administrative or criminal sanctions for neighboring rights infringements. Cases regarding copyright violations brought on behalf of Azerbaijani rightholders are usually considered in civil courts. There are no reports of any counterfeit audio products of international rightholders seized during the past several years.

There are no separate subdivisions or specially appointed officers dealing with the intellectual property infringements within the Azerbaijani law enforcement agencies.

BAHAMAS

Copyright law deficiencies: Copyright legislation in The Bahamas is poor. The copyright law does not provide protection for foreign sound recordings; it has not joined the Geneva Phonograms Convention, nor joined the WTO (which would afford protection for sound recordings, nor has it ratified or implemented the WIPO Performances and Phonograms Treaty (WPPT). Moreover, with respect to other works, The Bahamas is a party only to the Brussels Act (1948) of the Berne Convention. The immediate impact of these inadequacies is that international sound recordings do not receive the same treatment as local sound recordings and that Internet exploitation of music may be unprotected. Moreover, The Bahamas may lack border measures to prevent the trafficking of counterfeit products.

The Bahamas must improve its national legislation by, at a minimum, ratifying the WPPT, the WIPO Copyright Treaty (WCT), and the Paris Act (1971) of the Berne Convention, and amending its domestic legislation accordingly to meet the obligations in these treaties as well as the requirements of TRIPS. Additionally, it must organize enforcement actions that would discourage the sale of pirate products.

Enforcement deficiencies: Little or nothing is currently being done to provide effective enforcement against the spread of physical goods piracy. We are not aware of any police actions that serve as real deterrents against the commercial sale of pirate goods. The lack of adequate legislation and enforcement discourages potential local and international investments and threatens the growth of a local music industry. The Bahamas has the potential to be a successful market for the legitimate recorded music industry due to high levels of tourism and per capita income. The legitimate industry is also very interested in the exploitation of local and international repertoire in public locations, including cruise ships, and by broadcasters.

Letters of agreement: On February 18, 2000, the Motion Picture Association and the Television Association of Programmers filed a Special 301 petition that highlighted the fact that the Government of The Bahamas had implemented a compulsory license that violated international copyright norms. As a consequence, the Government of the United States entered

into negotiations with the Government of The Bahamas. The negotiations resulted in an exchange of letters dated October 26 and November 9, 2000 constituting an Agreement between the two parties. Under that Agreement, The Bahamas committed to conform its cable compulsory license to international norms. Even though more than four years have now passed, The Bahamas still has not met its commitments under that agreement.

BANGLADESH

Piracy and enforcement deficiencies: IIPA members express concern about alarming piracy levels in Bangladesh, affecting works such as published materials, optical media, music cassettes and theatrical prints. There seems to be little or no political will to implement and enforce the copyright law

Rampant book piracy is practically pushing legitimate publishers and distributors out of the market altogether. This scourge affects all categories of books, including English language learning books, higher education textbooks, medical books and other professional titles, computer books, trade fiction, dictionaries and more. These books can be found throughout the country, at universities, professional schools and international schools as well as in book markets in cities such as Dhaka, Chittagong, Rajshahi and Khulna. Publishers estimate that fewer than one in ten books in use in Bangladesh is a legitimate version. To date, the government has taken virtually no action to combat this pervasive problem.

In addition, optical media and cassette piracy is blatant and there is almost no enforcement. Two pirate optical disc plants, with three lines each, are operational in Bangladesh, one of which is owned by a major Pakistani CD pirate producer. Furthermore, pirate CD-R duplication is spreading rapidly.

Finally, the motion picture industry has experienced repeated instances of theatrical print piracy, with titles being changed and fraudulently cleared through the Board of Film Censors. In some cases, these fraudulent prints are then contracted for exhibition throughout neighboring countries. Right holders are unaware of the presence of these pirated theatrical prints unless they are reported by legitimate distributors in the affected territories.

IIPA encourages the government of Bangladesh to work with the appropriate right holders in taking steps to significantly reduce these piracy levels.

BOSNIA AND HERZEGOVINA

Piracy and enforcement deficiencies: The lack of effective enforcement activities is problematic in Bosnia and Herzegovina. High levels of piracy in the business software sector are reported, including the widespread use of unlicensed software in both commercial and public enterprises. The overwhelming amount of music discs (largely on CD-Rs), video tapes and DVDs sold in the country also are pirate. CD shops routinely sell pirated business software, and computers regularly are sold with illegal software pre-installed. The music industry reports that CD shops located in urban areas tend to sell legitimate copies of regional and local repertoire. However, international repertoire is widely sold in street stalls by pirate vendors, and in numerous specialist shops located by, and catering to, troop bases of the multinational Stabilization Force (EUFOR) that serve in the country. Specialized CD shops are invariably

located in what are almost exclusively pirate music/games enclaves. Therefore, decisive action against the speciality shops and vendors should not be difficult for the Bosnian government authorities to undertake. Pirated CD-Rs containing music are produced in Bosnia and shipped into Croatia, disrupting that market as well.

Copyright law deficiencies: The business software industry (BSA) reports that the pertinent laws in Bosnia and Herzegovina do not provide adequate and effective protection of copyright. Deficiencies include: the absence of clear protection for temporary copies; a too-broad decompilation rule that is not in line with the EC Copyright Directive; and the fact that possession of illegal software for commercial purposes is not an infringement. Necessary amendments to the 2002 Copyright Act have not yet been adopted.

Enforcement deficiencies in the area of business software: Even more troubling, the present, albeit deficient, copyright law has not been applied in practice to date. An exception in 2004 — the first signs of IPR enforcement — consisted of several police raids against music and other IP pirates (these actions were undertaken in December 2004). Official results of the raids are not yet available; thus any assessment of these actions is premature. Such raids, although a positive step, are nonetheless isolated, and do not mitigate the overwhelming deficiencies in the field of IP protection. Police, prosecutors and customs officials still lack the equipment and expertise necessary to conduct raids, perform investigations, and commence cases against copyright infringers. Nor does the judiciary have the necessary training or experience with IPR issues. Most software users continue to use illegal software; licensed software is so rare as to be almost non-existent. In addition, the software industry understands that illegal software is in use by government institutions, including those responsible for enforcement of copyright and related rights law. Last, piracy at the border is a particular problem; customs authorities are not taking appropriate actions to prevent the shipment of pirated products to and across the country.

In order to achieve adequate and effective protection of intellectual property rights for all copyright industries, the government of Bosnia and Herzegovina must take immediate and decisive measures to establish an effective IPR enforcement regime.

BURMA

Copyright law deficiencies: Burma has been a WTO member since 1995. It is not, however, a member of the Berne Convention nor a signatory thereto, nor has it ratified or implemented the WIPO "Internet" treaties. The country does not have a modern intellectual property rights regime under which piracy may be adequately addressed. Like its Southeast Asian neighbors, the potential for migration into its territory of optical disc plants involved in infringing activities raises concerns.

CAMBODIA

On October 13, 2004 Cambodia became a full WTO member. Following enactment of its Copyright Law in 2003, Cambodia is now scheduled to accede to the WIPO Treaties in 2005 and to join the Berne Convention. The new Copyright Law appears to contain generally favorable provisions. It provides protection for temporary copies and against the circumvention of technological protection measures. Furthermore, it provides civil and criminal remedies,

including the recovery of damages and the confiscation and destruction of infringing equipment and materials.

Given the country's location, the potential for migration of more optical disc plants engaged in piracy remains a concern. The lack of an appropriate legal regime to address optical disc overproduction must be addressed to forestall such plant migration. It has already been confirmed that some small optical disc manufacturing is taking place in Cambodia, where one plant may have migrated to the capitol. Therefore, the Cambodian government should be encouraged to adopt comprehensive optical disc regulations and to have the appropriate regulations in place before pirate production becomes a significant problem.

The entertainment software industry reports that the 2004 U.K. Customs statistics included the seizure of two shipments of over 200 video games originating from the country. Book publishers also report an influx of illegal reprints pouring over the borders from Vietnam. Thus, Cambodia should be encouraged to take the appropriate measures to reduce the flow of pirated materials into and out of the country.

CANADA

In 2002, following extensive public consultations, the Canadian Government unveiled a three-tiered agenda for copyright reform in the form of a report presented to the House of Commons Standing Committee on Canadian Heritage (the "Committee"). The first tier (so-called "short term agenda") called for Canada to ratify the WIPO "Internet" Treaties, which Canada signed in 1997, in order to "ensure that Canadian rights holders will benefit from copyright protection recognized in all treaty countries." In order to do so, the Government identified necessary amendments to Canada's Copyright Act, including adoption of a making available right and protection for technological protection measures and rights management information. In June 2004 the Committee recommended that the Government of Canada immediately ratify the WIPO "Internet" Treaties and that legislation permitting such ratification be introduced in the House of Commons by mid-November 2004.

Although the Canadian Government's stated commitment to ratify the WIPO Treaties in the "short term" is laudable, the actions of the Canadian Government in this regard have been woefully inadequate. Nearly ten years after playing a major role in negotiating and drafting the WIPO Treaties, and roughly eight years after signing them, the Government of Canada still has failed to ratify, or even introduce legislation to implement them — in spite of repeated requests from the responsible Parliamentary Committee and statements of intent from the Government. Meanwhile, 50 countries worldwide, including all of the countries in North America apart from Canada, have ratified. Each year that Canada has failed to act on the WIPO Treaties, it has fallen further and further out of step with its trading partners.

Quick action on copyright reform is necessary, not only to harmonize Canada's regime with much of the world, but to ensure adequate and effective protection of copyright works in the digital environment. This was made clear by a 2004 Federal Court of Canada decision (BMG Canada, Inc. v. Doe, 2004 FC 488) that effectively legitimized Internet piracy of sound recordings of music — a decision that has left Canada not just out of step with its major trading partners in developing modern norms of protection, but in direct violation of its obligations under TRIPS to protect the reproduction right and to provide for effective infringement penalties. A subsequent decision of the Canadian Federal Court of Appeal, with respect to the private copying regime, found that copies made on fixed memory in MP3 players (and presumably on

computers' hard drives) do not fall within the private copying regime. Both decisions are under appeal.

Canada's out-of-date copyright law has created an environment of legal uncertainty for digital copyright in Canada. As the Supreme Court of Canada has stated in an extraordinary criticism of the Canadian government for its failure in this regard:

Parliament's response to the World Intellectual Property Organization's (WIPO) Copyright Treaty, 1996 ('WCT') and the Performances and Phonograms Treaty, 1996, remains to be seen. In the meantime, the courts must struggle to transpose a Copyright Act designed to implement the Berne Convention for the Protection of Literary and Artistic Works of 1886, as revised in Berlin in 1908, and subsequent piecemeal amendments, to the information age, and to technologies undreamt of by those early legislators.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 (para. 43).

The result has been widespread trafficking in pirated intellectual property that has left the recording industry particularly vulnerable. The broad availability of pirate copies of recordings on the Internet and illegal digital copying are devastating sales. Prime Minister Paul Martin recognized the danger in the aftermath of the *BMG* v. *Doe* decision: "We are not going to let an industry that is so important to this country . . . be jeopardized." The time to act is now, and we urge the U.S. Government to press for immediate reform, and to initiate consultations in the WTO if immediate reform is not forthcoming.

Private copying exception: As amply demonstrated by the Federal Court of Canada and Federal Court of Appeal decisions referred to above, the Canadian Copyright Act's limited exception for the private copying of sound recordings requires clarification. The definition of private copying must be clarified to specify that it does not exempt Internet file sharing from copyright infringement and only applies to private individuals making copies for their own use of non-infringing sound recordings they legitimately own. In the digital era, anything broader than this definition transforms private copying into public copying, in violation of TRIPS. There is nothing private about the 2.6 billion sound recording files downloaded on the Internet each month without the consent of the artist or record company. Without specified limitations, the limited "private copying" exception for sound recordings is inappropriately transformed into an unlimited public copying license, with disastrous results for rights holders worldwide.

CROATIA

Piracy and enforcement deficiencies: The absence of sustained and consistent IPR enforcement activities in Croatia is a significant problem, particularly for the business software industry. The level of piracy experienced by the business software industry remains at an unacceptably high level. The Business Software Alliance (BSA) estimates that the 2003 business software piracy rate in Croatia was 59%. The recording and software industries report considerable delays with criminal raids as well as poor responses by the police to IPR infringement activity. However, after a special Cybercrime and IP Department was established within the Ministry of the Interior, the police appear to be placing greater emphasis on these cases and have shortened, but not eliminated, delays. Meaningful progress can be expected

only after Cybercrime and IP Departments are established in every police district throughout the country. All the copyright industries report that the police lack sufficient resources, in particular concerning the storage of seized pirate material, as well as the appropriate equipment, training, and expertise to effectively conduct their enforcement efforts, even while maintaining good relations with the industries. There are initiatives underway, including within the national CARDs program, to reorganize and create IPR specialists within the State Attorney's Office and the Judiciary.

BSA reports that the State Inspectorate (market police) did act on referrals from the industry in a timely manner in 2004, but that coordination between the State Inspectorate and police is minimal, resulting in many cases that have never been acted upon or never properly prosecuted under Croatian law. Nonetheless, enforcement is hampered by a lack of effective preliminary measures and expedient criminal procedures. Unfortunately, lengthy court proceedings are endemic to all of the copyright industries. Civil injunctions often take longer than six months to be issued, as compared to three days to three weeks, on average for the rest of Central Europe. One sign of progress in 2004 was the long-awaited enactment and application of the Customs Regulations on border enforcement; these regulations have shown initial positive results stemming the cross border flow of pirated products. The copyright industries request further transparency in the area of border enforcement, in particular, that Customs officials need to share information with rightholders about goods that cross the border.

CYPRUS

Piracy in the audiovisual sector: Cyprus suffers from a high level of pre-theatrical release piracy, with many pirate optical discs (VCDs, DVDs, and DVD-Rs) openly and widely available at kiosks, video clubs, and souvenir shops. Pirate discs are copied from parallel imported DVDs (also openly sold in video shops) or from pirate VCDs and DVDs imported from the Far East. There are about 150 souvenir shops where mostly tourists purchase pirate copies, 125 video clubs where pirate rentals and sales are taking place, and 250 kiosks working on a 24-hour basis which sell pirate products mostly to local residents. Many video clubs continue to obtain pirate copies of the latest titles, including titles that may not be legally rented or sold under the so-called "Windows" legislation (which protects a limited number of titles in theatrical release against video piracy from parallel imports). The retail shops supply the various markets, with a destructive effect on legitimate optical disc/cassette sales, and are creating a decline in box office admissions. In addition, pirate discs sold to tourists, who number around three million annually, are indirectly exported to their home countries (e.g., the UK, Scandinavian countries, Germany and Russia).

Record and music piracy: Counterfeit CD sound recordings are also sold openly in the many hundreds of small shops and kiosks around the island, which service the year-round tourist market. In addition, the recording industry has discovered that the small shops, sometimes found inside hotels, again aimed at meeting the needs of the resident tourists, are often found to be selling counterfeit discs. Each of these sell roughly 500 discs. In nearly all instances, the counterfeit discs are very poor quality CD-R home copies, with photocopied artwork, and presented in plastic sleeves. There is little or no evidence that the importation of discs from outside the island is a large problem in Cyprus. The recording industry has not yet encountered any pre-release CD-R discs in Cyprus.

Piracy in the entertainment software sector: The entertainment software industry reports that piracy of entertainment software products is growing worse, as pirated video games remain readily available at kiosks, shops catering to tourists, and in video rental outlets. Internet café piracy is a problem, as none of the 18 cafés on the island use licensed entertainment software. Modified or chipped video game consoles (i.e., with a circumvention device or modchip installed in the machine) are also prevalent in the market. The availability of pirated games for download from the Internet is damaging (and will continue to harm) the small PC games market that the industry has been able to develop in the country.

Enforcement and legislation: It appears that the Cypriot authorities have finally begun to respond to repeated requests to take action against the rampant piracy on the island. The first raids took place on December 29, 2004 when police and customs officers raided 17 shops in Limassol, seizing over 42,000 pirate DVDs, VCDs, videocassettes, music CDs, PlayStation® games, and two cars that were full of discs. Three shops were completely emptied of product. On January 5 2005, the Police and CYFACT raided ten kiosks and two shops in and around Nicosia and seized 1,561 DVDs, 12,666 CDs, 808 PlayStation games and 28 CD burners. On January 9, 2005 police and CYFACT raided an Indian-owned shop in Nicosia and seized around 4,300 DVDs and CDs, two CD burners and a DVD burner. On January 16, 2005 the police searched a shop and house in Larnaca and confiscated around 24,000 DVDs and CDs. Finally, on January 18, the Paphos Police searched four shops and seized 1,393 discs and 75 videocassettes. The recent raids follow a CYFACT seminar on December 16 for prosecutors, police officers, customs officers and Ministry of Commerce officials, and appear to indicate a change in attitude by the local authorities to the rampant pirate trade on the island. Despite the recent adoption of increased penalties for copyright offenses, and the creation of a small Anti-Piracy Squad at Police Headquarters, the local industry has been extremely frustrated at the almost total absence of police enforcement activity. While the recent raids are a very welcome breakthrough, they will have to be followed by the imposition of deterrent penalties and by a regular and consistent police response to the hundreds of complaints filed annually by CYFACT if the unacceptably high level of piracy on the island is to be reduced.

One entertainment software company reports that it has had some success with the customs authorities. In 2004, actions by customs authorities resulted in the seizures of cartridge-based video game products entering the country, thus somewhat reducing the levels of piracy for this platform. However, counterfeit video game cartridges continue to be widely available in the market, and it is hoped that the early efforts of the customs authorities will be sustained.

Finally, it appears that the Cyprus Copyright Law is applied by the judiciary in a way which raises difficult barriers to the enforcement of phonogram producers' rights. Piracy rates continue to increase in Cyprus, yet cumbersome burden-of-proof rules as to copyright ownership makes the initiation of legal proceedings against infringers very difficult. The Cyprus Copyright Law is currently interpreted in a way that requires rights owners to prove their ownership in each song fixed on a particular CD and does not provide for appropriate presumptions of ownership in favor of phonogram producers, nor does it allow sample testing of infringing goods. Thus, defendants are able to alternatively avoid suit altogether, limit their liability, or, at the very least, delay the legal proceedings against them. As required by the EU Enforcement Directive (adopted in May 2004), and in order to combat sound recording piracy, the recording industry urges the government of Cyprus to amend its laws to ease the burden of proving ownership, and to allow testing of samples of infringing goods.

CZECH REPUBLIC

Overview of key problems: Over the past years, there has not been a significant improvement in resolving key enforcement and legislative problems for many of the copyright industries in the Czech Republic. Music piracy remains at unacceptably high levels — one in two sound recordings sold is illegal. The main problems frustrating the legitimate market are optical media piracy, poor border enforcement, delays in criminal enforcement proceedings and lingering deficiencies in the copyright law. The once relatively strong market has been shattered due to massive CD-R piracy and a major increase in home burning. The recording industry's enforcement statistics indicate that over 90% of the seized pirated music discs were CD-Rs, which represents a significant increase since 2001. Over the past five years, the Czech legitimate music market has declined 35% in terms of value.

A serious problem in the Czech Republic is the overproduction of optical media (CDs, CD-Rs, and DVDs). The manufacturing capacity of the three operating CD plants with over 44 production lines is estimated to be as high as 154 million discs per year — significantly exceeding local demand. The GZ Digital Media plant has mastering capability and the Eximpo plant has CD-R and mastering capability. The GZ plant has obtained IRMA certification, and dialogue with the industries has been initiated with Eximpo and CDC on adoption of SID codes, though there remains scant evidence that these plants have any serious intention of adopting these codes.

The recording industry reports that there are cases being investigated involving pirated discs produced by known Czech plants. Additionally, cases are being investigated (in Germany, Switzerland, Poland and the U.S.), involving discs with large-scale music content in MP3 format produced by non-Czech plants but mastered in the Czech Republic. Recent visits to the Czech plants Eximpo and CDC by industry groups confirm that both the verification of the rights ownership of customers and the content of the orders are inadequate. In the absence of proper plant regulations, plant operators will have no incentive to adopt procedures to eliminate unauthorized reproduction. Furthermore, without any clear obligations for legally required checks and sanctions for violations, law enforcement agencies will have no basis for proactive investigations of plants. At present, the inverse is true — in the absence of regulations, plants have incentives to produce illegal material. The problem is further exacerbated by the absence of laws to monitor products leaving the plants (i.e., verification that the discs are as described and authorized); discs for both domestic and export use are of concern.

Illegal imports of pirate recordings from abroad continue, as well as pirate production of counterfeits and unlawful copies of sound recordings within the territory of the Czech Republic, particularly by Asian-based and other organized crime syndicates. These illegal activities are concentrated primarily at border areas in western and northern Bohemia. The most serious problems are in the district of Cheb, where police and Ministry of Interior officials, at least in theory, have been investigating illegal activities for years, without actually undertaking any meaningful enforcement. The illegal activity is open and notorious. Despite an increase nationwide in the number of investigations, there has been little political interest or central enforcement action to address the growing music piracy problem with closed cases. The criminal enforcement apparatus remains so slow (especially at the investigative, prosecutorial and judicial levels) that there is no deterrent effect.

The entertainment software industry reports that the level of piracy for its products continues to be problematic. Pirated console-based entertainment software products continue

to be shipped from Russia, sometimes through Austria and Germany, with distribution believed to be controlled by Russian organized crime syndicates. The level of piracy for counterfeit and pirated cartridge-based games increased in 2004, with Asia remaining the primary source of pirated material. Distribution of cartridge-based products is also controlled by organized criminal groups in the country. Internet café piracy continues to be a problem; only 20% of the 400 cafés have obtained licenses from ESA member companies. There is also concern that Internet piracy is growing.

On the positive side, the business software industry reports continuing cooperation from the government, especially with developing systems to monitor governmental compliance with its commitment to use only legal copies of software. There also continues to be a stream of fairly strong court decisions in software piracy cases.

Copyright law deficiencies: Legislative deficiencies remain. Despite numerous requests from the copyright industries, the Czech Government has not improved its current (2000 copyright law) insufficient protection of technological protection measures and rights management information. Furthermore, recently adopted amendments to the Copyright Law seriously undermined the ability of phonogram producers and other rightholders to exploit their rights.

Actions that the Czech government should take in 2005

- Demonstrate political will via public announcements and internal government orders
 to effectively implement and make the proper enforcement of IPR laws a priority;
- Have the Interior Ministry take swift actions against the omnipresent pirate activities, especially in the Cheb district;
- Adopt optical media regulations to control optical media production and distribution;
- Strengthen border enforcement to stop importation and transshipment of pirated goods, including optical media product;
- Improve the speed of criminal enforcement (at the police investigation, prosecutorial and judicial levels);
- Improve coordination between the various enforcement bodies (police, customs, prosecutors and the judiciary) so that concrete results in combating piracy is achieved as well as expand their expertise to act against Internet piracy;
- Amend the Copyright Law to effectively implement the WIPO Treaties, in particular, strengthen the provisions on technological protection measures and rights management information, in co-operation with copyright industries.

ESTONIA

Enforcement deficiencies: There has been little improvement in IPR enforcement activity in Estonia over the past several years. The piracy levels remain high and have negatively impacted the legitimate content industries. Weak border enforcement, Internet piracy, growing CD-R/DVD-R piracy, traditional and hand-to-hand piracy in the physical market, as well as a failure to implement effective civil search and seizure remedies are the major issues. The Estonian Government, in particular the Finance and Interior Ministries, must demonstrate proper political will to implement effective IPR enforcement in co-operation with rightholders' organizations.

Weak border enforcement remains a major problem, particularly along the eastern border with Russia. According to the copyright industries, in 2004, at least 70% of the pirated copies of music CDs in Estonia, came from Russia. The Estonian anti-piracy organization EOCP reports that smuggling of illegal pirate copies on the Eastern Estonian border continue. These reports were confirmed by the 2004 seizure by neighboring Finnish Customs officials of 13,000 pirate copies. While imports of pirated DVDs from Russia remain a threat to the motion picture industry, locally burned DVD-Rs are a growing source of pirated filmed entertainment in Estonia. Pirated business software also appears to originate primarily from neighboring countries, in particular Russia and Latvia. Despite the obvious presence of Russian-originated illegal product, Estonian Customs has not been doing its job. In 2003, BSA received only one request from Estonian Customs to assist with a seizure of suspect software products; in 2004, no requests were received. This despite BSA's participation in several training programs for Estonian Customs officials, in order to enable them to identify and seize counterfeit and illegally copied product pursuant to their *ex officio* powers.

The copyright industries urge the Estonian Government to mandate Estonian Customs to exercise their *ex offico* powers in order to stem the flow of counterfeit and pirate product into Estonia from Russia and Latvia.

The police have failed to take any effective actions against Internet piracy as well as against the illegal trade in the physical market. Those involved in Internet piracy operate with impunity, especially on FTP (file transfer protocol) servers and on popular illegal peer-to-peer services such as KaZaa and eDonkey. Rights holders contemplating legal action against Internet pirates face difficulties in identifying infringers due to restrictions in the Telecommunications Law. Local Internet Service Providers have refused to identify their users based on an IP address, as they (wrongly) consider this to be a "surveillance" which can only be undertaken in criminal proceedings.

The large-scale trade in pirate goods in the Tallinn harbor area targeted at Finnish tourists, as well as trade in Eastern Estonia, continues unabated, without any threat of police action. Pirates in Tallinn are charging as much as \$US13.00 for CD-Rs with pirate content. The police should focus on thoroughly investigating large-scale traders, uncovering warehouses and instigating cases against those controlling the pirate trade. Effective enforcement measures, such as well prepared raids, expeditious prosecutions, and deterrent sentencing, should be undertaken. The requirement for such action is clear: in Tartu, over 22,000 pressed CDs and DVDs were seized from a pirate distribution center; and in Tallinn, a pirate distribution center housing some 8,000 CDs and DVDs was discovered in 2004. There has been no evidence of basic communication and co-operation between the police and customs with respect to pirate goods, although this is an essential and basic requirement in any government program that is serious about tackling piracy.

BSA has been discussing the implementation of civil search and seizure procedures with the Government of Estonia for many years. Estonia is now close to ten years late in implementing a TRIPS-compliant civil search and seizure remedy. Without this remedy, private right holders are severely restricted in their ability to enforce and protect their own intellectual property rights. BSA urges the implementation of an effective civil search and seizure remedy without further delay

Finally, the Estonian government must direct its attention to optical disc plant activity in Estonia. In 2004, there was a significant amount of activity in connection with setting up OD replication operations in Estonia. While there has not yet been evidence or indication of

unauthorized production, the Estonian Government should start preparing optical disc regulations. The copyright industries' worldwide experience shows that the absence of such regulations, combined with a highly competitive market, can prove difficult for struggling OD plants wishing to comply with copyright laws, when competitors are generating revenue from illegal activities.

GEORGIA

Copyright and other legislative deficiencies: The rights of international phonogram producers are not fully protected in Georgia. Georgia has not even ratified the Geneva Phonograms Convention—an obligation that it undertook in an agreement with the United States more than a decade ago.

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." These problems have still not been addressed. 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, three years after the report by the U.S. government, Georgia has still not corrected these deficiencies (and including complete ratification of the digital treaties that it acceded to) nor has it improved its enforcement regime.

National legislation must be amended to enhance effective anti-piracy activity. Currently, the Georgian Administrative Code does not provide liability for distribution or other illegal use of phonograms.

There were an estimated 5.5 million pirate copies of sound recordings sold last year, including 4.3 million cassettes and 1.2 million CDs. Piracy rates for the music sector at large was approximately 80%, and over 90% for American repertoire. Trade losses suffered by American industry amounted to US\$8 million and overall losses suffered by international rightholders exceeded US\$11.4 million.

Enforcement deficiencies: In 2004, upon initiation of rightholders' complaints, the Georgian Police initiated two criminal cases under Article 189 of the Georgian Criminal Code. Police seized 160 CD-Rs and 684 cassettes containing phonograms of national and international repertoire. The investigation of these criminal cases is still ongoing; unfortunately, these are the only two reported cases.

There are no separate subdivisions or officers responsible for the fight against intellectual property infringements within the Georgian law enforcement agencies. This significantly impedes the establishment of an effective anti-piracy program.

GREECE

Business software: The widespread use of unlicensed software and distribution of low quality counterfeit CDs across the country show that there is still a lot to do to implement Greek intellectual property legislation in practice. Due to a lack of consistent enforcement activities, the level of piracy experienced by the business software industry remains at an unacceptably high level in both the private and public sectors, and even within the Public Administration. The Business Software Alliance (BSA) estimates that the 2003 business software piracy rate in Greece was 63%. This is well above the EU average of 37% and the highest of all countries in the enlarged EU region, including the traditionally more challenging countries in Eastern Europe.

Between 1999 and 2002 the increased efforts of the Greek National Police and SDOE (Greek Tax Police) in the field of software copyright protection resulted in an 8% decline in the Greek piracy rate. However, as both SDOE and the National Police have practically ceased their activities in the field of software copyright protection in the last two years, this positive downward trend has come to a halt. Meaningful progress can be expected only if the National Police and SDOE re-activate their enforcement activity and establish special departments/units within SDOE and the National Police to systematically fight intellectual property crimes.

In addition, the Greek government should lead by example stressing the importance of protecting intellectual property rights and legal software use within the Public Administration. By taking these positive steps and implementing policies that support legal software use, the government could raise significant awareness of the problem and help bring down the unacceptably high software piracy rate.

Music piracy: Music piracy in Greece is spinning out of control, and the government must take urgent action to address it. Similar to the situation in Spain, criminal syndicates use illegal immigrants (90% of which are estimated to be Nigerians). Due to the incredible tolerance of state services responsible for the application of immigration law and the scandalous impunity applied by the Greek justice system, the criminal networks are expanding day by day.

While the Greek police have confiscated a fair amount of pirate material, and have arrested some offenders, the only punishment the offenders get is their waste of time in the courtroom. The applied sentences are not the ones dictated by the law and a systematic consideration of attenuating circumstances is standard practice for judges. As a result, the imposed sentences are very low and never exceed a three year suspended sentence. Even the fines provided by the copyright law, which cannot be suspended, are not being imposed by the judges. In addition, the criminal records of the offenders are not updated, and the offenders appear to the court as first time offenders, while in a great number of cases they have already been sentenced several times.

Simply put, the state must do much more to address a large and growing problem. Piracy levels are well over 50%. The fiscal police must be directed to begin to address the piracy problem, judges must be educated to understand the gravity of these offenses and the need for deterrent punishments, and the copyright law needs to be updated. The Greek record industry submitted suggestions to the relevant ministry a number of years ago, but to date, nothing has been done.

Entertainment software piracy: Piracy levels for entertainment software products (including video games on optical disc and cartridge-based video games) are over 65%. Pirated cartridge-based games continue to be imported into the country from Asia, and CD-R burning has also increased. While the level of cooperation from the Customs authorities has generally been good, it is essential that border enforcement be further strengthened to adequately address continued importation of pirated entertainment software.

Audiovisual piracy: The main piracy problem for the film industry in Greece concerns prerelease titles, burned on CD-Rs and DVD-Rs in a vast number of small illegal duplication labs
and advertised in magazines and newspapers, via e-mail or through Internet websites. Penalties
continue to be too low for deterrence, and the time span between offense and punishment
remains entirely too long. Judges and prosecutors adhere to the provisions of the Penal Code
on sentencing rather than the provisions of the 1993 Copyright Law. This has resulted in the
imposition of non-deterrent sentences and a general feeling in the minds of infringers that they
can get away with minimal sanctions. Prosecutors, especially at the local level, are often
reluctant to pursue intellectual property cases and have largely ignored Supreme Court circulars
directing them to give intellectual property cases a high priority. These deficiencies in copyright
enforcement have led EPOE (the local anti-piracy organization) to use the "All-Day Court"
system established for urgent criminal matters. Unfortunately, this system can be invoked only
where the defendant is taken into custody within 24 hours of the issuance of the complaint;
otherwise the case is assigned to await its typical criminal court hearing.

Legal reform: Despite our enforcement concerns, we are very pleased with implementation of the Copyright Directive in Greece. Greece was the first of the EC member states to complete implementation of this Directive.

We encourage Greece to adopt an amendment in the copyright law to enable enforcement officials to impose administrative fines on all violators, in accordance with Act 2121/93 concerning Copyright and Neighbouring Rights. This would provide enforcement officials with additional tools against piracy, as long as such an amendment were crafted to provide an additional weapon and did not de-criminalize copyright offenses.

HONG KONG

While IIPA members remain pleased with the level of cooperation by Hong Kong Customs & Excise on a number of enforcement fronts, we are nonetheless concerned over some legislative and regulatory matters. IIPA members urge the U.S. government to monitor legislative developments in Hong Kong closely throughout the coming year and engage with the Hong Kong government to ensure that the Copyright Ordinance remains an effective tool in fighting all types of piracy, including digital theft. Though not recommending that Hong Kong be included on any of the Special 301 lists at this time, IIPA believes that the U.S. government should conduct an <u>out-of-cycle review</u> at an appropriate point to determine whether industry's concerns with current deficiencies in copyright legislation were adequately addressed in Hong Kong's consultative and legislative processes on copyright laws.

The Hong Kong government recently issued a consultation paper on the review of certain provisions of the Copyright Ordinance. The consultation paper's stated purpose is to facilitate review of crucial provisions involving the scope of end-user liability, fair use principles,

parallel import protection, evidentiary burdens in computer software cases, liability for circumvention of technological protection measures, and rental rights for films.

Notably absent from the consultation paper are important provisions relating to the protection and enforcement of intellectual property rights over the Internet. This is indicative of the somewhat piecemeal approach to legislative reform that the Hong Kong government has undertaken in recent years. The copyright industries have asked the government to conduct a comprehensive review and amendment of the Copyright Ordinance to meet the challenges in the digital age. Unfortunately, there has been no indication that this will be undertaken soon. Once again, IIPA urges the Hong Kong government to avoid attempting to deal separately with difficult subjects that are in fact interconnected in law and in practice. IIPA members are actively engaged in the consultation process and ask the U.S. government to monitor closely developments with respect to these vitally important topics.

The book publishing industry remains concerned with the Copyright (Suspension of Amendments) Ordinance 2001, which was recently extended to 31 July 2006, and which suspends criminal liability for those knowingly possessing an infringing copy of certain copyright-protected works in the course of a trade or business, with a view to committing an infringing act. This provision, which unnecessarily and unjustifiably differentiates between copyright-protected works according to medium or genre, reduces the level of protection afforded affected works, including many of those produced by the U.S. publishing industry. Such discrimination is wholly out of step with international norms, and with Hong Kong's obligations to employ effective and deterrent measures against copyright piracy. IIPA members remain actively engaged on this issue and strongly urge that this discriminatory provision be eliminated when next up for review.

In addition, entertainment software companies still face burdensome evidentiary requirements for prosecuting copyright offenses, causing an expenditure of excessive resources in order to bring a copyright infringement case. Under Hong Kong procedure, the copyright holder must provide Section 121 affirmations for every copyright infringement prosecution, which includes providing evidence of copyright ownership as well as attaching true copies of the video game titles that are the subject of the case. 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 Register) under Section 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 compliance with the affirmation requirements. It is hoped that the Hong Kong government will soon adopt the measures necessary to effect the recognition of foreign copyright registries.

The entertainment and business software industries appreciate the Hong Kong government's increased efforts against criminal syndicates involved in the distribution of pirated copyrighted products. The industries, however, remain concerned with Hong Kong's role as a transshipment point for counterfeit goods, including cartridge-based video games. Industry notes that according to statistics from U.S. Customs, in 2003 Hong Kong was the number two source of counterfeit goods reaching U.S. markets (behind only China). In 2004, there was an increase in seizures of counterfeit cartridge-based video game products from Hong Kong by the U.S. Bureau of Customs and Border Protection. Over 165,000 pirated Nintendo video game products were seized in the U.S. and several European countries in 2004. Despite the efforts of Nintendo of America (NOA) to provide exporter information on overseas seizures to Hong Kong Customs authorities, NOA has not received any information regarding legal action or investigations resulting from this information. It is hoped that the efforts that have been directed

toward addressing criminal syndicate involvement in optical disc piracy by the Hong Kong authorities will also be extended towards the problem of transshipment of pirated cartridge-based games through the territory.

The Hong Kong government has maintained good progress in eradicating optical disc piracy at the retail level and fighting illegal photocopying, and has recently begun to look at ways to address the growing problem of Internet piracy in the peer-to-peer environment. However, despite civil enforcement and IP education and awareness efforts by industry, business end user piracy remains a significant barrier to the development of the computer software industry in Hong Kong. End user piracy accounted for most of the US\$102 million in losses felt by the software industry in 2003, when Hong Kong experienced a software piracy rate of 52%. During the same time period, other markets in the region reduced their software piracy rates, putting Hong Kong well behind other advanced economies in the Asia Pacific region, including South Korea, Singapore, Japan, Taiwan, Australia and New Zealand.

The Hong Kong government has over time expressed its commitment to taking action against business end user piracy, consistent with its obligations under Article 61 of the TRIPS Agreement and its vision to build a knowledge-based economy. The government has also recently renewed its pledge to promote the development of cultural and creative industries, including the computer software industry. The government took steps to implement this policy in April 2001, when the Copyright Ordinance was amended to clarify that the knowing possession of infringing computer software for the purpose of or in connection with any trade or business is a criminal offense. Since the enactment of the law, the Customs & Excise Department have carried out a number of end user raids against those suspected of using software illegally. However, since that time only a few of these cases have made it to court and every contested case has ended in acquittal. Industry is concerned that the government has not invested sufficient resources to successfully investigate and prosecute business end user piracy cases and that, unless modified, the law remains inadequate to address the problem. The business software industry looks to the Hong Kong government to address the continuing challenge of end user piracy by achieving a meaningful reduction of this persistent form of piracy, through successful criminal enforcement and prosecution, and deterrent penalties.

Moreover, even though the current criminal law has proven to be ineffective in addressing the problem, the government recently consulted the public for views on proposed legislation that might significantly narrow the scope of protection for computer software. While the business software industry appreciates the government's stated commitment to tackle the business end user piracy problem, it urges the government to take concrete steps to make this commitment meaningful, including to: (1) take into account the apparent ineffectiveness of the current law when examining the need for refinements to facilitate the successful prosecution of business end user piracy cases in the short term; (2) refine the law to clarify the circumstances under which the failure to prove ownership of licenses can result in criminal sanctions; (3) refrain from rolling back copyright protection in software through amendments to existing legislation; (4) refrain from introducing a general fair use defense in copyright laws without first strengthening liability provisions; and (5) pursue sustained and effective criminal enforcement, prosecution, and IP education efforts.

IIPA members wish to emphasize that, though we have not asked for a specific ranking for Hong Kong at this juncture, we are deeply concerned about the approach Hong Kong is taking in its legislative reform process. The government's actions on the above-named matters have the potential for global significance. Hong Kong remains a vitally important market for the

U.S. copyright industries, and we therefore ask the U.S. government to pay close attention to upcoming developments in the territory.

ICELAND

Internet piracy, particularly through peer-to-peer (P2P) networks, is the biggest concern in Iceland. High levels of broadband penetration and other means of Internet access make the country fertile ground for online pirates. In 2004, following on leads from local anti-piracy associations, the police conducted raids at 12 locations against the operators of the file sharing network Direct Connect. It appears that the police were able to seize 11 terabytes of content during the raid. The hubs reportedly made available movies, music and computer games. The police are continuing their investigation and prosecutions may be initiated early this year.

KENYA

In spite of the Kenyan Government's acknowledgment that piracy is a problem, little progress has been made in rectifying the situation. The Kenya Copyright Board came into being in 2003, but has to date not been able to fulfill its mandate for various reasons, including funding. While IIPA members do not generally support adoption of banderole systems out of concerns that the banderoles themselves can be counterfeited, in this case, the failure of the government to implement the law with respect to banderoles has resulted in courts being unable to distinguish legitimate from illegitimate copies. This problem must be addressed. However, implementation of the banderole system is still waiting funding and the courts do not appear to be prepared to deal with the issue in the interim.

Pirated cassettes and CDs account for over 90% of the market and range toward 100% on other video and DVD media. Local repertoire is stolen and pirated in Uganda and Tanzania, the latter producing more sophisticated material. International repertoire comes in from Uganda and Pakistan. It is believed that two companies in Uganda and one in Zanzibar reproduce millions of pirated cassettes of both Kenyan and international artists and smuggle them back into Kenya — flooding the market.

There are four major problems currently preventing the fight against piracy that must be addressed by the Government of Kenya.

- Interpretation, implementation, and understanding of the copyright law pose enormous challenges to customs, police, and the judiciary.
- Corruption results in seized goods disappearing from custody and court cases being drawn out and finally dismissed.
- The Copyright Board has insufficient funds to establish a copyright office and has as such not budgeted for issues pertaining to enforcement of piracy.
- There is an ongoing refusal of Kenyan authorities to try to address the problem using any other legislation, such as the Trade Descriptions Act, which is easier for the courts to understand and apply.

LAO PEOPLE'S DEMOCRATIC REPUBLIC

While a Working Party was established for the WTO accession negotiations of the Lao People's Democratic Republic (PDR) in February 1998, the first meeting of the Working Party did not take place until October 2004. The country is not yet a member of the Berne Convention nor a signatory to the WIPO "Internet" treaties. As of 2001, there was as yet no law protecting copyright in the Lao PDR, though it appears that the country is in the process of preparing legislation for its accession to the Berne Convention.

The country's location gives rise to concerns regarding the potential migration of optical disc plants from neighboring Southeast Asian countries where illegal overproduction and export is a significant problem. The lack of an appropriate legal regime to address optical disc overproduction may become problematic should optical disc plants migrate to the country. In 1997, the U.S. and Lao governments concluded an Agreement on Trade Relations but the agreement was not signed until 2003. In late 2004, the U.S. Senate approved extending normal trade relations to Laos (the grant was part of the Miscellaneous Trade & Technical Corrections Act of 2004 signed by the President in December 2004) and brings into effect the 1997 trade agreement, which includes a chapter on intellectual property protection and enforcement. The Government of Laos should be encouraged to adopt the necessary measures to implement its obligations under the 1997 trade agreement as soon as possible.

MACEDONIA

Copyright enforcement is weak in Macedonia, according to all copyright industries active in the country. Markets for legitimate content barely exist and are heavily influenced by high piracy levels in all sectors. The overall music piracy level reaches as high as 95%, with pirate copies of international repertoire smuggled in from neighboring Eastern European countries. Domestic repertoire is targeted by the local CD-R pirates. The business software industry has seen some progress in the form of legal use of software by the government, education and awareness campaigns that are beginning to have initial impact. Additionally, the industry has seen some positive movement with respect to the acquisition of legal software by some businesses. Nonetheless, high levels of piracy in the business software sector still remain, most notably with respect to the widespread use of unlicensed software by commercial entities. Computers regularly are sold with illegal software pre-installed; but in recent months BSA reports that some system builders have been receptive to making commitments to adhere to the law and sell computers with legal software. Furthermore, police, prosecutors and customs officials lack the necessary equipment and expertise to conduct raids, perform investigations, and commence cases against copyright infringers. Also, the Copyright Inspectorate (which can take administrative enforcement actions) has failed to refer cases that merit criminal investigation to the police and prosecutors. Following recent Copyright Law amendments, the State Market Inspectorate is now competent to enforce the Copyright Law (as of January 2005); however, this extremely recent change remains untested in practice. Although the criminal and copyright laws permit the seizure and destruction of equipment used to make pirated goods, police and other enforcement bodies fail to do so in practice.

Piracy at the border is a particular concern, and customs authorities do not take appropriate action to prevent the shipment of infringing goods to and across Macedonia. Two particular problem areas are Macedonia's borders with Kosovo and Bulgaria. Another issue is excessive procedural delays. The business software industry reports that in general court

procedures take an inordinately long time. Also, it is rare for Macedonian courts to issue injunctions in criminal proceedings, even though there are legal provisions permitting such injunctions. When judgments are handed down by courts, they usually result only in minimal fines, rather than fines or prison sentences that constitute a deterrent to further infringement. However, in a sign of improvement, in 2004, the first two judgments were issued against persons who infringed software copyright.

At the end of 2004, Macedonia ratified the WIPO Performances and Phonograms Treaty (WPPT), which is due to enter into force on 20 March 2005. Unfortunately, the Macedonian Government decided to make two reservations following its earlier reservations to the 1961 Rome Convention. First, with respect to Article 3(3), phonograms published outside the territory of Macedonia will not be granted full national treatment. Furthermore, Macedonia took a reservation with respect to Article 15(3) of the WPPT, and as such, phonogram producers are unable to enjoy the broadcasting and communication to the public rights.

NIGERIA

Sound recording piracy is at a level of approximately 85% in Nigeria. Though a copyright law was enacted in 1992, there is little cooperation between government agencies, including law enforcement, toward implementation of the law.

There has been a proliferation of optical disc manufacturing plants in Nigeria, some of which have moved to Nigeria from Asia and operate to supply Central and Western Africa. In addition, pirates have completely overrun the book market, due in part to the government's decision in 2003 to cut all funding for universities' and libraries' purchases of these materials. The port of Lagos is inadequately policed against piracy and has become a major transhipment site for pirated product to enter Nigeria and nearby countries. The Nigerian government should increase enforcement—including the provision of increased resources, ensuring that cases go to trial and result in judgment. Additionally, the government should impose stiffer penalties, crack down on book piracy and provide adequately for legitimate purchase of academic materials. The government should likewise regulate the OD plants, and make the use of SID codes mandatory on all discs produced and sold in Nigeria.

The Nigerian National Copyright Administration (NCC) has responsibility in Nigeria for antipiracy activities, and the Nigeria Customs Service, as the nation's gateway police, has a significant role to play in anti-piracy enforcement. There needs to be better coordination between these two enforcement entities.

SOUTH AFRICA

Illegal commercial photocopying plagues the U.S. publishing industry in South Africa. Photocopy shops in and around university campuses, as well as facilities being abused in libraries and similar on-campus venues, are decimating the market for educational publishers. Business publishers experience widespread copying of their books by commercial end-users. In addition, the business software industry reports high levels of piracy — particularly commercial end-user piracy. IIPA encourages the Department of Justice to take an active role in tackling these problems by ensuring that adequate monetary and human resources are dedicated to fighting piracy. IIPA also requests that copyright infringement cases be given proper attention in the court system. Finally, IIPA understands that the Government of South

Africa is considering legislative provisions liberalizing aspects of fair use. Existing copyright law already makes it difficult, time-consuming, and expensive for rightholders to enforce their intellectual property rights. Amendments addressing these concerns are long overdue. IIPA requests that the government allow sufficient time for review and comment by affected parties and industries before finalizing any copyright proposals.

The entertainment software, filmed entertainment, and sound recording industries are generally pleased with the level of cooperation received from the Customs authorities and the police. However, the sound recording industry is concerned that South African Customs (SARS) does not detain contraband copyrighted product in transit and urges SARS to do so. Over the last year, there has been an increase in the level of seizures of pirated products at the border, as well as through raids conducted by the police in the optical disc market. Unfortunately, cases continue to languish in the courts where delay is common, resulting in considerable costs to the rightholder. The government must be encouraged to address the problem of chronic delay in the courts.

SPAIN

Continuing high levels of piracy in Spain are adversely affecting the music, entertainment software and filmed entertainment sectors in that country. Factory-produced pirate music CD products as well locally burned CD-Rs and DVD-Rs dominate the street market. Internet piracy is also a major problem, exacerbated by the growth and increased penetration of broadband. Organized crime syndicates have maintained their active role in the production and distribution of pirated materials. Despite good laws, piracy continues to flourish, and there is a great need for improvements in enforcement, and in particular in the courts, which are generally slow, and suffer from the uneven application and lack of understanding of the relevant laws.

Street piracy and organized crime: Piracy in Spain exhibits some characteristics that arise frequently in connection with OD piracy — namely the connection with illegal immigration and tobacco smuggling and other organized crime syndicates. These businesses are in the process of evolving, and much of the illegal business now hides behind the "legal" import of blank carriers and/or machinery used for piracy (of illegal origin most of the time) and their further distribution and sale.

Chinese syndicates are increasingly dominating the pirate trade in Spain. The Chinese syndicates are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€/CD), with an aggressive distribution through the use of itinerant sellers in streets and entertainment premises.

Police actions against "mochileros," who sell out of backpacks, are more difficult than actions against the street "manteros," who sell from blankets that are relatively fixed in location, and maintain more product. In 2004, the number of street vendors selling pirate optical disc products has continued to grow. There are an estimated 8,000 to 10,000 street vendors, including at least 5,000 mochileros and 3,500 manteros. About half of all street sellers specialize in audiovisual products, usually DVD-Rs of films in recent theatrical release (many titles are available within one week after theatrical release).

These Chinese networks are not only involved in recording CD-R and DVD-R formats, but also directly import pirate CDs manufactured in Taiwanese and Chinese plants. Product consists primarily of international releases, although albums of some important national artists have also been detected.

Many of these street sellers are illegal immigrants controlled by the Chinese gangs. Their illegal status creates additional judicial difficulties because they cannot be automatically deported and can take advantage of procedural delays to disappear, requiring rightholders to file numerous legal procedures with no decisions. (A decision cannot be made if the defendant cannot be located.) This highlights the need to address the organized production sources of the pirate product, not only its distribution. Organized gangs maintain labs and distribution centers in Madrid, Barcelona, Grenada, and possibly in Girona, Tarragona, and Alicante. Although the explosion in the growth of OD piracy began in mid-2002 in large urban areas, it has also expanded into the suburbs and other remote regions as supply has increased dramatically.

The following steps would be useful to effectively address the growing street vendor piracy problem: stronger criminal penalties; increased *ex officio* police actions against street sales; more actions against labs supplying street vendors; increased police coordination, and the inclusion of IP violations in the list of cases that qualify for "fast hearings."

Piracy in the music sector: Estimated trade losses for the music industry in Spain in 2004 were \$90 million—not counting losses associated with Internet piracy for which we offer no specific dollar amount but which undoubtedly exceed those connected to physical piracy. Despite increased enforcement activities, music piracy exceeds 24% (in some cities like Madrid, Seville, Granada or Murcia this percentage has reached between 30% and 40%), probably the highest rate of any developed country in the world, and losses continue to mount.

The situation for the recording industry in Spain is particularly dire, and pirate recordings are sold in the most open and notorious manner. This grave situation has been widely reported in the national media, and the pirates grow bolder and more organized each day. Although the Spanish government has increased its activities, these have not resulted in any reduction in piracy, and the music industry finds itself in a moment of true crisis. Legitimate music stores are closing because of inability to compete with the pirates. It is essential that the government increase its commitment to the fight against piracy, and in particular devote attention to problems in the courts. At present, judicial processes are very slow and cumbersome, and many judges lack an understanding of the gravity of the issues presented, resulting in the inadequate and uneven application of the law.

Piracy in the entertainment software sector: The entertainment software industry reports that there were more police actions against retail outlets selling counterfeit and pirated goods in 2004. However, notwithstanding the increase in police activity, pirated video game products remain readily available in the market (particularly in Barcelona, Valencia, and the Canary Islands). The Customs authorities must step up enforcement activity so as to stem the flood of pirated products being imported into the country.

Piracy in the audiovisual sector: For the audiovisual industry, which estimates an annual loss of over US\$40 million because of piracy, street sales of pirate optical discs have become the most threatening piracy problem. About half of all street sellers specialize in audiovisual products, usually DVD-Rs of films in recent theatrical release. Camcording is becoming a major

concern due to the fact that it is increasingly the favored source for street pirate product. In particular, sound recordings made in local theaters are frequently combined with "camcorded" video obtained in other countries and made available on the Internet. As such, anti-camcording legislation, which would specifically address sound recording as an independent activity, with jail sentences, preferably up to a year or longer for a first offense, and a higher penalty for any subsequent offense, would be useful to help address this problem.

Spanish government actions: Several ministries are directly involved in anti-piracy efforts. The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Copyright and Enforcement Directives. The Ministry of Interior coordinates actions of the Guardia Civil and Police, crucial for action against street sales. The Ministry of Culture is seeking to establish overall coordination between the different ministries to protect intellectual property.

Of particular interest is a draft "Integral Plan" to protect intellectual property released by the Ministry of Culture for comment in late December 2004. This "Integral Plan" needs a much stronger enforcement component to accompany its primary analysis and awareness focus. The government, particularly the Ministry of Justice, has agreed to seek enforcement specifics for the plan and has set up working meetings with industry for that purpose. A final plan, with analysis/awareness, legislation and enforcement elements, should be finalized early in the second guarter of 2005.

The Ministry of the Interior has undertaken a significant amount of police work against street sales, and in recent meetings with the Minister of Justice indicated that it is now much more open to taking effective action.

FAP (the local anti-piracy organization of the film industry) has presented to the Ministries of Culture and Justice a response to the draft "Integral Plan," supporting it and also requesting that it include more specific enforcement goals (i.e., a specific reference to police action, something the plan recognizes but generally dismisses as insufficient), implementation of the Copyright and Enforcement Directives, an effective implementation of the proposed "Internet Law" which should establish liability for ISPs, the development of rapid trial proceedings for street sales cases—specifically reducing the forensic burden currently imposed on rightholders—and government participation or diffusion on government media of the current industry led anti-piracy public awareness campaigns. Effective implementation of the Enforcement Directive is especially important, as it should facilitate enforcement efforts particularly in the digital environment. All these efforts should be monitored closely to ensure an outcome that facilitates enforcement efforts.

Despite positive changes in the Criminal Code and Criminal Procedures Code that took effect in October 2004, the Spanish government has failed to implement the EU Copyright Directive and has improperly implemented the E-Commerce Directive. (The Spanish draft creates a limitation of liability for Internet Service Providers [ISPs] that goes beyond that permitted by the Directive). The new commission to be established by the Ministry of Culture wants to set a goal of approximately one to one and a half years from now to analyze and propose legislative changes. This is simply too long.

Enforcement against Internet piracy is a big challenge: Rightholders contemplating legal action against Internet pirates in Spain face difficulties in identifying infringers due to restrictions imposed by Spanish data protection laws. Rightholders 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.

The Internet is still used for hard goods distribution, as it gives pirates an additional layer of protection because judges have to authorize special warrants allowing police to search their homes. Moreover, Internet downloading is growing rapidly, especially via peer-to-peer (P2P) systems and Internet Relay Chat (IRC) channels. As with street sales of discs, P2P downloading piracy appears to be growing exponentially.

One reason for these difficulties with Internet enforcement in large part lies with the Spanish government's failure to implement the EU Copyright Directive by the December 22, 2002 deadline. The draft Spanish implementation legislation, proposed in December is expected to improve this subject. The Parliament is not expected to pass any legislation to implement this Directive until March 2005. Furthermore, the draft Spanish legislation on the E-Commerce Directive² creates a limitation of liability for Internet Service Providers (ISPs) that goes beyond that permitted by that Directive. Local rights holders are working very hard to seek improvements to these two bills, and IIPA members are extremely interested in ensuring that the bills are adopted in ways that are consistent with the WCT and WPPT—in particular with those Treaties' obligation to: "ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement covered by this Treaty [including of course the right of making available], including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

IIPA urges the U.S. government to monitor closely the legal and enforcement situation in Spain. The Spanish government has taken impressive measures to address ubiquitous street piracy, but these measures have not yet proven to be fully effective and need to be further strengthened. The record industry in Spain finds itself in a struggle for survival. In addition, the U.S. government should work with the Government of Spain to ensure that legislation is adopted that implements the requirements of TRIPS and the WIPO Treaties to provide an effective deterrent to online offenses.

SWITZERLAND

The Federal Copyright Act of 9 October 1992 as amended is currently undergoing further revision in order to implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) into Swiss law. IIPA is concerned with the way in which the two treaties are being implemented in the country. The Swiss Federal Institute for Intellectual Property continues to delay the implementation of the WIPO Copyright Treaties. In September 2004 a draft implementation was released, but is problematic in several respects: it has an overly broad private copying exception (indeed the current exception is problematic and certain groups argue that downloading infringing copies of copyright works from peer-to-peer (P2P) networks is legal in Switzerland); inadequate protection of technological measures (including over-broad personal use exemptions); and burdens on rightholders employing technological measures (including labeling obligations).

1

¹ 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.

² The EC Directive 2009/24/EC on Contain Indiana.

² 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.

Furthermore, the Swiss government should seek to make the use of P2P networks for copyright infringement more difficult. SAFE (the Swiss Anti-Piracy Federation) continues to investigate portal sites, which are generally hosted by foreign providers. In March 2004, police (cooperating with SAFE and the German Anti-Piracy organization [GVU]) raided the home of the Swiss creator of an eDonkey portal offering an extensive number of links to movies, cartoons, PC and console games, software, books and pornography (averaging 220,000 visitors per day). This individual will be prosecuted for copyright offenses, the first such prosecution against the creator of a portal for a P2P network in Switzerland.

VIETNAM

Vietnam is still in the midst of its WTO accession negotiations, with the stated goal of achieving membership in 2005. Draft copyright legislation has been released and review of the legislation is underway. The U.S. government must ensure that this legislation provides the high standards of intellectual property protection required under the U.S.-Vietnam Bilateral Trade Agreement and the TRIPS Agreement, if Vietnam is to accede to the WTO. Vietnam should also fully implement the WIPO "Internet" Treaties.

Vietnam is a country of concern given the possible migration to its territory of optical disc and cartridge manufacturing facilities engaged in illegal activities. IIPA reports that there are four optical disc plants located in the country, comprising twelve production lines, capable of producing up to 42 million discs per year. This massive production capacity makes the adoption of optical disc regulations rather pressing. Entertainment software companies have found Vietnamese-sourced pirate products in several Asian countries, Canada, the Czech Republic, and Poland. It is believed that organized criminal syndicates are also involved in piracy operations. CD-burning operations also exist in the country, with pirated PC games being sourced from cracked versions made available through the Internet. Piracy is also widespread in Internet cafés.

Vietnam also suffers from blatant and widespread book piracy, in the form of illegal reprints and photocopies. These are distributed in a variety of venues, from government-owned bookshops to roadside stalls. The English language teaching market is among the hardest hit. More than 90% of this market (private-sector education and universities) is supplied by unauthorized reprints and adaptations. These are published by entrepreneurs using the licenses of state-sector publishers, such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City, and distributed through the mainstream state bookshops. Copies of such books also flow to Cambodia, supplying a similar proportion of the market there. Government publishing houses could help reduce piracy in the English language teaching sector by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy (mainstream bookshops require this information in order to make inventory decisions).

Software piracy is rampant in Vietnam. In fact, the software piracy rate in Vietnam in 2003 was 92%, putting Vietnam at the top of the chart with China. By comparison, the average software piracy rate in Asia in 2003 was 53% and the average worldwide piracy rate was 36%. Vietnam does not currently have adequate legal tools to fight software piracy effectively in its different forms, the most damaging of which is corporate end user piracy. Moreover, Vietnam has done little to use what administrative authority it does have to fight against software piracy. BSA provided some enforcement training to authorities in 2004 and will continue this training in 2005. Necessary legislative changes include the introduction of criminal penalties against corporate end user piracy and the introduction of statutory damages.

We call upon Vietnam to significantly improve its enforcement against copyright piracy.

APPENDIX D

CHART OF COUNTRIES'
SPECIAL 301 PLACEMENT (1989 – 2004)
&
IIPA'S 2005 SPECIAL 301 RECOMMENDATIONS

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2004) AND IIPA 2005 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2005 PWL																
		2004	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				WL	WL	WL											
Australia							WL	WL	WL	WL		WL	PWL	PWL	PWL	***************************************	
Austria								00	00								
Azerbaijan	SM	WL	WL	WL	WL	WL											
Bahamas	SM	PWL	PWL	WL + OCR	OCR	OCR											
Bahrain								WL	WL	WL	WL						
Bangladesh	SM																
Belarus	WL	WL	WL	WL	WL	WL	WL	00									
Belize		WL															
Bolivia	WL	WL	WL	WL	WL	WL	WL	00	WL	00	***************************************		***************************************	***************************************		***************************************	
Bosnia and Herzegovina	SM				***************************************		***************************************		***************************************		***************************************	***************************************	***************************************	***************************************	***************************************	***************************************	
Brazil (GSP)	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	00	PFC	PWL	PWL	PWL	PWL
Bulgaria	PWL	WL						PWL	WL	00	00						
Burma	SM			····				***************************************		•	***************************************						
Cambodia	SM			····						•							
Canada	SM	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	00		WL	WL	WL	WL
Chile	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia	PWL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica		WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia	SM	WL	WL														
Cyprus	SM								00	00	00	WL	WL	WL	WL		
Czech Republic	SM					WL	WL	WL	00								
Denmark						WL	WL	WL	WL		***************************************						
Dominican Republic	PWL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	00							
Ecuador	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
El Salvador								·		WL	WL	WL	WL	WL			
Estonia	SM					************************		00		***************************************							
European Union		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
Georgia	SM				OCR												
Germany								00	00	00	00	00		WL	WL	***************************************	
Greece	SM			WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala		WL	WL	WL	WL	PWL	PWL	WL									
Honduras				1			-	WL	WL	00	00	00					
Hong Kong	SM + OCR						OCR	WL	WL	00							
Hungary	WL	WL	WL	PWL	PWL	WL	WL	00	00				PWL	PWL	WL		
Iceland	SM			1													
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2004) AND IIPA 2005 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2005	USTR 301 PLACEMENT (as of April/May of each year)															
		2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Indonesia	PWL	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL
Ireland		******************************		****		WL	WL	WL	WL	00							
Israel	WL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	00	00	00		***************************************			
Italy	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica		WL	WL	WL	WL	WL	WL	WL									
Japan		•			OCR	•	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan	DS						WL	WL	WL	00	00						
Kazakhstan (GSP)	WL	WL	WL	WL	WL	WL		00									
Kenya	SM																
Kuwait	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	00						
Kyrgyz Republic					OCR												
Laos	SM				••••••			***************************************	***************************************							•••••••••••	
Latvia	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	PWL	PWL	PWL	PWL	PWL	WL	WL	00									
Lithuania	WL	WL	WL	WL	WL	WL											
Luxembourg									WL								***************************************
Macau					WL	WL	PWL	PWL									
Macedonia	SM													***************************************			
Malaysia	WL + OCR	WL + OCR	WL	WL	PWL	PWL	OCR				***************	***************************************	***************************************	***************************************	***************************************	WL	WL
Mexico	WL	WL	WL	OCR			WL	00	00	00							PWL
Moldova						WL											
Netherlands								00									
New Zealand	WL			WL	WL		WL							WL	WL		•
Nicaragua								00	00								
Nigeria	SM																
Oman						WL	WL	WL	WL	WL	00						
Pakistan (GSP)	PFC	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority						OCR											
Panama								00	WL	00		00				•	
Paraguay	306	306	306	306	306	306	306	PFC	PWL	WL	00	00		WL			
People's Republic of China	PWL + OCR	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
Peru	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
Portugal										00							WL
Qatar		-		WL		WL	WL	WL	00	00	00						
Romania	WL	WL	WL	WL	WL	WL	WL	00	00	00	WL						
Russian Federation (GSP)	PFC	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	00					

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2004) AND IIPA 2005 SPECIAL 301 RECOMMENDATIONS

	IIPA	USTR 301 PLACEMENT (as of April/May of each year)															
	Recommendation		r	1		•											
COUNTRY	February 2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
San Marino									WL								
Saudi Arabia	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL
Serbia & Montenegro	WL														WL	WL	WL
Singapore	DS					WL	WL	WL	WL	WL	WL	00					
Slovak Republic		WL	WL	WL	WL												
Slovenia						OCR											
South Africa	SM						WL	WL		00	WL						
South Korea	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain	SM					WL	WL	00				WL	WL	WL	WL	WL	WL
Sri Lanka																	
Sweden							WL	WL	WL								
Switzerland	SM																
Taiwan	WL	PWL + OCR	PWL	PWL	PWL	WL	WL			00	WL	WL	PWL	PFC	WL	WL	PWL
Tajikistan	WL	WL	WL	WL	WL	WL											
Thailand	PWL	WL	WL	WL + OCR	WL	PWL	PFC	PFC	PFC	PWL	PWL						
Tunisia								00									
Turkey	WL	PWL	WL	WL	WL	PWL	WL	WL	WL								
Turkmenistan	WL	WL	WL	WL	WL	WL											
UAE					WL	OCR	WL										
Ukraine	PFC	PFC	PFC	PFC	PFC	PWL	PWL	WL									
Uruguay		WL	WL	PWL	PWL	WL	WL	00	00								
Uzbekistan (GSP)	WL	WL	WL	WL	WL	WL											
Venezuela	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	SM	WL	WL	WL	WL	WL	WL	WL	WL	00	00						
Yemen								00									

PFC: Priority Foreign Country
PWL: Priority Watch List
WL: Watch List

OO: Other Observations (an informal listing formerly used by USTR)

SM: IIPA unranked countries deserving Special Mention OCR: Out-of-cycle review to be conducted by USTR.

GSP: GSP IPR review underway (based on copyright industries' petitions)

DS: Countries recommended for FTA Dispute Settlement

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 2005

ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List. See IIPA's 2005 report on Argentina at http://www.iipa.com/rbc/2005/2005SPEC301ARGENTINA.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." In 2004, IIPA recommended that Argentina remain on the Priority Watch List citing the growing problem of pirate optical media, and the lack of prosecutions or deterrent sentences stemming from raids and seizures. USTR agreed, stating in its Special 301 Announcement that "Argentina's overall copyright, patent, and data protection regimes do not appear to comply with its international obligations" and that "enforcement against piracy and counterfeiting remains lax and ineffective." Specifically, the important issue of data protection remains unresolved, enforcement of copyrights remains inconsistent, and the effectiveness of enforcement remains hampered by "inadequate resources, 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 2003, \$451.3 million worth of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 14.6% of its total imports. During the first 11 months of 2004, \$503.1 million worth of Argentine goods (or 14.8% 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 23.4% increase over the same period in 2003.

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2005 Special 301: Historical Summary

ARMENIA

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 <u>Watch List</u> 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 <u>Watch List</u> (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 <u>Watch List</u> for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

In 2001, IIPA recommended that USTR place Armenia on the <u>Watch List</u>, 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 <u>Watch List</u>, 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 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 2003, \$23 million worth of Armenian goods entered the U.S. under the GSP duty-free code, accounting for 61.2% of its total exports to the U.S. During the first 11 months of 2004, \$25.2 million worth of Armenian goods (or 58.5% 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 22.2% increase over the same period in 2003.

AUSTRALIA

Australia does not currently appear on any of the USTR lists. In 1994, Australia was named to the <u>Watch List</u>. 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 <u>Watch List</u> after some legal reforms were undertaken but was reinstated to the <u>Watch List</u> 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 <u>Watch List</u>. USTR agreed, and Australia remained on the <u>Watch List</u> through 1999, in part because of what was described as "serious concern" over 1998 legislation abolishing the importation right for sound recordings and pending legislation abolishing the importation right for other copyrighted works including software, electronic games, and gaming equipment.

Although Australia was removed from any Special 301 List in 2000, USTR noted in its May 1, 2000 Special 301 Announcement the possible initiation of future WTO dispute settlement cases against several countries, including Australia, for apparent noncompliance with TRIPS obligations.

AZERBAIJAN

In 2005, IIPA highlights copyright concerns about Azerbaijan in its Special Mention Section. See IIPA's 2005 Special Mention section at http://www.iipa.com/rbc/2005/2005SPEC301AZERBAIJAN.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 <u>Watch List</u>. 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 <u>Watch List</u>. In its April 30, 2002 announcement, USTR kept Azerbaijan on the <u>Watch List</u>. 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 <u>Watch List</u>, 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.

In 2004, IIPA recommended that Azerbaijan remain on the <u>Watch List</u>. USTR agreed, stating in its 2004 Special 301 Announcement that Azerbaijan had "yet to fully implement the 1995 US-Azerbaijan Trade Agreement and address deficiencies in its IPR law." No improvements were cited, and as "a result of these inadequacies, IPR enforcement in Azerbaijan remains weak and ineffective."

BAHAMAS

In 2005, IIPA highlights concerns regarding inadequate copyright protection and enforcement in The See IIPA's 2005 Special Mention section at http://www.iipa.com/rbc/2005/ Bahamas. 2005SPEC301BAHAMAS.pdf. Currently, The Bahamas is on the Special 301 Priority Watch List. The country 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, continuing 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 remained on the Priority Watch List in the 2004 USTR Special 301 Announcement because these problems persist. They noted that draft legislation for amendments to correct problems in the copyright law had passed through the lower house of Parliament, and urged The Bahamas to "work to fulfill its obligations under the agreement and promptly enact these necessary amendments to the copyright law."

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 2003, \$88 million worth of Bahamian goods entered the U.S. under the CBI, representing 18.6% of the Bahamas' total exports to the U.S. During the first 11 months of 2004, \$82.5 million worth of Bahamian goods (or 14.3% of the Bahamas' total exports to the U.S. from January to November) entered under the CBI, representing an increase of 3.6% from the same period in 2003.

BAHRAIN

Bahrain does not currently appear on any of the USTR lists. IIPA first recommended placing Bahrain on the <u>Watch List</u> 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 <u>Watch List</u>. From 1996 through 1999, IIPA recommended that Bahrain remain on the <u>Watch List</u> 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 <u>Watch List</u> through the 1998 cycle. However, due to concerted enforcement actions throughout 1998 and into 1999, USTR removed Bahrain from the <u>Watch List</u> in April 1999. Since it was removed from the 301 lists, Bahrain has not reappeared on any list. In 2004, the United States and Bahrain concluded negotiations toward a Free Trade Agreement, promising stronger levels of copyright protection and enforcement in Bahrain. The FTA will also require Bahrain to join the WCT and WPPT.

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 provides "adequate and effective" copyright protection. In 2003, \$65.1 million worth of goods from Bahrain entered the United States under the GSP duty-free code, accounting for 17.2% of its total exports to the U.S. During the first 11 months of 2004, \$53.7 million worth of goods from Bahrain (or 14.5% of Bahrain's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 11% from the same period in 2003.

BANGLADESH

Bangladesh currently does not appear on any USTR list. This year, IIPA highlights concerns in Bangladesh in its Special Mention section, including alarming piracy rates in the country and increasing evidence of optical disc production. See IIPA's 2005 Special Mention section at http://www.iipa.com/rbc/2005/2005SPEC301BANGLADESH.pdf.

Bangladesh participates in the Generalized System of Preferences (GSP) program which includes, as one of its criteria of eligibility, that a country provides "adequate and effective" copyright protection. In 2003, \$32.1 million worth of goods from Bangladesh entered the United States under the GSP duty-free code, accounting for 1.5% of its total exports to the U.S. During the first 11 months of 2004, \$15.2 million worth of goods from Bangladesh (or 0.7% of Bangladesh's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 48.2% from the same period in 2003.

BELARUS

IIPA recommends that Belarus remain on the <u>Watch List</u>, where it has remained since 1999. See IIPA's 2005 CIS country report at http://www.iipa.com/rbc/2005/2005SPEC301CIS.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

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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." 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 2004, IIPA recommended that Belarus remain on the Watch List because there were "no reports of any legal reform or enforcement success in 2003." In agreeing, USTR in its 2004 301 Announcement noted that Belarus had yet to take the several steps necessary to "fulfill its intellectual property commitments under the 1993 U.S.-Belarus Trade Agreement and to address other deficiencies in its IPR regime" which include weak enforcement, high levels of piracy, and a need to amend its copyright law to bring it into compliance with WCT and WPPT.

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 2005 Bolivia country report at http://www.iipa.com/rbc/2005/2005SPEC301BOLIVIA.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 TRIPScompatible 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 that "the government has not taken significant steps toward legalizing the use of its own software." In 2004, IIPA recommended that Bolivia remain on the Watch List. USTR agreed in its Special 301 Announcement citing, among other things, "sporadic and largely ineffective" enforcement efforts, weak border enforcements, and disappointing court enforcements of IPR law. USTR did note that Bolivia had "publicly committed itself to transparency and has demonstrated at multiple levels a desire to work with the United States."

In 1995, IIPA 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 2003, \$8.5 million worth of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 4.6% of its total exports to the U.S. Another \$94.5 million worth of Bolivia's exports to the U.S. that year. During the first 11 months of 2004, \$15.2 million worth of Bolivian goods (or 6.4% 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 95.7% increase over the same period in the previous year. Another \$113.1 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2004, representing an increase of 133.9% from the same period in 2003.

BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina have never appeared on a USTR Special 301 list. In 2005, as was the case in 2004, IIPA notes Bosnia and Herzegovina in its <u>Special Mention</u> section, see http://www.iipa.com/rbc/2005/2005SPEC301BOS_HERZ.pdf, citing high levels of piracy, most notably in the business software sector.

In 2003, \$3.1 million worth of goods from Bosnia and Herzegovina entered the United States under the duty-free GSP code, accounting for 26.1% of its total exports to the U.S. During the first 11 months of 2004, \$2.7 million worth of Bosnia and Herzegovina's goods (or 26.9% of Bosnia and Herzegovina's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 0.3% increase over the same period in 2003.

BRAZIL

IIPA recommends that Brazil stay on the <u>Priority Watch List</u>, to which it was elevated in 2002. See IIPA's 2005 Brazil country report at http://www.iipa.com/rbc/2005/2005SPEC301BRAZIL.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 Priority Watch 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 <u>Priority Watch List</u> 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 <u>Watch List</u> in April 1999, noting that "the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove policy authority to engage in ex officio searches and seizures on their own initiative ... We also look to the Brazilian government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000." The 2000 deadline came and went. Despite IIPA's recommendation that Brazil be elevated to the Priority Watch List, USTR kept Brazil on the Watch

<u>List</u>, 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 <u>Watch List</u>, 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 <u>Priority Watch List</u>. In its April 30, 2002 Special 301 Announcement, USTR did in fact elevate Brazil to the <u>Priority Watch List</u>. 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 São Paolo'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.

In 2004, IIPA recommended that Brazil remain on the <u>Priority Watch List</u> for continuing "high levels of copyright piracy and inadequate criminal enforcement." USTR, in its 2004 Special 301 Announcement, agreed, noting that "Brazil continues to fall short in providing adequate and effective protection of IPR." Despite positive developments regarding "the formation and activities of the Brazilian Congress' Chamber of Deputies' Commission of Parliamentary Inquiry on piracy and amendments to the criminal code, protection has not significantly improved." The Announcement noted that USTR plans to continue monitoring Brazil's progress in these areas, "including through the ongoing GSP review that was initiated by USTR in 2001."

In addition to Special 301 engagement, 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. In July 2004, USTR initiated a 90-day review of Brazil's performance. In December 2004, USTR announced that it would extend review of Brazil's GSP eligibility for an additional 180 days, until March 2005. IIPA hopes that Brazil will take sustained steps to improve copyright protection immediately, and extending through this additional period, avoiding the possibility of GSP withdrawal. In 2003, \$2.5 billion worth of goods from Brazil entered the United States under the duty-free GSP code, accounting for 14.1% of its total exports to the U.S. During the first 11 months of 2004, \$2.9 billion worth of Brazilian goods (or 15.1% 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 27.3% increase over the same period in 2003.

BULGARIA

IIPA recommends that Bulgaria be placed on the <u>Priority Watch List</u>. See IIPA's 2005 Bulgaria country report at http://www.iipa.com/rbc/2005/2005SPEC301BULGARIA.pdf. Bulgaria does not currently appear on any of the USTR lists.. 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.

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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 <u>Special Mention</u> 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 <u>Priority Watch List</u> in April, and to conduct a six-month <u>out-of-cycle review</u> 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 <u>Watch List</u>, 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 <u>Watch List</u>, 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 <u>Watch List</u> 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. IIPA recommended Bulgaria be added to the <u>Priority Watch List</u> in its Special 301 Report for 2004. USTR, in its 2004 Special 301 Announcement, placed Bulgaria on the <u>Watch List</u> for the first time in 5 years due to a "steady resurgence of piracy, mainly in the sale of pirated optical disc media, in Bulgaria over the past few years." USTR cited "poor enforcement, including ineffective prosecutions, minimal judicial sentences, shortcomings in current and draft legislation, and lax border measures" as contributing to this resurgence.

In terms of GSP, in 2003, \$41.9 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 9.5% of its total exports to the U.S. During the first 11 months of 2004, \$36.7 million worth of Bulgarian goods (or 7.7% 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 2% decrease over the same period in 2003.

CAMBODIA

Cambodia has never appeared on a USTR Special 301 list. This year, IIPA highlights concerns in Cambodia in IIPA's Special Mention citing concerns previously mentioned in past Special 301 Reports, particularly problems with optical disc plants. See IIPA's 2005 Special Mention section at http://www.iipa.com/rbc/2005/2005SPEC301CAMBODIA.pdf. In its 2003 submission, IIPA also highlighted concerns in IIPA's Special Mention, citing concerns over migration of optical disc plants. In its 2004 https://www.iipa.com/rbc/2005/2005SPEC301CAMBODIA.pdf, IIPA highlighted 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.

Cambodia currently participates in the Generalized System of Preferences (GSP) program which includes as one of its criteria of eligibility that a country provides "adequate and effective" copyright protection. In 2003, \$3.8 million worth of goods entered the U.S. under the duty-free GSP code, accounting for 0.3% of its total exports to the U.S. During the first 11 months of 2004, \$3.9 million worth of Cambodian goods (or 0.3% of its total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 12.8% over the same period in 2003.

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. In 2005, IIPA cites Canada's continued failure to implement the two treaties. the WCT and WPPT, Special Mention in its Section. http://www.iipa.com/rbc/2005/2005SPEC301CANADA.pdf. Similarly, in its 2004 Special Mention section, IIPA likewise highlighted the importance of closely monitoring Canada's ongoing copyright reform efforts glacial progress toward implementing the WIPO Internet treaties. www.iipa.com/rbc/2004/2004SPEC301CANADA.pdf. In its 2004 Special 301 Announcement, USTR placed Canada on the Watch List for making "little headway in addressing long-standing intellectual property issues related to copyright and patent reform such as ratification of the WIPO Internet treaties." Furthermore, USTR noted that "progress has stalled on the outstanding issue of national treatment of U.S. artists in the distribution of proceeds from Canada's private copying levy and its 'neighboring rights' regime."

CHILE

IIPA recommends that Chile be elevated to the <u>Priority Watch List</u> up from the <u>Watch List</u> where it has been since 1991. See IIPA's 2005 Chile country report at http://www.iipa.com/rbc/2005/2005SPEC301CHILE.pdf. In 2001, IIPA recommended that Chile be placed on the <u>Watch List</u> due to

continued high piracy levels. USTR placed Chile on the <u>Watch List</u> 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 <u>Watch List</u>, 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 <u>Watch List</u>, noting deficiencies in both legislation and enforcement. USTR's 2003 Special 301 Announcement retained Chile on the <u>Watch List</u>, even after the Chile FTA negotiations were announced. In 2004, IIPA recommended that Chile be placed on the <u>Watch List</u>. In its Special 301 Announcement, USTR agreed, keeping Chile on the <u>Watch List</u>. However, USTR noted that the US-Chile FTA agreement, entered into on January 1, 2004, coupled with two amendments to the copyright law that sought to implement the FTA and TRIPS, were positive signs toward better protection of IPR in Chile. Additional legislative efforts continued in 2004, and the industries remain concerned about these new efforts.

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 an IPR discretionary criteria for eligibility. In 2003, \$523.5 million worth of Chilean imports to the United States benefited from the GSP program, accounting for 13.2% of Chile's total exports to the U.S. During the first 11 months of 2004, \$6.97 million worth of Chilean imports to the United States benefited from the GSP program, or 0.2% of Chile's total exports to the U.S. between January and November, representing a 98.5% decrease over the same period in 2003.

COLOMBIA

IIPA recommends that Colombia be elevated to the Priority Watch List in 2005. See IIPA's 2005 Colombia country report at http://www.iipa.com/rbc/2005/2005SPEC301COLOMBIA.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 the although the Colombian Attorney General had initiated legal action against 108 television operators, "Colombia has still to resolve the major issue USTR highlighted in its December [1998] out-of-cycle review — failure to license legitimate pay television operators and pursue pirate operators." USTR also added a September 1999 out-of-cycle review to measure Colombia's progress. Progress was made on issuing these licenses, and on December 17, 1999, USTR announced its decision to keep Colombia on the Watch List as a result of the September 1999 out-of-cycle review. Colombia remained on the Watch List in 2000 in large part because of insufficient enforcement of copyright laws and high piracy levels. USTR's April 30, 2001 Special 301 Announcement noted that "current enforcement efforts and penalties have not proven to be a significant deterrent." In 2002, IIPA recommended that Colombia remain on the Watch List and that an out-of-cycle review be conducted to monitor legislative and enforcement improvements.

In the April 30, 2002 Special 301 Announcement, USTR elevated Colombia to the <u>Priority Watch List</u>. 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 <u>Priority Watch List</u> to the <u>Watch List</u>. International Intellectual Property Alliance

In its 2004 Special 301 Report, IIPA recommended that Colombia be placed back on the <u>Priority Watch List</u>, noting that piracy, especially in the music sector, continued to dominate the Colombian market. USTR kept Colombia on the <u>Watch List</u> for 2004, noting that despite a continued demonstration by the Colombian Government to strengthen IPR protection, problems continue, such as high levels of piracy and a lack of successful prosecutions for violations of IPR.

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 2003, \$159.2 million worth of Colombian goods entered the United States under the GSP program, accounting for 2.5% of its total exports to the U.S. \$2.9 billion worth of Colombian goods entered the U.S. under the ATPA program, accounting for 45.8% of its total exports to the U.S. During the first 11 months of 2004, \$174.6 million worth of Colombian goods (or 2.6% of Colombia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 17.6% increase over the same period in the previous year. \$3.5 billion worth of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for a 33.2% increase from the prior year.

COMMONWEALTH OF INDEPENDENT STATES (CIS)

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. See IIPA's 2005 CIS country report at http://www.iipa.com/rbc/2005/2005SPEC301CIS.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 International Intellectual Property Alliance

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

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, intensif[ying] training activity for officials involved in enforcement, and implement[ing] a decree focused on legitimizing software used by government agencies." In its 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 2004, IIPA highlighted copyright concerns in Costa Rica in its Special Mention section. That year, USTR kept Costa Rica the Watch List, noting in its Special 301 Announcement that the country needed to "improve its criminal and civil systems of intellectual property", and "make significant modifications and clarifications in the area of data protection." USTR commended Costa Rica's joining of the Central American Free Trade Agreement, and hoped that as Costa Rica begins to come into compliance with these agreements, it will solve some of its IPR problems.

In 2003, \$54.3 million worth of Costa Rican goods entered the U.S. under the GSP, accounting for 1.6% of its total exports to the U.S. Under the CBI, Costa Rica had \$660 million worth of goods enter the U.S. in 2003, accounting for 19.7% of its total exports to the U.S. In 2003, \$422 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2004, \$342 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2004, \$94.9 million worth of Costa Rican goods (or 3.1% 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 92% increase from the same period in 2003. During the first 11 months of 2004, \$533.8 million worth of Costa Rican goods entered the U.S. under the CBI, representing a decrease of 12.4% from the same period in 2003.

CROATIA

Croatia is currently on the <u>Watch List</u>. In this year's Special 301 Report, IIPA highlights copyright concerns in Croatia in the Special Mention section. See http://www.iipa.com/rbc/2005/2005/2005SPEC301CROATIA.pdf. 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 have never been made

available, though we note that the country was elevated to the <u>Watch List</u> in 2003. 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 <u>Watch List</u>. Croatia remained on the <u>Watch List</u> in 2004. In its Special 301 Announcement, USTR noted that even though Croatia ratified the 1998 U.S.-Croatian MOU Concerning Intellectual Property Rights, problems still persist, notably within the country's patent regime.

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 2003, \$68.4 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 37.9% of its total exports to the U.S.). During the first 11 months of 2004, \$109 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 42.7% of its total imports from January to November), representing a 78% increase over the same period from the prior year.

CYPRUS

Cyprus does not currently appear on any of the USTR lists. This year, IIPA highlights copyright concerns with Cyprus in the Special Mention section of its 2005 Special 301 Report. See http://www.iipa.com/rbc/2005/2005/PEC301CYPRUS.pdf. These concerns come as a result of high piracy in the audiovisual, sound recording, and entertainment software sectors. 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 <u>Special Mention</u> 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 <u>Special Mention</u> 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 <u>Other Observations</u> list (formerly known as the "<u>Special Mention</u> 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 2005, IIPA highlights copyright concerns in the Czech Republic in the Special Mention section of its 2005 Special 301 Report. See http://www.iipa.com/rbc/2005/2005SPEC301CZECH_REPUBLIC.pdf. 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 2003, \$290.5 million worth of Czech goods entered the United States under the duty-free GSP code, accounting for 21% of its total exports to the U.S. During the first 11 months of 2004, \$121.8 million worth of Czech goods (or 7.6% 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 53.8% decrease from the same period in 2003.

DOMINICAN REPUBLIC

IIPA recommends that the Dominican Republic be elevated to the Priority Watch List. See IIPA's 2005 Dominican Republic country report at http://www.iipa.com/rbc/2005/2005/2005SPEC301DOMINICAN_REPUBLIC.pdf. The Dominican Republic is currently on the Watch List, to which 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. In July 2004, USTR announced that it had closed the review, citing "positive steps taken by the [Dominican Republic] in conjunction with the recently concluded U.S.-Central American FTA (CAFTA), which includes binding. . . intellectual property provisions." That review was, in fact, 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 initialed 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. In 2004, IIPA recommended that the Dominican Republic be elevated to the Priority Watch List, noting the problems surrounding the "government's questionable commitment to effective and transparent copyright enforcement." In keeping the Dominican Republic on the Watch List, USTR reported in its 2004 Special 301 Announcement that in "March 2004, the Dominican Republic concluded an FTA with the United States that will require the Dominican Republic to upgrade considerably the level of intellectual property However, USTR also noted that "concerns still remain regarding the protection and enforcement of intellectual property, particularly with respect to copyright piracy and patent protection."

Regarding preferential trade benefits, in 2003, \$75.1 million worth of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 1.7% of its total exports to the U.S. During the first 11 months of 2004, \$85.5 million worth of Dominican goods (or 2.1% 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 29.3% increase from the same period in the prior year. In 2003, \$857 million entered under the CBI, accounting for 19.2% of its total exports to the U.S. During the first 11 months of 2004, \$796 million worth of Dominican goods entered under the CBI, representing a 2.4% increase over the same period in the prior year. In 2003, \$1.8 billion worth of Dominican goods entered under the CBTPA. During the first 11 months of 2004, \$1.6 billion worth of Dominican goods entered under the CBTPA, representing a 1.3% 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 2005 Special 301 Ecuador country report at http://www.iipa.com/rbc/2005/2005SPEC301ECUADOR.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.

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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 which appears to allow free software to educational institutions. Due to their concerns, USTR moved Ecuador back to the Watch List in 2003. In 2004, IIPA recommended that Ecuador stay on the Special 301 Watch List due to ineffective copyright enforcement by the Ecuadorian government. The USTR agreed, and Ecuador remained on the Watch List. In its 2004 Special 301 Announcement, USTR noted that though the IPR law was generally adequate in the country, Ecuador had shown "little progress in improving IPR protection over the last year . . . " and enforcement remained a concern.

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 2003, \$48.7 million worth of goods from Ecuador 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 2004, \$42.5 million worth of Ecuadorian goods (or 1.1% 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 3.3% decrease over the same period in the previous year. In 2003, \$1.6 billion worth of goods entered under ATPA, accounting for 65.37% of its total exports to the U.S. In the first 11 months of 2004, \$2.5 billion entered under the ATPA, representing a 76.5% increase from the same period in 2003.

EGYPT

IIPA recommends that Egypt remain on the Priority Watch List, to which it was returned in 2004. See IIPA's 2005 Egypt country report at http://www.iipa.com/rbc/2005/2005SPEC301EGYPT.pdf. 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 out-of-cycle review 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 out-of-cycle review 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 <u>Priority Watch List</u>, 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 International Intellectual Property Alliance

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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, 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." IIPA recommended that Egypt be returned to the Priority Watch List in 2004, noting high levels of piracy and low levels of enforcement as barriers to the legitimate market. USTR agreed and placed Egypt on its Priority Watch List in 2004. In its 2004 USTR Special 301 Announcement, USTR noted that "deficiencies in Egypt's copyright enforcement regime [and] judicial system ... necessitate the elevation of Egypt to the Priority Watch List." In particularly, USTR identified problems with copyright enforcement resulting from the lack of implementing regulations for Egypt's recent IPR law, and a slow court system where "collection of judgments is difficult and transparency is lacking."

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 provides "adequate and effective" copyright protection. In 2003, \$32 million worth of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 2.8% of its total exports to the U.S. During the first 11 months of 2004, \$33.2 million worth of Egyptian goods (or 2.8% 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 16.6% increase over the same period in 2003.

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 2003, \$28 million worth of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for 1.4% of its total exports to the U.S. During the first 11 months of 2004, \$30.5 million worth of Salvadoran goods (or 1.6% of El Salvador's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 98.3% increase over the same period in the previous year. In 2003, \$71.9 million worth of Salvadoran goods International Intellectual Property Alliance

entered the U.S. under the CBI. During the first 11 months of 2004, \$37.6 million worth of Salvadoran goods entered the U.S. under the CBI, representing a 45.1% decrease over the same period in the previous year. In 2003, \$1.1 billion worth of Salvadoran goods entered the U.S. under the CBTPA. During the first 11 months of 2004, \$1.2 billion worth of Salvadoran goods entered the U.S. under the CBTPA, representing a 13.5% increase from the same period in the previous year.

ESTONIA

IIPA notes Estonia in its <u>Special Mention</u> section in 2005. See http://www.iipa.com/rbc/2005/2005SPEC301ESTONIA.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 <u>Other Observations</u> list. In both 1999 and 2000, IIPA recommended placement of Estonia on the <u>Watch List because of significant deficiencies in the Estonian legal regime</u>, 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 though 2004, IIPA recommended that Estonia be placed on the <u>Watch List</u>, 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 2003, \$30.1 million worth of Estonian imports to the United States benefited from the GSP program, accounting for 16.9% of its total exports to the U.S. During the first 11 months of 2004, \$10.8 million worth of Estonian goods (or 3% 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 61.2% decrease 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 2005 Georgia country report at http://www.iipa.com/rbc/2005/2005SPEC301GEORGIA.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. In 2003, IIPA again recommended that Georgia be added to the Watch List, and in 2004 highlighted the country in its Special Mention section, pointing out key deficiencies in its enforcement regime.

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 2003, \$10.6 million worth of Georgian goods entered the U.S. (or 17.5% of Georgia's total exports to the U.S.). During the first 11 months of 2004, \$32.4 million worth of Georgian goods (or 46.1%

of Georgia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 206.8% 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 <u>Watch List</u> from 1991 to 1992. Though it was removed from any list in 1993, Germany was placed on the <u>Other Observations</u> 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 <u>Watch List</u> 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 <u>Other Observations</u> 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 <u>Other</u> Observations list. Germany has not appeared on any USTR list since 1998.

GREECE

Greece does not currently appear on any of the USTR lists. In this year's Special 301 Report, IIPA notes copyright concerns with Greece in its Special Mention section. See http://www.iipa.com/rbc/2005/2005SPEC301GREECE.pdf. Greece was on the 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

Guatemala has been on the Watch List since 2001. After seven years on the Special 301 <u>Watch List</u> (1992-1998), USTR elevated Guatemala to the <u>Priority Watch List</u> 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 <u>Watch List</u> in 2001. In 2002, IIPA recommended that Guatemala remain on the <u>Watch List</u>, 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 <u>Watch List</u>, USTR noted with approval the June 2001

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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. In 2004, IIPA highlighted copyright concerns in Guatemala in its Special Mention section. In its 2004 Special 301 Announcement, USTR maintained Guatemala on the Watch List for intellectual property concerns, notably with respect to protection of confidential test data. 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 2003, \$46.3 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code, accounting for 1.6% of its total exports to the U.S. During the first 11 months of 2004, \$50.4 million worth of Guatemalan goods (or 1.8% 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 31.2% increase from the same period in the previous year. In 2003, \$318 million worth of Guatemalan goods entered the U.S. under the CBI, accounting for 10.7% of its total exports to the U.S. During the first 11 months of 2004, \$258.5 million worth of Guatemalan goods (or 9.0% of Guatemala's total exports to the U.S. from January to November) entered under the CBI, representing a 5.7% decrease from the same period in the previous year. In 2003, \$770.5 million worth of Guatemalan goods entered under the CBTPA, accounting for 26.1% of its total exports to the U.S. During the first 11 months of 2004, \$812 million entered under the CBTPA, representing 28.2% of Guatemala's total exports to the U.S. for the same period in 2003.

HONG KONG

IIPA highlights copyright concerns in Hong Kong in its Special Mention section this year. See IIPA's 2005 Hong Kong country report at http://www.iipa.com/rbc/2005/2005SPEC301HONG_KONG.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 <u>Watch List</u> on April 30, 1997, and maintained it there in a January 16, 1998 <u>out-of-cycle review</u> 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 <u>Watch List</u>. USTR, calling for full implementation of new anti-piracy legislation, effective enforcement, and a significant reduction in piracy rates, kept Hong Kong on the <u>Watch List</u>. Hong Kong was removed from the <u>Watch List</u> after a February 1999 <u>out-of-cycle review</u>, but Ambassador Barshefsky added a September 1999 <u>out-of-cycle review</u> to assess Hong Kong's intellectual property progress.

On December 17, 1999, USTR announced that as a result of the September <u>out-of-cycle review</u>, Hong Kong would remain off the Special 301 <u>Watch List</u> 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. IIPA noted Hong Kong in its Special Mention section in 2004, citing strong concern over legislation that exempted those who used printed copies of works in trade or business from criminal liability.

HUNGARY

IIPA recommends that Hungary stay on the <u>Watch List</u>, where it was placed in 2003 by USTR. See IIPA's 2005 Hungary country report at http://www.iipa.com/rbc/2005/2005SPEC301HUNGARY.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 <u>Special Mention</u> list because of its enforcement and legal framework deficiencies. USTR did place Hungary on the <u>Special Mention</u> 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 <u>Priority Watch List</u>, from its <u>Watch List</u> 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 <u>Watch List</u>, noting the country's need to comply with TRIPS by remedying its criminal enforcement problems. USTR kept Hungary on the <u>Priority Watch List</u> 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 <u>Priority Watch List</u> to the <u>Watch List</u> in 2003. IIPA recommended that Hungary remain on the <u>Watch List</u> in 2004 because, although the country had made great strides to modernize its copyright legal regime, copyright owners reported "persistent prosecutorial delays and problems in a market that could otherwise sustain substantial growth." USTR kept Hungary on the <u>Watch List</u> in 2004, noting poor enforcement of its copyright law which has led to high piracy rates.

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 2003, \$404.8 million worth of Hungarian goods entered the U.S. under the duty-free GSP code, accounting for 15% of its total U.S. imports. During the first 11 months of 2004, \$121.2 million worth of Hungarian goods (or 5.2% 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 66.9% decrease over the same period in 2003.

ICELAND

Iceland has never appeared on a USTR list. This year, IIPA highlights Iceland in its <u>Special Mention</u> section, see http://www.iipa.com/rbc/2005/2005SPEC301ICELAND.pdf, noting concerns over Internet piracy, particularly through peer-to-peer (P2P) networks.

INDIA

IIPA recommends that India remain on the <u>Priority Watch List</u>. See IIPA's 2005 India country report at http://www.iipa.com/rbc/2005/2005SPEC301INDIA.pdf. India has been on the <u>Priority Watch List</u> since 1989 and was named a <u>Priority Foreign Country</u> 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 <u>Priority Foreign Country</u> until June 30, 1994, when it was moved to the <u>Priority Watch List</u> after it adopted significant amendments to its copyright law. USTR subjected India to a special <u>out-of-cycle</u> review (OCR) in January 1995 and its position on the <u>Priority Watch List</u> as its enforcement program began to take shape; USTR agreed.

In 1997, IIPA recommended that India be moved to the <u>Watch List</u> as a result of continued encouraging raiding activity. However, USTR disagreed and in April 1997 kept India on the <u>Priority Watch List</u>, 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. IIPA recommended that India remain on the Priority Watch List in 2004, noting its high piracy and low enforcement rates. USTR identified improvements in India's IPR regime in its 2004 Special 301 Announcement, but kept the country on the Priority Watch List because "protection of intellectual property in some areas remains weak due to inadequate laws and ineffective enforcement."

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 2003, \$2.6 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 20.3% of its total exports to the U.S. During the first 11 months of 2004, \$2.9 billion worth of Indian goods (or 20.6% 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 22% increase over the same period in 2003.

INDONESIA

IIPA recommends that Indonesia stay on the <u>Priority Watch List</u>, where it has remained since 2001. See IIPA's 2005 Indonesia country report at http://www.iipa.com/rbc/2005/2005SPEC301INDONESIA.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 "[pliracy 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." IIPA recommended that Indonesia remain on the Priority Watch List in 2004, and USTR agreed. The 2004 Special 301 Announcement noted that progress in the area of strengthening IPR, particularly in the area of enforcement against piracy and counterfeiting, "has been inconsistent." In addition, USTR stated that "serious concerns remain over lack of enforcement; the production, distribution, and export of pirated optical media products . . . and deficiencies in Indonesia's judicial system."

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 provides "adequate and effective protection for intellectual property rights." In 2003, \$1.3 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 14.3% of its total exports to the U.S. During the first 11 months of 2004, \$1.2 billion worth of Indonesian goods (or 11.9% 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 5% decrease over the same period in 2003.

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-

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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 remain on the <u>Watch List</u> where it has been since 2003. See IIPA's 2005 Israel country report at http://www.iipa.com/rbc/2005/2005SPEC301ISRAEL.pdf. 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 IIPA first reported serious piracy. At that time, IIPA noted the need for copyright law modernization and urged USTR to place Israel on the Special Mention status, where it remained in 1995 and 1996. In 1997, USTR elevated Israel to the 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 used 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. IIPA recommended that Israel be returned to the Priority Watch List in its 2004 report, noting a proposed copyright amendment which "seriously threatens the rights of foreign copyright holders, especially U.S. phonogram producers." USTR declined to elevate Israel, instead keeping it on its Watch List for 2004, but announcing that an out-of-cycle review would be conducted later in the year to assess whether Israel made progress in responding to U.S. concerns regarding the provision of "national treatment for U.S. rights holders in sound recordings." In January 2005. USTR deferred its decision on Israel.

ITALY

IIPA recommends that Italy remain on the <u>Watch List</u>, where it has been since 2001. See IIPA's 2005 Italy country report at http://www.iipa.com/rbc/2005/2005SPEC301ITALY.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 <u>Priority Watch List</u>, from the <u>Watch List</u>, where it had been listed since 1989. USTR agreed, and Italy was on the <u>Priority Watch List</u> in 1998 and 1999. In February 2000, USTR kept Italy on the <u>Priority Watch List</u>, and added a September <u>out-of-cycle review</u> (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. In its 2004 Special 301 Report, IIPA recommended that Italy remain on the Watch List, noting the country's piracy rate as one of the highest in Europe. USTR agreed, maintaining the ranking in its 2004 Special 301 Announcement and noting the country's high piracy rates "[d]espite the continued implementation of the 2000 Copyright Law and increased enforcement actions in 2003."

JAMAICA

Jamaica has been on the <u>Watch List</u> 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 <u>Watch List</u>, 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 2003, \$1.9 million worth of Jamaican imports to the United States benefited from the GSP program, accounting for 0.4% of its total exports to the U.S. During the first 11 months of 2004, \$4.6 million worth of Jamaican goods (or 1.7% 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 172.3% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$87.3 million worth of Jamaican goods entered the U.S., accounting for 21.2% of total exports to the U.S. in 2003. During the first 11 months of 2004, \$85.5 million worth of Jamaican goods (or 30.9% of Jamaica's total exports to the U.S. from January to November) entered under the CBI, representing a 11.1% 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, \$91.6 million worth of Jamaican goods entered the U.S. in 2003. During the first 11 months of 2004, \$68.6 million worth of Jamaican goods (or 24.8% of Jamaica's total exports to the U.S. from January to November) entered the U.S. under the CBTPA. IN 2004, USTR maintained Jamacia on the Watch List, stating that "while Jamaica's trademark and copyright laws are generally in line with international standards, we remain concerned over the continued failure to enact the Patents and Designs Act to meet Jamaica's obligations under the TRIPS Agreement and the U.S.-Jamaican bilateral IP Agreement."

JORDAN

Jordan does not currently appear on any of the USTR lists. In 2005, IIPA recommends that the U.S. government commence a dispute settlement action under the U.S.-Jordan Free Trade Agreement, due to Jordan's failure to meet the IPR provisions of that Agreement. 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 2003, \$35 million worth of Jordan's imports to the United States benefited from the GSP program, accounting for 5.2% of its total exports to the U.S. During the first 11 months of 2004, \$75.8 million worth of Jordanian goods (or 7.63% 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 181.4% from the same period in 2003.

KAZAKHSTAN

IIPA recommends that Kazakhstan remain on the <u>Watch List</u>, where it has been since 2000. See IIPA's 2005 Kazakhstan country report at http://www.iipa.com/rbc/2005/2005SPEC301CIS.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 2003, \$167 million worth of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 42% of its total exports to the U.S. During the first 11 months of 2004, \$133.6 million worth of Kazakh goods (or 26.3% 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 9.7% 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. Similarly, in its 2004 Special 301 Report, IIPA again recommended that Kazakhstan remain on the Watch List. In its Special 301 Announcement, USTR agreed, noting that while fulfilling many of its treaty obligations under 1992 trade agreement with the U.S., Kazakhstan still needed to take "additional steps. . . particularly with respect to copyright protection and enforcement."

KENYA

In 2005, IIPA identifies copyright concerns with Kenya in its <u>Special Mention</u> section, most notably with respect to the country's extremely high piracy rates, inadequate legislative and enforcement efforts. See http://www.iipa.com/rbc/2005/2005SPEC301KENYA.pdf. The country currently participates in the Generalized System of Preferences (GSP) trade program which requires, as one of its eligibility criteria, that a country provides "adequate and effective" copyright protection. In 2003, \$3.8 million worth of Kenyan goods entered the U.S. under the duty-free GSP code, accounting for 1.5% of the country's total exports to the U.S. During the first 11 months of 2004, \$5.6 million worth of Kenyan goods (or 1.8% of Kenya's total exports to the U.S from January to November) entered the U.S. under the duty-free GSP code, representing a 57.6% increase over the same period in 2003.

KUWAIT

IIPA recommends that Kuwait remain on the Priority Watch List, to which it was elevated in 2004. See IIPA's 2005 Kuwait country report at http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf.. Kuwait was on the Watch List from 2000 to 2003. 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, International Intellectual Property Alliance 2005 Special 301: Historical Summary

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, increas[e] the effectiveness of enforcement procedures, strengthe[n] an existing interagency process, and improv[e] judicial capacity to penalize present offenders and deter future ones" (2003), has kept Kuwait on the Watch List. IIPA recommended that Kuwait be placed on the Priority Watch List in 2004, noting it had the worst rate of optical piracy in the Gulf Region. In its 2004 Special 301 Announcement, USTR elevated Kuwait to the Priority Watch List "due to its failure to address serious and rampant copyright infringement and failure to amend its copyright law." Among the problems listed were Kuwait's failure to implement the 2002 work plan to increase IPR enforcement, the worst retail optical disc piracy rate in the region, corporate end user piracy, hard-disc loading, and cable piracy.

KYRGYZ REPUBLIC

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 2004, IIPA highlighted concerns with the Kyrgyz Republic in its <u>Special Mention</u> section. In particular, IIPA noted the lack of effective enforcement against piracy, and the lack of compliance with enforcement obligations of the WTO TRIPS agreement. 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 2003, \$781,000 in Kyrgyz exports to the United States benefited from the GSP program, accounting for 7.1% of its total exports to the U.S. During the first 11 months of 2004, \$48,000 of Kyrgyz goods (or 0.63% 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 93.8% decrease over the same period in 2003.

LAO PEOPLE'S DEMOCRATIC REPUBLIC (LAOS)

Laos has never appeared on a USTR list. In its 2003 and 2004 submissions, IIPA noted Laos as a Special Mention country, citing optical disc piracy concerns. This year in its Special Mention section, see http://www.iipa.com/rbc/2005/2005SPEC301LAOS.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 2005 Latvia country report at http://www.iipa.com/rbc/2005/2005SPEC301LATVIA.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 "[I]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." In 2004, IIPA recommended that Latvia be maintained on the Watch List, noting that the anti-piracy efforts in the country were "inadequate, if not virtually non-existent." USTR agreed, citing a variety of copyright concerns in its 2004 Special 301 Announcement, including Latvia's continued status as a "consumer of and transshipment point for pirated goods, especially from Russia." USTR also identified high piracy levels for the motion picture, recorded music, and entertainment software industries, and raised concerns over the growth of Internet piracy in Latvia. Finally, though some progress had been made on end-user piracy in the business software industry, USTR stressed that "unlicensed use of business software by government ministries remains a serious concern."

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 2003, \$11.1 million worth of Latvia's exports to the United States benefited from the GSP program, accounting for 2.8% of its total exports to the U.S. During the first 11 months of 2004, \$3.5 million worth of Latvian goods (or 1.0% 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 65.5% decrease over the same period in the previous year.

LEBANON

IIPA recommends that Lebanon remain on the <u>Priority Watch List</u>, where it has been since 2001. See IIPA's 2005 Lebanon country report at http://www.iipa.com/rbc/2005/2005SPEC301LEBANON.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 <u>Special Mention</u> list because of its high levels of piracy and outmoded copyright law. IIPA's 1996 filing recommended a <u>Watch List</u> 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 <u>Watch List</u>, 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 <u>Watch List</u> 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 <u>Other Observations</u> 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."

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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.

Lebanon's GSP review is ongoing. IIPA recommended Lebanon be maintained on the <u>Priority Watch List</u> in 2004 due to the continued dominance of pirated product in the market. USTR agreed, keeping Lebanon on its <u>Priority Watch List</u> in 2004. While USTR commended Lebanon for many of the positive International Intellectual Property Alliance

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changes it had made in 2003, including a "crackdown on illegal cable operators, a large scale raid on pirated DVDs, movement toward full legalization of government software [and] increased *ex officio* inspection along the borders." Among the problems that remained, USTR identified rampant piracy in Lebanon, a slow and inefficient judiciary, the country's failure to join the latest text of the Berne Convention, or ratify the two WIPO Treaties, the WCT and WPPT.

Lebanon currently participates in the Generalized System of Preferences (GSP) trade program, which has, as an eligibility criterion, that a country provide "adequate and effective" copyright protection. In 2003, \$29.9 million worth of Lebanon's exports to the United States benefited from the GSP program, accounting for 31.8% of its total exports to the U.S. During the first 11 months of 2004, \$31.1 million worth of Lebanese goods (or 45% of Lebanon's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 10.4% increase over the same period in the previous year.

LITHUANIA

IIPA recommends that Lithuania stay on the Watch List, where it has been since 2000. See IIPA's 2005 Lithuania country report at http://www.iipa.com/rbc/2005/2005SPEC301LITHUANIA.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 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. IIPA recommended that Lithuania remain on the Watch List in 2004, noting "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." In its 2004 Special 301 Announcement, USTR kept Lithuania on the Watch List, noting that despite "continue[d] . . . progress towards improving its legislative framework for protecting IPR and in combating software piracy," optical media piracy levels remain high. Furthermore, as USTR pointed out, "Lithuania is a key transshipment point in the Baltic region for pirated music . . . DVDs and videogames."

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 2003, \$6 million worth of Lithuania's imports to the United States benefited from the GSP program, accounting for 1.7% of its total exports to the U.S. During the first 11 months of 2004, \$1.8 million worth of Lithuanian goods (or 0.4% 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 66.4% decrease from the same period in 2003.

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.

MACEDONIA

Macedonia has never appeared on a USTR list. In 2005, IIPA identifies Macedonia in the Special Mention section of its Special 301 Report, see http://www.iipa.com/rbc/2005/2005SPEC301MACEDONIA.pdf, noting particular concerns with the country's weak enforcement, and piracy rates of as high as 95% in some industries. Despite ratifying the two WIPO Digital treaties, the WCT and WPPT, Macedonia has made reservations with respect to the treaties that threaten to undermine some of the protections the treaties seek to provide.

Macedonia currently participates in the GSP program. In 2003, \$6.3 million worth of Macedonian goods entered the U.S. under the duty-free GSP code, representing 10% of the country's total exports to the U.S. During the first 11 months of 2004, \$6.2 million worth of Macedonian goods (or 9% of the country's total exports to the U.S. from January to November) entered the U.S., representing an increase of 11.5% from the same period in 2003.

MALAYSIA

In 2005, IIPA recommends that Malaysia remain on the Watch List (where it has remained since 2002). See IIPA's 2005 Malaysia country report at http://www.iipa.com/rbc/2005/2005SPEC301MALAYSIA.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-ofcycle 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. In 2004, IIPA again recommended that Malaysia remain on the Watch List and that an out-of-cycle-review be conducted to determine whether Malaysia had progressed in reducing the high levels of manufacture and export of pirate optical discs. In its 2004 Special 301 Announcement, USTR placed Malaysia on the Watch List, noting that "[p]iracy rates remain high for optical media (especially entertainment software) and books, and the substantial export of illegal goods continues." In addition, USTR identified Malaysia as the "world's largest exporter of pirate entertainment software." In order to monitor Malaysia's progress towards eradicating its unacceptably high rate of pirate optical disc production and export, and efforts to improve its "lax enforcement," USTR announced that it would conduct an out-of-cycle review of Malaysia in the fall of 2004. In early 2005, that review concluded with Malaysia's maintenance on the Watch List.

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 between 1999 and 2002. In 1998 and 1999, IIPA urged the U.S. Government to place Mexico 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 leads to prosecutions and convictions and copyright amendments that do not meet international obligations. The 2004 USTR Special 301 Announcement commended Mexico for its many improvements in IPR protection, including enacting "legislation classifying piracy as an organized crime." USTR kept the country on the Watch List, however, largely because piracy of copyrighted material remains a major problem due to "lax enforcement at both the criminal and administrative level"

MOLDOVA

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 2003, \$503,000 worth of Moldavian imports to the United States benefited from the GSP program, representing 1.2% of its total exports to the U.S. During the first 11 months of 2004, \$673,000 worth of Moldavian goods (or 1.5% of Moldova's total exports to the U.S. from January to November) entered the U.S. under the GSP duty-free code, representing an increase of 53.1% over the same period in 2003. IIPA included Moldova in the Special Mention section of its 2004 report, noting that while many legal reforms have been made over the past few years, the country "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."

MYANMAR

Myanmar has never appeared on any USTR list. In 2005, IIPA notes copyright concerns in Myanmar resulting from a lack of modern intellectual property laws and the potential for migration into the country of pirate optical disc plants.

NEW ZEALAND

New Zealand does not currently appear on any of the USTR lists. In 2005, IIPA recommends that New Zealand be returned to the Watch List, from which it was removed in 2003. See IIPA's 2005 New Zealand country report at http://www.iipa.com/rbc/2005/2005SPEC301NEW_ZEALAND.pdf. New Zealand appeared on the Special 301 Watch List in 1991 and 1992. In 1998, at the urging of IIPA, USTR initiated an outpout IIPA, USTR initiated an outpout IIPA, USTR initiated an outpout IIPA, USTR in 1991 and 1992. In 1998, at the urging of IIPA, USTR initiated an outpout IIPA, 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. New Zealand did not appear on any Special 301 lists in 2000. In the April 30, 2001 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 2003, \$99.8 million worth of Nicaraguan imports to the United States benefited from the CBI program, accounting for 13% of its total exports to the U.S. During the first 11 months of 2004, \$123.5 million worth of Nicaraguan goods (or 13.6% of Nicaragua's total exports to the U.S. from January to November) entered the U.S. under the CBI, representing a 45.7% 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 2003, \$149.2 million worth of Nicaraguan goods benefited from the CBTPA program, accounting for 19.4% of Nicaragua's total exports to the U.S. During the first 11 months of 2004, \$177.6 million worth of Nicaraguan goods (or 19.6% of Nicaragua's total exports to the U.S. from January to November) benefited from the CBTPA program, representing an increase of 31.3% over the same period in 2003.

NIGERIA

In 2005, IIPA highlights copyright concerns in Nigeria stemming from very high piracy rates, inadequate cooperation between government agencies, and a proliferation of optical disc manufacturing plants.

Nigeria currently participates in the Generalized System of Preferences trade program, which requires eligible beneficiary countries to provide "adequate and effective" protection of intellectual property, including copyright. In 2003, \$2.1 million worth of Nigerian goods entered the U.S. under the duty-free GSP code, accounting for 0.02% of the country's total exports to the U.S. During the first 11 months of 2004, \$655,000 worth of Nigerian goods entered the U.S. under the GSP code, representing a decrease of 68.2% over the same period in 2003. Nigeria also participates in the African Growth Opportunity Act (AGOA) which, like the GSP, has an intellectual property component. In 2003, \$9.4 billion worth of Nigerian goods entered the U.S. under the AGOA, representing 92.5% of the country's total exports to the U.S. During the first 11 months of 2004, \$14 billion worth of Nigerian goods entered the U.S. (or 95% of the country's total exports to the U.S. from January to November) under the AGOA, representing a 63.6% increase over the same period in 2003.

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 <u>Special Mention</u> list (equivalent to USTR's <u>Other Observations</u> 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 <u>Watch List</u> 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 <u>Watch List</u>, 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 <u>Watch List</u> 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 <u>Watch List</u>, 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 <u>Watch List</u>, 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 provides "adequate and effective protection of intellectual property rights." In 2003, \$40.7 million worth of Oman's exports to the United States benefited from the GSP program, accounting for 6.7% of its total exports to the U.S. During the first 11 months of 2004, \$43.1 million worth of Oman's goods (or 10.6% 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 15.8% from the same period in 2003.

PAKISTAN

IIPA recommends that Pakistan be designated as a Priority Foreign Country. See IIPA's 2005 Pakistan country report at http://www.iipa.com/rbc/2005/2005SPEC301PAKISTAN.pdf. Pakistan was on the Special 301 Watch List from 1989 to 2003. In 1997 and 1998, USTR noted 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 noted the CD plants and Pakistan's TRIPS-incompatible law. In 2000, IIPA again recommended that Pakistan be kept on the Watch List, again noting the increasing pirate CD production problem. In 2001, IIPA made the same recommendation. 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 <u>Priority Watch List</u>, noting the alarming rise of pirate optical disc production. USTR, in keeping Pakistan on the <u>Watch List</u> 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. IIPA recommended that Pakistan be designated as a <u>Priority Foreign Country</u> in 2004, for extremely high levels of piracy, and the Pakistani government's complete lack of attention to the problem. The 2004 USTR Special 301 Announcement once again described Pakistan as the "fourth largest source of counterfeit and piratical goods seized by the U.S. Customs Service" and elevated Pakistan to the <u>Priority Watch List</u>, citing worsening piracy and counterfeiting problems.

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." In 2001, IIPA filed a petition with USTR's GSP Committee requesting that it evaluate Pakistan's eligibility for the trade benefit program given the country's record of poor copyright protection and enforcement. In June 2004, USTR accepted the petition. 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 \$91.9 million worth of products into the International Intellectual Property Alliance

United States without duty in 2003 (3.6% of its total exports to the U.S.), and \$85.6 million worth of products (or 3.2% 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, representing a 1.2% increase over the same period of the previous year.

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 2003, \$291,000 of products imported from the West Bank benefited from the GSP program, representing 62.3% of the Palestinian Authority's total exports to the U.S. During the first 11 months of 2004, \$310,000 of products (or 81.6% 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 21.9% increase over the same period in 2003.

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 2003, \$5.7 million worth of Panamanian imports to the United States benefited from the GSP program, accounting for 2.0% of its total exports to the U.S. During the first 11 months of 2004, \$5.8 million worth of Panamanian goods (or 2.1% 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 17.5% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$37.2 million worth of Panamanian goods entered the U.S., accounting for 12.8% of total exports to the U.S. in 2003. During the first 11 months of 2004, \$26.3 million worth of Panamanian goods (or 9.8% of Panama's total exports to the U.S. from January to November) entered under the CBI, representing a 17.6% 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, \$3.5 million worth of Panamanian goods entered the U.S. in 2003. During the first 11 months of 2004, \$333,000 worth of Panamanian goods (or 0.12% of Panama's total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

PARAGUAY

In 2005, 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 2005 Paraguay country report at http://www.iipa.com/rbc/2005/2005SPEC301PARAGUAY.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 <u>Priority Foreign Country</u> because of the longstanding problems of piracy, ineffective enforcement and an inadequate copyright law. In April 1997, USTR elevated Paraguay to the <u>Priority Watch List</u>, 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 <u>OCR</u> of Paraguay's Special 301 status. Because Paraguay simply failed to meet the standards laid out in that review, USTR designated Paraguay as a <u>Priority Foreign Country</u> 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 <u>Section 306 monitoring</u> of Paraguay. USTR's April 30, 2001 Special 301 Announcement noted inadequate implementation of the MOU and that "Paraguay continues International Intellectual Property Alliance 2005 Special 301: Historical Summary

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. IIPA recommended once again that Paraguay be monitored under Section 306 in 2004, and USTR agreed. In its 2004 Special 301 Announcement, USTR noted that Paraguay continued to have problems in providing protection for copyrights and trademarks, both with respect to poor internal enforcement and weak border enforcement.

Paraguay currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide "adequate and effective protection of intellectual property rights." In 2003, \$16.5 million worth of Paraguayan imports to the United States benefited from the GSP program, accounting for 32.9% of its total exports to the U.S. During the first 11 months of 2004, \$17.1 million worth of Paraguayan goods (or 35.5% 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 18.7% increase from the same period last year.

PEOPLE'S REPUBLIC OF CHINA

In 2005, IIPA recommends that, for the reasons discussed below, China be placed on the Priority Watch List when USTR concludes its out-of-cycle review, or when USTR makes its Special 301 ranking announcement on May 1, 2004 (whichever first occurs), and that it announce at that time an additional out-of-cycle review period ending July 31, 2005. See IIPA's 2005 People's Republic of China country report at http://www.iipa.com/rbc/2005/2005SPEC301PRC.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. International Intellectual Property Alliance

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 <u>Priority Foreign Country</u> 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.

Between 1998 and 2004, IIPA continued to recommend, and USTR agreed, that China be subject to Section 306 monitoring to ensure its compliance with the 1995 IPR Agreement and the 1996 Action Plan. In its 2004 Special 301 Announcement, USTR additionally stated that it would begin an out-of-cycle review of China in early 2005, "to evaluate whether China is implementing its commitments and whether the actions undertaken are bringing forth substantial progress toward China's objective of significantly reducing its level of IPR infringement."

PERU

IIPA recommends that Peru remain on the <u>Watch List</u>, where it has been since 2001. See IIPA's 2005 Peru country report at http://www.iipa.com/rbc/2005/2005SPEC301PERU.pdf. USTR first placed Peru on the Special 301 <u>Watch List</u> 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 <u>Watch List</u> in both 1997 and 1998. In both 1999 and 2000, IIPA recommended, and USTR agreed, that Peru should be elevated to the <u>Priority Watch List</u>.

In 2001, IIPA recommended that Peru be put on the <u>Watch List</u> in recognition of noticeable progress INDECOPI has made on copyright issues. USTR agreed, placing Peru on the <u>Watch List</u> 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 <u>Watch List</u>, noting high piracy levels, weak enforcement, and a failure to require government agencies to use licensed software. Peru remained on the <u>Watch List</u>. International Intellectual Property Alliance

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 <u>Watch List</u> in 2003. IIPA recommended that Peru continue to be on the <u>Watch List</u> in 2004. In its 2004 Special 301 Announcement, USTR agreed, noting "continuing concerns with respect to Peru's IP regime over the lack of data protection, weakened patent protection, widespread piracy of copyrighted works and lack of effective IPR enforcement."

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 2003, \$110.2 million worth of Peru's imports to the United States benefited from the GSP program, accounting for 4.6% of its total exports to the U.S. During the first 11 months of 2004, \$96 million worth of Peruvian goods (or 3% of Peru's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 4.3% over the same period in 2003. An additional \$1.3 billion worth of Peruvian products benefited from the ATPA in 2003, accounting for 53% of total exports to the United States. In the first 11 months of 2004, an additional \$1.4 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 25.6% increase in ATPA benefits from the same period in 2003.

PHILIPPINES

IIPA recommends that the Philippines be maintained on the <u>Priority Watch List</u>, and that an <u>out-of-cycle review</u> (OCR) be conducted to evaluate whether recently initiated enforcement and legislative actions to eradicate copyright piracy are being sustained. See IIPA's 2005 Philippines country report at http://www.iipa.com/rbc/2005/2005SPEC301PHILIPPINES.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 <u>Priority Foreign Country</u>, 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 <u>Watch List</u> to the <u>Priority Watch List</u>. 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 <u>Priority Watch List</u> to the <u>Watch List</u> 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 <u>Priority Watch List</u> "to underscore U.S. insistence that these long-standing and serious problems be effectively tackled." USTR agreed and placed the Philippines on the <u>Priority Watch List</u> 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 <u>Priority Watch List</u> and conduct an <u>out-of-cycle review</u> (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 International Intellectual Property Alliance

agreed, to keep the Philippines on the <u>Priority Watch List</u>. 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. In 2004, the IIPA recommended, and USTR agreed, that the Philippines be placed on the <u>Priority Watch List</u>. USTR's 2004 Special 301 Announcement mentioned little improvement in the Philippines, noting that "serious concerns remain regarding the lack of consistent, effective, and sustained IPR protection in the Philippines."

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 provides "adequate and effective protection of intellectual property rights." In 2003, \$894.7 million worth of Philippine imports to the United States benefited from the GSP program, accounting for 9.8% of its total exports to the U.S. During the first 11 months of 2004, \$890.5 million worth of Philippine goods (or 10.5% 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 8% from the same period in 2003.

POLAND

IIPA recommends that Poland remain on the Watch List See IIPA's 2005 Poland country report at http://www.iipa.com/rbc/2005/2005SPEC301POLAND.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. IIPA recommended that Poland remain on the Priority Watch List in 2004, citing serious problems with imports of pirated copyright products, and optical disc production. USTR lowered Poland's ranking to the Watch List in its 2004 Special 301 Announcement, even though pirating, border control, and enforcement efforts still remained a serious issue. USTR further noted that after being put on the Priority Watch List the Polish Government demonstrated "its willingness to address U.S. IP-related concerns, especially regarding copyright protection, and has made changes over the past year that have provided the foundation for long-term, sustained improvements." Finally, USTR stated that it would conduct an out-of-cycle review in the fall of 2004 to ensure that Poland continued its efforts to strengthen IPR protection and enforcement. IIPA participated in that review, recommending that Poland remain on the Watch List. In January 2005, USTR concluded the review, maintaining Poland's placement on the 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 2003, \$374.2 million worth of Poland's exports to the United States benefited from the GSP program, accounting for 28.3% of its total imports. During the first 11 months of 2004, \$143.9 million worth of Polish goods (or 8.7% of Poland's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 56.9% from the same period in 2003.

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. In 2003, IIPA recommended that Qatar be maintained on the Watch List. In its submission, IIPA noted that though Qatar took steps to bring its copyright law into compliance with international standards, software piracy remained at high levels due to Qatar's failure to enforce its copyright law. USTR did not place Qatar on any list in either 2003 or 2004.

ROMANIA

IIPA recommends that Romania stay on the <u>Watch List</u>, where it has been placed since 1999. See IIPA's 2005 Romania country report at http://www.iipa.com/rbc/2005/2005SPEC301ROMANIA.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 <u>Watch List</u> 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. In 2004, IIPA once again recommended that Romania remain on the <u>Watch List</u>. In its 2004 Special 301 Announcement, USTR agreed, noting that "IPR enforcement did not improve in Romania in 2003. High piracy levels continued across all sectors, optical disc piracy grew, and poor border enforcement led to a surge in imports of pirated material."

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 2003, \$118.7 million worth of Romania's imports to the United States benefited from the GSP program, accounting for 16.3% of its total exports to the U.S. During the first 11 months of 2004, \$198.8 million worth of Romanian goods (or 25.3% 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 93.1% increase over the same period in 2003.

RUSSIA

IIPA recommends that Russia be elevated to Priority Foreign Country status in 2005. See IIPA's 2005 Russia country report at http://www.iipa.com/rbc/2005/2005SPEC301RUSSIA.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 <u>Priority Foreign Country</u> 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 <u>Priority Watch List</u> 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 <u>Priority Watch List</u> 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 <u>Priority Watch List</u> ever since 1997. The USTR 2003 Special 301 Report notes that Russia made International Intellectual Property Alliance

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. IIPA recommended and USTR agreed that Russian should remain on the Priority Watch List for 2004. The major problems cited in the 2004 Special 301 Announcement were Russia's copyright law and enforcement measures which are "deficient and appear to be inconsistent with the 1992 U.S.-Russian Federation Trade Agreement." In addition, Russia's copyright law does not protect pre-existing works and border enforcement has not been able to prevent the significant problem of unauthorized production and export of pirated optical media products.

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." USTR also pointed to other problems such as weak enforcement and "[I]ack of an effective OD law." In 2003, \$429.8 million worth of Russia's imports to the United States benefited from the GSP program, accounting for 5.1% of its total exports to the U.S. During the first 11 months of 2004, \$515 million worth of Russian goods (or 5% 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 36.8% increase from the same period in 2003.

SAUDI ARABIA

IIPA recommends that Saudi Arabia remain on the <u>Watch List</u> where it has been since 1996. See IIPA's 2005 Saudi Arabia country report at http://www.iipa.com/rbc/2005/2005SPEC301SAUDI ARABIA.pdf. Saudi Arabia was on the <u>Priority Watch List</u> from 1993 to 1995. In April 1995, USTR kept Saudi Arabia on the <u>Priority Watch List</u> and added an <u>out-of-cycle review</u> (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 <u>Watch List</u> in recognition of end-of-1995 enforcement actions taken by the Ministry of Information. It remained on the <u>Watch List</u> in 1997. In 1998 and 1999, IIPA recommended, and USTR agreed, that Saudi Arabia should remain on the <u>Watch List</u>, 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 <u>Priority Watch List</u>, 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 <u>Watch List</u>, 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 <u>Watch List</u>, noting increasing enforcement, but many of the same structural difficulties, including lack of transparency. USTR agreed. In its 2003 Special 301 Announcement, USTR

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¹ This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

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." In 2004, IIPA recommended that Saudi Arabia remain on the <u>Watch List</u> 2004, and that USTR conduct an <u>out-of-cycle review</u> to determine if the copyright law had been implemented properly to protect all U.S. works in line with international standards. USTR kept Saudi Arabia on the <u>Watch List</u> but did not announce an <u>out-of-cycle review</u>. The 2004 Special 301 Announcement praised Saudi Arabia for the improvements it made. USTR did, however, identify significant, and continuing problems with piracy and copyright protection in Saudi Arabia, particularly the failure to provide "adequate protection for sound recordings, . . . *ex parte* civil search orders [, or] deterrent penalties."

SERBIA AND MONTENEGRO

Serbia and Montenegro have never appeared on a USTR Special 301 list. In 2005, IIPA recommends that Serbia and Montenegro be placed on the <u>Watch List</u>, noting unacceptably high piracy levels, inadequate legislation, and ineffective enforcement remedies. See IIPA's 2005 Serbia and Montenegro report at http://www.iipa.com/rbc/2005/2005SPEC301SERBIA_MONTENEGRO.pdf. In the 2004 Special Mention section, IIPA highlighted certain legislative and enforcement deficiencies, in Serbia and Montenegro, specifically with respect to the business software and recording industries.

SINGAPORE

In its 2005 Special 301 Report, IIPA recommends that the U.S. Government consider commencing a dispute settlement action under the U.S.-Singapore Free Trade Agreement, as a result of inadequate protection of intellectual property rights. See IIPA's 2005 FTA Dispute Settlement report at www.iipa.com/rbc/2005/2005SPEC301SINGAPORE.pdf. Singapore 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 TRIPSconsistent copyright law.

In 1999 and 2000, IIPA recommended and USTR agreed that Singapore remain on the <u>Watch List</u>. 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. IIPA highlighted Singapore in the <u>Special Mention</u> section of its 2004 Special 301 report, noting the continuing problem of "illegal photocopying of textbooks and academic journals," and concerns over the export of pirate optical media discs.

SLOVAK REPUBLIC

The Slovak Republic is currently on the <u>Watch List</u>, where it has been since 2001. The Slovak Republic was originally placed on the <u>Watch List</u> 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." The Slovak Republic was placed on the <u>Watch List</u> by USTR once again in 2004, which noted, among other things, that "imports of pirated optical media, primarily from the Ukraine and Russia, have increased."

In 2003, \$72.9 million worth of the Slovak Republic's exports to the United States benefited from the GSP program, accounting for 7.2% of its total exports to the U.S. During the first 11 months of 2004, \$24.5 million worth of the Slovak Republic's exports to the United States (or 2.1% of the Slovak Republic's total exports to the U.S. from January to November) benefited from the GSP program, representing a decrease of 63.8% over the same period in 2003.

SOUTH AFRICA

South Africa does not currently appear on any of the USTR lists. In 2005, IIPA highlights concerns in South Africa in IIPA's Special Mention section. 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 <u>Watch List</u> 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 <u>Watch List</u>. In her April 30, 1999 announcement, Ambassador Barshefsky added a September 1999 <u>out-of-cycle review</u>, 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 <u>Watch List</u>, 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 2003, \$670.2 million worth of South Africa's exports to the United States benefited from the GSP program, accounting for 13.7% of its total exports to the U.S. During the first 11 months of 2004, \$850 million worth of South Africa's exports to the United States (or 15.9% of South Africa's total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 39.2% over the same period in 2003. South Africa also participates in the African Growth Opportunity Act (AGOA), another trade program which contains a basic intellectual property rights protection component. In 2003, \$998.4 million worth of South Africa's exports to the U.S. During the first 11 months of 2004, \$753.5 million worth of South Africa's exports

(or 14.1% of the country's total exports to the U.S.) benefited from the AGOA program, representing a decrease of 16.3% over the same period in the previous year.

SOUTH KOREA

IIPA recommends that South Korea be maintained on the Priority Watch List, to which it was elevated in See IIPA's 2005 South Korea country report at http://www.iipa.com/rbc/2005/ 2005SPEC301SOUTH_KOREA.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." In its 2004 Special 301 Announcement, USTR kept South Korea on the Priority Watch List, noting that despite progress since the conclusion of the 2003 out-of-cycle review, significant problems remained, including the country's failure to update its laws and bring it into compliance with modern, international standards.

SPAIN

In 2005, IIPA highlights copyright concerns in Spain in the Special Mention section of its Special 301 Report. See http://www.iipa.com/rbc/2005/2005SPEC301SPAIN . 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. In 2004, IIPA recommended that Spain be returned to the Watch List, citing the country's high piracy rates and the dominance of pirated material in street markets.

SWITZERLAND

Switzerland has never appeared on a USTR list. This year, IIPA notes Switzerland in its Special Mention section, pointing out concerns with the way in which the country is implementing the two WIPO Treaties, the WCT and WPPT. See IIPA's 2005 Special Mention section at http://www.iipa.com/rbc/2005/2005SPEC301SWITZERLAND.pdf.

TAIWAN

IIPA recommends that Taiwan be placed on the Watch List, and that an out-of-cycle review (OCR) be conducted. See IIPA's 2005 Taiwan country report at http://www.iipa.com/rbc/2005/ 2005SPEC301TAIWAN.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 <u>Priority Watch List</u> 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 <u>Watch List</u> 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 <u>Watch List</u>, 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 <u>Watch List</u> 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 <u>Watch List</u>, with an <u>out-of-cycle review</u> 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 <u>Priority Watch List</u> 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 <u>Priority Watch List</u> in 2002. IIPA also recommended that an <u>out-of-cycle review</u> 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 <u>Priority Watch List</u> in 2003. In 2004, IIPA recommended that Taiwan remain on the <u>Priority Watch List</u>. In addition, IIPA suggested that USTR conduct an <u>out-of-cycle review</u> to evaluate Taiwan's adoption of legislation correcting the deficiencies in the copyright amendments adopted in 2003, and to assess whether it had improved enforcement against OD factories. In its 2004 Special 301 Announcement, USTR commended Taiwan for its efforts to improve enforcement. In keeping on the <u>Priority Watch List</u>, however, USTR noted significant copyright concerns, particularly with respect to optical disc manufacturing, which appeared to have migrated from large plants to small, custom burning operations, in the face of strengthened enforcement from Taiwanese authorities. USTR also announced that it would conduct an <u>out-of-cycle review</u> to evaluate Taiwan's progress in improving protection for intellectual property. That review concluded in January 2005, with USTR maintaining Taiwan's status on the Watch List.

TAJIKISTAN

IIPA recommends that Tajikistan remain on the <u>Watch List</u>, where it has stayed since 2000. See IIPA's 2005 CIS country report at http://www.iipa.com/rbc/2005/2005SPEC301CIS.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 <u>Watch List</u>. 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 <u>Watch List</u> in both 2002 and 2003. In 2004, IIPA recommended, and USTR agreed that Tajikistan should remain on the <u>Watch List</u> In its Special 301 Announcement that year, USTR pointed out continuing legal deficiencies with Tajikistan protection of sound recordings, as well as weak enforcement.

THAILAND

IIPA recommends that Thailand be elevated to the Priority Watch List in 2005. See IIPA's 2005 Thailand country report at http://www.iipa.com/rbc/2005/2005SPEC301THAILAND.pdf. Thailand is currently on the Watch List. IIPA first identified Thailand in 1985 as a country with one of 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 to the <a href="Wat

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 <u>Watch List</u>, and requested that USTR conduct an <u>out-of-cycle review</u>, 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 <u>Priority Watch List</u>, citing increased concerns over rampant optical disc piracy for export. In the 2003 USTR Special 301 Announcement, in which Thailand was retained on the <u>Watch List</u>, 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. IIPA recommended that Thailand be elevation to the <u>Priority Watch List</u> in 2004, as a result of serious problems with optical disc piracy, and enforcement that, while on a brief upswing, eventually tapered off. USTR, in its May 2004 announcement, kept Thailand on the <u>Watch List</u> in 2004, citing "serious concerns about the Thailand Government's failure to effectively address the growth in optical media piracy, copyright and trademark infringement, counterfeiting, end user piracy, and cable and signal piracy."

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 provides "adequate and effective protection of intellectual property rights." In 2003, \$2.7 billion in Thailand's exports to the United States benefited from the GSP program, accounting for 17.9% of its total exports to the U.S. During the first 11 months of 2004, \$2.9 billion worth of Thai goods (or 18.1% 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 17.4% over the same period in the previous year.

TURKEY

IIPA recommends that Turkey be placed on the <u>Watch List</u>. See IIPA's 2005 Turkey country report at http://www.iipa.com/rbc/2005/2005SPEC301TURKEY.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 <u>Watch List</u> (1990-1991, 2001-2002) and the <u>Priority Watch List</u> (1992-2000). In IIPA's 1993, 1995 and 1996 Special 301 submissions, IIPA recommended that Turkey be designated a <u>Priority Foreign Country</u> 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 International Intellectual Property Alliance

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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 <u>Priority Watch List</u>. However, USTR downgraded Turkey to the <u>Watch List</u> 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 <u>Priority Watch List</u>, 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 <u>Watch List</u> in April 2002, it acknowledged that "[I]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 <u>Watch List</u>. 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 2003, \$722.6 million worth of Turkey's exports to the United States benefited from the GSP program, accounting for 19.1% of its total exports to the U.S. During the first 11 months of 2004, \$886.3 million worth of Turkish goods (or 19.6% of Turkey's total exports to the U.S. from January to November) entered the U.S. under GSP, representing an increase of 36.5% over the same period in the previous year. IIPA recommended that Turkey be placed on the Watch List in 2004, in part in recognition of amendments that would ban street crimes. In its 2004 Special 301 Announcement, USTR, once again elevating Turkey to the Priority Watch List, cited, among other things, the proliferation of book and optical media piracy. In addition, USTR cited problems with the judiciary's failure to impose deterrent penalties despite amendments in 2001 which would allow the requisite level of penalties to be applied in copyright infringement cases.

TURKMENISTAN

IIPA recommends that Turkmenistan remain on the <u>Watch List</u>, where it has been since 2000. See IIPA's 2005 CIS country report at http://www.iipa.com/rbc/2005/2005SPEC301CIS.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, International Intellectual Property Alliance

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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 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. In 2004, IIPA recommended, and USTR agreed, to keep Turkmenistan on the Watch List. In its 2004 Special 301 Announcement, USTR noted that the country had failed to completely satisfy its obligations under the 1993 U.S.-Turkmenistan agreement by failing to sign the Berne Convention, Geneva Phonograms Convention, and otherwise update its copyright law to reflect international standards.

UKRAINE

IIPA recommends that Ukraine remain a Priority Foreign Country, as it has been since 2001. See IIPA's 2005 Ukraine country report at http://www.iipa.com/rbc/2005/2005SPEC301UKRAINE.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 https://www.iipa.com/rbc/2005/2005SPEC301UKRAINE.pdf. In the In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was elevated to the https://www.iipa.com/rbc/2005/2005SPEC301UKRAINE.pdf. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was elevated to the Other Observations list, and Ukraine was elevated to the https://www.iipa.com/rbc/2005/2005SPEC301UKRAINE.pdf. In both 1998 and 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was elevated to the Other Observations list, and Ukraine was elevated to the Priority Watch List. In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries 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 <u>Priority Foreign Country</u>. USTR placed Ukraine on the <u>Priority Watch List</u>, with the caveat that it was prepared to designate Ukraine as a <u>Priority Foreign Country</u> 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 <u>Priority Foreign Country</u>.

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 International Intellectual Property Alliance

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 <u>Priority Foreign Country</u>, 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 <u>Priority Foreign Country</u>, 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 or 2004, as the benefits were withdrawn due to Ukraine's continued failure to provide adequate and effective copyright protection. In 2003, despite being ineligible for GSP benefits, \$7,000 worth of goods entered the U.S under the duty-free GSP code. In 2004, IIPA again recommended, and USTR agreed, that Ukraine, largely due to its failure to enact and enforce optical disc media licensing legislation, or to fully comply with the Joint Action Plan to Combat Optical Disc Piracy, remain a Priority Foreign Country.

UNITED ARAB EMIRATES

The UAE does not currently appear on any USTR lists. The UAE was on the USTR <u>Watch List</u> 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 <u>Watch List</u> after an <u>out-of-cycle review</u> (OCR) in November 1995. In April 1996, Ambassador Barshefsky maintained the UAE on the <u>Watch List</u>, noting continued deficiencies in the copyright law. In 1997, the UAE was kept on the <u>Watch List</u> by USTR, who noted that efforts to reduce software piracy had "not been sufficient to reduce the level of illegal activity."

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In 1998, IIPA, in recommending that the UAE be kept on the <u>Watch List</u>, 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 <u>Watch List</u>, 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 <u>Other Observations</u> list, to acknowledge the progress of the UAE government in "fighting piracy through a sustained enforcement campaign." Ambassador Barshefsky kept the UAE on the <u>Watch List</u> 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 <u>Watch List</u> in 2001 for concerns over adequate and effective intellectual property protection unrelated to copyright. IIPA made no recommendations for UAE in 2002 through 2004, nor has USTR placed the country on any list in those years. The U.S. announced in 2004 the commencement of negotiations toward a Free Trade Agreement with the Emirates, which is certain to raise the levels of substantive protection and enforcement. The Emirates also joined both the WCT and WPPT in 2004.

URUGUAY

Uruguay currently appears on the <u>Watch List</u>. USTR placed Uruguay on the <u>Other Observations</u> 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 <u>Watch</u> 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 Uruquay'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 Uruquay. 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. IIPA highlighted copyright concerns in the Special Mention section of its 2004 301 Report, citing legislative deficiencies (despite a recent update of its copyright law) as well as problems with prosecutions of intellectual property cases. In its 2004 Special 301 Announcement, USTR maintained Uruguay on the Watch List citing its failure "to pass the implementing regulations for its 2002 copyright legislation to improve and strengthen Uruguayan copyright protection."

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 2003, \$55.3 million worth of Uruguay's exports to the United States benefited from the GSP program, accounting for nearly 21.8% of its total exports to the U.S. During the first 11 months of 2004, \$52.7 million worth of Uruguayan goods (or 9.9% 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 8.4% increase from the same period in 2003.

UZBEKISTAN

IIPA recommends that Uzbekistan retain its position on the <u>Watch List</u>, where it has remained since 2000. See IIPA's 2005 CIS country report at http://www.iipa.com/rbc/2005/2005SPEC301CIS.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 2004 IIPA recommended, and USTR agreed, to keep Uzbekistan on the Watch List. The 2004 Special 301 Announcement noted that despite recently announcing a plan to amend its IPR laws, Uzbekistan "still appears to be out of compliance with its intellectual property commitments under the 1994 U.S.-Uzbekistan Trade Agreement, particularly with respect to copyright protection and enforcement."

In 2003, \$2.4 million worth of Uzbek exports to the United States benefited from the GSP program, accounting for 2.9% of its total exports to the U.S. During the first 11 months of 2004, \$2.9 million worth of Uzbek exports to the United States (or 3.4% of Uzbekistan's total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 30.2% from the same period in 2003.

VENEZUELA

In 2005, IIPA recommends that Venezuela be maintained on the Watch List, where it has been since 1989. See IIPA's 2005 Venezuela country report at http://www.iipa.com/rbc/2005/2005SPEC301VENEZUELA.pdf. 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 2003, \$619 million worth of Venezuela's exports to the United States benefited from the GSP program, accounting for 3.7% of its total exports to the U.S. During the first 11 months of 2004, \$746.8 million worth of Venezuelan goods (or 3.4% of Venezuela's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 33.1% increase from the same period in the previous year.

In 1999 and 2000, Venezuela remained on the <u>Watch List</u>, as recommended by IIPA. In 2001, IIPA recommended that Venezuela remain on the <u>Watch List</u>. 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 <u>Watch List</u> 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 <u>Watch List</u>, 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 <u>Watch List</u> in 2003, adding that it intended to review the country's progress later in the year. USTR kept Venezuela on the Watch List in 2004 noting signs of decline in its commitment to IPR protection.

VIETNAM

IIPA highlights copyright concerns in Vietnam in its Special Mention section this year. See IIPA's 2005 Vietnam country report at http://www.iipa.com/rbc/2005/2005SPEC301VIETNAM. 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 <u>Watch List</u> 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 <u>Watch List</u>. In 2000 and 2001, USTR agreed with IIPA's assessment of continuing IPR problems in Vietnam, and retained Vietnam on the <u>Watch List</u> in both years. In 2002, USTR kept Vietnam on the <u>Watch List</u>, noting that "[e]nforcement of intellectual property rights. . . in Vietnam remains weak, and violations of IPR are rampant." Vietnam remained on the <u>Watch List</u> 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." IIPA noted Vietnam in the <u>Special Mention</u> section of its 2004 Special 301 Report, citing problems with the probable "migration of optical disc and cartridge manufacturing facilities, as well as optical disc overproduction." USTR kept Vietnam on the <u>Watch List</u> in 2004. The 2004 Special 301 Announcement noted that IPR violations and enforcement continue to be problems despite improvements in laws and regulations.