

Copyright Protection and Enforcement Around the World:

IIPA's 2006 Special 301 Report

**submitted to the
U. S. Trade Representative**

by the

IIPA®

International Intellectual Property Alliance®

February 13, 2006

**Association of American Publishers (AAP)
Business Software Alliance (BSA)
Entertainment Software Association (ESA)
International Film & Television Alliance (IFTA)
Motion Picture Association of America (MPAA)
National Music Publishers' Association (NMPA)
Recording Industry Association of America (RIAA)**

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2006 SPECIAL 301 REPORT
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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

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February 13, 2006

Ms. Victoria Espinel
Acting Assistant U.S. Trade Representative
for Intellectual Property
Office of the United States
Trade Representative
600 17th Street, N.W.
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"), 71 Fed. Reg.
2166 (Jan. 17, 2006)

Dear Ms. Espinel:

This filing responds to the Request for Written Submissions appearing on January 17, 2006 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 types, levels, and costs of piracy, an evaluation of enforcement practices to reduce those levels, and the status of copyright law reform in 46 separate country reports. We also recommend where these countries should be ranked on the various Special 301 watch lists. We highlight seven challenges and initiatives in this letter that define the copyright industries' agenda for the coming year. Finally, we mention 22 additional countries/territories that we have not recommended be on a Special 301 list but which merit attention by the U.S. government in its bilateral engagements with those countries.

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 seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 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; musical compositions, records, CDs, and audiocassettes; and textbooks, trade books, 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 industries¹ accounted for 6% of U.S. GDP or \$626.6 billion in value-added 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 and royalty remittances 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 that may be referenced in the country survey. Included in this year’s submission are the following:

- This letter, which (1) outlines IIPA’s recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2006; (2) summarizes our submission this year; and (3) points the reader to various appendices;
- Appendix A, which contains IIPA’s country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy;
- Appendix B, which describes IIPA members’ methodology for calculating estimated trade losses, piracy levels, and global data on optical disc factories and production capacity;

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.

- Appendix C, which includes all the country surveys² and at the end lists 22 countries that deserve continued U.S. government attention but which we have not recommended for placement on the Special 301 lists;
- Appendix D, which provides a historical chart of countries/territories' placement on Special 301 lists by USTR since 1989; and
- Appendix E, 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 2006

The goal of this submission is to improve copyright protection and reduce global piracy levels 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—the world which our industries faced in the early 1980s. In that world, 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, most important, 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 seven 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, combined with the failure of these governments to enforce their existing copyright and related laws, threatens to outpace the fight to combat it. IIPA believes that a significantly heightened effort is called for to make further progress on the following objectives in 2006. 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

² Country surveys were prepared by Maria Strong, IIPA Vice President and General Counsel; Michael Schlesinger, IIPA Vice President and Associate General Counsel; Eric H. Smith, IIPA President; Steven J. Metalitz, IIPA Senior Vice President; Eric J. Schwartz, IIPA Vice President and Special Counsel; and are based on information furnished by IIPA member associations. We also thank the Smith & Metalitz LLP staff, Melissa Braford, Pam Burchette, Lauren Braford, and Kristen Schumacher, for their contributions in preparing, producing and distributing this submission.

necessarily listed in order of priority, since different issues may demand priority attention in different countries.

Effective and Deterrent Enforcement Against Copyright Piracy

The copyright industries most important global goal is to significantly reduce piracy levels in order to open foreign markets, and create increased revenue and employment. Only through effective deterrent enforcement, as required by the WTO TRIPS Agreement and the various Free Trade Agreements (FTAs) which the U.S. has recently negotiated, can this goal be met. The lack of effective enforcement undergirds virtually all the initiatives/challenges described below, as well as the credibility of the multilateral and bilateral agreements entered into by the United States.

The industry and the U.S. government have been engaged for over twenty years in many countries with the highest piracy levels to secure deterrent levels of enforcement that would bring piracy levels down to acceptable levels. Even following implementation of the TRIPS agreement's new enforcement obligations in 1996 and 2000, many countries still have not meaningfully upgraded their enforcement systems to meet their international obligations by adopting effective remedies and imposing deterrent penalties. While there has been a general global upgrading of police ability, and in many cases willingness, to conduct raids on pirate production, wholesale and retail sites, increased seizures of pirate product has not been enough. The necessary deterrence requires capable and aware prosecutors and judges (or, where applicable, administrative agencies) that are willing to impose penalties that would remove the significant monetary incentives that drive the pirate trade. Many enforcement systems lack that willingness. Pirates whose vast economic gains amount to hundreds of thousands to millions of U.S. dollars simply cannot be deterred through mere monetary fines. Deterrence requires substantial prison sentences in these cases. Again and again, in country after country, our industry has witnessed major pirates either evading conviction (as a result of systemic delays or corruption) or being slapped with monetary fines that do not even come close to providing the disincentive needed to deter them from continuing in this illegal business. Again and again, raided stores reopen quickly with new product, or major producers continue their trade in a new guise to avoid the next enforcement action, which may never come, or may come only after the pirate has lined his pockets with more millions in illegal income.

Since no country will ultimately undertake effective reform unless it understands that it is in its own interest, it is essential that the U.S. government continue to take steps that will facilitate such an understanding, and that increase the capacity of willing governments to take effective action. Among the strategies that could be employed are:

- Better coordinated enforcement training, including localized training that shows the benefits of deterrent enforcement.
- Better coordination among U.S. agencies and between those agencies and industry, and with international organizations with training resources;
- Creating "best enforcement practices" models, including legislative provisions and specific and practical reforms at the police, prosecutorial and judicial levels. These would be based on the TRIPS text and the U.S. FTA models, but with far greater detail to assist the enforcement authorities. This could include recommendations for "zero tolerance" policies against retail piracy and specific actions to be taken in the area of Internet piracy. It should include model sentencing guidelines that would help the authorities in assessing what

- penalties will actually deter pirates;
- Setting specific enforcement targets for countries in bilateral negotiations;
- Considering the negotiation of plurilateral enforcement agreements among countries based on these “best enforcement practices” and negotiated targets.

We believe the Special 301 process must specifically target enforcement in a very direct and clear way. It is a fact that many countries believe that Special 301 ranking decisions can be made on the basis of law reform, followed by enforcement “promises” alone. Experience has taught us that this simply hasn’t worked. Countries should be made acutely aware that they will not see a change in their Special 301 placement unless they take the specific enforcement actions necessary to actually reduce piracy rates.

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, is undergoing 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. Yet we know that 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 to create a legal and regulatory environment that will facilitate the growth of legitimate online delivery of copyrighted materials.

The Legal and Enforcement Solutions: IIPA recommends that USTR and the U.S. government more broadly 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, as described above, 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 with which countries must comply 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.

Finally, as described further below, the more specific and clarified enforcement obligations in the U.S. government’s Free Trade Agreements also establish binding enforcement obligations which should form the underpinnings of the Internet enforcement systems in these countries, and eventually in all countries.

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 10, 2006, official deposits of the treaties with WIPO stood at 58 for the WCT and 57 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, the usual lines separating the roles of industry and government in policy, enforcement and education must also evolve. Close coordination will be the key to success in this challenging new environment. Efforts should be undertaken to encourage global adoption of the Council of Europe Cybercrime Convention, which requires countries to adopt effective remedies

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.

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 in deterring 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, and where possible, actions against 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 and enable expeditious action against piracy 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 peer-to-peer file sharing through aggressive enforcement against unauthorized uploaders of infringing product, whether of musical recordings, movies, business or entertainment software or literary material, as well as against services that provide these tools for the purpose of encouraging and profiting from infringement. If new legal Internet-based services for delivery of copyrighted material are to succeed, we must ensure that they are not undermined by unfair competition from unauthorized sources.

It is critical that governments, educational institutions and similar enterprises that provide broadband interconnections to their employees, students or others develop and enforce strong internal policies (such as executive orders in the case of governments) 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

Piracy of optical disc (OD) products today causes grave losses to all the copyright industries. Increasingly, all sectors of the copyright industry use 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, entertainment and educational products, but also by the potential for pirates to generate billions of dollars in illegal income. Optical disc production capacity has for years greatly exceeded 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, CD-Rs and DVD-Rs 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. With the increased and more effective regulation of factory production, “burning” has nearly become our industries’ biggest “hard goods” piracy threat.

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 79 countries/territories:

- There were as many as **1,117 optical disc production plants** in 2005, a 14% increase in the number of plants over 2004.
- Those plants had (not including blank facilities in Taiwan) at least **5,912 production lines**.
- Total production capacity worldwide was estimated at more than **30.8 billion discs per year** in 2005.

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.

Estimated Number of Optical Disc Plants and Production Capacity in 79 Countries/Territories⁴									
	Plants			Production Lines			Estimated Capacity in Millions		
Year	2005	2004	2003	2005	2004	2003	2005	2004	2003
ASIA									
Australia	13	11	9	NA	59	96	NA	206.5	374.0
Bangladesh	2	2	NA	6	6	NA	21.0	21.0	NA
Burma/Myanmar	1	1	1	2	2	1	7.0	7.0	3.5
Cambodia	1	1	1	1	1	1	3.5	3.5	3.5
China	86	83	71	1,374	763	808	4,809.0	2,670.5	3,875.0
Hong Kong	106	88	112	817	805	538	2,859.5	2,817.5	2,455.0
India	20	12	9	166	378	334	581.0	1323.0	1,353.0
Indonesia	29	40	27	100	75	37	350.0	262.5	197.0
Japan	32	21	34	NA	297	941	NA	1,039.50	2,783.0
Korea	28	32	31	78	72	93	273.0	252.0	404.0
Laos	1	0	2	1	0	2	3.5	0.0	7.0
Macau	3	4	2	5	16	NA	17.5	56.0	0.0
Malaysia	41	32	38	NA	126	NA	300.0	441.0	1,871.0
New Zealand	3	NA	NA	3	NA	NA	10.5	NA	NA
Pakistan ⁵	5	10	8	NA	25	25	NA	230.0	140.0
Philippines	11	16	7	38	26	21	133.0	91.0	73.5
Singapore	20	14	15	106	96	169	371.0	336.0	698.0
Sri Lanka	2	2	NA	2	2	NA	7.0	7.0	NA
Taiwan	89	44	61	341 ⁶	2,818	2,171	10,700.0	9,863.0	7,779.0
Thailand	42	40	39	155	157	98	542.5	549.5	556.0
Vietnam	5	4	3	12	12	3	42.0	42.0	10.5
SUB-TOTAL	540	457	470	3,207	5,736	5,338	21,031.0	20,218.5	22,583.0
E. EUROPE/CIS⁷									
Belarus	1	1	NA	2	1	NA	7.0	5.2	NA
Bulgaria	9	8	7	18	12	9	63.0	55.0	19.0

⁴ The methodology used by IIPA to calculate estimated capacity is discussed in Appendix B of IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ Pakistan: The capacity numbers in 2003 and 2004 represent actual production based on polycarbonate imports and various countries' customs data.

⁶ This number is the estimated lines producing pre-recorded discs, while the capacity reported includes production of blank recordable discs. Estimated capacity of finished discs in Taiwan is roughly 1.2 billion discs.

⁷ The capacity numbers in Bulgaria, Kazakhstan and Poland (2005 numbers) do not follow the IIPA methodology, and are based on plant visits and/or different per line capacity estimates. Many of the estimates from 2003 especially, but also 2004 (including Belarus, Bulgaria, Kazakhstan, Poland, Russia, and Serbia and Montenegro) did not follow the IIPA methodology.

Estimated Number of Optical Disc Plants and Production Capacity in 79 Countries/Territories ⁴									
	Plants			Production Lines			Estimated Capacity in Millions		
Year	2005	2004	2003	2005	2004	2003	2005	2004	2003
Croatia	NA	1	NA	NA	1	NA	NA	3.5	NA
Czech Republic	4	4	4	NA	44	43	NA	154.0	193.0
Estonia	2	1	NA	2	1	NA	7.0	3.5	NA
Hungary	4	4	3	14	14	7	49.0	49.0	37.0
Kazakhstan	2	1	1	2	1	0	11.6	8.1	0.0
Lithuania	1	1	1	2	2	1	7.0	7.0	5.0
Poland	9	9	9	122	101	154	775.0	597.2	501.0
Romania	2	1	1	3	2	1	10.5	7.0	6.0
Russia	47	34	32	113	83	52	395.5	390.0	220.0
Serbia and Montenegro	4	4	NA	10	5	NA	35.0	25.0	NA
Slovenia	2	2	NA	5	5	NA	17.5	17.5	NA
Ukraine	5	5	4	14	13	5	49.0	49.5	31.0
SUB-TOTAL	92	76	62	307	285	272	1,427.1	1,371.5	1,012.0
W. EUROPE									
Austria	5	4	NA	8	6	NA	28.0	21.0	NA
Belgium	3	4	NA	25	25	NA	87.5	87.5	NA
Denmark	5	4	NA	36	16	NA	126.0	56.0	NA
Finland	3	3	NA	6	6	NA	21.0	21.0	NA
France	18	23	NA	204	156	NA	714.0	546.0	NA
Germany	42	44	NA	144	132	NA	504.0	462.0	NA
Greece	12	5	5	40	40	73	140.0	140.0	NA
Ireland	8	8	NA	70	70	NA	245.0	245.0	NA
Italy	29	23	23	101	119	182	353.5	416.5	801.0
Luxembourg	2	2	NA	19	19	NA	66.5	66.5	NA
Netherlands	17	18	NA	107	62	NA	374.5	217.0	NA
Portugal	3	3	NA	5	5	NA	17.5	17.5	NA
San Marino	2	2	NA	2	NA	NA	7.0	NA	NA
Spain	16	16	12	119	123	100	416.5	430.5	600.0
Sweden	5	7	NA	12	9	NA	42.0	31.5	NA
Switzerland	3	3	NA	11	11	NA	38.5	38.5	NA
United Kingdom	16	19	NA	128	90	NA	448.0	315.0	NA
SUB-TOTAL	189	188	40	1,037	889	355	3,629.5	3,111.5	1,401.0
W. HEMISPHERE									
Argentina	9	11	10	30	26	26	105.0	91.0	142.8
Brazil	13	11	9	88	91	128	308.0	318.5	624.9
Canada	17	17	NA	132	78	NA	462.0	273.0	NA
Chile	2	2	2	2	5	3	7.0	17.5	19.0
Colombia	2	2	2	9	9	8	31.5	31.5	48.0
Costa Rica	1	1	NA	1	1	NA	3.5	3.5	NA
Dominican Republic	1	1	1	1	1	1	3.5	3.5	7.0
Mexico	9	12	12	205	231	101	717.5	808.5	514.0
Paraguay	1	1	NA	1	1	NA	3.5	3.5	NA
Peru	2	3	3	3	5	3	10.5	17.5	17.0
United States	181	143	NA	740	348	NA	2,590.0	1,218.0	NA
Uruguay	1	1	NA	1	1	NA	3.5	3.5	NA
Venezuela	2	2	2	7	7	7	24.5	24.5	40.0
SUB-TOTAL	241	207	41	1,220	804	277	4,270.0	2,814.0	1412.7
MIDDLE EAST									
Algeria	4	3	NA	10	NA	NA	35.0	NA	NA
Egypt	4	4	4	6	6	4	21.0	21.0	23.0
Iran	2	2	NA	3	2	NA	10.5	7.0	NA
Israel	7	7	5	19	18	23	66.5	63.0	114.0
Jordan	1	1	NA	1	NA	NA	3.5	NA	NA

Estimated Number of Optical Disc Plants and Production Capacity in 79 Countries/Territories⁴									
	Plants			Production Lines			Estimated Capacity in Millions		
Year	2005	2004	2003	2005	2004	2003	2005	2004	2003
Lebanon	1	1	1	1	1	1	3.5	3.5	7.0
Kuwait	1	NA	NA	3	NA	NA	10.5	NA	NA
Palestinian Authority	1	3	2	1	4	4	3.5	14.0	23.0
Saudi Arabia	1	3	1	6	7	NA	21.0	24.5	NA
Syria	2	1	1	5	1	NA	17.5	3.5	NA
Turkey	10	8	8	25	23	NA	87.5	80.5	NA
SUB-TOTAL	34	33	22	80	62	32	280.0	217.0	167.0
AFRICA									
Nigeria	15	8	NA	36	25	NA	126.0	87.5	NA
Senegal	1	1	NA	1	1	NA	3.5	3.5	NA
South Africa	5	3	3	24	12	NA	84.0	42.0	NA
SUB-TOTAL	21	12	3	61	38	NA	213.5	133.0	NA
TOTALS	1,117	973	638	5,912⁸	7,814	6,275	30,851.1	27,865.5	26,575.7

The growing optical disc problem confronting the copyright sector, now familiar to governments worldwide, demands new and creative legislative and enforcement solutions. Traditional enforcement mechanisms have not been sufficient to prevent optical disc piracy from spinning out of control and flooding national, regional, and even global markets with millions of high-quality pirate products. As part of countries' WTO TRIPS obligations to provide deterrent enforcement against piracy "on a commercial scale," every country whose optical disc production facilities are producing significant pirate product should create and enforce a specialized regulatory framework for tracking the growth of optical disc production capacity, including the cross-border traffic in production equipment and raw materials, principally optical-grade polycarbonate. These regulatory regimes must include strict licensing controls on the operation of optical disc mastering and replication facilities, and the requirement to use identification tools that identify the plant in which production occurred and that help lead the authorities to the infringer. So far such regimes have been established in Bulgaria, China, Hong Kong, Indonesia, Macau, Malaysia, Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, are under consideration in Bahrain, India, and other countries, and are committed to be established in Oman. Increasingly, pirate optical disc production is migrating from jurisdictions with optical disc production regulatory regimes to countries that as yet have not adopted these regulatory tools, such as Russia, Pakistan, India, 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 a set of "Effective Practices." We commend these to all governments addressing this problem. We stand ready to work with USTR to assist

⁸ This total number of lines does not include Taiwan blank disc production lines. If we were to include these lines, the total number actually went up in 2005.

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 exploitation – often by the very same syndicates that operated the factories and generate millions of dollars for the pirate operators. In some countries, like Taiwan, Brazil, Mexico, Spain and many others, seizures of pirate product in 2005 were overwhelmingly of “burned” product. Commercial “burning” has nearly become the biggest piracy threat in the “hard goods” market. This new development calls for innovative responses. Improved enforcement machinery must aim 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. As we have monitored the development of these regulatory regimes, it has become increasingly apparent, as it has with all piracy, that enforcement is again the key to the effective functioning of these new regimes. In too many cases, the regulations are put into place and then simply not enforced. This must end. Governments must be given the authority to conduct surprise inspections of optical disc production facilities to ensure full compliance, and then must actually engage in such inspections. They must deal effectively with commercial “burning” operations, and they must use that authority accompanied by vigorous enforcement. Deterrent penalties—including license revocation, confiscation of equipment and raw materials, and heavy fines and imprisonment—must be consistently and efficiently imposed on optical disc pirates, and governments must adopt and implement zero tolerance policies on the sale of infringing materials.

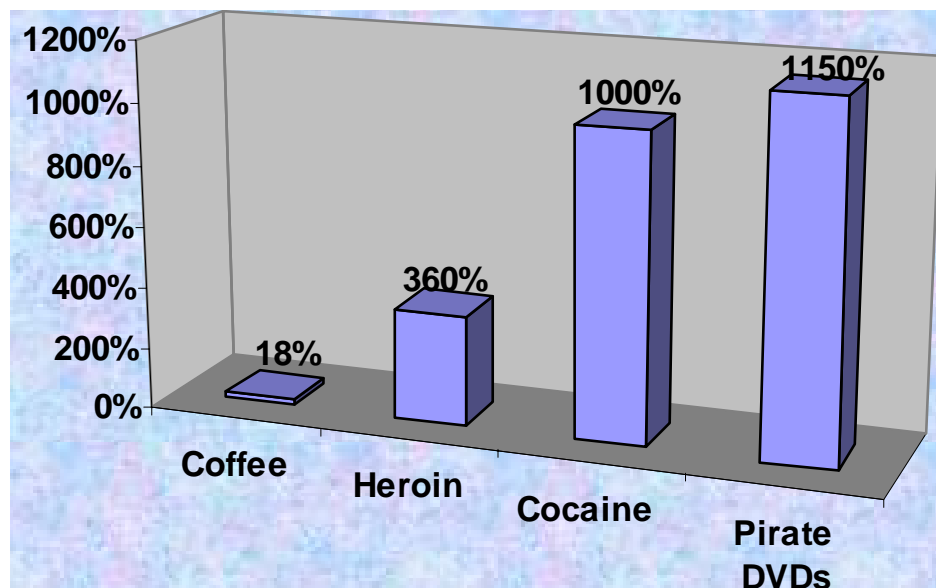
Piracy by Organized Crime Syndicates

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. This phenomenon has grown to epidemic proportions in 2006.

In an October 2005 study by MPA, it was reported that the estimated criminal revenue in 2004 for IPR theft was \$512 billion, while for drug trafficking it was \$322 billion.⁹ The following table from that same study shows graphically that the mark-up for DVD piracy is higher than that for cocaine and heroine, with the risk of getting caught and receiving deterrent punishment very significantly less.¹⁰



Source: Adapted from UK National Criminal Intelligence Service SU/Drug Project (2004); Cocaine markup is Colombia to Spain/U.K.; Heroin markup is from Iran to U.K.; DVD markup is from Malaysia to UK.

Examples of the involvement of organized crime on a global basis include:

- In a cross-jurisdiction operation called Operation Glaring Sun, **Hong Kong, Macau** and mainland **China** authorities in June 2005 arrested 1,600 triad members, raiding more than 1,900 locations, taking down 31 vice establishments, 30 gambling dens, nine drug dens and 61 pirate disc centers. Police froze US\$11 million belonging to the syndicates and seizures included 159,000 pirated and pornographic optical discs, US\$1.4 million worth of illegal betting slips, 3,000 liters of illicit fuel, 4.51 million contraband cigarettes, 123 grams of heroin, 212 tablets of ecstasy, 180 grams of ICE, 1,104 tablets of midazolam, and 70 grams of ketamine. A follow up operation yielded the arrest of a further 27 individuals implicated in an optical disc piracy manufacturing operation. In that raid, 53 CD-R burners, 10,000 pirated discs, and 90,000 pornographic discs were seized.

⁹ Motion Picture Association, *Optical Disc Piracy v. Illegal Drug Trafficking*, October 2005, p. 2. About the same time, MPA released another new study, *Organized Crime & Motion Picture Piracy*, from which some of the examples in the text are taken.

¹⁰ *Id.*, at 3

- In **China**, the head of a criminal syndicate was sentenced in March 2004 to 7 years in prison for the sale of more than 6 million pirate audio and video products. Chinese prosecutors estimated that this syndicate had been responsible for one third of all pirate music CDs seized over several years. More than 10 million discs had been imported, mainly from Hong Kong, from 2001-March 2003.
- 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. A battle (at times armed) for control between two criminal gangs resulted in physical intimidation of investigators from the motion picture industry's Australian anti-piracy program.
- 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 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 press report has 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 and blank discs reportedly were imported 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.
- 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 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 January 2005 in **Malaysia**, incoming MDTCA Minister Datuk Shafie Apdal reiterated the importance of arming IPR enforcement officers after gun battles erupted during several VCD raids: “... we asked for the guns as protection for our people who are constantly at risk while dealing with these pirate VCD traders. There is a criminal element among some of these traders and our officers have to be protected.”
- 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 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 May 2005 in **Italy**, the historical involvement in music piracy of the Camorra mafia gang in Italy was confirmed by the Naples Deputy Attorney General Franco Roberti, who said that 213 members of the gang had been sentenced since 2000. In late 2004, a police officer in Naples had been shot and killed during a raid with the killer believed to be linked to the Camorra gang.
- 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\$57,200) 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. (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 to be a principal financier of one or two of **Pakistan's** largest optical media plants.

The copyright industries alone cannot fight such organized criminal activity. Company representatives and counsel have in some countries already experienced threats on their lives or physical intimidation when their investigations began to make progress. In some cases, this has prevented any enforcement activity by the private sector. We look to the U.S. government for additional leadership, both here and in the appropriate bilateral and multilateral fora, to place 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 for temporary copies, or do so by interpretation of their laws, 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, countries must 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—even though their TRIPS obligations require both.

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, 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 seized 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.

Using FTAs to Improve Global Standards of Copyright Protection and Enforcement

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, Bahrain, Oman and Peru have been concluded. Negotiations with Panama, the United Arab Emirates and the other Andean Pact countries of Colombia and Ecuador are slated to end soon. Negotiations with Thailand are ongoing and a new FTA with South Korea was just announced. An FTA negotiation with Malaysia may be announced soon. IIPA trusts and expects that the valuable precedents established in these earlier agreements will be carried forward to the ongoing FTA negotiations, including with the South African Customs Union (SACU), and with any more FTA negotiations opened in the future. 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 protection; 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 commend the Administration and Ambassador Portman 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, while the negotiations have been stalled for some time, it is possible to envision in the future an unprecedented Free Trade Agreement of the Americas in which the standards of copyright protection and enforcement will 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.

D. IIPA RECOMMENDATIONS FOR THE 2006 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 46 countries/territories and has recommended them for placement in the categories of Priority Foreign Country, Priority Watch List, Watch List, and Section 306 Monitoring. We also mention specific issues in 22 additional countries/territories that deserve increased U.S. government attention.

IIPA recommends that USTR designate Russia as a Priority Foreign Country in 2006 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 70%-80% in 2005 and piracy losses again exceed \$1.7 billion.¹¹ 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 as well as all other 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 recommends that the remaining countries/territories be placed on, or maintained on, the Priority Watch List or the Watch List, where they are subject to ongoing bilateral scrutiny.

IIPA recommends that 16 countries be placed on the Priority Watch List: Argentina, Bulgaria, Chile, Colombia, Costa Rica, the Dominican Republic, Egypt, India, Indonesia, Israel, Lebanon, the People's Republic of China, the Philippines, Thailand, Turkey, Ukraine and Venezuela. IIPA also recommends that 28 countries/territories be designated or kept on the Watch List. We also recommend that out-of-cycle reviews be taken in seven countries/territories: Brazil, Canada, Hong Kong, Malaysia, Pakistan, Saudi Arabia, and South Korea.

With respect to the People's Republic of China, IIPA recommends that USTR maintain China on the Priority Watch List. Industry and USTR continue to look into the prospects of a WTO dispute settlement case against China. 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 still hover around 90%, where they have been for years.

IIPA commends Paraguay for the efforts that it has made over the course of the past two years, and recommends that USTR continue to monitor developments in Paraguay under Section 306 of the Trade Act of 1974.

Appendix C contains a survey of a total of 68 countries or territories. The countries/territories appear by recommended category and in alphabetical order within each category.

¹¹ The methodology used by IIPA member associations to calculate these estimates is described in IIPA's 2006 Special 301 submission, at www.iipa.com/pdf/2006spec301methodology.pdf. For example, ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

PRIORITY FOREIGN COUNTRY	PRIORITY WATCH LIST	WATCH LIST	SECTION 306 MONITORING	OTHER COUNTRIES DESERVING SPECIAL MENTION
Russia	Argentina Chile Colombia Costa Rica Dominican Republic Egypt India Indonesia Israel Lebanon PRC Philippines Thailand Turkey Ukraine Venezuela	Bahamas Belarus Bolivia Brazil (OCR) Bulgaria Canada (OCR) Ecuador Greece Hungary Italy Kazakhstan Kuwait Latvia Lithuania Malaysia (OCR) Mexico Pakistan (OCR) Peru Poland Romania Saudi Arabia (OCR) Serbia and Montenegro South Korea (OCR) Taiwan Tajikistan Turkmenistan Uzbekistan Vietnam	Paraguay	Azerbaijan Bangladesh Bosnia and Herzegovina Brunei Burma Cambodia Cyprus Czech Republic Estonia Hong Kong (OCR) Japan Kenya Laos Morocco Netherlands New Zealand Nigeria Panama Singapore South Africa Spain Sweden Switzerland
1	16	28	1	22

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. Sixteen 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.”¹² Under this criterion, these 16 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 numerous petitions requesting the U.S. Government to initiate GSP IPR reviews of copyright law and enforcement practices in targeted countries. As of February 13, 2006, the U.S. government is continuing GSP IPR investigations on the copyright law and enforcement practices in four countries in

¹² Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994).

which IIPA was the original petitioner: Russia, Lebanon, Kazakhstan and Uzbekistan. In January 2006, USTR terminated the GSP investigations of Ukraine, Brazil and Pakistan: in all three cases IIPA was the original petitioner. The GSP program is due to expire at the end of 2006, unless Congress reauthorizes its funding. IIPA strongly supports reauthorization.

Since 1999, IIPA (and in one case, a coalition of 6 of 7 IIPA members) has filed 18 GSP IPR petitions with USTR, requesting the initiation of IPR investigations against the following countries: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, the Kyrgyz Republic, Brazil, Russia, Guatemala, Costa Rica, Uruguay, Thailand, and Pakistan. Of these 18 petitions, USTR initiated reviews in 10 countries: the Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Brazil, Russia, Lebanon, and Pakistan. IIPA withdrew its request to initiate reviews in three cases (Peru, Uruguay and Thailand). Of these 10 reviews, so far USTR has completed its investigations and terminated its reviews in 7 cases (Armenia, Moldova, Dominican Republic, Ukraine, Brazil, and Pakistan, plus Turkey—a case which IIPA petitioned for in 1993 and was closed in 2001).

E. COUNTRIES DESERVING SPECIAL MENTION IN 2006

In addition to the 46 countries/territories for which IIPA has provided comprehensive country reports, IIPA also highlights issues in 22 countries which deserve special attention this year but which are not recommended for placement on the Special 301 Lists. These countries and the problems encountered in them can be found at the end of Appendix C in a Section entitled “Countries Deserving of Special Mention.” These countries/territories are: Azerbaijan, Bangladesh, Bosnia and Herzegovina, Brunei, Burma, Cambodia, Cyprus, Czech Republic, Estonia, Hong Kong, Japan, Kenya, Laos, Morocco, New Zealand, Nigeria, Panama, Singapore, South Africa, Spain, Sweden and Switzerland.

F. ESTIMATED LOSSES DUE TO PIRACY

As a result of deficiencies in the copyright regimes of the 68 countries/territories highlighted in this submission, the U.S. copyright-based industries suffered estimated trade losses due to piracy in these 68 countries/territories of over \$15.8 billion in 2005.¹³ On a global basis (that is, in all countries/territories including the U.S.), IIPA conservatively estimates that total losses due to piracy were \$30-35 billion in 2005, 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 publishing, and book publishing industries—for 2004 and 2005. 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.

¹³ The methodology used by IIPA member associations to calculate these estimates is described in IIPA's 2006 Special 301 submission, at www.iipa.com/pdf/2006spec301methodology.pdf.

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY IN 68 SELECTED COUNTRIES IN 2005 (in millions of U.S. dollars)	
Industry	Estimated Losses
Motion Pictures ¹⁴	1,976.0
Records & Music	2,563.4
Business Software	8,028.1
Entertainment Software ¹⁵	2,652.8
Books	606.5
Total	15,826.8¹⁶

Appendix B summarizes the methodology used by the IIPA member associations 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 OD production lines, and capacity both for 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.

G. CONCLUSION

Special 301 remains a cornerstone of U.S. intellectual property and trade policy. We urge the Administration to use Special 301, and the tools available under the GSP, CBI, ATPA, CBTPA, and AGOA programs, and to consider IIPA's proposals to amplify attention to ineffective and non-deterrent enforcement—to encourage the countries/territories identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring their enforcement (and where necessary their copyright) regimes up to international standards. The U.S. government should also use the WTO dispute settlement

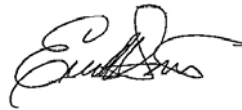
¹⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

¹⁵ 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.

¹⁶ For many countries, the "total" loss figure does not include losses for one or more industry sectors where figures are unavailable (NA). Consequently, the totals for these countries are even more conservative.

machinery to ensure that countries/territories bring their substantive and their enforcement regimes into compliance with their international obligations under TRIPS. The dispute settlement mechanisms in FTAs should also be used, where necessary, with those trading partners. We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

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

Eric H. Smith
President
International Intellectual Property Alliance

APPENDIX A

ESTIMATED TRADE LOSSES DUE TO PIRACY & PIRACY LEVELS (2004-2005)

**FOR
IIPA's 2006 SPECIAL 301 RECOMMENDATIONS**

APPENDIX A: IIPA 2006 "SPECIAL 301" RECOMMENDATIONS

IIPA 2004-2005 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY

(in millions of U.S. dollars)

and 2004-2005 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software ¹				Records & Music ²				Motion Pictures ³				Entertainment Software ⁴				Books		Totals ⁵	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004
PRIORITY FOREIGN COUNTRY																				
Russian Federation (GSP)	748.4	800.0	85%	87%	475.9	411.9	67%	66%	266.0	275.0	81%	80%	223.9	255.8	82%	73%	42.0	42.0	1756.2	1784.7
PRIORITY WATCH LIST																				
Argentina	80.6	63.0	77%	75%	69.5	41.5	60%	55%	NA	30.0	NA	45%	NA	NA	NA	80%	4.0	4.0	154.1	138.5
Chile	47.4	49.0	64%	64%	22.7	24.8	51%	50%	NA	2.0	NA	40%	NA	37.9	NA	70%	1.0	1.0	71.1	114.7
Colombia	44.8	46.0	55%	55%	47.7	51.6	71%	71%	NA	40.0	NA	75%	NA	NA	NA	NA	6.0	6.0	98.5	143.6
Costa Rica	9.6	9.0	67%	67%	18.3	NA	60%	NA	NA	2.0	NA	40%	NA	NA	NA	NA	NA	NA	27.9	11.0
Dominican Republic	2.6	2.0	77%	77%	10.8	10.3	75%	75%	NA	2.0	NA	20%	NA	NA	NA	NA	1.0	1.0	14.4	15.3
Egypt	30.3	28.0	64%	65%	9.0	7.5	60%	40%	NA	NA	NA	NA	14.3	NA	85%	90%	30.0	30.0	83.6	65.5
India	265.1	239.0	74%	74%	70.7	67.3	55%	50%	NA	80.0	NA	60%	65.2	59.5	86%	86%	42.0	38.0	443.0	483.8
Indonesia	97.9	100.0	85%	87%	24.5	27.6	75%	80%	NA	32.0	NA	92%	NA	NA	NA	NA	32.0	32.0	154.4	191.6
Israel	32.9	30.0	34%	33%	28.0	34.0	35%	40%	NA	30.0	NA	40%	NA	12.4	95%	88%	1.0	1.0	61.9	107.4
Lebanon (GSP)	17.9	15.0	75%	75%	3.2	3.0	75%	70%	NA	10.0	NA	80%	NA	NA	NA	75%	4.0	3.0	25.1	31.0
People's Republic of China	1276.1	1488.0	88%	90%	204.0	202.9	85%	85%	244.0	280.0	93%	95%	589.9	510.0	92%	90%	52.0	50.0	2366.0	2530.9
Philippines ⁴	43.3	38.0	71%	71%	21.0	20.0	40%	40%	NA	33.0	NA	85%	11.3	NA	85%	90%	48.0	48.0	123.6	139.0
Thailand	107.9	100.0	77%	78%	21.9	24.9	45%	45%	149.0	30.0	62%	60%	NA	NA	75%	76%	30.0	30.0	308.8	184.9
Turkey	119.2	107.0	64%	66%	18.0	15.0	80%	70%	NA	50.0	NA	45%	NA	NA	NA	NA	23.0	23.0	160.2	195.0
Ukraine	61.8	63.0	90%	91%	30.0	115.0	60%	65%	NA	45.0	NA	90%	NA	NA	NA	NA	NA	NA	91.8	223.0
Venezuela	40.9	39.0	78%	79%	33.0	31.0	83%	80%	NA	25.0	NA	NA	NA	NA	NA	NA	NA	NA	73.9	95.0
WATCH LIST																				
Bahamas	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Belarus	NA	NA	NA	NA	25.0	26.0	70%	71%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	25.0	26.0
Bolivia	6.0	5.0	80%	80%	15.8	16.0	90%	90%	NA	2.0	NA	NA	NA	NA	NA	NA	NA	NA	21.8	23.0
Brazil (OCR)	385.2	359.0	65%	64%	334.5	343.5	52%	52%	NA	120.0	NA	30%	120.8	120.4	77%	74%	18.0	18.0	858.5	960.9
Bulgaria	20.5	18.0	73%	71%	7.0	6.5	80%	75%	NA	4.0	NA	35%	21.0	NA	81%	50%	NA	NA	48.5	28.5
Canada (OCR)	580.6	560.0	36%	36%	NA	NA	NA	NA	118.0	NA	8%	NA	NA	NA	NA	NA	NA	NA	698.6	560.0
Ecuador	7.9	7.0	70%	70%	26.3	20.0	90%	95%	NA	NA	NA	NA	NA	NA	NA	NA	2.5	2.5	36.7	29.5
Greece	58.3	60.0	60%	62%	26.0	20.0	60%	60%	NA	10.0	NA	15%	NA	NA	NA	70%	NA	NA	84.3	90.0
Hungary	64.7	65.0	42%	44%	12.0	11.5	30%	38%	102.0	20.0	73%	35%	NA	21.5	30%	59%	4.0	4.0	182.7	122.0
Italy	760.8	779.0	48%	50%	40.0	45.0	20%	23%	161.0	160.0	22%	15%	639.2	NA	30%	34%	20.0	23.0	1621.0	1007.0
Kazakhstan (GSP)	NA	NA	NA	NA	20.0	23.0	66%	68%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	20.0	23.0
Kuwait	30.6	26.0	68%	68%	8.5	8.0	70%	65%	NA	12.0	NA	95%	NA	NA	91%	NA	0.5	1.0	39.6	47.0
Latvia	12.5	10.0	58%	58%	12.0	12.0	85%	85%	NA	NA	NA	NA	1.3	NA	82%	80%	NA	NA	25.8	22.0
Lithuania	12.2	11.0	58%	58%	12.0	15.0	85%	80%	NA	1.5	NA	65%	1.7	NA	88%	85%	NA	NA	25.9	27.5
Malaysia (OCR)	75.1	73.0	60%	61%	38.8	55.5	49%	52%	NA	36.0	NA	50%	23.4	12.9	91%	91%	10.0	10.0	147.3	187.4
Mexico	214.2	222.0	64%	65%	376.5	326.0	65%	60%	483.0	140.0	62%	70%	137.7	132.2	75%	76%	42.0	42.0	1253.4	862.2
Pakistan (OCR)	15.7	14.0	83%	82%	25.0	70.0	100%	100%	NA	12.0	NA	NA	NA	NA	NA	NA	55.0	52.0	95.7	148.0
Peru	23.6	22.0	73%	73%	66.0	68.0	98%	98%	NA	4.0	NA	75%	NA	NA	NA	NA	9.0	8.5	98.6	102.5
Poland	212.3	197.0	58%	59%	25.0	36.0	31%	37%	102.0	30.0	66%	35%	NA	109.3	60%	94%	5.0	5.0	344.3	377.3
Romania	41.6	32.0	75%	74%	17.0	18.0	80%	78%	NA	8.0	NA	55%	NA	NA	75%	65%	2.0	2.0	60.6	60.0
Saudi Arabia (OCR)	80.1	73.0	52%	52%	20.0	15.0	50%	35%	NA	20.0	NA	40%	NA	NA	95%	68%	10.0	14.0	110.1	122.0
Serbia and Montenegro	NA	NA	NA	NA	12.5	12.0	80%	80%	NA	NA	NA	85%	NA	NA	NA	NA	NA	NA	12.5	12.0
South Korea (OCR)	255.8	276.0	46%	46%	1.3	2.3	13%	16%	NA	40.0	NA	20%	415.1	349.0	55%	43%	43.0	42.0	715.2	709.3
Taiwan	77.5	88.0	42%	43%	21.5	49.4	26%	36%	98.0	40.0	51%	40%	161.9	123.0	42%	63%	18.0	20.0	376.9	320.4
Tajikistan	NA	NA	NA	NA	5.0	5.0	80%	81%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0	5.0
Turkmenistan	NA	NA	NA	NA	7.0	7.0	85%	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	7.0	7.0
Uzbekistan (GSP)	NA	NA	NA	NA	30.0	31.0	80%	81%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	30.0	31.0
Vietnam	26.8	30.0	91%	92%	NA	NA	95%	NA	NA	10.0	NA	NA	NA	NA	NA	NA	16.0	16.0	42.8	56.0

APPENDIX A: IIPA 2006 "SPECIAL 301" RECOMMENDATIONS

IIPA 2004-2005 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY

(in millions of U.S. dollars)

and 2004-2005 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software ¹				Records & Music ²				Motion Pictures ³				Entertainment Software ⁴				Books		Totals ⁵	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004
SPECIAL 306 MONITORING																				
Paraguay ⁷	7.3	6.0	83%	83%	128.0	127.8	99%	99%	NA	2.0	NA	95%	NA	NA	NA	NA	2.0	2.0	137.3	137.8
SPECIAL MENTION																				
Azerbaijan	NA	NA	NA	NA	15.0	12.0	80%	83%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	15.0	12.0
Bangladesh	NA	NA	NA	NA	NA	NA	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.0	6.0	6.0	6.0
Bosnia and Herzegovina	NA	NA	NA	NA	2.0	NA	95%	NA	NA	4.0	NA	90%	NA	NA	NA	NA	NA	NA	2.0	4.0
Brunei	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Burma	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.0	4.0	4.0	4.0
Cambodia	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.5	4.0	4.5	4.0
Cyprus	5.9	5.0	53%	53%	NA	NA	NA	NA	NA	8.0	NA	50%	NA	NA	50%	NA	NA	NA	5.9	13.0
Czech Republic	70.5	69.0	39%	41%	10.0	12.0	50%	60%	NA	10.0	NA	25%	NA	NA	NA	NA	NA	NA	80.5	91.0
Estonia	11.1	9.0	55%	55%	6.8	6.5	60%	60%	NA	2.0	NA	30%	NA	NA	50%	60%	NA	NA	17.9	17.5
Hong Kong (OCR)	59.0	58.0	51%	52%	4.3	4.8	18%	19%	NA	28.0	NA	20%	90.8	NA	71%	NA	6.0	7.0	160.1	97.8
Japan	890.3	822.0	27%	28%	NA	NA	NA	NA	NA	161.0	NA	12%	NA	NA	NA	NA	NA	NA	890.3	983.0
Kenya	10.4	9.0	83%	83%	13.0	12.6	97%	98%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	23.4	21.6
Lao People's Democratic Republic	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	3.0	3.0	3.0	3.0
Morocco	42.8	37.0	72%	72%	10.0	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	52.8	37.0
New Zealand	13.3	15.0	22%	23%	NA	NA	NA	NA	NA	10.0	NA	8%	NA	NA	28%	NA	NA	NA	13.3	25.0
Nigeria	33.6	30.0	84%	84%	52.0	50.0	95%	99%	NA	NA	NA	NA	NA	NA	NA	NA	6.0	4.0	91.6	84.0
Panama	2.6	2.0	70%	70%	NA	NA	NA	NA	NA	2.0	NA	40%	NA	NA	NA	NA	NA	NA	2.6	4.0
Singapore	49.7	54.0	42%	42%	2.4	3.7	5%	9%	NA	10.0	NA	12%	NA	NA	NA	NA	2.0	2.0	54.1	69.7
South Africa	110.5	107.0	36%	37%	NA	NA	NA	NA	NA	35.0	NA	40%	NA	NA	NA	NA	2.0	2.0	112.5	144.0
Spain ⁷	388.0	346.0	44%	43%	27.0	90.0	22%	24%	253.0	40.0	32%	25%	135.3	103.6	43.0%	46%	NA	NA	803.3	579.6
Sweden	176.0	166.0	26%	26%	NA	NA	NA	NA	NA	5.0	NA	5%	NA	NA	NA	NA	NA	NA	176.0	171.0
Switzerland	168.4	168.0	27%	28%	NA	NA	NA	NA	NA	14.0	NA	20%	NA	NA	NA	NA	NA	NA	168.4	182.0
TOTALS	8028.1	8046.0			2563.4	2649.4			1976.0	1966.5			2652.8	1847.5			606.5	603.0	15826.8	15112.4

Endnotes:

¹BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in each country, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

²RIAA: In Paraguay, RIAA reports that its estimated losses to the records and music industry include both domestic piracy in Paraguay and estimated losses caused by transshipment. In Spain, RIAA's 2004 loss estimate of \$90 million reflects all-industry losses (U.S. plus International repertoire); the 2005 losses reflect U.S.-only estimates. All-industry 2005 losses in Spain are in the \$75 million range.

³MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

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

⁵For many countries, the "total" loss figure does not include losses for one or more industry sectors where figures are unavailable (NA). Consequently, the totals for these countries are even more conservative.

"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

2006 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 2005 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

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 these platforms. Simulation is used to capture, and make best use of, the range of estimates received from respondents. 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 presences 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, they do not measure, and thus vastly understate, 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 prices, 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.

The description immediately following describes the methodology used in 2004. MPAA's methodology for 2005 appears at the end of this description.

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 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.

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.

Methodology for 2005: Prior loss calculations involved supply. In 2005, loss calculations were based on demand.

- Piracy loss figures are based on a direct measurement of consumer purchasing/pirating behavior, including hard goods and Internet piracy.
- Piracy levels are based on the percentage of potential market lost to piracy. Calculations involve revenue losses, legitimate market sizes, and potential legitimate markets without piracy.

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, professional surveys 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, bookstores and outdoor bookstalls. 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 PLANTS AND PRODUCTION CAPACITY

IIPA collects information from authoritative sources on numbers of plants and production capacity of optical disc products in more than 79 countries/territories, which are represented in the “Estimated Number of Optical Disc Plants and Production Capacity in 79 Countries/Territories” chart in the IIPA submission. Figures presented reflect the number of plants as well as production lines (where that information is available), and estimated capacity (again, where line numbers are available) for 2003, 2004, and 2005. We note that, for 2005, there is not sufficient reliable data to breakout the capacity to produce pre-recorded discs versus “blank” recordable media such as CD-R, CD-RW, DVD-Rs, DVD-RW, etc.

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 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 numbers of plants and lines reported in this submission to be a conservative estimate.

IIPA estimates the production capacity in countries where line data is available, represented in the chart by multiplying the number of known production lines by 3.5 million, a figure itself derived through the application of very conservative assumptions. These include: 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 extremely conservative assumptions regarding plants’ hours of operation. For example, it is known that, through plant visits made by industry and government representatives, 40% of plants have indicated that they vary shift patterns according to orders they are asked to produce, with several indicating that 24 hour (continuous) shifts are not uncommon during busy seasonal periods, e.g., Christmas. Furthermore, 33% of plants visited were operational 24 hours a day year-round (only shutting off occasionally for maintenance), while 12% reported running two 8-hour shifts, and only 15% reporting 8-hour daily shifts. There are also different expectations for number of hours a line is capable of remaining in operation based on its size, make, model, etc. It is also the case that the estimated number of discs per line per year – 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, we note that in some countries, where we have more precise data, those more exact capacity numbers are reported (and denoted with a footnote explanation in the chart in the submission).

PRIORITY FOREIGN COUNTRY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

RUSSIAN FEDERATION

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that the Russian Federation be designated a Special 301 Priority Foreign Country in 2006.¹ IIPA also recommends that the United States government immediately suspend Russia's eligibility for any duty-free trade benefits that it enjoys under the Generalized System of Preferences (GSP) program,² and that it condition Russia's entry into the World Trade Organization (WTO) on meaningful copyright law enforcement.

Simply stated, Russia's current copyright piracy problem is enormous — one of the worst of any country in the world, resulting in losses of over \$1.7 billion in 2005 (and well over \$6.5 billion in just the last five years).

Piracy of all copyright materials — motion pictures, records and music, business and entertainment software, and books — is at levels ranging from a low of about 67% to a high of 85%, levels totally unacceptable for a country and economy of the size and sophistication of Russia. Moreover, exports of infringing products from Russia — which have been forensically identified in over 27 countries -- are eroding the copyright industry's legitimate businesses in third country markets.

For nine straight years, Russia has been on the Priority Watch List, while the number of optical disc plants producing illegal material and exporting it abroad has grown exponentially— from 2 plants in 1996 to 47 plants as of January 2006. The Russian Government has run an increasing number of raids in the last few months of 2005. While this is a positive step, it can hardly qualify as rising to the level of needed enforcement. In the past four years, the number of optical disc (i.e., CD and/or DVD) plants in Russia has more than tripled. These plants are, in essence, unregulated, with only a handful subject to surprise inspections (although most were apparently “inspected” in 2005 according to the Russian Government), or the seizure of material, and almost none have been the subject of the imposition of effective criminal enforcement for commercial piracy or the seizure of the equipment used in illegal production. Effective enforcement means that plants involved in the manufacture of illegal material must be closed, plant operators convicted and sentenced, and the machinery used to conduct this piracy must be seized and destroyed.

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/2006SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

Russia received over \$617.9 million in just the first 11 months of 2005 in GSP trade preferences. IIPA recommends that the U.S. government immediately suspend Russia's eligibility for GSP trade benefits and that the U.S. use other trade measures — including denying entry into the WTO — to get the Russian government to make progress on copyright enforcement. To date, the Russian government has taken only sporadic action against optical disc plants (with raids and seizures of some infringing product) and a handful of prosecutions, in addition to the adoption of legal reforms. Russia must make meaningful and measurable enforcement progress against a problem that has escalated due to Russian government inaction.

Enforcement Steps for 2006: 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.

There are several critical steps that the Russian government could take immediately to effectively confront its optical disc and related piracy problems:

1. Inspect, on a regular, unannounced and continuous basis, each of the 47 known OD plants, and immediately close and seize the machinery used to produce pirate product (some of these steps may require additional legislative or regulatory measures);
2. Introduce, 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 the withdrawal of licenses and the 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. In addition, any plant licensing regime (including current law) should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works;
3. Announce, from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities, and instruct the Inter-Ministerial 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. Also, it is imperative to establish a central coordinating body for law enforcement authorities with wide powers, derived directly from the President, to combine the efforts of the Economic Crime Police, the Police of Street Order, Police Investigators (who investigate major cases from the beginning to trial) and Department K (the New Technologies Police);
4. Adopt in 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). We understand such a decree may be proposed as early as February 2006. We also recommend amending Article 146 to a minimum penalty of six years, not the current penalty of five years (since only penalties of six or more years are treated as “serious” crimes);
5. Immediately take down websites offering infringing copyright materials, such as allofmp3.com (music), www.threedollardvd.com (films/music) and www.fictionbook.ru (books), and criminally prosecute those responsible, including unauthorized collecting societies (such as ROMS) that purport to grant licenses for rights that they do not possess;

6. Improve border enforcement, including the import of machinery used to produce illegal product and the export of large shipments of that product abroad;
7. Initiate investigations into and criminal prosecutions of organized criminal syndicates that control piracy operations in Russia (including operations that export pirate material to markets outside Russia);
8. Encourage the Economic Police (including the Anti-Fraud Department) to substantially increase the number of anti-piracy raids, especially against large-scale targets, and to extend their actions to the distribution networks supplying illegal street sellers as well as to bring more cases to the prosecutors; and
9. Take action to undo the situation in St. Petersburg, where legitimate video and DVD markets have been effectively lost due to the activities of a collective management organization known as the Association of Collective Management of Authors' Rights (which falsely claims to represent MPA member companies and which, incredibly, enjoys the support and protection of local officials, and requires, in violation of federal law, the application of a pirate hologram on all products sold with its license).

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).

In 2004, Russia adopted important law reforms 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. There are numerous other legal reforms, especially those targeted to improved enforcement, that Russia must make, including further updating the criminal code, the criminal procedure code, and administrative code (as detailed in this and prior reports). Criminal procedure amendments intended to enable more efficient prosecution of cases are pending in the State Duma and may be adopted in 2006. Amendments to the Code of Administrative Misdemeanors were adopted in 2005, and will enter into force in 2006.

Most importantly, Russia needs to seriously address the problem of optical disc piracy that has been "discussed" for far too long without meaningful action. Nearly ten years ago there were only two optical disc plants. IIPA and the U.S. government identified plant production as an important "emerging problem" in Russia, and suggested the need for an enforcement "action plan" to address it, including legislative reforms. 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 have even been introduced to tackle optical disc plants' unauthorized activities.

RUSSIAN FEDERATION
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005³

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ⁴	266.0	81%	275.0	80%	275.0	75%	250.0	80%	250.0	80%
Records & Music	475.9	67%	411.9	66%	405.0	64%	371.9	66%	285.0	64%
Business Software ⁵	748.4	85%	800.0	87%	704.0	87%	370.0	89%	90.6	87%
Entertainment Software ⁶	223.9	82%	255.8	73%	NA	80%	NA	90%	173.6	90%
Books	42.0	NA	42.0	NA	40.0	NA	40.0	NA	48.0	NA
TOTALS	1756.2		1784.7		1424.0		1031.9		847.2	

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Illegal Optical Media Production and Distribution

There are now 47 known optical disc plants in Russia manufacturing and distributing products (including music CDs, DVDs, videogames, and VCDs); at least 24 of the plants have been confirmed to be producing pirate product. The Russian government has publicly stated that as many as 18 plants are located on government owned or leased property; these plants on former military bases are known as “Russian State (owned) Restricted Access Regime Enterprises” (RARE). These RARE plants are directly connected to state owned and state run enterprises, and are located on premises important to Russian state security officials. Thus, they not only pose a potential security risk for the Russian government, they also undermine the government’s campaign against piracy. As of March 2005, Ministry of Interior officials and State Trade Inspectors were granted the authority to have 24-hour access to RARE facilities in order to conduct plant raids (which are otherwise off-limits to local enforcement authorities). MOI officials and State Trade Inspectors need to use their authority to undertake surprise inspections, including the seizure of illegal material and the closure of illegal plants.

The 47 optical disc plants have a total plant capacity of 395 million CDs and DVDs per year (with an estimated actual production of between 150 and 200 million discs per year). There are estimated to be a total of 113 lines of production at these plants, with 51 lines dedicated to DVD production, up from 34 just one year ago. The local legitimate market is significantly less

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

⁴ MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Russia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁶ 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.

than this figure. For example, it is estimated that the current demand for legitimate DVDs is about 10 million discs per year but that Russian plants are now manufacturing between 50 and 80 million DVDs per year for export to markets outside of Russia.

The steady growth of optical disc production has been documented (in numerous IIPA filings) as follows: 1996—two plants; 1998—three plants; 1999—six plants, with a capacity of 60 million discs; 2000—ten plants, with a capacity of 90 million discs; 2001—thirteen plants, with a capacity of 150 million discs; 2002—seventeen plants, with a capacity of between 150 and 183 million discs; 2003—twenty-six plants (including 5 DVD plants), with a capacity exceeding 300 million discs; 2004—thirty-four plants (including 8 DVD plants), with a capacity exceeding 390 million discs.

In 2005, the Russian government undertook raids against some of the plants – certainly a positive step, but merely a first step. In fact, the government claimed to have conducted “inspections” of all the known plants, although they were not surprise inspections even if all the plants were visited. In our view the Russian government did not raid the plants in any comprehensive way, nor do they have a comprehensive plan to address the optical media production and distribution problem. Instead, of the 18 plant visits (“raids”) of which we are aware (with as many as nine in September and October 2005 alone), the authorities only discovered evidence of illegal production at six plants, essentially finding the remaining 12 plants “clean.” This “cleanliness” should not be misinterpreted; it likely resulted because many visits were not surprise inspections. We applaud the increase in plant inspection activity—an increase that led to the seizure of increased quantities of piratical goods. But taken in context, these raids are not sufficient to address the escalating piracy problem. For example, it is reported that over 6 million DVDs were seized in all of 2005. But the motion picture industry reports that as many as 50 to 80 million discs were produced for export alone in 2005.

The end results of the 2005 (and 2004) raids are telling, and underscore the significant amount of work Russia must undertake to address the piracy problem as well as to meet its bilateral (including GSP eligibility) and multilateral obligations.

It would appear that almost all of the optical disc plants that were raided in 2004 and 2005 remain in operation after those raids. A raid in November 2005 on the Roff plant in Odintsovo, near Moscow, led to a suspension of a license while a criminal prosecution proceeds. This was the first such suspension (by the new Federal Service charged with compliance with licensing regulations) and several other suspensions were announced in January 2006. More common, however, has been, for example, the case of a several plants raided (in 2004) where truckloads of illegal material were seized weeks later from the same plants by Russian government enforcement officials – and still these same plants remain in operation and their licenses have not been suspended by the Ministry of Culture (i.e., the Federal Licensing Service – Rosokhrankultura).

Most fundamentally, the plant owners remain unscathed by the criminal justice system. A few plant employees have been convicted – after extensive delays in criminal investigations – but virtually all received suspended sentences. Consequently, there is no deterrence to continuing to conduct commercial piracy in Russia at present. The only exception to this pattern was in June 2002 when the Disc Press MSK plant (raided in September 1999) was finally closed and a Zelenograd court handed down four-year prison sentences to two operators of the plant. 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 was supposed to be completed last year, but the plant is still in operation.

The record industry has been involved in 38 cases against optical disc plants and large warehouses in the past three years. Thirty-two of those 38 cases (that is, 84%) remain without a resolution as investigations have dragged on or have been terminated without just cause or based on ill-founded assertions (such as, no *corpus delicti* or no suspects identified). The other six cases resulted in conditional sentences, and in only a handful of cases were the pirated materials destroyed. Thus, these enforcement measures have had little or no impact on reducing piracy in Russia.

A raid in November 2005 by RAPO and the Russian Federal Security Service (FSB) on the Roff Technologies plant in Odintsovo near Moscow resulted in the seizure of thousands of pirate DVDs, CDs, and stampers, along with illegal molds (i.e., molds without the plant's name and licensing number, as required by licensing regulations). The plant had been previously raided in September (by RAPO) and the Economic Crime Police in October. The November raid led to the suspension of the plant's license while a criminal investigation (and hopefully, prosecution) proceeds. This is the first suspension case by the new federal service charged with securing compliance with the existing licensing regulations.

To solve this problem, Russia must undertake vigorous criminal enforcement (not, as they suggest, private party action) backed by the highest political officials in the government, since much of the piracy is undertaken by organized criminal syndicates. For example, according to the Entertainment Software Association (ESA), Russian organized crime syndicate pirates of videogame material are so well entrenched that they "label" their product. Russian-produced pirated entertainment software products are also localized into Russian and the language of the country to which the pirate exports are destined (for instance, Poland). Pirated videogames produced in Russia have been found in neighboring Eastern European countries, and as far away as Israel. The Motion Picture Association (MPA) reports that DVDs are being locally produced in seven or eight foreign languages, not including Russian, indicating that the organized crime syndicates are producing these DVDs strictly for export. Markets that have been negatively impacted by imports of pirate Russian DVDs include: Poland, Estonia, Finland, Ukraine, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Germany, Israel, the United Kingdom, and Turkey. The music industry reports that Russian produced CDs have been found in many of these same countries – over 25 in all.

To date, the Russian Government (formerly the Ministry of Press and Mass Media) has been using reproduction and licensing regulations — issued in June 2002 — to provide licenses for replication facilities for optical discs and analog tapes. The regulations allow for unannounced inspections of replication plants and for the suspension, but not withdrawal, of operating licenses of facilities found to be in breach of the regulations. 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 and the inability to seize and confiscate the equipment used for pirate production.

After the 2004 government reorganization, a 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) took over the plant licensing function; its role is to issue plant operating licenses. The FSCLMM (also known as Rosokhrankultura) is a part of the Ministry of Culture. Rosokhrankultura has responsibility only for the licensing of optical disc plants that produce music or DVDs, not computer software (according to Federal Law No. 80-FZ "On Licensing of Certain Types of Activities"). There was a delay after the transfer of authority to Rosokhrankultura, with inspections and licensing reviews

commencing again only in May 2005. The Russian Government reported at the end of 2005 that it “inspected” all of the known plants in operation. A separate result of the 2004 government reorganization was that copyright policy is now vested in the new Federal Service on Intellectual Property (including Rospatent) within the Ministry of Education and Science setting up the potential for bureaucratic wrangling over certain aspects of optical disc enforcement.

In October, November, and December 2005, several plants were raided as part of a large-scale police operation (“Kontrafakt-2005”). Rosokhrankultura reported in January 2006 that three plants had their licensees revoked as a result of those raids: the Data Media plant, located in Korolev, near Moscow (raided October 5, 2005); the UVK Stimul plant in Moscow (suspended December 12, 2005); and the Laguar plant in Podolsk, near Moscow (suspended January 23, 2006). Further, according to a press release issued by Rosokhrankultura in December 2005, six more lawsuits were filed to revoke licenses from other plants producing illegal disks.

As noted, according to special regulations adopted by the Ministry of Interior (MOI) in March 2005, MOI officers have the right to 24-hour access to all “restricted access” (RARE) facilities for the purpose of conducting raids on optical disc plants located on these restricted access (RARE) properties. The full scope of MOI’s authority remains unclear, however. It is hoped that MOI will use whatever authority it possesses to suspend the operations of enterprises involved in piracy, and to seize piratical goods and the machinery used to manufacture them pending a (court) order for destruction. Further, IIPA hopes that Rosokhrankultura will suspend plant licenses immediately upon presentation of evidence of piratical activity, and that the courts will act promptly to issue license revocation orders thereafter, as was the case with respect to the Laguar optical disc plant, noted above, which had its license revoked at the end of January upon a motion from Rosokhrankultura.

The business software industry has also seen an increase in optical disc piracy in recent years and the sale of discs (including “burned” discs) in the Russian market, as well as Russian produced discs exported and sold in many other countries. Under the current optical disc regulations, the reproduction of software on optical discs is not even subject to licensing (only audio and video works are covered). Amendments to correct this deficiency were proposed by the Ministry of Culture in April 2005.

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 have started to circulate to change optical disc licensing requirements, including a much-needed proposal to adopt mandatory SID codes. In 2005, the Ministry of Economic Development and Trade drafted legislation to regulate the importation of polycarbonates used in the production of optical media; that draft is now circulating for approval before introduction. 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 four years ago.

Raids and Seizures in 2005

In 2005, there were 21 actions taken against optical disc plants, including raids and seizure of illegal materials (but not at all the raids) according to industry and Russian government reports. In 2004, there was a total of eight actions taken. As noted, in almost all cases the plant operators go unscathed by the criminal justice system and/or the plants continue in operation.

In 2005, the recording industry was involved in raids on seven suspect optical disc plants. One of these plants was raided on three separate occasions. Prosecutors initiated criminal investigations in four cases, rejected a proceeding in one, and have yet to announce anything with respect to the other two. The recording industry is hopeful that the 2005 results will be better than in 2004 when out of eight total cases, two were rejected, two remain open, one case was suspended, and the three other cases resulted in conditional sentences applied to low-level plant employees.

In 2005, the motion picture industry's anti-piracy organization, RAPO, participated in 10 raids on suspect DVD plants, including raids on plants in Zelenograd, Moscow, Tver and Kazan. The plant in Kazan, Tatarstan that was raided in October 2005 is a RARE facility. As a result, local authorities who tried to raid the plant were prevented from doing so by the federal authorities, but were ultimately successful (along with RAPO). In early December 2005, RAPO and the Economic Police found a second unlicensed plant on a large defense facility in Kazan that contained 2 DVD and 3 CD lines, and over 300,000 pirate discs. The plant in Tver that was also raided in early December 2005 was found to have 4 unlicensed DVD lines and over 21,000 pirate DVDs. The lines were sealed by the local Economic Crime Police.

In virtually all cases where plants were raided in 2005, it is reported that the plants remain in operation. In general, the industries report that criminal investigations now proceed in about half (up from 33%) of the cases (not only including the plant-related cases). However, extensive prosecutorial delays persist and few cases result in criminal convictions and almost none against the operators and owners of the plants. In 2005, a total of only nine pirate offenders (and no plant operators) were jailed.

In December 2005, the City Court of Pushkino, near Moscow, imposed a two-year prison sentence (not suspended) on a local DVD retailer, who was caught by RAPO earlier last year selling pirate DVDs (between 400 and 500 discs). The defendant (a former Russian Army officer) was charged under Article 146(3) of the Criminal Code, which deals with IP offenses committed by organized groups—this defendant had conducted his business with family members. The defendant was likely convicted because of his blatant sales, which continued after the raid and right up to his trial, and his defense, which angered the court when he noted that he was merely serving the “poor people of Pushkino” who could not afford to buy legitimate DVDs. This case was the first time that a Russian court imprisoned a first-time IP offender (a victory for RAPO and the local prosecutor). In August 2004, the Russian courts punished a pirate with the first-ever unsuspended prison sentence. The defendant, a video shop owner found with a DVD burner and hundreds of pirate DVDs, DVD-Rs and VHS cassettes, was sentenced to 3 years and 2 months after a prior conviction had resulted in a two-year suspended sentence.

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 and DVDs remain widely available. Piracy in retail outlets such as in supermarkets (large and small), specialty (CD/DVD) shops, and large kiosks, is rampant. Retail cases have resulted in some administrative fines, but these are generally of a *de minimis* nature. IIPA understands that amendments to the law to be considered in 2006 would expand the scope of this ban to (business and entertainment) software and databases; we recommend its immediate enactment.

The pattern of successful raids without successful prosecutions (with a few exceptions) is a recurring problem. It is estimated that about two-thirds 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 November 2005, a large Ministry of Interior operation called "Counterfeit" was undertaken—it resulted in police raids at numerous markets (including Gorbushka, Mitino and Solntzevo) and warehouses, especially in Moscow and St. Petersburg, and the seizure of hundreds of thousands of pirate discs.

On December 15, 2005, RAPO investigators and officers from the Ministry of Interior's IP Department No. 28 raided a warehouse in the Khimki district of Moscow and seized over 500,000 pirate discs (mostly DVDs). The raid was organized by RAPO following an earlier police search of a truck in Klin that yielded about 60,000 pirate discs. Subsequent investigations revealed that two trucks made three-times-a-week deliveries from an optical disc plant in St. Petersburg to Moscow via Klin (with materials stored at a warehouse in Khimki). Among the titles seized in the raid were recent releases: *Harry Potter and the Goblet of Fire*, *The Fog*, *The Interpreter*, *Stealth*, *The Terminal*, and *Robots*. RAPO investigators also participated in a raid December 14, 2005 with the local Economic Crime Police at a warehouse in Narofominsk, seizing 180,000 pirate DVDs.

The Business Software Alliance (BSA) reports on an optical disc plant raid that took place on November 17, 2005. The Economic Crime Police of Moscow raided the Unitekhnoplast Ltd. plant located in Lobnya. The police seized a number of CD stampers, moulds for CD replication and counterfeit CDs, including some containing illegal Microsoft software. Preliminary damage estimates exceed \$1 million. An investigation and examination of the seized CDs and stampers is underway, along with the initiation of a criminal case.

Continued High Piracy Levels and Other Problems

The piracy levels and dollar losses in Russia are very high for an economy as well developed as the Russian market. 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 at \$130 million in 2005. In another study undertaken by the software industry (BSA/IDC Study, December 2005), it was estimated that if levels of piracy could be reduced by 10 points, it would add \$23.5 billion to the Russian economy and create 33,700 new jobs—more jobs than are currently employed in Russia's hardware, software, and services sector combined. It would also generate \$15 billion in local industry revenues and \$823 million in tax revenues.

The motion picture industry reports very high piracy rates for DVDs, 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 and to lower the prices of legitimate product. 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 \$475.9 million in 2005.

The level of piracy for entertainment software is 82% of the market. Russian syndicates continue to control 100% of the production and distribution of PlayStation® and PlayStation2® videogames and personal computer games. Pirated entertainment software products on optical disc that are not produced in the country are typically imported from Ukraine. Cartridge-based video games (like *Nintendo Game Boy®* products) continue to be imported from Asia, particularly China. Although pirated entertainment software products continue to be available in Moscow, a growing industry presence is resulting in promising changes to the city's market. However, piracy remains rampant in other key cities such as St. Petersburg and Vladivostok where organized criminal syndicates control piracy operations. Piracy at Internet cafés remains problematic; of the 9,000 cafés in the country, only about 10% are licensed. Flea-market type venues (of which there are an estimated 50,000 in the country) continue to be a primary source of pirated video game product. Internet piracy also increased significantly in 2005.

One example of the failure of the Russian enforcement regime to work effectively is the control that criminal syndicates continue to 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 does not appear to have diminished.⁷ 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 syndicates control not only the illegal distribution networks in Russia but the distribution networks in the surrounding countries to which Russian-sourced pirated products are exported. 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 these groups are strengthening their ties with the syndicates operating in Ukraine. Given these circumstances, it is imperative to use the criminal code against organized criminal syndicates, and for the

⁷ As reported in the 2005 IIPA report, one of these piracy syndicates attempted to register an ESA member company's trademarks for a videogame product that was being pirated by the syndicate.

Russian Government to 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 past, 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. In addition, 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.

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. Many of these websites, such as www.fictionbook.ru and www.gribuser.ru that offer entire books for download, are operating without any interference from Russian authorities even after repeated requests for investigations. The Association of American Publishers (AAP) estimates losses in Russia in 2005 at \$42 million.

In December 2005, a senior Putin Administration member repeated a theme of the Russian government regarding the “pricing” of legal versus illegal product in Russia. For several years Russian officials have suggested that the high prices for legitimate goods are to blame for the piracy problem. These comments frankly raise serious questions about the commitment of the government of Russia to fighting piracy and reflect 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 at least 27 countries over the past few years. 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.

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—and, according to Russian statistics provided to IIPA, less than 1% (8 out of 338) of those convicted of IPR crimes (including copyrights and trademarks) were sentenced to any jail time; a few were fined but most of these were not deterrent fines. For example, the Russian Government reported that, as of December 1, 2005, a total of 1,592 cases were undertaken under Article 146 of the Criminal Code, with 1,513 being “grave harm” cases. This includes all IPR cases (including trademark and patent cases as well as copyright ones). Further, the Russian Government reported that 1,127 of these cases went to the courts.

It appears that the criminal enterprises are also using the Internet as a 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 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.

Internet piracy is also growing. The world’s largest server-based pirate music website – allofmp3.com – remains in operation after a criminal prosecutor in early 2005 reviewed the case and (wrongly) determined that current Russian copyright law could not prosecute or prevent this type of activity. The case is on appeal. In fact, this interpretation of the Russian law is contrary to all the assurances the Russian government gave the U.S. government and private sector during the years-long adoption of amendments to the 1993 Copyright Law; those amendments were finally adopted in July 2004. This site sells American and other foreign-owned music to consumers worldwide and must be shut down. In addition, the role of unauthorized collecting societies must be curtailed. ROMS, in particular, has continued its illegal practice of issuing licenses for the Internet distribution of sound recordings owned by RIAA members, despite the fact that ROMS has no rights to do so. Other rogue collecting societies have since followed ROMS’ example. In October 2005, Russian police ran a raid on one unauthorized music site (mp3search.ru) but have not acted against the more notorious and larger allofmp3.com site. There are other sites offering infringing copyright materials of films and music (such as, www.threedollardvd.com) and books (www.fictionbook.ru and www.gribuser.ru) that also need to be criminally investigated, closed down, and prosecuted.

The business software industry (BSA) reported the following enforcement statistics for January through December 2005: there were 93 end-user raids and 156 “channel” raids undertaken. There were 152 criminal/administrative actions, compared with 52 civil actions. There was a total of 9 civil and 47 criminal judgments received and overall, the number of software enforcement actions increased.

The software industry noted several favorable criminal court decisions against small resellers selling pirate CD-Rs in 2005. For example, in one case, a reseller received a three-year suspended sentence plus three years of probation. In October 2005, a criminal court in Rostov-on-Don sentenced an on-site installer to a year of actual imprisonment. In some instances criminal courts also ruled on the civil matters in the cases. In 2005, the business

software industry continued to focus its 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 industry reported that both channel and end-user cases were conducted with good police cooperation; there were even some "first ever" actions, but that much more sustained action is needed. The police throughout many regions were willing to undertake HDL actions, even against larger companies. Police in Moscow conducted HDL test purchases in stores of four top-10 computer retail companies (including the largest Russian retail chain), resulting in criminal verdicts against store employees (but not owners). There was also an increase in the number of end-user raids and criminal prosecutions against end-user companies throughout all of Russia, but end-user enforcement still remains very limited in Moscow. The police continued to concentrate on easy (small) CD-R targets. Finally, prosecutors throughout the country remain very reluctant to bring charges against companies using unlicensed software in their business operations.

For effective enforcement against software (and other) piracy, the business software industry recommends that the Interior Ministry and the Prosecutor's Office publish detailed methodologies on how to collect and fix evidence pertaining to IPR crimes committed on the Internet. Such recommendations should focus on fixing and retaining electronic evidence of IP violations. Since IPR cases against Internet piracy are relatively new, the software industry further recommends that these cases be referred to the Department K (high tech) police officers.

In sum, the main criminal enforcement obstacles confronting the software industry (but common to other industries) are: (1) the poor coordination between police and the prosecution; (2) the reluctance of prosecutors to initiate and pursue IPR cases; (3) the failure of prosecutors to conduct expeditious and effective investigations and prosecutions of IPR crimes -- prosecutors create considerable delays (of months or even years) after police conduct raids; and (4) the role of political influences and corruption in cases.

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 raids 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; no such statistics were available in 2005. Over the past few years, 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; illegal product is confiscated and small fines imposed (on average, less than US\$200). Market seizures continue to involve the employment of huge resources, since administrative penalties remain totally inadequate to deter over the long term. The recording industry reported that although the law makes liable those who distribute material, the sources and channels of illegal material are rarely pursued. In lieu of this, most administrative actions against shop owners and sellers require payment of, on average, US\$200.

Civil Enforcement

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 civil causes of action were commenced in Russia against optical disc plants. IFPI was being pressed to do so by the Russian government, which was convinced that civil procedures would prove effective. There are now a total of 16 IFPI civil claims lodged against two plants—Russobit and Roff Technologies. Predictably, instead of this course proving effective, 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.

Civil enforcement against certain types of Internet piracy has been impeded because of: (1) the delay (until September 2006) in implementing the critical copyright law amendments providing a right of making available; and (2) silence in Russian law on the issue of legal regulations or liability of Internet service providers for third-party activities.

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 direct customs officials to properly address this issue. One major flaw is that these officials do not have the proper and clear *ex officio* authority to commence criminal cases after making an inspection and seizure. Also, customs officials should be encouraged to consult and coordinate their actions with right holders' organizations. 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 (such as Poland). The music industry reports that Russian-made pirate CDs have been exported to over 25 countries. The entertainment software industry reports that Russian-sourced pirate video games are shipped into Poland, Latvia, Lithuania and Israel. The Russian Federal Customs Service reported 270 administrative cases were brought against those trafficking in pirated goods in the first 9 months of 2005 (but only 75 of these were copyright violations; the rest were trademark cases).

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. In 2004, the government issued a "Working Plan of the Government Commission for Counteracting Intellectual Property Infringements" which it has begun to implement. Unfortunately, the government reorganization in 2004 stalled much of this implementation. To date, the commission has taken smaller steps, focusing on legislative reforms rather than focusing on the more important problem of combating optical disc production and retail piracy. The commission needs to get more decisive and focused on these key enforcement objectives, including the adoption and implementation of a comprehensive plan to stop the production and distribution of optical media, curtailing retail piracy, and finally by revisiting the question of a federal stamp for optical disc products.

Unfortunately, jurisdiction over IPR enforcement is scattered among many government agencies, including those responsible for policy and regulation (i.e., Rospatent) and others with

limited enforcement authority. Thus, there is no single agency responsible for IPR enforcement, nor a single key policymaker charged with authority to implement a comprehensive enforcement scheme. In addition, especially for IPR violations committed over the Internet, inexperience among the enforcers, including prosecutors and judges, is preventing effective enforcement.

One encouraging note in 2005 was the General Prosecutor's initiative announced in September 2005 to better coordinate cases with other law-enforcement agencies (including the Ministry of Economic Development and Trade, the Ministry of Interior, the Federal Service of Security, the State Service for Control over Drugs, the Federal Customs Service and others). The goal is to coordinate and simplify the complex administrative, statutory, organizational and law enforcement measures to improve IPR enforcement efficiency.

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 November 2005, October 2003, and March 2001. In 2004, \$541 million worth of Russia's imports to the United States benefited from the GSP program. During the first 11 months of 2005, \$689.3 million worth of Russian goods entered the U.S. under the duty-free GSP code (an increase of 37.3% for the same period in 2004). While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia in 2005 amounted to over \$1.75 billion. The IIPA recommends that Russia 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. Since enforcement is the priority of the copyright industries in 2006, we simply list the legal reforms that are necessary at this time (and provide detailed requirements only for the much-needed optical media regulations). More details about the other legal reforms can be found in prior IIPA reports at <http://www.iipa.com/countryreports.html>.

The legal reforms necessary for effective enforcement include:

- A proper optical media law to:
 - Close plants that are caught illegally producing copyrighted material.
 - Seize infringing product and machinery.
 - Require plants to keep meaningful order, production, and delivery records.
 - Require plants to adopt source identification (SID) codes so that the source of illegally produced discs can be traced.
 - Introduce sanctions (including criminal penalties) for infringing the regulations.
 - Control the importation of raw materials (optical grade polycarbonate) used in the production of optical disc media.

- More details of what proper regulations are necessary can be found at the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> on page 14.
- Effective protection regarding the use of copyright materials on the Internet. This includes the immediate coming into force of an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with Article 8 of the WCT) and for phonogram producers (consistent with Article 14 of the WPPT).
- Amendments to the Criminal Code and Criminal Procedure Code to provide proper *ex officio* authority and allow for the confiscation of equipment used to make illegal copyright materials.
- Amendments to strengthen the implementation of the Code on Administrative misdemeanors and apply deterrent fines, especially for legal entities and their officers.
- Amendments to the Customs Code to provide the proper *ex officio* seizure authority. We understand these provisions are scheduled for consideration in the Duma in March 2006.
- Amendments to the Copyright Law to ensure the adoption of responsible business practices by collecting societies to avoid abuses that harm right holders' ability to exercise and enforce their own rights.
- Regulations that cover telecine operators (i.e., of film to video machinery) and film mastering labs.
- Introduction and enforcement of anti-camcording legislation that facilitates enforcement; provides for deterrent jail sentences and higher penalties for repeat offenders; and that ensures that anti-camcording measures are not undermined by the private copying exception.

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 was a part of the amendments to make prosecution of copyright-related cases a “public” matter, meaning it no longer requires a formal complaint from the right holder, although as a matter of practice such a complaint is still necessary (this was also part of a corresponding Criminal Procedure Code change to divide enforcement authority between the police and prosecutors). In September 2005, amendments to Article 151 of the Criminal Procedure Code were approved by the Government of Russia and introduced in the State Duma to enable the police also to have investigative jurisdiction of IPR cases (since the police actually do the investigations now and since the prosecutors are often backlogged with other serious crimes). We recommend the adoption of these amendments and others intended to provide law enforcement officials with additional investigative tools; we further recommend that Article 146 be amended to specify that legal entities can be criminally liable for IPR violations.

IIPA understands that the Supreme Court will adopt — perhaps as soon as February 2006 — a much-needed decree setting forth sentencing guidelines for judges, advising the courts to impose deterrent penalties as provided under the penal code (Article 146).

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 to date only been tried 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. Despite the fact that the Arbitration Procedure Code enables *ex parte* searches, the Russian arbitration courts are not utilizing *ex parte* measures. Unfortunately, during the late 1990s some plaintiffs misused these measures against potential defendants, and these unfair practices significantly discredited the use of *ex parte* searches in Russia.

A new Customs Code went into force on January 1, 2004, providing for measures to prevent the trade in counterfeit goods across borders. Unfortunately, border enforcement officials were not provided all of the necessary *ex officio* enforcement authority, to properly commence investigations. Additional amendments to the Code to provide the proper authority and procedures are scheduled for consideration in the Duma, perhaps as early as March 2006.

There are several remaining deficiencies in the Copyright Law (detailed in earlier IIPA reports), such as overly broad private copying exceptions, flawed provisions on technological protection measures (because they are linked to proof of a copyright infringement), and on collective management issues. For example, the poorly worded provisions in Article 45 permit collective management organizations to license rights and collect remuneration without a mandate from the right holders they purport to represent. 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. This has also affected the music industry. The Inter-Ministerial Commission was asked to study the problems of collective rights management in Russia, so far without resolution.

IIPA recommends the introduction into the Copyright Law of a clear definition of "Internet Service Provider" and confirmation of clear (third party) liability in civil and criminal law for facilitating Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases.

IIPA recommends that any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works. Also, Russia needs to adopt anti-camcording legislation to facilitate the enforcement and prosecution (with jail sentences of a year or more for first offenses and longer terms for repeat offenders) for those involved in recording films from theater screens to use in pirate products.

IIPA is encouraged that the Code on Administrative Misdemeanors is being amended consistent with our past recommendations. In December 2005, amendments were adopted in the State Duma that will enter into force in 2006. These amendments (1) extend the timetable for pre-action investigation from the current two days to two months; (2) extend the statutory limitations to one year (from the current two months); and (3) increase the penalties for administrative violations of copyrights and related rights.

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.

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 Government of Russia 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.

APPENDIX C

COUNTRY SURVEYS

PRIORITY WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ARGENTINA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2006.

Actions Which the Argentine Government Should Take in 2006:

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.

Legislation

- Adopt the bill to amend the copyright law to provide for statutory damages and the seizures of infringing equipment;
- 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;
- Propose an anti-piracy bill that will increase criminal penalties for piracy and characterize IPR violations as a serious crime (along the lines of the bill proposed in 2001);
- At the appropriate opportunity, Argentina needs to revive efforts to properly implement its obligations under the two WIPO "Internet" Treaties, addressing the following illustrative issues:
 - Affording express protection for temporary copies, distribution and rental rights, and the communication to the public/making available right;
 - Adopting provisions on technological protection measures and electronic rights management information;
 - Providing for notice and takedown provisions and for ISP liability; and
 - Adopting provisions on border measures (*ex officio*).
- Support efforts to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices.

ARGENTINA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	69.5	60%	41.5	55%	30.6	53%	26.0	60%	78.2	47%
Entertainment Software ³	NA	NA	NA	80%	NA	NA	NA	NA	NA	95%
Business Software ⁴	80.6	77%	63.0	75%	44.0	71%	10.7	62%	72.5	62%
Motion Pictures ⁵	NA	NA	30.0	45%	30.0	45%	30.0	45%	30.0	45%
Books	4.0	NA	4.0	NA	4.0	NA	NA	NA	8.5	NA
TOTALS	154.1 +		138.5		108.6		66.7		189.2	

COPYRIGHT PIRACY IN ARGENTINA

The recording industry reports that music piracy worsened in 2005, even after there was some recovery in the prior three years due to generally improved economic conditions in Argentina. The piracy rate went from 55% to 60% of the total market, which amounts to 24 million pirate units. The two major threats involve physical piracy (usually burned CD-Rs) and the Internet. Blank CD-Rs come mostly from Taiwan, go through Uruguay and land in Argentina. Some find their way to Paraguay; later these same CD-Rs return to Argentina and are used to burn music for piratical purposes. Thousands of street vendors take advantage of these CD-Rs throughout the country. Although some raids have taken place in downtown Buenos Aires, the interior of the country remains plagued with street vendors selling pirate product (like cities of Tucuman and Santa Fe). Pirate stands are often seen around train stations and other high traffic areas. Another major concern in 2005 was the widespread offering of “home delivery” for pirate product; these services advertise in newspapers, websites, and through e-mails, and offer 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. Furthermore, Internet piracy has

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf. For information on the history of Argentina under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² 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.” The methodology used by the ESA is further described in Appendix B of this report.

⁴ BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Argentina, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

surged, with one market survey (by a third party vendor) estimating close to 400 million songs are being downloaded on an annual basis. In November 2005, the international recording industry initiated actions against major uploaders using peer-to-peer (P2P) operations in several countries, including for the first time, Argentina.⁶ Because of the dire piracy situation, there are very few legitimate music retailers left in the countries for consumers wanting to buy legitimate product; some of these retailers have redesigned their businesses to include electronic equipment and books in order to stay in business.

The Business Software Alliance (BSA) reports that there was not major improvement in the software piracy situation in Argentina in 2005. 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. Also, the software industry remains 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. Improvement in lowering piracy levels could provide much benefit to the local economy.⁷ The industry continues to support efforts by the Argentine government (in particular, the *Subsecretaría de la Gestión Pública* — the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several “standards” have been issued by the *Subsecretaría*, the Argentine government has shown no indication that it is legalizing its software use.

MPA reports that due to the economic rebound, the dynamic of piracy in Argentina has changed in the last years. The sales of DVD players increased significantly in 2005 and the pirate market followed this tendency with high-quality DVD-Rs coming into the market. Illegal duplication labs previously producing high-quality VHS counterfeits are now engaging in producing pirated DVD-Rs, which are provided to video rental stores and street vendors. Finally, 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 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. In fact, in 2005 a study of 1,100 students in Buenos Aires and Rosario revealed that 40% study with photocopied materials (not legitimate books) and universities copy more than 2.5 billion pages per

⁶ The International Federation of the Phonographic Industry (IFPI) announced over 2,100 new legal cases against individuals and extending the actions to five new countries in Europe, Asia and, for the first time, South America. In Argentina, four out of ten people who have access to the Internet use unauthorized P2P services. These file-swappers are high-income people, mostly aged between 20 and 30. Seven out of ten people in Argentina are aware that unauthorized file-sharing is illegal. The actions in Sweden, Argentina, Switzerland, Hong Kong and Singapore join Austria, Denmark, France, Finland, Germany, Iceland, Ireland, Italy, Japan, the Netherlands, the UK and the US, bringing the total of countries involved in litigation to 17. See IFPI, “Biggest wave of actions yet announced against illegal file-sharing,” November 15, 2005, at <http://www.ifpi.org/site-content/press/20051115.html>.

⁷ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](#), using 2004 data, found the following: A 10-point drop in Argentina's piracy rate (from 75% to 65%) could create 7,000 new jobs and pump \$1.8 billion into the economy. It could also increase local industry revenues by more than \$1.1 billion and generate an additional \$173 million in tax revenues for the Argentine government. See <http://www.bsa.org/idcstudy/pdfs/Argentina.pdf>.

year.⁸ This same study found that 10% of the students admitted they had not read one legitimate book the entire year, 25% said they read one or two books, and 22% said more than six books, with the remaining 45% having read between three and six books. Basically, unauthorized photocopied materials are replacing legitimate books in university settings.

The entertainment software industry continues to suffer from several forms of piracy in Argentina including: (a) widespread piracy in the retail and flea markets, as well as in Internet cafes. Internet café piracy, where the café owners install unlicensed or pirated entertainment software onto café computers, continues to be a problem; (b) reproduction-on-demand whereby entertainment software is burned onto blank CD-Rs; (c) Internet piracy, where websites offer pirated videogame software for sale. During 2005, one publisher experienced an Internet piracy problem involving the unauthorized posting of games on a BitTorrent site, but the investigation unfortunately did not result in the identification of the poster; and (d) 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). In one particularly frustrating incident in late 2005, the National Customs Administration (ANA) detected approximately 20,700 pirated GameCube discs entering the country from Malaysia. However, rather than detaining and seizing the pirated discs, the shipment was simply rejected and returned to the country of origin. The goods should have been removed from the channels of commerce.

COPYRIGHT ENFORCEMENT IN ARGENTINA

Criminal copyright enforcement remains ineffective: Criminal copyright enforcement has always been cumbersome, costly, time-consuming and lacking in deterrent impact. While criminal enforcement remains far from ideal, the willingness of the Argentine authorities to take initial raiding actions was encouraging in 2005, continuing cooperation experienced 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. The *Secretaria* was expected to be assigned more enforcement personnel in 2005, but industries are not aware of any increases.

BSA reports that the various agencies (including the Federal Police, Gendarmería, etc.) are improving their technical capacities to support the courts in the investigation of computer crimes (including piracy) and the provision of technical reports, which is useful evidence in judicial cases. Enforcement is too cumbersome to be used effectively in practice against end-users, so BSA did not rely on it during 2005. BSA does not generally use the criminal process in Argentina because criminal copyright enforcement has consistently proven to be ineffective. The recording industry reports that some anti-piracy actions are being carried out in metropolitan Buenos Aires; but more is needed to reduce the amount of product being offered in high traffic areas. Flea markets and street vendors are easy targets in Buenos Aires since they operate in the open, with impunity. MPA reports that in 2005 it has closely worked with Gendarmería and Federal Police to conduct investigations and raids against labs. In 2005, MPA performed total of 243 raids and seized more than 112,000 pirated movies.

Despite good cooperation from police, few prosecutions are pursued and there are few criminal cases that reach final judgement in Argentina. The recording industry reports that the average case take two years to reach a verdict in the first instance. Unfortunately, the sentences include no jail time or jail time is suspended because the judges do not consider intellectual property crimes as serious offenses. In 2005, the film industry obtained 35 convictions.

⁸ *La Nación* online, April 27, 2005, citing studies and interviews with representatives of local book industry associations.

Border authorities are cooperative but more results are needed: Given its triborder geography, Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in transit for potential pirate product. On a positive note, the industries recognize that Argentine Customs is inspecting all shipments of blank optical discs coming into the country based on a court order issued in 2004. Philips Argentina works with Customs to identify those importers who are current with patent licenses for blank CD-Rs and DVD-Rs. BSA reports that in 2005 the Customs Service (*Administración Nacional de Aduanas*) is cooperating in an effective way to improve enforcement at the borders. BSA has not pursued interdiction of border entry of blank media or components; however, both problems are reported to continue at least at the same level as in recent years.

Delays and no deterrent damages in civil infringement cases: 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. Civil actions are still weakened by the lack of statutory damages and extensive delays. BSA achieves some results despite the problems with enforcement, relying primarily on the process of mediations required by the civil procedure, which facilitates the resolution of cases under BSA's model. Civil actions which are brought all the way through to final judgment are too protracted to be effective. Another problem is caused by the unavailability of deterrent civil damages. This problem could be remedied if Argentina were to introduce an effective statutory damages system. The recording industry has identified 20 cases involving sizeable uploads of music files using P2P technology. The local industry group is pursuing legal action against these uploaders through civil actions. These 20 cases will be an interesting test of the will of the courts to pursue digital piracy cases. So far, the Argentine courts have agreed with the industry's filings requiring ISPs to reveal uploaders' identities.

Administrative inspections of video stores: During 2005, MPA continued to support 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 pirate product. In 2005, 210 video stores were jointly inspected by UAV and INCAA, an increase of 35% compared to 2004.

Trainings: The recording industry offered several training sessions for police officers as well as providing its annual IP course for judges. In 2005, MPA offered one training session for Argentine authorities.

COPYRIGHT LAW AND RELATED ISSUES IN ARGENTINA⁹

1993 Copyright Act, as amended: Argentina already has acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Argentina's 1933 Copyright Act (as amended) has been under review for many years, and full implementation of the WIPO treaties is still needed.

⁹ 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 2005, \$555.0 million worth of Argentine goods (or 13.1% 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 10.3% increase over the same period in 2004.

Legislative amendments in progress: There have been a number of legislative attempts in recent years to improve various Argentine laws related to copyright protection and enforcement:

- The Argentine Senate approved a bill in November 2004 which would increase the term of protection for phonograms. The bill was introduced to the House of Representatives in March 2005, where it is going through some modifications from interested parties. The bill should be returning to the Senate when the 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. Legislative passage in 2006 remains uncertain.
- There also are pending amendments which would increase penalties for copyright infringement and circumvention of technical measures for all media.
- The government of Argentina should reintroduce and pass a bill which would aid the anti-piracy fight. In 2001, a bill was introduced and approved by the Chamber of Deputies which would enhance such measures. 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. This bill was not approved within the required time frame and fell off the docket.
- Argentina's 1933 Copyright Act has been under review for many years; further amendments are needed to properly implement Argentina's obligations under the two WIPO treaties. For example, a package of copyright amendments, circulated in July 2001, apparently is still under review within the Ministry of Justice. That 2001 package, however, failed to address many of the enforcement deficiencies and required further clarification with respect to other key issues for the copyright industries.¹⁰ For example, deficiencies still need to be corrected before introduction to the Congress and such reforms should include: express protection of temporary copies, distribution and rental rights, and the communication to the public/making available right; protection against circumvention of technological protection measures and removal or alteration of electronic rights management information; establishment of ISP liability and procedures for notice and takedown; establishment of *ex officio* border measures, statutory damages and the seizures of infringing equipment; increasing criminal penalties for piracy; and extend the term of protection for phonograms to 95 years from publication. The Argentine Government should resume discussions to amend its copyright law.

Customs Valuation: Argentina bases its customs duties on audiovisual works and sound recordings on an assessment of potential royalties. Customs duties should be 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. In 2005, Customs authorities filed criminal legal action against broadcasting networks and TV distributors for importation of films and programming based on the price of physical media rather than licensing contracts. MPA expects that, in 2006, Customs authorities will resume investigations related to the home entertainment sector.

¹⁰ For examples of some of the key problems with the 2001 proposal, see IIPA's 2002 Special 301 submission at <http://www.iipa.com/rbc/2002/2002SPEC301ARGENTINA.pdf> (pages 63-64).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

CHILE

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Chile be elevated to Priority Watch List in 2006.

Actions Which the Chilean Government Should Take in 2006: The intellectual property rights chapter of the U.S.-Chile Free Trade Agreement (FTA) provides a high level of copyright and enforcement obligations. Although the FTA entered into force on January 1, 2004,¹ some of the copyright and enforcement obligations were subject to transition periods and have not yet entered into force. With respect to piracy and enforcement on-the-ground, the copyright industries remain very concerned by the lack of any tangible improvement in Chile during 2005. The Chilean government should engage in several simultaneous measures to improve copyright protection, including a public declaration expressing the political will to fight piracy on a national level and announcing specific actions in that regard.

Legislative

- Revise the pending anti-piracy bill (introduced in January 2004), which contains several provisions which do not meet the high levels of effective enforcement in either the FTA or TRIPS. Legislative consideration of this bill stalled during 2005, due to elections, and it is expected to move by March/April 2006..
- 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 calls for:
 - 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;
 - Establish ISP liability; and
 - Adopting provisions on technological protection measures and the enforcement against their circumvention.
- Adopt appropriate provisions (as agreed to in the U.S.-Chile FTA) to regulate the acquisition and management of software by government agencies.
- Implement exclusive importation rights for local copyright holders and provide protection to encrypted program-carrying satellite signals.

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.

Enforcement

Concerted and organized enforcement efforts should include the following:

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Concepción, and Valparaíso;
- The police should 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: 2001-2005 ²										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ³	22.7	51%	24.8	50%	21.1	40%	14.0	35%	12.2	35%
Business Software ⁴	47.4	64%	49.0	64%	42.0	63%	34.0	51%	46.3	51%
Motion Pictures ⁵	NA	NA	2.0	40%	2.0	40%	2.0	40%	2.0	40%
Entertainment Software ⁶	NA	NA	37.9	70%	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.1	NA	1.1	NA	1.1	NA
TOTALS	71.1+		114.7		66.2		51.1		61.6	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf. For more details on Chile's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.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.

⁴ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Chile, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

COPYRIGHT LAW REFORM IN CHILE

The U.S.-Chile 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 Chile FTA IPR chapter does contain extended transition periods (ranging from 2 to 5 years) which delay the significant benefits that immediate implementation of these treaties' obligations would bring to the copyright industry and to both the U.S. and Chilean economies.⁷ 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.

During 2003, Chile adopted 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. These amendments addressed many of the longstanding deficiencies and/or ambiguities in this law which IIPA and its members had identified as not satisfying the thresholds of obligations found in U.S. bilateral programs, the WTO TRIPS Agreement and the two WIPO Internet treaties.⁸

According to the FTA terms, Chile has a transition period to provide protection to temporary copies, establish effective technological protection measures, grant comprehensive public performance rights and non-interactive digital transmission rights, and adopt ISP liability and notice and takedown provisions. We encourage Chile to amend its laws to fully comply with the WCT/WPPT and U.S.-Chile FTA obligations. Moreover, Chilean law should be amended to establish an exclusive importation right for local copyright holders; and provide protection to encrypted program-carrying satellite signals.

2004 anti-piracy bill is pending before Congress and needs further reform: President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, the bill is not satisfactory and has not received the full support of the copyright-based industries. While the goal of such reform is laudable, it is not a comprehensive attempt to fully implement the rest of the Chile FTA enforcement obligations. The bill was approved by the Economic Committee in the House of Representatives. It is now pending review by the Committee on the Constitution, Legislation and Justice. After being voted out of that committee and passed by the Chamber of Deputies, it will move to Senate committees, and, eventually, to the Senate as a whole. The bill did not make any legislative progress in 2005, due in large part to the elections, and is not expected to move until March/April 2006, the beginning of the congressional session. The copyright industries are concerned that the government will pressure Congress to approve the current text of the bill, which contains many deficiencies (see below).

This anti-piracy bill (Boletín N° 3461-03) purports to accomplish two major amendments to current law: (1) replacing the section in the current copyright law on infringements and penalties with a new chapter; (2) adding modifications to enforcement procedures, including precautionary measures and empowering certain courts. The copyright industries have highlighted the following features of this legislation:

⁷ 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.

⁸ For a historical sense of Chilean copyright efforts over the past decade, please refer to IIPA's prior Special 301 country reports at <http://www.iipa.com/countryreports.html>.

- 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, the drafting formulation remains “fines or jail” for most offenses. In present practice, Chilean judges rarely issue any jail sentences. For example, minimum sentencing (that is, house arrest) has been applied in the few audiovisual piracy 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).
- The bill does not address two important 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).
- On a positive note, the bill does include a fair number of FTA-related civil procedure and provisional measures.
- 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).
 - The availability of civil *ex parte* search remedies (Chile FTA Article 17.15)—a historic problem, especially for the software industry.

During 2005, several Chilean government agencies reportedly were trying to amend the bill to incorporate very broad “fair use”-like exceptions which would allow copyrighted materials to be used without the rightsholders’ authorizations. It is likely that these provisions, if included, would also meet with the objections of the copyright industries.

The copyright industries have informed the Chilean government of the inadequacies embodied in this bill and the need to reform it. The industries have been pressing for additional amendments to this bill, especially to increase criminal penalties.

COPYRIGHT PIRACY IN CHILE

The copyright industries report no improvement in the piracy situation in Chile in 2005, with many industries reporting major concern over the growth in digital piracy. Copyright piracy involving hard goods continues to be a serious problem. For example, street piracy is notorious, with sellers on the sidewalks covering their pirated wares with big towels printed with the cover image of movies, games, music or software; the buyer asks for the product, the seller makes a phone call, and in a few minutes a runner appears with the pirated product.

The Business Software Alliance (BSA) reports that piracy accomplished mostly by burning machines (and not via Internet distribution) has become its most pressing problem in Chile. Commercial piracy conducted by integrators (such as OEMs) and by the hardware and software retailers is serious, and anti-piracy campaigns by BSA and its Chilean colleagues (ADS) have not reduced these problems. 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) remains the most economically harmful form of piracy for the business software industry in Chile.⁹ The impending challenge will be Internet piracy, because Chile has the highest Internet penetration among South American countries.¹⁰ Furthermore, with growing broadband penetration, Internet piracy will, in the next few years if not sooner, become a major problem in Chile.

Piracy of music and sound recordings, primarily in the form of pirate CD-Rs, continues to wreak havoc. The pirate market today is approaching 5.6 million units in annual sales. The recording industry reports that pirate music CD-Rs can be found all around the major cities and in *ferias* around the country. The police (*carabineros*) have made efforts to remove many street vendors in Santiago, Concepcion and Valparaiso but require more resources specifically allocated to fight piracy in order to intensify the campaign. Most of the pirate product found in Chile is produced domestically. 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 2005, the recording industry anti-piracy group (APDIF Chile) assisted police in identifying pirate locations, resulting in the seizures of approximately 300,000 recorded CD-Rs and DVD-Rs as well as 459 burners. Although these numbers reflect the goodwill of the police force, this is not sufficient to deter the sale of over 5 million pirate products. In addition, the industry has reached out to many local and state authorities during 2005 by conducting training seminars on piracy for police, prosecutors and tax auditors.

Chile continues to experience a significant problem involving the massive importation of blank CDs from South East Asia. Most of these blank CDs end up being used in the black market. The recording industry reports that this importation problem is especially serious in the Iquique region, where there is free trade zone. To address this problem, the government should establish a customs policy whereby all blank CD shipments must pass through “red light” proceedings. This procedure would require that every shipment of optical media be inspected for price and classification accuracy as well as legitimacy of exporters and importers. To simplify such an operation, Chilean Customs may want to consider limiting the number of ports of entry for blank optical media, as have programs already implemented in Mexico and Paraguay. In addition, the creation of an importers’ register will also improve disclosure; such a system should also involve rightsholders.

The Motion Picture Association (MPA) reports that optical disc piracy remains a major problem 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

⁹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Chile.pdf), using 2004 data, found the following: “Cutting Chile’s piracy rate from 64 percent to 54 percent could add a half a billion dollars to its economy, increase local industry revenues by more than \$418 million, generate an additional \$55 million in tax revenues, and create 1,600 new jobs.” See <http://www.bsa.org/idcstudy/pdfs/Chile.pdf>.

¹⁰ BSA cites of Nielsen/Net Ratings, updated on November 21, 2005, which reports Chile having an internet penetration of 45.9%, compared to 13.3% average among the region.

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, are of continuing concern. These unregulated distribution points, which are nearly 100% pirate, represent direct competition to the potential legitimate video market, making it even harder for otherwise legitimate retailers to compete. Furthermore, signal piracy remains a significant problem in Chile,¹¹ especially involving the creation of mini-head ends that receive pirate programs that are then provided to particular buildings, condominium associations and small towns. The Chilean Government and municipalities accept registrations from and grant licenses to pirate companies without investigation so long as these companies pay taxes. Regarding enforcement, the government does not pursue investigations or enforcement actions; legal actions by the private sector have resulted in the closure of pirate services, but enforcement by the government of the sentences issued by courts is weak.

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 also produce pirate product. 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.

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 pirate products imported from Asia and Paraguay.

COPYRIGHT ENFORCEMENT IN CHILE

The Chilean enforcement system fails in practice to meet Chile's existing bilateral and multilateral obligations, and the industries report no noticeable improvement in 2005. The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. 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 below 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. 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 violates TRIPS Article 50. It also undercuts the effectiveness of the remedy, because it affords a defendant the opportunity to remove/erase all traces of piracy or to

¹¹ Market research has identified 842,342 subscribers of legitimate pay TV platforms, while the national census reported that 1,050,913 homes have access to pay TV products and services, constituting a 20% piracy rate.

take other steps to protect him/herself from the inspection. This remedy is particularly important because the BSA conducts only civil (no criminal) actions in Chile.

- 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 recording and audiovisual industries 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.
- For cybercrimes, including intellectual property violations, Chile's Civil Police created a specialized, dedicated force to investigate Internet crimes, which has generally performed well. The few intellectual property cases that they have investigated have been related to individuals engaged in hard goods sales.
- Criminal sentences are not deterrent. Although distribution of pirated material is theoretically punishable by incarceration of 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 2005 but none carried any type of incarceration. The MPA reports 34 sentences issued in 2005, ranging from 41 to 200 days; however, only one convicted defendant was incarcerated. The vast majority of these sentences were suspended.
- The industries report that a new criminal procedure code entered into effect in 2005 which established an oral hearing which renders the whole procedure more transparent, and imposes a maximum duration of 2 years for the entire criminal legal action. Before, the duration of a criminal case was on average 6 years. Currently the average is one year for new cases. However, the procedures remain ineffective if, at the end of the day, penalties are not increased and if mechanisms to more easily prove organized crime activities are not created. The new procedure did not clean up the backlog of old cases. For example, an entertainment software company notes that some of its criminal cases have been pending since 2002. Though some of the much older cases have been resolved (cases that were pending as far back as 1998), many simply ended with a "temporary stay," without the imposition of penalties (deterrent or otherwise).
- 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.
- Border enforcement measures are ineffective. Imports of optical discs remain a serious concern. Iquique continues to be a hub of blank cassettes and pirated compact discs, business software applications, and entertainment software products. Estimates show that over 130 million blank CD-Rs were imported in 2004, which would appear to be far out of proportion to legitimate demand. An encouraging sign of the potential for border enforcement was a raid conducted by Chilean Customs in December 2005 that netted 540 thousand units of blank CDRs being smuggled through the free port of Iquique.

- The Chilean government must fully implement government software asset 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 still has not fulfilled this FTA commitment.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

COLOMBIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Colombia be elevated from the Watch List to the Priority Watch List in 2006.

IIPA supports the ongoing Free Trade Agreement (FTA) process. The U.S. began FTA negotiations with Colombia and other Andean countries in May 2004, and the negotiations with Colombia continue in early 2006, after Peru has concluded its FTA talks. The FTA negotiations process offers a vital tool for encouraging compliance with 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) and for outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil, and customs contexts. IIPA has recommended for years that Colombia take immediate steps to improve its poor enforcement record. Colombia is a beneficiary country of two U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA).¹

Actions Which the Colombian Government Should Take in 2006:

- Require the Attorney General (*Fiscalía General de La Nación*) 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 among larger, organized distributors of pirated materials;
- 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 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, and have the Ministry of Education continue and expand its campaign against book piracy;

¹ 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 8, 2005 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>. During the first 11 months of 2005, \$174.5 million worth of Colombian goods (or 2.2% 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 0.1% decrease over the same period in the previous year. In addition, \$4.1 billion worth of Colombian goods entered the U.S. under the ATPA program for this same 2005 period, accounting for an 18.9% increase from the prior year.

- Encourage adoption of criminal code amendments to increase criminal penalties for copyright infringement;
- 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 from Ecuador and going to Venezuela. Customs should work with the affected industries on this initiative;
- With the border authorities, 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);
- 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;
- 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;
- 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.
- Eliminate trade barriers already existing in Colombian Law, such as: the broadcast TV quota, screen quota and box office tax. Moreover, FTA should not contain any “cultural exception” which could lead to the adoption of restrictive measure in any cultural sector, including filmed entertainment.

COLOMBIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005 ²										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	47.7	71%	51.6	71%	49.4	70%	56.3	65%	73.0	65%
Business Software ³	44.8	55%	46.0	55%	37.0	53%	21.7	51%	19.5	52%
Motion Pictures ⁴	NA	NA	40.0	75%	40.0	75%	40.0	90%	40.0	90%
Entertainment Software ⁵	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	6.0	NA	6.0	NA	5.4	NA	5.3	NA	5.3	NA
TOTALS	98.5+		143.6		131.8		123.3		137.8	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Colombia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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

COPYRIGHT PIRACY IN COLOMBIA

Piracy continues to dominate the Colombian market, adversely affecting legitimate sales. Pirates are increasingly turning to new media—primarily CD-R and DVD-R — as the preferred medium for piracy. Unauthorized photocopying continues to harm the publishing industry, and the business software industries continue to face piracy in businesses as well as retail channels.

Record and music piracy: 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 \$47.7 million. Piracy of music CDs in Colombia continues is mostly due to local CD-R replication, with pirates primarily copying local repertoire. Most of the blank CD-Rs are brought in to Colombia in containers from the Far East through Panama. Many of them are priced below market for purposes of importation at 3 cents per unit. The industry estimates that over 60 million blank CD-Rs came to Colombia during 2005. Pre-recorded pirate CD-Rs are also being smuggled in from Ecuador. A major problem is the hundreds of stalls in the street markets of San Andrecitos that continue to openly and brazenly sell pirate and counterfeit product. Street vendors sell pirate CDs on the traffic corners in Bogotá, Medellín and Cali. Because these vendors move around so much, it is difficult to locate them and to 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 in 2004. The legitimate music market in Colombia decreased again for the fifth year in a row. The total unit drop since 2000 is close to 68%. The commercial environment in Colombia to sell recorded music products is in jeopardy.

Book piracy: 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 little enforcement against photocopy shops located inside or outside universities, 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 indicate that institutions themselves are sometimes “sponsoring” students or student associations in the sale or distribution of photocopied versions. These photocopied versions, which are sold at a fraction of the legitimate price, are even found in some bookstores in major commercial areas. Some publishers report that there was a slight improvement in the market because in 2005 the Ministry of Education initiated an anti-piracy campaign against book piracy. Unfortunately, this campaign has not yet resulted in improved sales for original copies. 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 2005.

Business software piracy: The Business Software Alliance (BSA) reports that the piracy rates in Colombia remain high, particularly within small to medium-sized organizations, and inflict damage on the legitimate industry. Sophisticated, high-volume software counterfeit production facilities have been discovered in Bogotá. CD-R burning has become the main form of piracy afflicting the business software sector. Piracy — both end-user and retail — in cities outside Bogotá is particularly high. Paramilitary groups appear to be involved in distribution of pirated products. Estimated losses due to business software piracy amounted to \$44.8 million in 2005, with a 55% piracy level. Although Colombia has one of the lower software piracy rates in Latin America, nevertheless, piracy is causing much commercial harm to the business software industry; between

2000 and 2004, the market for legitimate software shrunk by 58% and sales also decreased in early 2005.⁶

Audiovisual piracy: Over the past two years, MPA reports that enforcement activities have improved, although there are few concrete results in terms of deterrent sentences or reductions in piracy rates. Optical disc piracy is a growing problem in Colombia and black markets such as San Andrecitos are the main distribution chain for pirate movies. Importation of blank media from Panama and Ecuador are also a worrisome problem. Video outlets piracy remains an issue in Colombia, especially in smaller cities. Although film piracy remains severe, the Colombian Government is taking the lead to address audiovisual piracy and granted to the Film Development Fund (*Fondo para el Desarrollo Cinematográfico*) a specific budget for anti-piracy activities. Part of this budget was designated to PRACI, a private entity created in August 2005 by local exhibitors and distributors of audiovisual products, which is engaged in four areas: investigation and intelligence, encouraging judges to issue deterrent sentences, training programs, and public relations. PRACI coordinates its anti-piracy program with the National Anti-Piracy Agreement (*Convenio Antipiratería de Colombia*), and has been endorsed by the National Council for Film Arts and Culture (*Consejo Nacional para las Artes y la Cultura en Cinematografía* – CNACC).

Entertainment software piracy: 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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National Anti-Piracy Campaign needs to be revitalized. The Colombian government has not taken significant steps to develop a national anti-piracy campaign and policy. Ten years ago, an interagency group, the National Anti-Piracy Campaign, was established. It involves a large number of governmental and independent agencies in the fight against piracy.⁷ Members of the campaign continue to meet, and efforts continue to improve public awareness, trainings, and similar educational efforts. Such efforts should continue. However, the campaign is not an operational entity that the industries view as having an immediate impact in leading on-the-ground enforcement efforts to deter piracy throughout the country. That kind of high-level political will and coordination is still missing in Colombia.

Criminal raids do occur, but prosecutions are few. The industries report good cooperation with criminal enforcement agencies, but very few actions are taken outside of Bogotá, Medellín and Cucuta. In 1999, the Attorney General ordered the creation of a special unit of prosecutors and investigators (CTI) to work, at the national level, to fight copyright piracy and crimes involving telecommunications systems (Resolution No. 0-08888 of May 31, 1999). These prosecutors

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: If Colombia reduced its 55-percent software piracy rate by 10 points (to 45%), then \$581 million could be added to the economy, 1,900 new jobs created, and local industry sales increased by almost \$450 million. For Colombia's government, the cumulative effect of all this growth could mean an additional \$38 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Colombia.pdf>.

⁷ The Colombian National Anti-Piracy Campaign is supported by numerous government agencies and private sector groups, including: the President's Office, the Ministry of Culture, the Ministry of Commerce, Industry and Tourism, the Ministry of Communications, DIAN—the Tax and Customs Authority, DAS—the Administrative Department of Security, the National Television Commission, the National Attorney General's Office, the National Police, the National Copyright Office, as well as CERALC, CECOLDA, SAYCO, FEDESOF, ACODEM, CEDER and several others. A 1999 agreement reaffirmed the first anti-piracy agreement, which was signed in December 1995.

coordinate action with special police forces and perform inspections, bring criminal actions against pirates, and issue expert reports on pirated products.

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; however, this operation was not carried out consistently and was halted during the first quarter of 2005. Colombian authorities have done little to investigate pirate duplication and distribution facilities, which continue to feed a vast network of street vendors. Paramilitary groups controlling the pirate sale of CDs in some flea markets in Bogotá are a major new concern. In 2004, of 1,885 raids conducted, only 32 were directed at labs where duplication of pirate CDs took place. The result of these actions has been the seizure of approximately 7 million pirated CD-Rs and 794 CD burners. Unfortunately many of these seizures are taking place in Cucuta and Bucaramanga, two cities distant from the major commercial centers of Bogotá and Medellín. The industry reports that the product seized was quickly replaced in most of the thousands of stands offering pirate product around the country due to a lack of frequency of raids.

According to investigations by APDIF and the National Police, narcotraffickers and paramilitary groups have infiltrated the production and distribution of pirate music, increasing by 20% in the past five years.⁸ In March 2005, Colombian authorities assisted by APDIF conducted a major raid in Cucuta, seizing 800,000 recorded CD-Rs and 10 million inlays; what made this action particularly noteworthy was the difficulty in obtaining evidence and executing raids in an area controlled by narco-guerilla insurgents. In January 2006, anti-piracy teams joined with police and prosecutors in the covered market of vendors in San Andrecito de la 20 (near downtown Bogotá), which involved the issuance of 90 search warrants, four arrests, and the seizure of 210,000 music CD-Rs, nearly 100,000 counterfeit DVDs, 1.1 million inlays and over 300,000 jewel boxes. All these efforts to seize product, unfortunately, have a reduced impact on piracy because of a lack of effective deterrent sentences. The industry reports that out of 42 convictions in 2005, no one was incarcerated for piracy. Starting in the second half of 2005, MPA started a joint enforcement program with the local recording industry anti-piracy group; more than 800,000 pirate movies were seized in 2005.

BSA reports that their 2005 actions resulted in more seized products than in 2004, but this had little effect on the legitimate market. BSA's anti-piracy campaign continues to receive strong support from the *Fiscalia* and SIJIN (Judicial Department of Intelligence of the National Police), and 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, Medellín, and Cali. Unfortunately, prosecutions are few and slow.

The book industry reports that in 2005 the Ministry of Education initiated an anti-piracy campaign against book piracy. In the first half of 2005, the police seized over 161,000 copies of pirated books and 8,300 books-on-CD. The problem is that these seizures do not yet seem to have a visible effect on improving the local book marketplace.

⁸ "Colombia: narcotraffic and paramilitary groups reach phonographic market," *La Republica*, November 24, 2005.

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. All industries report that the Colombian courts do not impose deterrent penalties, and cases can take five years or more to be resolved. Even if defendants are found guilty, judges will suspend the sentence or fine, so infringers have no incentive to cooperate and resolve their cases. Increasing authorized penalties, as was done in the 2004 amendments to the criminal code (see below), is not enough; it is also important to expedite criminal prosecutions. When it takes more than six years or more between the commencement of the criminal investigation and the final decision of the court; pirates do not feel pressure when an action is filed against them.⁹

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.

Border enforcement remains weak and must be improved. Enforcement at the Colombian borders still needs to be improved, especially given the growth of optical media piracy in the region. Millions of blank CD-Rs enter Colombia for the purpose of being used in the creation of pirate music CDs. For example, the recording industry has received estimates that over 60 million blank CD-Rs were officially imported during 2005. 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. 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.

Therefore, it is critical for any effective anti-piracy campaign that custom authorities begin to implement measures to track entry of blank CD-Rs. An important step would be to limit the number of ports of entry to allow closer inspections of blank optical media coming into the country. Second, the importation of optical media contained pirated product (coming from Ecuador) must be halted. Third, minimum prices must be established for importation of blank media that at least reflect real manufacturing and patent royalty costs (no progress was made on this initiative in 2005).

Administrative enforcement against signal theft piracy remains ineffective. However, 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. BSA also uses civil remedies to pursue those persons and businesses engaged in end-user piracy. Inspections take at least six months to be carried out (from the date of the request). During that time period, leaks frequently occur, severely hampering enforcement efforts. 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 generally greatest in cities outside Bogotá, where judges show less understanding of intellectual property rights, despite educational efforts. Because of the judicial delays in obtaining civil *ex parte* search authority, BSA has been forced to rely heavily on criminal enforcement.

⁹ 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 is not required to serve any jail time.

Software Regulatory Enforcement of 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. When asked why it has failed to enforce the law and conduct audits, the tax authority insists that it lacks the personnel and resources.

Industry Trainings: BSA reports that in 2005, it conducted about 20 training courses which were attended by 2,000 police officers and prosecutors. In addition, the World Intellectual Property Organization (WIPO) has pledged its support to help Colombia modernize its intellectual property infrastructure,¹⁰ and IIPA hopes that this includes some copyright- and enforcement-related components. .

COPYRIGHT LAW AND RELATED ISSUES IN COLOMBIA

Copyright Law of 1982: Colombia’s 1982 copyright law, as amended in 1993 and 1997, and including a 1989 decree on computer programs, is comprehensive. Copyright law amendments 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). Amendments to the criminal code actually provide sanctions in the form of fines for the circumvention of technological protection measures. However, 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. Among other things, revisions to the copyright law should include: exclusive distribution, making available, rental, and importation rights; statutory damages; protection of temporary copies; ISP liability along with notice and takedown procedures; and civil sanctions against circumvention of technological measures and electronic rights management information.

Criminal Code: Colombia’s criminal code entered into effect in July 2001. It includes copyright infringements as a crime, and with possible sanctions of a jail term of 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; however, violations are only punished by 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 early 2004, the recording industry supported the introduction of a bill to amend Article 271 of the Criminal Code to increase penalties for copyright infringement up to a four-to-eight years’ term. Reports indicate that Congress recently did pass an amendment to the Criminal Code which increases the level of criminal penalties from a minimum of 2 years and 8 months to 4 years and from a maximum of 7 years and six months to 8 years for copyright infringement. (IIPA does not have the text of the law.)

¹⁰ WIPO Update, “Director General Pledges WIPO Support to Colombia,” November 11, 2005, at http://www.wipo.int/edocs/prdocs/en/2005/wipo_upd_2005_262.html.

Criminal Procedure Code: In January 2005, Law No. 890 took effect and included two positive 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, although as to copyright infringements, this appears to have been superseded by the recent amendments, discussed above. 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. Granting parole will be subject to the full payment of fines imposed and indemnification of the victim. In addition, Law No. 906 (Article 313 of the new Colombian Criminal Procedures Code), effective as of January 1, 2005, imposes preventive incarceration in piracy cases where the value of the seized merchandise exceeds 150 times a set salary rate (approximately US\$20,000).

MARKET ACCESS ISSUES IN COLOMBIA

Colombia, through different laws, adopted a series of discriminatory and protectionist measures to defend the national audiovisual sector. These should be dismantled in any FTA:

- Colombia has a broadcast TV quota which requires that 70% of prime-time programming during the week be of local content. This quota should be eliminated.
- Colombia has a screen quota, which should be eliminated or transformed into guidelines for exhibitors.
- Colombia created an 8.5% levy on the net box office receipts of foreign films, which should be eliminated.

Moreover, the FTA should not contain any “cultural exception” provision which could allow Colombia to introduce any new, restrictive measure in any cultural sector, including filmed entertainment.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

COSTA RICA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Costa Rica be elevated from the Watch List to the Special 301 Priority Watch List in 2006.

Actions Which the Government of Costa Rica Should Take in 2006:

- Pass Bill No. 15.076, which would amend the 2000 "*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*" to bring it into compliance with Costa Rica's obligations under TRIPS and the WIPO "Internet" Treaties; this bill has the support of the local copyright industries.
- Instruct the Attorney General to revoke his 2005 order to his prosecutors to stop bringing IPR cases, and act on the dozens of cases that have been submitted to his prosecutors;
- Reduce unwarranted delays in investigations, prosecutions and sentencing in copyright cases;
- Increase and apply vigorously criminal sanctions for copyright infringement (the improved statutory basis will be provided in Bill No. 15.076, above);
- Create a Public Prosecutor's Office specialized in IP matters, and assign resources and personnel to the office;
- Amend the enabling legislation for the Copyright Office so this office has the authority to conduct administrative enforcement (a power currently reserved for the judicial authorities);
- Improve training of enforcement officials and technical experts in Costa Rican agencies.

IIPA and its members in recent years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system.¹ Unfortunately, no progress was made in addressing these problems in 2005, and in fact, Costa Rican law enforcement authorities took several detrimental actions which undermine effective copyright enforcement in this country. For a country which receives significant preferential treatment under several U.S. trade programs, Costa Rica continues to make only sporadic and inconsistent efforts to improve its IPR enforcement regime.²

IIPA and its members also support the IPR chapter in the U.S.-Central America-Dominican Republic Free Trade Agreement;³ it contains strong provisions on standards of copyright protection

¹ For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendix D of this filing at <http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>.

² During the first 11 months of 2005, \$327 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2005, \$83 million worth of Costa Rican goods (or 2.7% 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 12.5% decrease from the same period in 2004. During the first 11 months of 2005, \$598.1 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 12.2% from the same period in 2004.

³ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

and enforcement. This FTA was signed on August 2, 2004, and will enter into force sometime during 2006.⁴ So far, however, Costa Rica is the only CAFTA country which has not ratified it.

COPYRIGHT ENFORCEMENT IN COSTA RICA

There is a variety of problems which interfere with effective copyright enforcement in Costa Rica. Some have been engrained in the system for years without resolution, and others have appeared within the past year.

2005 instruction to drop all IPR complaints: At the beginning of 2005, apparently the Attorney General instructed all prosecutors around the country to “drop” all copyright complaints based on a claimed lack of resources. As a result of this decision, 65 music piracy cases were dropped by the prosecutors and no anti-piracy operations were conducted in 2005. The music industry has requested action on all the cases in different parts of the country many times, to no avail. The business software industry also reports increased problems with enforcement due to the extremely low priority placed on copyright enforcement by the Attorney General's office.

Copyright office revokes license of collecting society: The Head of the Copyright Office (Registradora de Derecho de Autor) in December 2005 revoked the license to the phonogram producers' and performers' collecting society based on a non-existent legal requirement. The collecting society for producers and performers (Asociacion Costaricense de la Industria Fonografica y Afines), also known as ACOGEF, had been operating for over a year. The revocation questioned the approval given by the same office (under the direction of a different director) to the original filing. As a result of this decision, ACOGEF stopped collecting all funds and issuing licenses for broadcasting and public performances, thereby in effect making international sound recordings free for use in Costa Rica. The parties are applying for reconsideration of this revocation, and if approval does not come quickly, they will file for an injunction against the decision.

Law still pending to amend the objectionable *Ley de Observancia*: The amendments to the Law on Enforcement Procedures of IPR (*Ley de Observancia de los Derechos de Propiedad Intelectual*) is still pending at the Legislation Commission in the Legislative Assembly (Congress). However, it remains in 37th place on the legislative agenda; this means it will not be acted upon. The President of the Commission has made no effort to push for these amendments. Passage of the industry-supported legislation is essential to unraveling the mess that is Costa Rican criminal copyright enforcement. To review (further details appear in the law section, below):

- In 2000, Costa Rica enacted its “*Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*” – however, this intellectual property reform legislation diverged substantially from TRIPS requirements and actually scaled back the protection afforded to copyrighted materials. The copyright industries objected to this law but its recommendations were ignored; the bill as adopted in 2000 failed to meet TRIPS standards.
- The copyright industries, working with Congressional officials, developed a bill to amend the *Ley de Observancia* (Bill No. 15.076), increase criminal sanctions and make other necessary amendments to Costa Rican law to improve enforcement.

⁴ USTR Press Release on CAFTA-DR Implementation, December 30, 2005 at http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html.

- However, the Costa Rican government also presented its own bill (Bill No. 15.556) to amend the 2000 law. Unfortunately, this bill reduces the minimum (maximum?) penalty for copyright piracy to one year, making it nearly impossible to incarcerate pirates, in large part because this allows judges to reduce any prison sentence to a mere fine. The Costa Rican government's attempts to make effective criminal enforcement more difficult is certainly not the correct path for it to take, especially given its upcoming CAFTA obligations.

Need for Special IPR Prosecutor: A Special Prosecutor's Office (*Fiscalía Especializada*) is required because existing prosecutors generally are not sufficiently trained to adequately enforce Costa Rica's intellectual property laws. In 2003, the Costa Rican legislature proposed a law to create a Special Prosecutor's Office, but the law failed to pass; no action was taken during 2005 to address this issue. The creation of a specialized prosecutor's office with nationwide jurisdiction may be the only way to significantly expedite IP criminal cases. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office has become even more of a priority.

In February 2002, the Costa Rican General Prosecutor officially announced that 12 specialized "link" prosecutors, one for each public prosecutor's office in the country, were appointed to handle, "with priority," intellectual property cases. While this development appeared to be positive, by 2003 the Costa Rican Public Ministry had not appointed new "link" prosecutors, but instead commissioned already existing prosecutors. The copyright industries continue to support the need for these "link" prosecutors.

Delays: Delays have recently turned into "no action," given the Attorney General's mandate to prosecutors not to bring IP cases. Historically, long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case. Procedural delays in criminal cases could be avoided if prosecutors were to request, and judges were to order, *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs (*querellantes*), as allowed by the Criminal Procedural Code.

Creation of the Inter-Ministerial Committee on IP matters by decree: In early 2002, an Inter-Ministerial Committee on IP matters was created by resolution of the participating agencies which included representatives from the Ministry of Justice, Ministry of Foreign Trade, Public Ministry, OIJ, Customs Administration, and the Judicial School. Reports indicated that ratification of this committee through a presidential decree would empower it to act in front of other public agencies and private organizations and would be a further signal of the government's true commitment to IPR protection. This committee still exists, but it does not include representatives of the private sector. Local industries are not aware of any agenda this committee might be pursuing or any actions taken.

Querellantes and problems with prosecutors and judges in software cases: Despite the fact that private plaintiffs in criminal actions (*querellantes*) are parties to the criminal action and thus have standing to participate in all proceedings, public prosecutors and judges normally do not allow private plaintiffs to actively participate during software piracy raids. Apart from violating procedural due process rights accorded to private plaintiffs (*igualdad procesal del acusador particular*), this practice hampers the effectiveness of the prosecutors and jeopardizes the success

of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the OIJ; this procedure is consistent with Costa Rican legislation.

Lack of personnel at OIJ: Local updates on the most recent developments at the OIJ are not available. In the past, the industries have reported that the General Criminal Unit of the OIJ is in charge of investigating intellectual property crimes, and this unit's lack of specialized personnel prevents it from adequately performing its duties. It is imperative for the government to implement an extensive training program for official experts in IPR matters

Trainings: The recording industry organized an IPR piracy seminar for 50 police officers and prosecutors during September 2005, with participation of trainers from the United Kingdom.

COPYRIGHT LAW AND RELATED ISSUES IN COSTA RICA

The inadequate *Ley de Observancia* (2000): On October 2, 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual* ("*Ley de Observancia*"), with the objective of complying with TRIPS but which diverges substantially from those requirements. Some of the more harmful provisions of the *Ley de Observancia* are:

- *Lack of ex officio actions:* The competent authorities in Costa Rica should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party. Article 43 of the *Ley de Observancia* provides that criminal actions against intellectual property violations are considered public actions but can be initiated only by private parties ("*acción pública de instancia privada*"). This means that in the event that a public official detects any intellectual property violations, such official cannot initiate legal action. Only the injured party can initiate legal action. Public officials must be empowered to initiate legal actions for IP violations.
- *Penalties are not at deterrent levels:* Articles 54 and 59 of *Ley de Observancia* provide a maximum penalty of three (3) years of imprisonment for copyright violations. These articles provide the same maximum penalty for those who fix a work without authorization and sell infringing materials. Under other provisions of the Costa Rican penal law, sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended), and the defendants never have to serve time. These provisions violate Articles 41 and 61 of TRIPS (deterrent remedies).⁵ Maximum imprisonment penalties should be high enough (four or more years) so as to prevent suspension.
- *Lack of criminalization of some forms of piracy:* Article 70 of the *Ley de Observancia* provides that the "minor" ("*insignificante*") and "without profit" ("*gratuito*") use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law. There is no definition of "minor" use and reproduction, and it is not clear when the use and reproduction of illegal products is considered "without profit." It may be easy for pirate resellers to avoid liability by simply reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets. For example, BSA may be forced to prove the illegal connection among the many CD reproduction centers to overturn

⁵ By comparison, Article 212 of the Costa Rican Criminal Code states a maximum penalty of six years of imprisonment for larceny, a kind of theft of physical property. Since intellectual property crimes are a form of theft of intangible property, the lesser sentence applied to them as compared to larceny indicates an inconsistency between the *Ley de Observancia* and other Costa Rican legislation.

the qualification of “minor” use and reproduction. This provision also violates various provisions of TRIPS and should be removed.

- *Failure to provide for statutory damages*: TRIPS Article 45.2 permits nations to authorize their courts to order payment of “pre-established damages” (e.g., statutory damages). The adoption of this remedy has proved to be an effective way to deter piracy in other countries, such as Brazil. The CAFTA-DR provides that pre-established damages shall be established as an alternative to actual damages.

Bills to amend the *Ley de Observancia*: There are two pending proposals to amend this 2000 law, only one of which should be adopted.

Bill No. 15.076 (sponsored by the Congress and supported by the copyright industries): This bill was first introduced on November 27, 2002, and is presently number 37 in the legislative queue, meaning it is very unlikely to receive consideration. The bill contains the following key provisions:

- A new Article 70 calls for closing pirate businesses and/or destruction of equipment used in the infringement. The objectionable “insignificance principle” (“*principio de lesividad e insignificancia*”) will be removed from the Criminal Procedural Code so that it does not apply to IP violations;
- Maximum imprisonment penalties for IP violations will be elevated from 3 to 5 years. Minimum penalties will be elevated from 1 to 3 years. This elevation is aimed at ensuring the imprisonment of copyright infringers.
- Public officials, not only injured parties, will be able to file criminal actions for IP violations (“*acción pública de instancia pública*”);
- The unauthorized “use” of protected works is a crime; and
- Any fine imposed for IP violations should be in addition to the prison sentence, and not in the alternative.

Bill No. 15.556 (sponsored by the Government): On March 15, 2004, the Government of Costa Rica presented to the National Assembly (Congress) a new bill to amend the “Enforcement Procedures of Intellectual Property Rights Law” (File No. 15.556). This government-supported bill has two serious deficiencies, which is why the industries do not support it: (1) It includes penal sanctions from 1 to 5 years for all piracy crimes, which is a decrease in the level of penalties proposed in the industry bill (from 3 to 5 years), the longer term being necessary to ensure imprisonment and not suspended sentences; (2) This bill keeps the existing requirement that industry file complaints. Like the industry bill, this government bill is also low on the legislative queue.

Government software asset management: In February 2002, former Costa Rican President Miguel Angel Rodriguez issued a Government Software Legalization Decree. Its aim was twofold: ensuring that all software in use in the federal government was duly licensed, and establishing and implementing sound and effective software procurement and software asset management policies. President Pacheco reiterated his administration’s intention to fully implement that decree. Both the issuance of the decree and President Pacheco’s reiteration of it are important steps that demonstrate the Government of Costa Rica’s increasing awareness of the value of managing their software assets. The Government of Costa Rica should to continue down the path toward implementation of the software asset management practices called for in this decree.

COPYRIGHT PIRACY IN COSTA RICA

The recording industry reports that music piracy is rampant in Costa Rica. The legitimate market for sound recordings has decreased by 59% since 2000. Only two multinational companies operate in Costa Rica and very few independents are in business. The local legitimate recording activity has almost come to a halt. CD-R burning is the most prevalent form of music piracy. The industry estimates piracy to be in excess of 50 percent of total units sold in the market mostly through street stands and flea markets. The key pirate markets include San Jose, Heredia and Alajuela. The business software industry reports that the most devastating form of piracy in Costa Rica remains the use of infringing or unlicensed software by legitimate businesses and government agencies. Lowering the business software piracy rate could contribute to the Costa Rican economy.⁶

COSTA RICA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005 ⁷										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁸	18.3	60%	NA	NA	7.2	56%	7.0	50%	4.8	40%
Business Software ⁹	9.6	67%	9.0	67%	10.0	68%	6.7	61%	6.9	64%
Motion Pictures ¹⁰	NA	NA	2.0	40%	2.0	35%	2.0	40%	2.0	40%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software ¹¹	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	27.9+		11.0		19.2		17.6		13.7	

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Costa Rica's piracy rate (from 67% to 57%) could add \$176 million to its economy, create hundreds more high-wage technology jobs, increase local industry revenues by \$130 million, and generate an additional \$13 million in tax revenues. See http://www.bsa.org/idcstudy/pdfs/Costa_Rica.pdf.

⁷ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁸ Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

⁹ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Venezuela, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

¹⁰ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

¹¹ 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

EXECUTIVE SUMMARY

Special 301 Recommendations: IIPA recommends that the Dominican Republic be elevated from the Special 301 Watch List and placed on the Priority Watch List in 2006. IIPA and its members support the IPR chapter in the U.S.-Central America-Dominican Republic Free Trade Agreement.¹ The CAFTA-DR contains strong provisions on copyright law and enforcement, and includes a side letter by which the government of the Dominican Republic made specific commitments to improve broadcast piracy enforcement and resolve copyright infringement cases in the courts in advance of the FTA entering into force.² This FTA was signed on August 2, 2004, and will hopefully enter into force with the Dominican Republic sometime during 2006.³

Actions for the Dominican Republic to Take in 2006:

- Have the enforcement agencies (including the police-*Fiscalía*, ONDA and INDOTEL) conduct more regular and sustained actions, followed by prompt criminal prosecutions;
- Improve interagency communication and cooperation between ONDA and the Attorney General's Office;
- Assign a squad of investigative law enforcement officers to follow up on the cases after ONDA or the *Fiscalía* has conducted a raid;
- 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;
- Expedite prosecutions and judicial decisions in criminal cases;
- Dedicate more resources and training to ONDA, 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);
- Continue to work toward full implementation of the copyright and enforcement elements in the CAFTA-DR IPR chapter and WIPO Treaties.

¹ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

² The U.S.-DR-CAFTA IPR Chapter text is posted on the USTR website at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file934_3935.pdf and the August 4, 2004 Side Letter on IPR Procedures is posted at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file15_5851.pdf.

³ USTR Press Release on CAFTA-DR Implementation, December 30, 2005 at http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html.

DOMINICAN REPUBLIC
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005 ⁴

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁵	10.8	75%	10.3	75%	9.9	65%	6.9	65%	7.7	65%
Business Software ⁶	2.6	77%	2.0	77%	3.0	76%	3.6	61%	4.0	64%
Motion Pictures ⁷	NA	NA	2.0	20%	2.0	20%	2.0	60%	2.0	60%
Entertainment Software ⁸	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	14.4+		15.3		15.9		13.5		14.7	

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

Over the years, several trade tools have been used to engage the Dominican Republic to improve copyright protection and enforcement,⁹ including Special 301 as well as the Generalized System of Preferences (GSP) program.¹⁰ IIPA and its members look to the Dominican Republic to continue to work to improve on-the-ground copyright enforcement which, we believe, is imperative to reducing the high levels of piracy in this country.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ 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.

⁶ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in the Dominican Republic, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁷ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁸ 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.

⁹ For more details on the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see IIPA's summary in Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission.

¹⁰ 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. As the Dominican Republic FTA negotiations moved forward, USTR terminated the GSP investigation on July 2, 2004. During the first 11 months of 2005, the following benefits were tracked: (a) \$136.8 million worth of Dominican goods (or 3.3% 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 60% increase from the same period in the prior year; (b) \$774 million worth of Dominican goods entered under the CBI, representing a 0.6% increase over the same period in the prior year; and (c) \$1.5 billion worth of Dominican goods entered under the CBTPA, representing a 6.4% decrease over the same period in the prior year. Once the FTA enters into force, the Dominican Republic's benefits under these two trade programs will cease.

Record and music piracy: Record and music piracy continues to plague the legitimate marketplace, making it impossible for record companies to invest in the Dominican Republic. The number of vendors on the streets continues to climb, with little pro-active intervention visible by this current administration. Nearly all of the music piracy found is burned onto CD-Rs. Street vendors in possession of large inventories of pirate music flood many major shopping plazas in the tourist areas around the country. This problem extends beyond the Dominican Republic; the Recording Industry Association of America (RIAA) reports finding illicit product in flea markets in Puerto Rico that are sold by Dominicans who bring the product on the ferry between the two countries. RIAA has a pro-active anti-piracy program in the Dominican Republic, and the new criminal code sufficiently addresses the illegal act of creating, distributing and selling of illicit sound recordings. However, ONDA (the Copyright Office) -- the government agency responsible for conducting, among other things, music piracy inspections and seizures -- was absent in music piracy enforcement in 2005. In fact, ONDA has refused to provide any data or statistics to the recording industry that would shed light on the level of activity, if any, ONDA has undertaken in this area. Furthermore, the recording industry also has had some setbacks with the IPR prosecutor for one of the provinces of Santo Domingo; he has imposed a high threshold for the filing of a criminal case (discussed below). The estimated trade loss due to music recording piracy in the Dominican Republic was \$10.8 million in 2005.

Film piracy and broadcast piracy: MPA reports that broadcast and pay-TV piracy and video piracy remain key priorities for 2006 in the Dominican Republic. The broadcast/cable transmission of movies prior to release in theaters in the Dominican Republic or during their theatrical run greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators. For many years, MPA and its member companies have taken action against television and video piracy in the Dominican Republic. Since 2003, the Dominican Republic has taken some actions to reduce piracy in both of these areas. In addition to broadcast piracy, retail piracy is a growing problem, and more and more street vendors are selling pirate DVDs.

Business software piracy: The Business Software Alliance (BSA) reports that computer software piracy in the Dominican Republic comprises primarily end-user piracy and hard-disk loading. End-user piracy rates remain high among Dominican businesses of all sizes, from small family businesses to large, prosperous financial institutions and industrial concerns. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to the consumer. 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. Preliminary estimated trade losses to the business software industry are \$2.6 million in 2005, with a piracy level of 77%. Lowering the business software piracy levels could have a dramatic, positive effect on the local economy.¹¹

Book piracy: The book publishing industry reports that problems in the Dominican Republic during 2005 continued to center around illegal photocopying, primarily of English language teaching (ELT) textbooks. Commercial book piracy is diminishing while legitimate distributors increase. Estimated trade losses to the publishing industry were approximately \$1 million in 2005.

¹¹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: Cutting the Dominican Republic's piracy rate 10 points (from 77% to 67%) could add \$47 million to its economy, increase local industry revenues by more than \$31 million, and pump an additional \$3 million into the Dominican Republic's tax coffers. The 10-point reduction could also create hundreds of new IT jobs. See http://www.bsa.org/idcstudy/pdfs/Dominican_Republic.pdf.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Mixed results in anti-piracy actions against music piracy. Although the recording industry has a good working relationship with the police department, the police do not take self-initiated actions. The only criminal raids taking place are via the industry's partnership with ADOPROFONO, the local group representing Dominican record labels. In 2005, RIAA's anti-piracy operations netted the following seizures: 259,950 pirate music CD-Rs, 94 CD-R burners, and 19 computers used in the manufacturing of illicit product. There have been 87 people arrested during these operations. Criminal charges were brought against 12 individuals by the prosecutor's office. There were four convictions; two were served out and two are on probation.

However, there are two disturbing developments. First, ONDA has not taken any music piracy inspections nor made any seizures. ONDA has refused to provide any data/statistics to the industry that would reveal their music anti-piracy activities. To try to address this problem, the industry has met three times with the new ONDA director. The industry's understanding is that ONDA refuses to work with the Attorney General's office, because ONDA believes that under the new law, they have sole responsibility for anti-piracy cases. Therefore, it seems the relationship between ONDA and the Prosecutor's Office is non-existent. Efforts to help reconcile this situation between these two agencies have not been successful. RIAA also met with the Secretary of State and discussed the difficulties created by the ONDA, but to date problems have not been resolved. There is a need to have the current administration identify a law enforcement body within the National Police (perhaps the tourist police), provide the necessary training, and have them become a proactive force in anti-piracy operations. The recording industry believes that ONDA could use new leadership that understands IP laws and wants to work with the National Police, the Attorney General's office and ADOPROFONO to address its growing music piracy problems.

Second, the IPR prosecutor for one of the provinces of Santo Domingo has imposed an 800-unit threshold for filing a criminal case against anyone arrested for music piracy. There is no threshold amount level written into the current criminal code. RIAA has opposed this threshold from its inception.

Actions taken against broadcast, cable operators and hotels piracy. In 2005, ONDA and INDOTEL, with assistance of the IPR Department of the Attorney General's Office, undertook eight inspections against cable operators and one broadcast station (Virus), and four cable operators were shut down. Moreover, the Attorney General's Office filed new cases against cable operators; however, authorization to perform raids was denied by judges in the first instance. INDOTEL continues to conduct investigations against hotels in the larger tourist cities.

Anti-piracy actions taken against video piracy. MPA reports that ONDA conducted 20 raids against video retailers and street vendors in 2005. The growth of DVD piracy is a concern.

Good anti-piracy actions taken against business software piracy. BSA reports continuing progress in criminal actions in 2005. The *Fiscalía of Distrito Nacional and Provincia de Santo Domingo* 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 of the police (*fiscalías*). Since the beginning of 2005, the police have carried out 17 raids (12 raids by the *Fiscalía Distrito Nacional* and another 5 by the *Fiscalía Provincia de Santo Domingo*).

Status of criminal prosecutions against broadcasters: Ongoing broadcast piracy has been one of the major piracy problems in the Dominican Republic over the last decade. Below is a summary of the pending television piracy cases in which MPA is active:

- In 2004, MPAA filed criminal complaints with the District Attorney against Digital 15 and Virus (broadcast stations). However, in 2005, the only legal action filed was against Virus, which was settled. No other criminal actions were initiated.
- In the Canal del Sol case, the first hearing was held in 2003, followed by additional hearings in 2004. On June 11, 2004, the judge decided in favor of the right holders and the prosecution and allowed the inclusion of the director of Canal del Sol as a named defendant. The final decision is still pending. Canal del Sol has entirely changed its programming and currently broadcasts only music videoclips and programs regarding politics. This positive, improved behavior is mainly due to three reasons: the MPA legal action; INDOTEL's intervention with the owner of Canal del Sol; and political interests of the owners which established a new political party.
- In the Telemicro case, hearings took place in 2003 and 2004. In 2004, the court sanctioned Telemicro's representative (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. MPA had filed an accompanying civil suit, and was awarded US\$11,000. The defendant has appealed the civil decision. Both penalties and damages currently are suspended, pending this appeal. In December 2005, the Court decided to review all evidence presented, which is expected to take place in February 2006.

Prosecutions and courts results in recording piracy cases: As noted above, the recording industry has experienced setbacks with the IPR prosecutor for one of the provinces of Santo Domingo. The prosecutor has imposed an 800-unit threshold for filing a criminal case against anyone arrested for music piracy; there is no threshold amount level written into the current criminal code. And, the fact that the possession of 100 or more units constitutes a criminal felony charge in nearly every state in the U.S., RIAA has opposed this threshold requirement since its inception.

The judicial process in the Dominican Republic has improved under the amendments to the criminal procedural code that entered into effect on September 21, 2004. The RIAA has successfully obtained four prosecutions for people processed after the new code entered into effect. This represents a substantial increase in both prosecutions and the expeditious manner in which the cases were processed. For its cases which predated the 2004 changes in the criminal code, the RIAA continues to experience great delays at the appellate level. For example, 105 criminal cases for music piracy filed between 1999 and September 2004 are still pending trial or appellate court review.

Trainings: RIAA has provided education and training geared to the different audiences in the Dominican Republic. In 2005, these included IP seminars with other IP industries, specific training for prosecutors, ONDA inspectors and members of the ADOPROFONO anti-piracy team that highlight identification of pirate product, impact on the music industry, artist, employees of labels, distributors and retailers. RIAA utilizes sample product picked up in the streets of Santo Domingo to show actual product being sold locally. With the change in ONDA, the RIAA offered training for all of the new inspectors; however, ONDA has not agreed to schedule a training session for their personnel. RIAA held a training session with the prosecutor's office in early 2005.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law: The Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of work to replace its inadequate 1986 copyright law. The GSP investigation clearly helped prompt legislative consideration of the new law. The 2000 law represented success in advancing higher levels of substantive copyright protection as well as expanding the battery of tools available for criminal, civil and administrative copyright enforcement. The law raised the level of copyright protection up to WTO TRIPS levels, and also integrated some elements found in the two WIPO "Internet" Treaties. However, several refinements to the copyright law and other laws will be required to fully implement the comprehensive IPR obligations found in the CAFTA-DR.

WIPO Internet Treaties: The Dominican Republic joined both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT), with January 10, 2006 as the dates of entry into force. The deposit process took about three years, and IIPA and its members are pleased that the Dominican Republic has joined the international community in adhering to these two important treaties. We welcome and now expect full implementation of the treaties' obligation as part of the FTA implementing process.

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. As reported above, the recording industry has a significant backlog of cases stifling in the courts under the old code.

Constitutional Challenge to 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 to consider whether Hard Soft committed a copyright infringement was scheduled for November 4, 2003, but was postponed until April 2004. BSA is still waiting for the Supreme Court's final decision on this constitutional challenge.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

EGYPT

EXECUTIVE SUMMARY

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

Priority Actions Requested in 2006:

- **Establish Effective Enforcement Unit in Ministry of Communications and Information Technology (MCIT):** In 2002, when the IP Code was enacted, business software and entertainment software right holders were assured that implementing regulations would move responsibility for copyright enforcement to the MCIT. The Implementing Decree (2005) only complicates the enforcement picture, as it is ambiguous whether MCIT is given sole purview over software. No enforcement agency took responsibility for these important copyright sectors in 2005 as a result. MCIT must immediately begin to take sustained enforcement actions against all illegal distributors and retailers of pirate entertainment and business software products, and significantly increase audits and enforcement against pirate end-users of business software.
- **Tackle Book Piracy Effectively:** The book piracy situation remains bleak in Egypt, with piracy of higher-education textbooks severely undermining the market for legitimate texts. The Government must take sustained enforcement actions against book piracy, and the Egyptian Ministries of Education and Higher Education must get involved to instruct universities to use only legal copies of publications.
- **Allow Right Holders to Participate in Investigation of Piracy:** IIPA understands that even after successful raids, the Ministry of Culture is thwarting enforcement efforts by determining that clearly pirate materials are, in their view, “genuine.” The failure to include right holders’ experts on identifying pirate product is the cause of this problem, although there is evidence suggesting undue influence as well. The Minister of Culture must instruct its officials that piracy cases will be fully investigated and evidence will be open to inspection and forensic testing by right holders upon their request.
- **Increase Deterrence at Court:** The Egyptian courts are notoriously slow, bureaucratic, and fail to mete out deterrent results, instead slapping pirates on the wrist with fines that do not even amount to a cost of doing business. The Minister of Justice should step in to introduce judicial reforms in the copyright area, through training and assigning specialist IP judges to copyright cases, increasing the ease with which *ex parte* orders and injunctions are issued in cut-and-dried piracy cases; and ensuring that courts are meting out deterrent penalties, including high fines and jail sentences, in piracy cases.
- **Ease Onerous Market Access Restrictions:** The Egyptian market is one of the most closed in the world to foreign right holders, imposing an incredible array of market access barriers. Pirates and counterfeiters do not observe these, so legitimate right holders are further unable to compete with piracy. These market access barriers should all be immediately lifted (some of these violate Egypt’s current international obligations).
 - A discriminatory *ad valorem* duty (basing the customs’ valuation of imported CD-based goods on the invoice value of the product rather than on the value of the physical medium) upon import into Egypt of films, sound recordings and entertainment software.

- An additional sales tax (i.e., a tax on goods imported for sale in Egypt) amounting to 10% of the value of imported films, sound recordings, etc.
- A censorship certificate release fee of 700 Egyptian pounds (US\$122).
- The requirement that all song lyrics on locally manufactured releases be translated into Arabic.
- No trading rights (requirement that a commercial entity be 100% Egyptian-owned in order to import products into Egypt).
- A discriminatory and GATT-inconsistent entertainment tax on foreign films (20% box office tax on non-Arabic language films, while the tax for Arabic-language films is only 5%).
- A cap on the number of prints that may be imported for any major U.S. film title (five).
- **Amend Copyright Law (and to the Extent Necessary, the new Implementing Decree) to Cure TRIPS Deficiencies, and Implement the WIPO Treaties.**

For more details on Egypt's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

EGYPT ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	30.3	64%	28.0	65%	34.0	69%	12.7	52%	14.5	58%
Books ³	30.0	NA	30.0	NA	25.0	NA	28.0	NA	32.0	NA
Entertainment Software ⁴	14.3	85%	NA	90%	NA	90%	NA	NA	NA	90%
Records & Music	9.0	60%	7.5	40%	8.0	45%	8.2	41%	9.2	41%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	NA	NA	15.0	35%
TOTALS	83.6		65.5		67.0		48.9		70.7	

PIRACY AND ENFORCEMENT UPDATE

Failure of Ministry of Communications and Information Technology (MCIT) to Take Lead on Software Piracy Leaves Enforcement Vacuum: Unauthorized use of business software in a business setting (end-user piracy of business software) and reseller software

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Egypt, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ In 2002 and 2003, lower losses of \$28 million and \$25 million to U.S. publishers due to piracy in Egypt reflect currency devaluations and do not reflect a decrease in piracy rates.

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 MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>. Cable piracy remains a significant problem in Egypt.

piracy cause great losses to the business software community in Egypt, while piracy of entertainment software is devastating to that industry's ability to do legitimate business in Egypt. Retail malls dealing in computers continue to offer illegal business and entertainment software unchecked. Imports of counterfeit software have become a serious concern, passing freely through the Egyptian borders. Egyptian Customs has not established an effective mechanism to seize such goods at the point of entry. Resellers of counterfeit software advertise these illegal products openly in trade magazines.

While the 2005 Implementing Regulations for the IP Code (copyright chapter) officially moved purview over business and entertainment software to MCIT (and the Information Technology Industry Development Agency, ITIDA), the regulation was ambiguous as to what role the Ministry of Culture (MOC) may still play. The result was that no enforcement agency took responsibility for these important copyright sectors. To date, neither MCIT nor ITIDA have taken any steps toward forming an enforcement body. MCIT should immediately form an effective enforcement unit and begin to take sustained enforcement actions against all illegal distributors and retailers of pirate entertainment and business software products, and significantly increase audits and enforcement against pirate end-users of business software. As a result of the enforcement vacuum, there were no business software end-user raids in 2005. The enlargement of the Police's anti-piracy unit into an "IPR Department," which we are told will have more personnel and resources, signifies the keenness of the Ministry of Interior to protect copyright. However, there has been no impact in the market in terms of losses felt by industry or increased sales (hence, there is little change to the piracy rate).

Book Piracy: Egypt is 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, depending on subject matter, ranging between 50% and 80%. Texts in medicine, sciences, management and even some social sciences are plagued by print piracy, illegal photocopying and illegal translations. 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 textbooks. The piracy level for medical books is as high as 90%, and the vast majority of the market for other professional reference books (such as engineering books) is pirate product. Most major universities are affected by this ongoing problem, including the American University of Cairo and the new German University in Cairo.⁶ Universities are in some cases working hard to overcome this phenomenon, as they are losing money from the books they are directly importing from foreign publishers. Egypt prides itself on its educational structure and heritage and needs to take steps to ensure the protection of quality education at its universities by ensuring use of legitimate materials in their courses. Although legitimate U.S. publishers provide books at deep discounts (sometimes as much as 70-80%), piracy of their works continues on a commercial scale.

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.

Entertainment Software Piracy Decimates Window for Legal Product: Pirate and counterfeit software dominates 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® games 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 (transshipped) and Asia (piracy rates for this product in Egypt are about 60%). The overall piracy rate for the video game products is about 85%. Piracy rings in Egypt continue to be run by large criminal syndicates, and in 2005, were present in previously legitimate stores. In 2005, there were instances of compromised investigations in which the Ministry of Culture thwarted enforcement efforts by determining that clearly pirate materials were, in their view, “genuine.” The failure to include right holders’ experts on identifying pirate product is the cause of this problem.

Internet Piracy in Small But Virulent Doses in Egypt: The Egyptian Government claims it has the largest number of Internet users of any Arab country, at 4.4 million.⁷ Yet, broadband penetration remains relatively low. Thus Internet download piracy has not hit Egypt with full force yet, and Internet-based piracy involves mainly 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.

Courts Do Not Function Effectively to Deter Piracy: The court system is completely unable to mete out deterrent justice in piracy cases. For cases that have resulted in positive judgments being awarded to right holders, the sentences are almost always non-deterrent, usually a fine of EL5,000 (US\$872) regardless of the number of titles or copies involved. Since collections take an unreasonably long time in Egypt, it is practically not worth pursuing cases. The system in Egypt also continues to be marred by structural defects from initial raid to judgment, and cases 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.

MARKET ACCESS ISSUES

Egypt is one of the world’s most restrictive markets when it comes to trade in copyrighted materials. Problems include:

- **Discriminatory *ad valorem* Duty:** The copyright industries regularly face discriminatory *ad valorem* duties upon import into Egypt. Egypt bases the customs’ valuation of imported 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

⁷ The MCIT cites a study by the Egypt-based “Information and Decision Support Center” of November 1, 2005, finding that of 13.5 million Arab-country Internet users as of June 2005, 4.4 million were Egyptian (Egypt and Saudi Arabia had half of all Internet users in the Arab world). See Ministry of Communications and Information Technology website, at http://www.mcit.gov.eg/news_details.asp?newsid=164. This number is close to where the CIA World Factbook pegs Egypt’s Internet users, at 4.2 million as of June 2005.

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 EL120 (US\$21) per kilogram plus 5% (Egyptian Customs authorities use whichever method of calculation results in the higher yield). 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).

- **A 10% Sales Tax:** 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: for films, the cost of the print, including freight charges, customs duties and other import taxes; for music and games, an extra 10% sales tax is added to the import duty.
- **A Censorship Certificate Release Fee:** 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 EL700 (US\$122) is levied upon issuance of the certificate. This discriminatory tax is not imposed on domestic films and should be removed.
- **Arabic Lyrics Requirement:** There is a requirement in Egypt 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.
- **Failure to Afford Trading Rights:** 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.
- **GATT-Inconsistent Entertainment Tax:** 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%.
- **Five-Print (Film) Cap:** Only five prints may be imported into Egypt for any major U.S. film title.

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.

COPYRIGHT LAW AND RELATED ISSUES

Implementing Regulations Issued: On March 28, 2005, the Government of Egypt issued Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005). Unfortunately, the Implementing Decree did little to remedy TRIPS deficiencies in the 2002 Law, or to clarify ambiguous provisions, or to make other changes recommended by IIPA. The following recounts the changes called for in the IP Code (from IIPA’s 2003 Special 301 submission on Egypt), and where applicable, how the Decree dealt with these issues. Where there is no mention below, the Implementing Decree did not address the issue raised.

- **Criminal Remedies Too Low:** The Code contains non-deterrent criminal penalties. Article 181 provides a sentence of “not less than one month” imprisonment and a fine of EL5,000 to 10,000 (US\$872 to \$1,743). While a minimum sentence of “one month” imprisonment constitutes a positive development, there is no set maximum jail term (as there was in the old law), potentially making this provision much weaker as carried out in practice (for example, if only the statutory minimum, and no higher sentence, is regularly imposed). Fines on their face are totally insufficient and non-deterrent (TRIPS Article 61 requires remedies “sufficient to provide a deterrent”). IIPA understands that the fine is to be imposed “per work” or “per title.” For pirates dealing in high-end commercial software, for example, the fine would not even amount to a cost of doing business, and would be well worth the risk. Fines must be increased and doubled for recidivists (as of now a recidivist receives mandatory minimum jail term and maximum fine), and as opposed to “per work” should be meted out “per copy.” Imprisonment should be set at from three months to three years (with mandatory imprisonment for recidivists). Such penalties would be closer to TRIPS standards. The GOE must implement tougher penalties through implementing regulations to satisfy TRIPS.
- **Provide TRIPS-Compatible Remedy as to “Materials and Implements.”** Article 179(3) in the Code is TRIPS deficient, in that it only permits the seizure of “materials” that are “serviceable” only for infringement. On the other hand, TRIPS Article 46 requires that judicial authorities shall have the authority to “order that materials and implements the predominant use of which has been in the creation of the infringing goods” be (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements. Implementing regulations should confirm that Article 179(3) will be read as compliant with TRIPS, namely, that the language “serviceable” “only” does not conflict with the “predominant use” standard of TRIPS, and should also confirm the availability of forfeiture and destruction as required by TRIPS.
- **Expressly Provide for *Ex Parte* Civil Searches.** Article 179 appears not to provide judicial authorities with the clear express authority to “adopt provisional measures *inaudita altera parte* (without notice to the defendant) where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed,” as required by TRIPS Article 50. The copyright industries are examining this provision and considering a test in the courts, but in the meantime, the implementing regulations should clarify the availability of this vital measure, in line with Article 50 of TRIPS.
- **Delete Provision Allowing for Government-Sanctioned Sell-Off of Pirated Products.** Article 180 provides that “the court may support a sequester with a view to republish the [allegedly infringing] work, sound recording, broadcasting program, as well as, exploiting or offer copies of it,” and “the accrued revenue shall be deposited with the court’s treasury until the original dispute is settled.” This provision diverges completely from accepted practice and violates Egypt’s TRIPS obligations. Article 46 of TRIPS requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or . . . destroyed.” Clearly, sale in public auction would prejudicially harm the right holder. This provision amounts to a government-sanctioned sell-off of pirated products, and must be deleted.

- **Provide Modern, TRIPS-Compatible Presumptions.** The law does not provide expressly for presumptions of subsistence of copyright or for copyright ownership. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights, and Egypt's implementing regulations must be amended to include them in order to comply with TRIPS.⁸
- **Repeal Provision Requiring Translation Into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication; if not, they are deemed to fall into the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt's international obligations, is highly prejudicial to all right holders, including U.S. publishers, and it must be deleted.
- **Repeal Overly Broad Compulsory License.** Article 170 of the Code contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently extends to computer programs and audiovisual works. Such a compulsory license is completely contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed by implementing regulations, or deleted altogether.⁹ ***The Implementing Decree (Articles 4 and 5) fails to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.***
- **Repeal Overly Broad Moral Rights Provision.** The moral rights provisions in the Code impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Article 142(3) provides that the author may reject "any amendment in the work, which the author considers as changing or distortion of his work," regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive adaptation right. The standard for rejection of a change must be objective, as set forth in the Berne Convention, not subjective, as set forth in the Code. The Article also provides that "amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author." This would violate Berne Article 8, as it would impinge on an author's exclusive translation right.

⁸ The following formulation might, for example, be appropriate:

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

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

- **Confirm That Egypt Provides Full Retroactive Protection.** There is no provision in the Code ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion. Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS- and Berne-compatible) retroactivity for all subject matter under the law.¹⁰
- **Confirm That Egypt Provides Border Measures as Required by TRIPS, Including Ability to Interdict and Take *Ex Officio* Actions.** The law contains no provisions on border measures (TRIPS Articles 51-59). We are unaware of whether separate customs measures exist or are being drafted to provide TRIPS-level protection in the area of border measures.
- **Confirm Narrow Scope of Temporary Copy Exception.** Article 171(9) provides what IIPA hopes is a narrow exception for certain “ephemeral” copies, where such copy is made “during digital broadcasting or receiving digitally stored work,” with the proviso that such copying is performed “through normal operations used by the rightful owner.” IIPA believes that Egypt should not provide an exception for temporary copies. Barring that approach, Article 171(9) appears to be fairly narrow, since it requires that the person availing himself of the exception must be “the rightful owner.”
- **Confirm That Article 171 Exceptions Are Subject to Berne “Tripartite” Test.** The law contains overbroad exceptions to protection (TRIPS Article 13). Article 171 (on exceptions to protection) should include “chapeau” language limiting excepted acts to special cases, provided that such acts “do not conflict with a normal exploitation of the work [or object of neighboring rights]” and “do not unreasonably prejudice the legitimate interests of the author [or right holder],” in line with TRIPS Article 13. ***The Implementing Decree (Article 10) makes an attempt to limit the computer program exception in Article 171(3). It is unclear whether it succeeds in making the exception TRIPS-compatible although it appears to at least come close.***
- **Confirm That the IPR Code Provides Adequate Civil Damages as Required by TRIPS.** Nowhere in the Egyptian law is there provision for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Code provides for some “cautionary measures,” including “[c]alculating the revenue of [illegally] exploiting the work or performance or sound recording or broadcast, then disburse this revenue in all cases,” although it is unclear whether this is intended to cover all civil damages. TRIPS requires the courts to have the authority to award “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity,” and in appropriate cases, suggests the availability of “recovery of profits and/or payment of pre-established damages,” even where the infringer did not knowingly (or

¹⁰ The simplest way to fix the retroactivity void in the Egypt draft would be to add a new article as follows:

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

with reasonable grounds to know) engage in the infringing activity. Egypt's law remains deficient on provision of adequate civil remedies.¹¹

- **Delete Provisions That Unreasonably Restrict the Ability to Freely Contract.** Articles 150, 151 and 153 are restrictions on the ability to enter into freely-negotiated contracts, and should be abolished. Specifically, Articles 150 and 151 contain transfer provisions that impose undue burdens on the freedom to contract, while Article 153 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Amend Performers' Moral Rights Provision.** In Article 155(1), the performer's right of attribution should permit the omission of the performer's name, if such is dictated by the manner of the use of the performance, and Article 155(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers' reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **Delete Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This amounts to a compulsory license and should be deleted.
- **Clarify Panoply of Exclusive Rights for Producers of Audiovisual Works.** Article 177(5) clearly should not apply to sound recordings and therefore the word "audio" should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as "the natural or legal entity who produces the ... audiovisual work, and undertakes the responsibility of such achievement" [Article 138(11)]. Article 177(5) provides that the producer "shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing," and "the producer shall be considered as the publisher, and will have the rights of the publisher" Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.¹² The

¹¹ The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

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

¹² The simplest formulation of the producer's rights would be as follows: "Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof."

producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.

- **Delete Right of Publicity.** Article 178 appears to create a right of publicity in a person's likeness, and does not belong in a copyright law.

Not only does the Decree not deal with most of the above, but it goes backwards in a number of respects. For example, certain provisions (Articles 11-16) appear to codify a registration ("recordal") and deposit requirement in Articles 184-86 of the IP Code. These requirements may not interfere with the exercise of rights (since the law expressly states that registration is not a prerequisite to protection), but certainly impose undue burdens on right holders, since failure to register/deposit places a right holder in direct violation of the IP Code and subject to fines. Articles 184-186 should not apply to foreign right holders if Egypt is to live up to its international obligations.

Article 187, dealing with registration of businesses engaged in the distribution of copyright materials, is yet another onerous and costly burden on legitimate businesses, which has the perhaps unintended but certain consequence of further insulating pirates, who will not pay for such registrations. Article 17 of the Implementing Decree and the Table set forth an elaborate schedule of charges to legitimate businesses dealing in copyright materials.

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 2004, \$38.1 million worth of Egyptian goods were imported into the U.S. duty-free, accounting for 2.9% of its total imports to the U.S. For the first 11 months of 2005, \$59.6 million worth of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for 3.2% 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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY

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

ACTIONS TO BE TAKEN IN 2006

- **Establish Specialized IP Courts or IP Judges, Increasing Speed of Adjudication of Criminal and Civil Cases, and Increasing Deterrence:** While traditionally the Indian authorities have run raids, the lack of an efficient and deterrent judicial remedy has doomed efforts to significantly lower piracy levels. The Government of India should set up specialized IP courts, or the chiefs of the high courts should appoint special judges in all the states to:
 - ease backlogs;
 - enforce deadlines for adjudication/resolution of piracy cases;
 - encourage completion of a set number of “model” cases with deterrent penalties to deliver a message to the Indian public about piracy;
 - prevent unjustified continuances;
 - adopt case management techniques;
 - treat piracy as a serious economic crime;
 - establish clear standards for damages in civil cases, including implementing a statutory damage system which results in real deterrence.

There have been negligible criminal convictions for piracy in India since January 1, 2000. This likely violates 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. India should 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;

- **Create a National Anti-Piracy Task Force:** The fundamental missing piece of the enforcement puzzle, in addition to the significant improvements in the judicial process noted above, 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. A circular was issued that asked each state to set up special task forces to counter piracy. Only Tamil Nadu and Kerala have set up special audio video anti-piracy cells. Unfortunately, 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. A national anti-piracy task force to take criminal and civil actions against piracy that could act across state borders

would be beneficial to right holders in India. If this is not achievable, the government should provide resources to the states to equip and train state IP task forces. The Home Ministry should take the lead in providing 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. In addition, the government should ensure that film piracy issues are coordinated among the various responsible ministries, including the federal Home Ministry and the state home ministries responsible for enforcement; the Ministry of Information and Broadcasting, which regulates the film industry; and the Ministry of Human Resource Development (HRD), which is responsible for the copyright law. Finally, provision needs to be made for the warehousing of infringing goods seized in raiding activity.

- **Increase the Number of *Suo Moto* Raids:** Significantly increasing the number of *suo moto* raids against piracy at all levels will help provide some of the deterrence needed to drive piracy rates down. The government should significantly increase the resources and manpower in the local IPR cells and the local police forces and should also enhance training levels. Enforcement of IPR should be included in the manual provided to the police personnel, and a certain minimum number of IPR-related actions should be prescribed, with appropriate incentives.
- **Pass Optical Disc Regulation:** India, with 20 optical disc plants and known pirate production, should adopt a modern optical disc regulation to license factories, gather sample discs for forensic testing, mandate the use of SID mastering and mould codes, and provide authorities with the ability to run surprise inspections, day or night, to detect illegal production.
- **Enact Copyright Law Amendments Consistent with WCT and WPPT:** Right holders have been waiting for the Government of India to adopt amendments to the copyright law that correct deficiencies and properly implement all the obligations of the WIPO “Internet” Treaties (WCT and WPPT), including protection for temporary copies; adequate and effective protection against the circumvention of technological protection measures; and ISP liability rules that are clear, with narrow exceptions, and with an effective notice and takedown system. Draft amendments fall well short of these goals. HRD should rework the draft to include key protections necessary for the digital age.
- **Legalize Use of Published Materials at Educational Institutions:** The Government should take an active role in combating pirate photocopying on university campuses, starting with a government order 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.
- **Empower Customs to Effectuate Seizures and Destruction of Pirate Goods:** Customs should be empowered to seize, and in particular, destroy, pirated goods. Currently, many seized goods are resold to shops working with the Customs Service. This TRIPS-inconsistent practice must stop. Additionally, the customs process continues to be cumbersome. Customs should take significant action to (a) reduce the substantial 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 (c) investigate and prevent exports of pirate and low-cost India editions of textbooks, including to the U.S.

For more details on India’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

INDIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level		
Records & Music	70.7	55%	67.3	50%	6.0	40%	6.6	40%	NA	40%
Business Software ²	265.1	74%	239.0	74%	187.0	73%	257.7	70%	256.0	70%
Motion Pictures ³	NA	NA	80.0	60%	77.0	60%	75.0	60%	70.0	60%
Entertainment Software ⁴	65.2	86%	59.5	86%	113.3	84%	NA	NA	NA	90%
Books	42.0	NA	38.0	NA	36.5	NA	36.5	NA	37.0	NA
TOTALS	443.0 +		483.8		419.8		375.8		363.0	

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Suo Moto Raids Take Hold in India: A major development begun in 2004 and continuing throughout 2005 was the increasing willingness of police forces to take action *ex officio* (*suo moto*). Starting in Delhi, and continuing with Mumbai and now the four southern states,⁵ all are running significantly more raids, with numbers of raids increasing dramatically throughout 2005 in these states. Industry reports that over 1,500 police were involved in over 140 separate raids in the state of Kerala alone in a single day.⁶ IIPA commends the Indian government and the various police forces for starting this wave of *ex officio* action. Notwithstanding this very positive development, however, raiding alone will not provide the level of deterrence needed to drive down piracy rates significantly; criminal cases with deterrent sentences actually imposed will be the true arbiter of whether these raids have had their ultimate desired effect.

Goonda Act: The Tamil Nadu Government implemented the Goonda Act in 2003, which has had telling impact on piracy. Under this Act, pirates can be placed under preventive detention for up to one year. The inclusion of video piracy within the Goonda Act in Tamil Nadu, with its provisions for detention without trial for up to a year, saw a dramatic decrease in piracy in this state. We understand that burning operations have since moved from Chennai to Pondicherry as a result (still in Tamil Nadu but outside the capital, Chennai, where the police had been more proactive). The music industry also notes the deterrent effect on music piracy.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in India, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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 Tamil Nadu is the only state with an audio-video anti-piracy police cell which has been registering a large number of cases against pirates. Kerala is the other state which has set up a cell in each district to counter piracy. Maharashtra and Gujarat are also considering doing the same.

⁶ It should be noted that these raids were also the result of complaints to the Chief of Police and Chief Minister of Kerala about a physical attack on Motion Picture Association investigators.

that the Goonda Act has had, as sales of music companies have reportedly increased by more than 30 percent in Tamil Nadu since the implementation of the law.

Internet Piracy: Growth of broadband in India increased significantly by 140% in the year from the fourth quarter of 2004 to the third quarter of 2005, with total broadband lines reaching 623,000 at the end of the third quarter of 2005. Thus, it is not surprising that the record industry reports that MP3 music file-sharing and other P2P file-sharing is starting to truly devastate the music market in India.⁷ Cell phone “ringtone” piracy has become a major source of damage to the music industry, as an estimated 500,000 unauthorized ringtones are being downloaded in India every day. There are new reports of some downloading of entertainment software and grave concerns about piracy of mobile phone games, a growing market in India. The Business Software Alliance reports that in all of 2004 the number of online software infringements traced to Indian ISPs was 1,672, but that this number grew to 4,112 in the first 10 months of 2005. At that rate, by year’s end it is believed that the number of infringements would have increased by 195% year on year, mainly in the P2P domain. Furthermore, the government announced an initiative to digitize textbooks and offer free access to them over the Internet. There have been reports of up to 200 e-book titles being offered for sale 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. It is crucial that India take urgent steps to shore up its legal infrastructure and put a workable enforcement strategy in place, or Internet piracy will quickly become a major threat to legitimate right holders in India.

The chief enforcement tool used against download sites in 2005 was notice and takedown. In January 2006 the major music industry group in India announced it may soon target the Internet service providers facilitating online infringement; ISP cooperation appears not to be forthcoming.⁸

Optical Disc Piracy – Some Factory But Predominantly “Burned” Discs: There was an alarming increase in optical disc (OD) production capacity in India in 2005. There are now as many as 20 OD factories in India, with at least 166 production lines and a capacity of at least 581 million discs per year. It is known that at least one, located just outside New Delhi, continues to produce pirate product.⁹ Following persistent pressure for India to adopt an optical disc law like its neighbors in Asia, in 2005 the Ministry of Information & Broadcasting (MIB) tasked FICCI (the Indian Chamber of Commerce) with drafting an optical disc law. IIPA hopes that FICCI will use the draft model provided to MIB by IIPA and that a strong draft will emerge soon. Notwithstanding some evidence of pirate factory production, the predominant form of optical disc piracy in India markets today consists of “burned” recordable discs, with content including music compilations (MP3 formats, which are smaller and highly compressed so several albums can fit onto one disc), pre-release music (lots of Indian titles and some

⁷ The recording industry identified 875 pirate sites during 2005.

⁸ Leslie D'Monte, *Downloads May Run Out of Tune*, Business Standard, January 12, 2006 (reporting the Indian Music Industry (IMI), a body representing the industry, is considering “appropriate civil and criminal action” against over 600 websites and 30 Indian Internet service providers (ISPs), including the Internet Service Providers Association of India (ISPAI) for “not preventing” the unauthorized downloading of online music; and that the ISPAI had “assured co-operation” with the Indian Music Industry on this issue). However, the ISPs subsequently rebuffed IMI, asserting that their actions were not illegal; Moumita Bakshi Chatterjee Nithya Subramanian, *We are not violating Copyright Act: ISPs Music Industry charge refuted*, The Hindu Business Line, January 15, 2006.

⁹ 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).

international repertoire),¹⁰ motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title) business software, and books/reference materials on CD-ROM. 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. Optical discs containing pirated entertainment software, predominately factory-produced but also “burned,” saturate the retail outlets and flea markets in India. The entertainment software piracy level is estimated at over 80%.¹¹

Signal Piracy: Piracy of cable and satellite broadcasting signals remains rampant, mainly through significant under-declaration of subscribers to content owners. It is estimated that India's cable companies declare only 20% of their subscribers and that the piracy level in this market is 80% with significant losses.

Piracy of Business Software Causes Massive Losses to the Software Industry: 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. Losses increased again in 2005, to US\$265.1 million, while the piracy rate stayed the same – at 74%, much higher than the regional average in Asia of 53%. India is out of step with the region, and there is little sign things can be turned around unless courts begin adjudicating with greater efficiency and meting out more deterrent sentences. To IIPA's knowledge, none of the 164 *suo moto* actions taken by the police across India, dating back to January 2001, have been resolved in court. In the one retail case in which the Business Software Alliance did achieve a conviction in 2002, the matter was successfully appealed by the defendant and that ruling was appealed by the prosecution.¹²

Book Piracy – Offset Prints and Photocopying Remain Severe Problems: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry. At the 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. For instance, about 70 retailers in and around Churchgate (in Mumbai) continue to deal openly in pirate books, with no resistance from law enforcement. 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.

¹⁰ Since pirates do not pay taxes, the local Indian music industry association, IMI, has written letters to the Income tax and sales tax departments to take action against pirates.

¹¹ Increasingly, 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 available, etc.) of legitimate soon-to-be-released or already released full versions of a video game. Demo games 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.), 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 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.

¹² Around 46 retail cases that have been pending for a few years without reaching court are now time barred.

Percentages may soar even higher for certain individual works.¹³ Photocopying remains a problem at public and private educational and research institutions and is on the rise with regard to medical texts.¹⁴ Sales of CD-ROMs medical and technical and reference books are also growing.

The publishing industry continued to be active in addressing all forms of book piracy in 2005. Raids undertaken by publishers have had some effect on this organized commercial piracy. Continued seizures of offset pirate prints have helped to contain the offset print piracy problem somewhat, particularly in New Delhi, where industry reports good cooperation from the authorities.¹⁵ Cooperation has been severely lacking in other cities and regions, however, especially in Bangalore and Mumbai, where efforts by authorities have dissipated, leaving right holders with nothing but a corrupt enforcement system that turns a blind eye to blatant piracy.¹⁶ A national IP task force would help to address such localism (and irregularities). Publishers have still not obtained a single conviction for book piracy. The criminal prosecution system remains as sclerotic as ever with a total of 441 court hearings now backing up the system. Illustrative of the kinds of challenges publishers face is that from April through June, fifteen criminal cases filed under the British Publishers Association campaign came up for hearing and in each case the matter was adjourned.

Book Exports Harm Markets Outside India: India is unusual in the world for producing inexpensive but relatively high-quality books in a country from which it is easy to export. High quality pirated books continue to be exported from India to surrounding countries in Asia, and to the Middle East, Europe, and the U.S.¹⁷ Increasingly, the pirates are 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.

Unauthorized Rental of Motion Pictures: Piracy via unauthorized rental remains a major problem. Pirate rental libraries now exist all over India and there is virtually no legitimate

¹³ For instance, more than 10,000 pirate copies of the book *Harry Potter and the Half Blood Prince* were seized within four weeks of its worldwide release. Publishers estimate that seizures reflect only 1/5 of total pirate production of the work. This is startling when compared with legitimate sales of the book; just one hundred thousand copies within four weeks of its release.

¹⁴ 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.

¹⁵ Of particular note are three recent actions in Delhi. In July, investigations into sales by juveniles of pirated consumer books at traffic lights resulted in seizures of 5,700 copies of titles including authors Sheldon, Grisham, Coelho, and Dan Brown. Three arrests were made, including that of leading pirate Kailash. In early August, seizures were made of 34,000 trade bestsellers. This activity and the arrests that followed received widespread attention in the press. A key pirate, Amit Wadhvani, was apprehended and spent several days in police custody. In November, a seizure of 23,567 books was made in Delhi with the arrests of several people connected with AK Book Services, the operation apparently supplying the sales at traffic lights.

¹⁶ The nature of the campaign in 2005 changed as the key pirates in the market for pirated books have been identified and raided. As a result, the industry's efforts have been frustrated in some areas where the pirates have influenced the withdrawal of police cooperation, notably in Bangalore and Mumbai. The case of Nasraj of Bangalore, where many days of surveillance of warehouses storing many thousands of books was wasted due to police collusion, is typical of this trend. Other cases abound, including an unfortunate case of collusion in Gurgaon (State of Haryana) involving a repeat offender, L. D. Arora.

¹⁷ The Hindu Business Line, *Low-cost higher education books hit US stores*, February 7, 2006. The report states that "The books are being published in India at lower rates as a special gesture by American publishers for students here."

rental business. A hopeful sign has been the renewed attentiveness of the Indian film industry to this issue. Recent raiding activity has been successful in encouraging many stores to stock original product only.

Pre-Trial Procedural Burdens, Leaks, 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. For example, obstruction of the raiding process is all too common, such as leaks to the pirates before raids occur. Once the raid is run, police often only seize the specific pirated goods with 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.

Another source of harassment for right holders takes the form of counter-cases 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 right holders. These professionals use the slow court system to initiate false cases against those representing right holders in anti-piracy actions. The syndicates then create adverse publicity as an obvious tactic to defame these anti-piracy operations. MPA was targeted by these groups; cases were litigated and MPA was successful in obtaining damages in one case. Many of these cases are still pending, however.

Court Functioning – Criminal: 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. 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 convictions¹⁸ for copyright piracy, as far as industry is able to ascertain. In March 2004, and included in the above figure, was a rare conviction for video and music piracy (1,500 videos plus CDs) 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. As noted, also encouraging are longer pretrial detentions in Tamil Nadu under the Goonda Act, which allows such detentions for up to one year.

Court Functioning – Civil: The motion picture and business software industries continue to use civil cases with varying degrees of success. In 2005, the software industry noted that there have been some improvements in the adjudication of civil cases as follows:

¹⁸ There have been 800 convictions since 1997, 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. The local recording industry also states that the level of penalties being imposed is being increased. As noted in the text below, MPA recently obtained three additional convictions under Section 63B—a welcome development.

- The civil courts have begun to grant higher damage awards.¹⁹
- The threshold requirements for granting Anton Piller Orders have been progressively simplified. Courts no longer need affidavits from informants. Anton Piller Orders are granted on the basis of affidavits filed by investigators who have had telephone conversations with responsible persons in the target company. This has greatly reduced the time frame within which a right owner could take a case to court.

On the negative side, the courts are now insisting that parties file original documents at the time of the filing of the suit. Thus, right owners would need to file certified copies (which have been notarized and legalized up to the Indian Consulate). This new directive is bound to apply more pressure and inconvenience to right owners.

TRAINING

IIPA member associations continued to conduct training in 2005. For example, the Business Software Alliance (BSA) has a reasonably good working relationship with the police across India and has conducted training on IPR issues with many police divisions. Specifically, BSA provided training to police on software piracy and related IPR law in the following cities: Delhi (Police Training College), Hyderabad, Baroda, and Cochin, and planned to do so in December 2005 in Noida, Gurgaon, Pune, Ludhiana and Ahmedabad. The recording industry conducted over a dozen police training programs in 2005, conducted for various levels in the police force and also at the National Judicial Academy.

The local recording industry association (the Indian Music Industry—IMI) has conducted more than 15 training programs in India in various states. In addition, IMI has had regular meetings with the Directors General of Police in different states to highlight the impact of piracy and ask the police to conduct *suo moto* raids

The MPA has also conducted a number of trainings for police forces in conducting *suo moto* actions. Following one training in Kerala at which 800 training manuals were distributed, the police conducted 140 raids resulting in the arrest of over 67 offenders. Over 1,500 police personnel were involved.

¹⁹ In a landmark decision by the Delhi High Court, the Court awarded Rs.19.75 Lacs (US\$44,885) as damages to Microsoft® Corporation for the infringement of the intellectual property rights in its software programs. The defendants in this case were a company by the name of M/s Dytronics Pvt. Ltd. and its director, Mr. Yogesh Popat. The company operated from Mumbai. The Defendant was indulging in hard disc loading piracy, which typically involves loading of pirated versions of software programs onto computers sold to the customer, free of charge. This is the largest damage award given by a court in India in an intellectual property infringement matter, and the first ever software piracy damages award. The Delhi High Court recently has shown increasing willingness to grant damages in a series of intellectual property suits. However, there have only been a few cases to date that demonstrate increased damages are being awarded, and the case results are only anecdotal. In this case, since the award was made in the absence of the defendant, it may not be indicative of a trend in contested cases.

COPYRIGHT LAWS AND RELATED ISSUES

Proposed Copyright Amendments Finally Released for Public Comment; Many Proposals Are Deficient: India generally has a good copyright law. IIPA detailed the positive and negative provisions in that law in its 2003 submission.²⁰

IIPA recently became aware that the Copyright Office within the Ministry of Human Resources Development had posted on its website proposed amendments²¹ that had been in preparation for the last five years. In prior submissions, IIPA had indicated its grave concern that this amendment process was being conducted in secret and that foreign right holders and the U.S. government were not permitted to participate. IIPA is pleased to see that the Copyright Office has now completed its work and finally opened up the process for full public comment.

While IIPA has not had the opportunity to review fully these proposed amendments (and plans either to provide comments directly or to assist its members in commenting), a cursory review indicates that there are many amendments that are positive. However, there are other proposals which raise grave concern, particularly certain provisions which are intended to implement the provisions of the WIPO “Internet” Treaties (WCT and WPPT). There are also major revisions to the exceptions to protection provisions in the Copyright Act, which appear dangerously overbroad, particularly in the context of Internet transmissions, uploading and downloading of copyright works which are not authorized by the right holders of those works. Below we highlight a few of these concerns:

- **Unclear Protection for Temporary Copies:** The provisions defining the scope of the reproduction right seek to protect copies “stored” in a computer. However, the provisions are ambiguous with respect to whether temporary and transient copies made in the RAM of a computer are reproductions as required by the Berne Convention, the TRIPS Agreement, and the WCT and WPPT. While there are provisions later in the proposed amendments deeming that certain transient and temporary copies are not infringing copies, implying that such temporary copies fall under the reproduction right, the drafting should be much clearer and cover all copies whether they are permanently stored in a computer or merely temporary and transient in computer RAM.
- **Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention:** The proposed amendments seek to implement the anti-circumvention provisions (regarding technological protection measures (TPMs) of the WCT and WPPT. The proposed provision is seriously deficient and if enacted in its present form would be incompatible with the WCT and WPPT. The provision (Article 65A) (a) does not cover access controls and is limited only to TPMs protecting the exercise of exclusive rights; (b) covers only the “act” of circumvention and does not also cover trafficking in circumvention devices or services; (c) does not define an “effective technological measure”; (d) contains an exception which would appear to permit circumvention for any purpose that would not amount to infringement under the act (thereby almost completely eviscerating any protection); (e) creates other overbroad exceptions; and (f) provides for only criminal and not civil remedies.

²⁰ See IIPA’s 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

²¹ The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>

- **Overly Broad Exceptions:** The proposed changes to Article 52 would create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. These include (a) a broad “private copying” exception;²² (b) overbroad exceptions for copying of computer programs, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy; (c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself; (d) an overbroad exception permitting the performance of films in educational contexts and in “clubs”; (e) an overbroad exception with respect to making reproductions of books not available for sale in India; and (f) a change in the scope of the rental right.²³ These and certain other exception would violate India’s obligations under the Berne Convention and the TRIPS Agreement.

India Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to bootleg “dealers” throughout the world and over the Internet. India should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

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 provide “adequate and effective” copyright protection. In 2004, \$3.3 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 21% of its total exports to the U.S. During the first 11 months of 2005, \$3.8 billion worth of Indian goods (or 22% 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 29% increase over the same period in 2004.

MARKET ACCESS

Many market access barriers in 2005 hindered copyright owners’ abilities to participate fully in the market in India for copyright materials. Excessively high valuations of imported film prints by Mumbai customs remain of concern. Despite the encouragement of the federal government to lower entertainment taxes, disparities in entertainment taxes remain around the country. On average entertainment taxes are believed to be in the region of 35-40% and as such remain of concern to the industry. Another barrier is the discriminatory taxes in Tamil Nadu that are still being in practice applied to films dubbed into Tamil, despite a court order against this (entertainment tax on films dubbed into Tamil is 50%, while only 15% for all other films).

²²The motion picture industry is concerned that this exception can also be interpreted to permit the making of camcorder copies in theaters under the pretext of their being for private and personal use.

²³ The proposed amendment in Section 14(d), which in particular includes substitution of the word “hire” with the words “commercial rental” and the further explanation that “commercial rental” will not include rental for nonprofit purposes by a nonprofit library will only give a handle to the pirate libraries to circumvent the law.

Of particular concern to the broadcast industry are the Downlinking Guidelines introduced by the Ministry of Information & Broadcasting in late 2005. While the full impact of these Guidelines is still being reviewed, it appears they place significant disincentives on foreign investment via their tax implications for foreign broadcasters, who now must be registered in India. Additionally, a recent Bombay High Court order specifying that all films must be rated for universal viewing is of concern to foreign broadcast channels. While local broadcasters can have their films re-certified for such universal viewing, foreign broadcasters will not find it as easy or cost effective to incur this obligation, particularly bearing in mind those channels broadcast into India from foreign feeds.

A content committee constituted by the Ministry of Information & Broadcasting is currently deliberating various options for regulation of content. It is important that any such guidelines ensure that a level playing field is maintained for all broadcasters, local or foreign, and do not include any measures that would restrict access such as upper limits or quotas for content of foreign origin broadcast by any channel.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

INDONESIA

EXECUTIVE SUMMARY

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

Priority Actions Requested in 2006:

- **Sustain Raid Efforts on Major Retail Centers and “Burning” Operations in Indonesia:** Piracy rates in Indonesia have been among the highest in the world for years. In late 2005, the Indonesian National Police ran a series of unprecedented raids aimed at the heart of retail piracy and CD-R/DVD-R “burning” in Indonesia. In 2006, the test will be whether such raids can be run on a continuous and sustained basis, to rid the most notorious pirate hotspots of piracy for good.
- **Eradicate Production of Pirate Optical Discs:** Indonesia-sourced optical discs are not only harming the domestic market for copyright products, but are landing outside of Indonesia, namely, in the Philippines, the United Kingdom and elsewhere in Europe. Now that Indonesia has an optical disc statute it believes is adequate to eradicate pirate production, IIPA urges it to take actions in 2006, including inspections, seizures of pirate goods and equipment, and prosecutions of plant owners and financiers, that will test this assertion.
- **Curb Pirate Exports:** The Directorate General of Customs & Excise has not gotten sufficiently involved with the fight against pirate exports. Customs should name and direct an IPR team of agents to track and work with other agencies to investigate organized exports of pirate goods, seeking to curb substantially the sheer numbers of pirated goods leaving the docks and ports each year.
- **Sign National IP Task Force Decree:** To ensure that adequate resources are devoted to the piracy problem on a year-round basis, the President must sign and implement the National Task Force Decree, and assign sufficient numbers of officers to tackle copyright piracy and bring piracy rates down.
- **Inspect Businesses Suspected of End-User Software Piracy:** End-user piracy of business software causes the greatest losses to the business software industry in Indonesia, and piracy rates there remain among the highest in the world. The Government recently added a provision to its Copyright Law criminalizing end-user piracy. In 2006, the Government must bring more cases, including criminal cases; legalize software usage in businesses throughout Indonesia; and improve the Government’s software asset management.
- **Address Book Piracy:** Piracy of published materials runs rampant in Indonesia, including photocopying (mainly on university campuses), print piracy, and unauthorized translations. The Indonesian Government should include in its ambit of raids photocopy shops as well as distributors of pirate offsets and translations, and should implement an approach to legitimize use of published materials at schools and universities, including directives to ensure adoption of legal textbooks.

- **Lift Market Access Restrictions:** Indonesia's investment bans and barriers to a foreign role in creating and distributing copyright products are wholly inconsistent with the steps the regime has taken to reduce barriers to the Indonesian market generally and to respond to calls from the international community for market liberalization. They also violate Indonesia's bilateral pledge to the United States in 1992 that direct distribution of audiovisual product would be permitted as soon as the market was opened to the direct distribution of any other foreign goods. The various stifling market access restrictions in Indonesia should be lifted.

For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

INDONESIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	97.9	85%	100.0	87%	94.0	88%	109.6	89%	63.1	88%
Books	32.0	NA	32.0	NA	30.0	NA	30.0	NA	30.0	NA
Records & Music	24.5	75%	27.6	80%	44.5	87%	92.3	89%	67.9	87%
Motion Pictures ³	NA	NA	32.0	92%	29.0	92%	28.0	90%	27.5	90%
Entertainment Software ⁴	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS⁵	154.4+		191.6		197.5		259.9		188.5	

PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

National IP Task Force Decree: IIPA hopes that the President of Indonesia will shortly sign the National IP Task Force Decree, establishing an inter-departmental task force on IP enforcement made up of representatives of the Directorate General of IPR, Ministry of Trade, the Police, Customs and the Attorney General's office. This Task Force would hopefully ensure that adequate resources and manpower (such as that needed for the raids described immediately below) are devoted to significantly reducing piracy in Indonesia in 2006.

Recent Campaign on Retail Malls Meets Success, Massive Seizures: Beginning in November 2005, the Indonesian authorities began what appears to be the first serious effort to

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Indonesia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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 Total losses due to piracy of records & music, business software, and books was virtually unchanged, from \$159.6 million in 2004 to \$154.4 million in 2005.

tackle piracy in Indonesia in many years. The high profile and highly “secured” Ratu Plaza and Mangga Dua malls in Jakarta were both raided on the same day with each raiding party comprising around 50 officers (a much more significant show of manpower than is normally the case). As is usually the case in Indonesia, information of the raids had leaked and, as a result, the shops and counters were not staffed upon arrival. However, the Indonesian Police actually opened the shops and counters and seized the goods without the presence of the owners – an unprecedented act in Indonesia. Close to one million pirate optical discs were seized in these two operations. A few days later, the Police raided Glodok, the largest distribution center in Jakarta and one that is notoriously difficult to raid, seizing around 300,000 pirate optical discs. IIPA understands that these and some raids on “burning” operations (detailed below) were the result of instructions from highest levels of the Indonesian National Police. The Police have since given right holders assurances that raids will be ongoing in 2006 and will be followed by prosecutions. It is hoped that this reflects a real sea change from the sporadic enforcement efforts of the past few years. Whether further raids promised against Ratu Plaza and Mangga Dua proceed will be a good indication of the veracity of these claims, as past history has shown that once raided, targets become even harder to raid again due to increased “interference.” Raids are now scheduled for mid-February 2006 as pirate activity has recently picked up.

IIPA understands that the President of Indonesia will shortly issue a decree establishing an interdepartmental task force focused on IPR enforcement. The force is likely to consist of representatives of the Directorate General of IPR, the Ministry of Trade, the Police, Customs and the Attorney General's office. IIPA looks forward to learning more about this task force, its goals and its actions.

Breakthrough on Criminal Cases Out of Retail Raids, Book Piracy: It is hoped that the raids described above will be followed by swift prosecutions leading to the imposition of deterrent sentences on key pirate operators. In 2004 and 2005, industry has been heartened by what it sees as an increased recognition that raiding alone is not enough, but must be followed by swift and effective prosecutions in order to create deterrence and drive piracy levels down. For example, the business software industry has seen several of its cases proceed to criminal prosecution and conviction.⁶ Five convictions were achieved in October and November 2005 as a result of retail raids run in Jakarta in February 2005 on ITC Cempaka Mas, Ambassador Mall, and Mangga Dua Mall, with unsuspended sentences ranging from ten months imprisonment (Cybershop Mangga Dua Mall, which is on appeal), two years imprisonment (owner of Meteor Disc store, ITC Cempaka Mas), to three years imprisonment (Luis Mauwa, owner of store in ITC Cempaka Mas). These cases represent a welcome development in that they are custodial sentences, not suspended, and that the prosecutions were concluded in a reasonably short time. In one of the few cases brought against book piracy in Indonesia,⁷ a defendant was convicted on September 12, 2005 for pirating books (in a case dating back to October 2003) of six local publishers and one international publisher and sentenced to 30 months imprisonment. The defendant has appealed. IIPA is hopeful that if raiding and prosecuting continues at this pace, and with these levels of penalties, piracy rates may begin to decrease in 2006.

Optical Disc Piracy, Both Factory-Produced and “Burned”: IIPA understands there remain at least 29 plants mass-producing optical discs in Indonesia, with a minimum estimated

⁶ Cases arising from retail raids in Mangga Dua and Harco Malls in February 2004 resulted in six convictions between December 2, 2004 and January 10, 2005, all resulting in sentences of one year imprisonment (suspended for two years probation).

⁷ *In re Parlin Marbun*.

100 production lines for VCDs, DVDs, CDs, and CD-ROMs of all kinds of copyright materials.⁸ Total annual disc capacity in 2005 can be estimated at over 300 million discs. There are at least six plants (three registered) in Indonesia with “stamper” manufacturing facilities (a key production part needed to mass-produce optical discs that contains the copyright content and therefore must be covered in laws, optical disc regulations, and be subject to seizure). Indications suggest that in 2004, some factories relocated from Malaysia to Indonesia, mainly in the Jakarta area, but also in Surabaya and Batam. The result of all this factory production is that, in addition to local consumption of pirate factory-produced discs, Indonesia remains an export base for pirate CDs, VCDs, and DVDs. Pirate product sourced from Indonesia was found in 2005 in the Philippines, Australia, Hong Kong, Belgium, Denmark, Norway and the United Kingdom. Local “burning” of pirate product onto recordable discs is also becoming an increasing concern.

There have reportedly been some enforcement actions/inspections conducted at ten plants in 2005, reportedly seizing at least two lines.⁹ Charges have been laid in some cases, but there have been no prosecutions as yet. Results were better in terms of dealing with pirate “burning.” In late November 2005, the Jakarta Metropolitan Police raided a highly sophisticated burning operation, seizing 28 stack burners and over one million burned discs, the majority of which were pirate copies of U.S. motion pictures. This demonstrates both the magnitude of the optical disc piracy problem in Indonesia, and that deterrence will be virtually impossible to achieve without more raids and more criminal prosecutions in the area of production as well as those stemming from the retail piracy trade. Activity in Jakarta against plants is pushing some factories out into other regions.

Significant Levels of Signal Theft Piracy: The cable and satellite television industry in Indonesia remains in its infancy in part due to significant levels of piracy. Industry analyst Media Partners Asia estimates that there are twice as many homes receiving illegal pay television as there are receiving legal services (150,000 legal versus at least 300,000 illegal as of December 2004). Anecdotal industry estimates are an order of magnitude higher, incorporating many subscribers using decoder boxes from overseas to receive programming, including the programming of U.S. companies, without authorization. The government passed its Broadcast Law in November 2002, governing terrestrial, and cable and satellite subscription television, and paving the way for creation of an Independent Broadcast Communication (KPI) which began functioning in December 2003. Both the Broadcast Law and the Copyright Law of 2002 provide a degree of protection for broadcast signals. Enforcement to date, however, has been virtually non-existent. There are reports that the KPI is considering the initiation of anti-piracy programs and enforcement actions but no enforcement action, has been taken thus far.

End-User Piracy of Business Software: Unauthorized use of business software in businesses causes the greatest losses to the business software industry in Indonesia, and piracy rates there remain among the highest in the world (only China and Vietnam are higher of relatively major markets). While the Government is very responsive to the software industry’s needs for raids against suspected pirate end-users, and as noted above, has run some

⁸ Department of Industry (DOI) figures indicate that 22 plants have been identified, comprising 3 mastering facilities and 19 replication plants. Seven plants had SID code allocation through IFPI/Philips prior to the passage of the Optical Disc Act, five more have been allocated SID codes by the DOI; and a further thirteen applications were being processed as of January 18, 2006. There is no certain indicator of the number of replication lines but exemplars have been recently collected from 5 plants which have between them 34 injection molding machines. One licensed plant alone has 19 replication lines with a projected output of 6 million CD-Rs per month (72 million/year) in full production.

⁹ It has been reported in local newspapers that a four line VCD factory in Bogor was raided by local police in November 2005. Also, it appears the Metro Polda police raided a factory in November 2005.

unprecedented retail raids in 2005, the limited number of criminal prosecutions in this area and the sheer size of the problem have made it difficult to bring piracy rates down significantly. The Copyright Law now criminalizes end-user piracy, and four end-user raids, against targets provided by the Business Software Alliance, have been conducted by the Police since September 2004. However, given the size of the problem and the indiscriminate use of licensed software in the workplace, the deterrent impact has been negligible. A high profile conviction in such a case in 2006 would help to send a strong message to the business community.

Book Piracy Still Severe: Book piracy remains widespread in Indonesia, consisting of photocopy shops in and around universities (copying English language teaching materials, reference books, and computer-related volumes), and commercial offset printing operations throughout the country, including some that produce and market illegal reprints or unauthorized translations of U.S. books. Disturbingly, in 2004, the Indonesian Army announced an initiative to offer unauthorized electronic versions of books in Indonesia, which would be blatantly illegal.¹⁰ There were no large-scale raids against pirates of published materials, although there was one encouraging conviction (discussed above). The Government of Indonesia needs to add commercial printers and photocopy shops to those targeted for immediate enforcement and follow up prosecutions. The Ministry of Education and Culture must get involved to direct universities to use only legal copyright materials. Most universities in Java condone students and libraries buying pirated copies and photocopying them. Photocopy kiosks litter the areas around major universities such as Bandung Technology Institute, Parahyangan University and Padjajaran University. In addition to these street stalls and copyshops, mainstream bookselling chains such as Gramedia and Gunung Agung are in some cases openly stocking pirated books. The Pondok Indah mall in Jakarta is well known for featuring pirate sellers.

Internet Piracy Emerging: Internet piracy remains in its relative infancy in Indonesia, although the number of users has grown nine-fold (from 2 million in 2000 to 18 million today). Broadband penetration is still low, so most usage is through Internet cafés and purchasing hard goods from websites advertising pirate “burned” discs. Nonetheless, the business software industry noted a significant upward trend in piracy, detecting 328 software infringements online in 2004, and 594 by October 2005, representing 117% growth year-on-year. IIPA is encouraged by reports that the Police have taken actions against two “advertising” sites in 2005. These two raids resulted in seizure of 6,700 pirate DVDs, two PCs, a printer and Internet modem.

Positive Development on Government Legalization: The business software community received good support from the Government to legalize software usage within Indonesian Government ministries and is to be commended for its efforts in this regard.¹¹

TRAINING AND PUBLIC AWARENESS

The copyright industries participated in various training and public awareness activities in Indonesia:

¹⁰ 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.

¹¹ *Bisnis Indonesia*, November 22, 2005, reported,

[T]he government's IT expenditure for hardware and software reached Rp528b [US\$57.2 million] this year and was distributed to 67 departments or non-departmental government institutions all over Indonesia. The Director of Electronics and Information Technology Center for BPPT Sulisty Suhrowardi had previously said that as much as 90% of PCs in government institutions use pirated software.

- The Motion Picture Association has been active over the years in providing training to enforcement authorities. In 2004 and in particular 2005, extensive training was provided (in association with other trade associations) for the optical disc monitoring and inspection teams.
- The International Federation of Phonographic Industries conducted five training sessions in 2005, and two thus far in 2006. IFPI also is due to participate in two additional training sessions funded by USAID in February 2006.
- The Business Software Alliance (BSA) launched a “hotline” to report end-user software piracy in March 2005. The response was overwhelming with nearly 500 leads being received by the end of the year. The Government of Indonesia has been supportive of this effort.
- The BSA held a “software asset management” seminar in Jakarta (supported by the Indonesian Directorate General of IPR) on August 25, involving 324 participants from 249 companies. The event featured a keynote by Mrs. Halidah Miljani, Expert Staff of the Ministry of Trade, and Abdul Bari Azed, Director General of intellectual Property Right Indonesia.
- The BSA conducted training for the Indonesian Police Department in Bali from November 24 to 26 for police officers from all over Indonesia on issues relating to investigating and prosecuting instances of software piracy.

MARKET ACCESS BARRIERS

Trading and Distribution Rights, and Media Investment Ban: Indonesia maintains a blanket prohibition on foreign company participation in, or even investment in, importation, direct distribution, exhibition, or retailing in most copyright products in Indonesia. Presidential Decree 118 of 2000 remains in force and stipulates that all importation and distribution of films and video product be restricted to wholly-owned Indonesian companies. An annexure to the Decree lists those media sectors that are closed to foreign investment, including:

- Radio and television broadcasting service providers, radio and television broadcasting subscription service providers and print media information service providers;
- Film making businesses, film technical service providers, film export and import businesses, film distributors and movie houses operators and/or film showing services.

However, the Broadcast Law allows foreign ownership up to a 20% cap. As a law, this will override a Presidential Decree. It is believed the draft Film Law also contains a 20% foreign ownership cap.

Broadcast Law: As reported in previous years, the “Broadcast Law”¹² would, among other things, ban the broadcast of most foreign programming in Indonesia.¹³ The Independent Regulatory Commission (KPI) created by the new Broadcast Law has now been installed and

¹² Law of the Republic of Indonesia, No. 32 Year 2002, Regarding Broadcasting (into force February 2003).

¹³ Specifically, the law requires that private broadcasting institutions be established initially without any foreign investment. Subsequent foreign investments can then be made, but only up to a 20% ownership cap shared by a minimum of two shareholders. Additional restrictions in the draft legislation include: (1) a restriction on foreign managers, (2) cross ownership limitations, (3) a local content quota of 60% on broadcast television and 10% on pay-television, (4) a 30% dubbing quota on foreign programs, (5) advertising limits of 20% of total broadcasting time for private broadcast stations and 15% for public stations, and (6) a total ban against the establishment of foreign broadcast institutions in Indonesia.

has issued implementing regulations, but a competing set of regulations was issued by the Ministry of Communication and Information Technology (Kominfo), and the latter are being challenged as unconstitutional by KPI.¹⁴ Support from members of Parliament for KPI's position is believed to have led to the postponement and likely amendment of the regulations. Even with KPI's regulations, the law is onerous and the various market access restrictions should be lifted. IIPA understands that the Kominfo regulations were scheduled to be finalized after consultation with KPI by February 2006, but at the time of writing, their status was unclear. IIPA will be monitoring this situation closely.

Film Law: It is believed a draft Film Law was submitted to Parliament for consideration in December 2005. Industry has not been able to view this draft and indications that it contains screen quotas and limits on foreign participation in the film industry, among many other market access restrictions are of real concern.¹⁵ It is also highly unfortunate that the government advisory board on Film Issues, the BP2N, which has been tasked with this law, did not consider the views of foreign film producers or related associations' views in their discussions. It is suspected that this draft will follow the Broadcast Law and limit foreign participation to 20%.

COPYRIGHT LAW AND RELATED ISSUES

Previous years' reports have gone through in detail the legislative landscape in Indonesia. The following is intended to provide a summary of latest developments only.

Copyright Law: In addition to the improvements proposed in previous reports to the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) (effective July 29, 2003),¹⁶ draft "rights management information" (RMI) regulations were

¹⁴ Of concern to foreign broadcasters is that the Kominfo regulations, issued on November 16, 2005, are reported to have a number of negative features, possibly including a "made in Indonesia" requirement for pay-TV advertising. Article 24(5) of Government Regulation of the Republic of Indonesia No. 52 of 2005 Regarding Broadcasting Provided by Subscriber Broadcasting Institutions requires advertising to use a "domestic resource," although it is not clear if this requires the advertising to be made in Indonesia (e.g., it may simply mean Indonesian talent or resources had to be used). Art 24(6) requires foreign advertising to be replaced by domestic advertising, and cross-media and foreign ownership restrictions.

¹⁵ The draft was expected to install an Independent Film Commission made up of local members, and set import and screen quotas, higher entertainment taxes on film admissions to imported films, requirements that all prints be made locally, and possible restrictions on foreign direct investment in the film industry. In addition, under the draft, it was reported that only local Indonesian companies would be permitted to operate a "Film Business" or a "Film Professional Service." Another provision of the draft apparently 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." The draft also apparently specifies that only national film companies would be permitted to make film commercials, that imported films are expected to be supplementary to national product and imports should be "in proportion to local production," and although the existing film law permits films approved for all ages to be dubbed into Bahasa Indonesian, the new draft would apparently prohibit any form of dubbing except for educational, research, or information purposes, and require that all films be subtitled in Bahasa Indonesian.

¹⁶ The key improvements recommended include but are not limited to the following:

- Extend the term of protection for all protected materials, to life plus 70 years for works, and 95 years from publication for producers of sound recording.
- Confirm protection for pre-existing works and sound recordings (and performances).
- Confirm that the right of "publication" satisfies the WCT Article 8 requirement with regard to communications to the public and the "making available" of works, and afford a WPPT-compatible right including the "making available" right to right holders in sound recordings.
- Delete the compulsory translation and reproduction license which does not meet the requirements of the Berne Convention (and therefore violates TRIPS Article 9).

apparently finalized but were not issued in 2005,¹⁷ but implementing regulations regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law) are still badly needed.¹⁸

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 the basis of an incorrect declaration or under-declaration. Draft regulations went out to industry for comment in July 2001, but there has been no reported 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. Since export of pirate discs is such a crucial issue for right holders, IIPA is hopeful that the Government will share a draft for comment.

Electronic Information and Transactions Bill: The "Draft of the Law of Indonesia, No. __, Year __, Regarding Electronic Information and Transaction" has been submitted to the Indonesian National Assembly (DPR) for debate. The Bill represents an essential component of the broader vision to address ICT needs under the "Government of Indonesia's Five-Year Action Plan to overcome the Digital Divide for the Development and Implementation of Information and Communication Technologies (ICT) in Indonesia" of May 2001. The Bill focuses mainly on electronic transactions and digital signatures, but contains, in Article 24, the general provision on copyright, "Electronic information composed in an intellectual creation, internet website design and intellectual creation contained within, are protected as an Intellectual Property Right, based on prevailing law and legislations." It is unclear whether a separate cybercrime bill will be considered, but if not, then a provision which essentially implements the copyright provision of the Council of Europe Cybercrime Convention should be added.¹⁹

OD Regulations Enter Into Force: 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." The Regulations entered into force on April 5, 2005. With Indonesia fast becoming an export base for pirated optical discs, the successful enforcement of these regulations is crucial to reducing endemically high piracy levels

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- Delete Article 18(1) which appears to amount to an a statutory license for "publication of a work" by the Indonesian government "through a radio, television broadcast and/or other means," which goes beyond what is permitted by TRIPS and the Berne Convention.
 - Provide minimum level punishments including mandatory jail time, which would create a true deterrent effect.

¹⁷ The 2004 proposed RMI Regulations we reviewed appeared successful at 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 "Manag[ing] every access, the using, and integration of protected Work." 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."

¹⁸ 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.

¹⁹ Article 10 of the Council on Europe Cybercrime Convention (Sept. 10, 2001) provides that a party to the Convention will "establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system."

in Indonesia and contributing to a reduction elsewhere in Southeast Asia. The Regulations allow the Government to inspect, to seize suspected pirate goods and tools and implements used to produce them, and to prosecute plant owners for violation of the Regulations or other laws (e.g., the Copyright Law). Nonetheless, IIPA notes the severe shortcomings in these Regulations:

- No centralized licensing of prerecorded or blank optical discs.
- Requires imported pre-recorded discs to be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications.
- Does not adequately cover stampers and masters, e.g., it is not clearly stated that penalties specifically apply against illegal stampers or moulds alone.
- Does not expressly cover exports of discs, equipment and raw materials.
- Does not expressly prohibit unlawful uses/manipulation of identification code.
- Does not expressly authorize forcible entry in an inspection.
- Does not require the government to keep records of “permits” and raids run.
- Does not provide for plant closure (although IIPA understands that since business licenses can be revoked, technically, factories cannot operate without the license).
- Does not expressly impose corporate liability on individuals.

Two Ministerial Decrees were issued by the Minister of Trade and Industry, one relating to the importation of machinery, raw material, and optical discs,²⁰ and another on reporting by registered producers.²¹ The former sets forth requirements as to the importation of optical disc production machinery, raw materials (optical grade polycarbonate) and, unfortunately, finished discs (in addition to blank discs). It is feared that this importation Decree will thus be used as a tool to keep legitimate copyright owners or authorized distributors from importing discs into Indonesia.

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 2004, nearly \$1.3 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. During the first 11 months of 2005, \$1.4 billion worth of Indonesian goods (or 13.0% 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.

²⁰ Regulation of Minister of Trade of the Republic of Indonesia 05/M-DAG/PER/4-2005 (May 2005) (which repealed Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 645/Mpp/Kep/10/2004 (October 18, 2004), Regarding Stipulations on Importation of Machinery, Machine Equipments, Raw Material and Optical Disc.

²¹ Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 648/Mpp/Kep/10/2004 (October 18, 2004), Regarding Reporting and Monitoring of Optical Disc Industrial Company.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY

Special 301 Recommendation: Israel should remain on the Priority Watch List.

Actions to be Taken in 2006:

- **The Knesset Should Reject Attempts by the Government to Pass Copyright Law Hostile to Right Holders and Which Could Violate Israel's Bilateral Obligations to the U.S.:** IIPA understands the Knesset has passed a first reading of the Copyright Amendment Bill 2005. This Bill significantly weakens protection for right holders in sound recordings, threatening their very livelihoods, and could also result in Israel violating its bilateral obligations and overruling a case decision of 2004 in favor of foreign right holders. The Knesset should send this Bill back to the Executive for reconsideration in light of the many points made in this submission and previous submissions to the Israeli Government. Rather than moving backward on copyright, as this Bill proposes to do, the Israeli Government should move forward, including adequately protecting copyright in the digital age and fully implementing the WCT and WPPT. Other attempts to change the copyright legislation include a proposal to substantially reduce a right holder's ability to decide how and within which structure to exploit their public performance and broadcasting rights, seriously undermining their negotiating position with respect to users of recorded music.
- **Fortify Special Police IPR Units:** The Special Police Units function well in Israel, but they require significantly more manpower to be as effective as possible, and should have the authority to take actions *ex officio*. The National Police Unit should have the authority to coordinate districts for more effective and sustained enforcement.
- **Give Copyright Piracy Cases Priority Attention:** Police attorneys and prosecutors should expeditiously handle incoming copyright piracy files, proceed with criminal prosecutions of pirates within shorter periods of time, and ask for substantially higher penalties.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.¹

¹ Because of the importance of the legislative issues to IIPA this year, we dispense with providing piracy and enforcement updates. The issues remain similar to those reported in the IIPA 2005 Special 301 report on Israel which can be found at <http://www.iipa.com/rbc/2005/2005SPEC301ISRAEL.pdf>.

ISRAEL
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(IN MILLIONS OF U.S. DOLLARS)
AND LEVELS OF PIRACY: 2001-2005²

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	28.0	35%	34.0	40%	40.0	63%	34.0	50%	40.0	25%
Business Software³	32.9	34%	30.0	33%	35.0	35%	29.9	37%	36.9	40%
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
Motion Pictures⁴	NA	NA	30.0	40%	30.0	50%	30.0	50%	15.0	50%
Entertainment Software⁵	NA	95%	12.4	88%	NA	75%	17.2	68%	66.5	89%
TOTALS⁶	61.9+		107.4		106.0		112.1		159.4	

COPYRIGHT AND RELATED LAWS

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).⁷ The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).⁸ The various laws have been amended a number of times over the years.⁹ Nonetheless, there are a few TRIPS

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Israel, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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. In 2005, cooperation between the Customs authorities and entertainment software publishers was good, resulting in seizures of pirated video games on optical disc, particularly shipments from Ukraine. One ESA member company reports that Israeli Customs seized several shipments of pirated entertainment software on optical media being imported into the country from Ukraine; the pirates use false documentation to import pirated products into the country. A seizure action dating back to 2004 is still pending against one Ukrainian importer. Internet piracy is increasing as broadband penetration also increases. Notwithstanding good cooperation with border authorities, piracy at retail remains problematic as does the lack of deterrent penalties being meted out by judges.

⁶ Total losses due to piracy of records & music, business software, and books remained roughly the same, from \$65 million in 2004 to \$61.9 million in 2005.

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 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. 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

deficiencies in practice, including the unavailability in practice of adequate civil damages, and the inadequacy of the statutory damages system as a substitute.¹⁰

Copyright Bill – 2005: The “Copyright Bill – 2005” (published by the Government of Israel on July 20, 2005), which was reportedly passed by the Knesset on first reading, apparently aims to modernize Israel’s protection of copyright, and to implement the key international agreements with respect to copyright, including the Berne Convention,¹¹ which is incorporated into the WTO TRIPS Agreement,¹² as well as aiming to adhere to Israel’s current bilateral obligations.¹³ The Draft also included at least some issues addressed in the WIPO “Internet” Treaties, the WCT and WPPT.¹⁴ We obtained an unofficial translation of the draft Bill that was published by the Government and have provided comments to the Knesset Economics Committee.

Summary of Comments: IIPA highlights directly below several areas where the draft would result in weakening of protection (e.g., with respect to phonograms), or in violations of Israel’s international and/or bilateral commitments, and other areas which should be but are not covered in this draft (e.g., protection of “technological protection measures” used by creators to protect their creations).¹⁵

- By proposing Section 10 on “mutuality” (material reciprocity), the Draft could, if passed without change and if implemented through an Order, result in an **abrogation of Israel’s TRIPS obligations** to provide national treatment for works. We assume that this is not the intent of retaining this provision (from the old U.K. statute), but TRIPS-compatible national treatment for works should be confirmed.
- The application of “material reciprocity” would mean that foreign sound recordings would lose important rights provided under the current law, and would **violate Israel’s bilateral commitments to protect U.S. sound recordings on the basis of national treatment**.
- Draft Section 45 **fails to provide Berne- or TRIPS-compatible retroactive protection** for works and phonograms.
- The **legal protection of phonogram producers is seriously weakened** under this draft, which is an unwarranted discrimination with respect to other right holders.
- **End-user piracy appears not to be considered a crime** in the Draft.

therein”). The amendment also improves presumptions regarding copyright ownership that apply to both civil and criminal proceedings, although it remains unclear in early 2006 how this provision is being interpreted in practice. The amendment also imposes 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 offense from being committed), and doubles fines for copyright offenses committed by companies.

¹⁰ 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.

¹¹ Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on September 28, 1979).

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1994).

¹³ Bilateral commitments include the U.S.-Israel bilateral copyright agreement reached on May 4, 1950, and consisting of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, Ambassador of Israel. The Agreement provides assurances from the government of Israel that “all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions.”

¹⁴ See WIPO documents CRNR/DC/94 (the WIPO Copyright Treaty, or WCT) and 95 (the WIPO Performances and Phonograms Treaty, or WPPT), and, for the agreed statements concerning the treaties, see WIPO documents CRNR/DC/96 and 97.

¹⁵ There are also many positive aspects of the Bill, and we do not list those aspects here.

- The Draft appears to **require proof of “trading purpose”** or an actual sale for all criminal violations, which **would not satisfy Israel’s TRIPS obligation** to criminalize piracy on a commercial scale.
- There are **no provisions to protect against circumvention of technological protection measures (TPMs)** used by creators to protect their works from unauthorized copying/use of exclusive rights or from unauthorized access, or against trafficking in circumvention devices/providing circumvention services. Israel should **implement this key WIPO Treaties requirement** (as nearly 90 countries have now done) and join the WIPO Treaties.
- The **publication right appears to provide a WIPO Treaties-compatible** interactive digital right, but the scope of that right should be confirmed.
- **The reproduction right** in the Draft, read with the exception in Section 26 for certain indispensable transient reproductions, **appears to protect temporary copies**, as the drafters apparently intend to do, but does not do so explicitly. This can be accomplished with minor changes to the draft.
- Since **no automatic or express point of attachment** for foreign creations (including phonograms) is provided in the law in accordance with Section 9, an appropriate **“Order” must be issued** referring to, e.g., the Berne Convention, TRIPS Agreement and other bilateral and international agreements to which Israel is a party, before the transition period for the Draft has elapsed in order to ensure that there is no lapse in continuous protection.
- The **Draft’s rental right** in Section 11(7) as modified by Section 17 **violates TRIPS** and must be fixed.
- Several **exceptions to protection run afoul of the Berne Convention and the TRIPS Agreement**. There are concerns with Israel’s proposed adoption of the four “fair use” factors from U.S. law, with the possible overbreadth of exceptions as to computer programs, temporary copies, public performances, and libraries/archives.
- The definition of “infringing copy” in Section 1 would **exclude from protection** any import for which distribution in Israel is not authorized, i.e., so-called **“parallel imports.”**
- **Term of protection for phonograms should be extended** to the same level as for other creations.

Detailed Comments: For reference and for the public record, IIPA makes the following comments on Copyright Bill – 2005:

National Treatment Can Be Denied Under Draft: Section 10 of the Draft proposes,

The minister is allowed, upon the approval of the government, if discovered that a certain country does not grant proper protection to creations of a creator who is an Israeli national, to restrict by order the rights prescribed by this law, wholly or partly, in relation to creations of creators who are nationals of that country; had the Minister prescribed so, the order shall be valid as to creations created after its entering into validity.

This provision permits the minister to deny rights to foreign right holders that are provided to Israeli nationals, if the foreign right holders’ countries deny such rights to Israeli nationals – so called “material reciprocity.” Imposition of material reciprocity would violate the principal of “national treatment” whereby countries treat foreign and domestic right holders alike. National treatment is a core principle of the TRIPS Agreement (Article 3) (as well as the Berne Convention), and by passing Section 10, Israel would put itself in a position of violating TRIPS (and Berne) if it ever issued such an order. Foreign copyright owners would be negatively prejudiced by such a change, and foreign right holders may have no recourse but to seek an

international remedy under TRIPS if Israel effectuates such a drastic change. Section 10 of the Draft should be deleted and the principle of national treatment should be applied to all subject matter; at least, the Israeli government should acknowledge that its treaty (multilateral and bilateral) obligations are controlling, and that the government will therefore never apply (i.e., never issue an order to apply) material reciprocity to copyright protected works subject to treaty obligations.

Application of “Material Reciprocity”: Section 8(c) and 10 also could violate Israel’s commitments as to sound recordings. Under the 1911 U.K. Act, adopted by the Order, 1924, as amended, in Israel, Israel has long protected sound recordings as if they were “musical compositions,” i.e., as “works.” Up until now, Israeli sound recordings and foreign sound recordings received equal treatment (“national treatment”) in Israel, and also received the same treatment as other works, including the full panoply of exclusive rights, which include public performance and broadcasting. Section 10 would allow Israel to single out those foreign countries which do not provide such exclusivity, and deny these important rights to legitimate right owners in sound recordings solely on the basis of their nationality. In other words, while Israeli right holders would receive full rights, foreign right holders could be discriminated against. Discrimination through the application of “material reciprocity” is exacerbated by the fact that the copyright point of attachment is not even apparently provided for foreign sound recordings except as to the rights of reproduction, making available and rental. See Draft Section 8(c), which in effect provides that only phonograms created by Israelis enjoy the full set of exclusive rights. Other phonograms are protected if they were first or simultaneously published in the territory of Israel, but are not granted the important exclusive rights of broadcasting and public performance.¹⁶ Such discrimination is unprecedented in Israel’s copyright history and, at least with respect to U.S. sound recordings, violates Israel’s legal obligations.

Israel’s obligation to afford full national treatment to sound recordings was established by the 1950 U.S.-Israel Bilateral Copyright Agreement. That Agreement, reached on May 4, 1950, consisted of an exchange of notes between U.S. Secretary of State Dean Acheson and Eliahu Elath, Ambassador of Israel, providing 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.” Works “published in Israel” receive full rights, including public performance and broadcasting, and works includes sound recordings in Israel to the present day, thus, sound recordings first published in the United States or in Israel must receive the same exclusive rights.

The requirement for Israel to provide equal treatment in Israel for U.S. sound recordings as for Israeli sound recordings was confirmed in Israel in 2004, through an important court decision (the April 30, 2004 decision of the Restraints-of-Trade Tribunal in Jerusalem in the matter of IFPI-Israel) and another exchange of letters between the United States and Israel. The court, notwithstanding the Israeli Ministry of Justice’s proffered opinion that U.S. sound recordings are not protected in Israel, decided in favor of IFPI-Israel, and confirmed copyright

¹⁶ While Section 9 provides that the government of Israel may achieve point of attachment through an Order granting protection to right holders from countries belonging to international treaties to which Israel is a party, no such Order has apparently been issued, and implementing regulations with regard to Israel’s accession to the Rome Convention in 2002 indicate, in Section 3, that protection is provided to “phonograms the producer of which ... is a national of a Member State or (the phonogram) was first published in a member state – in respect of reproduction [or] is a national of a Member State that grants similar rights to Israeli phonogram producers or Israeli performers and listed in the appendix – in respect of the direct use for broadcasting and public performance.” Thus, the intent is clear to discriminate against foreign right holders in sound recordings.

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 (it was a given and not in dispute that Israel must provide national treatment for works).¹⁷ The Court stated: “we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel.”

In late 2004, the United States Trade Representative exchanged letters with the government of Israel, in which the Israeli government confirmed that it had instructed the Ministry of Justice staff to follow the court’s interpretation of the 1950 Bilateral Agreement, namely, that Israel will continue providing national treatment for U.S. right holders in sound recordings. The government should now issue in writing an assurance that the meaning of its commitment is that material reciprocity will never be applied in Israel. As noted, we recommend that Section 8c be amended so as to grant all foreign phonogram producers the full set of rights granted to Israeli nationals and section 10 be deleted and that the principle of national treatment be applied as to all subject matter.¹⁸

Retroactivity and Rule of the Shorter Term (Draft Section 45): Draft Section 45 intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel’s obligations under Article 7(8) and 18 of the Berne Convention. Namely, Draft Section 45 provides, “The period of a creation copyright as detailed shall not be longer than the period of copyright that this creation has in its original country.” Article 18 of the Berne Convention requires that Israel protect “all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the “term shall not exceed the term fixed in the country of origin,” not the term that the creation “has” as in the Israeli provision. It is well understood that the “term fixed” means the term the work would have enjoyed had all formalities been complied with. Thus, Israel’s Draft Section 45 is revealed to be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under the Berne Article 18 retroactivity principle, must be protected in Israel. Draft Section 45 must be amended to ensure that it meets its international obligations.

Weakening of Protection for Phonograms: Whereas under the previous legal regime, phonograms were regarded as works, and thus entitled (with the limitation for mechanical reproductions) to all the exclusive rights of other works (e.g., the right to “produce, reproduce, perform ... the work”), under the Draft, phonograms are granted substantially more limited

¹⁷ The Court quoted more of the 1950 exchange of letters between the Israeli Ambassador in Washington and the U.S. Secretary of State in May 1950, as follows:

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]

¹⁸ We note that to comply with the 1950 Bilateral Agreement, Israel must at least protect U.S. sound recordings based on the principle of national treatment

rights. Thus, phonogram producers receive financial rights in the phonograms, but these rights are limited, e.g., the public performance right and broadcast right is limited to “commercial” phonograms, meaning phonograms “published for commercial purposes.” The changes result in an overall weakening of protection; the Israeli government should not permit such a weakening to occur. Draft Section 4 further confirms this downscaled treatment for phonograms in the Draft, ending over half a century of equal treatment, and denying right holders in phonograms rights they previously held.

IIPA hereby expresses its deep objections to the language in the “explanation” to Section 4 which states in pertinent part:

In the final section of sub-clause (a)(2) it is proposed to determine that the phonograms be protected as a different type of creation, to distinguish from the situation today, when records are protected by copyright as though musical creations (see clause 19(1) of 1911-Law). This separate classification is justified by the fact that records are *administered by rules different from the rules applied on other protected creations in the international marketplace*, and same regards the proposed law as to the kind of rights *and the period of the copyright*. Also, differently from other protected creations, *a record may not be "original" as it is prevalent in other countries*. [emphasis added]

This statement reveals the extreme prejudices and biases of the drafters against protection of sound recordings, and the emphasized portions of the above in fact belie the current commercial realities. First of all, in at least 20 countries today, including in the United States, phonograms are administered by the same rules from those applied to ‘other protected creations in the international marketplace’; the catalog of produced and recorded music would be far smaller if these countries did not protect sound recordings as they do other works. Also, there is no reason to discriminate regarding the term of protection for phonograms. Phonograms are protected for greater than 50 years in at least 17 countries around the world, and the number providing increased terms is growing each year. As artists’ local catalogues get older, and with increased life expectancies, governments recognize that increasing the term of protection is a chief way to ensure creators properly can reap the benefit from their phonograms. Again, the proposed weakening belies the tradition in Israel of protecting phonograms as though they were musical works.

Still No Clear Coverage of End-User Piracy as a Crime: The unauthorized use of business software and other copyright materials in a commercial setting causes grave harm to legitimate right holders. To the extent that such illegal uses result in significant unjust enrichment (i.e., on a commercial scale), such activities must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. Unfortunately, while the Israeli government has considered this issue for many years, with some within the government advocating criminalizing end-user piracy, the Draft apparently fails to do so. Section 50 dealing with “indirect” civil infringements does make it illegal to “hold” (possess) for “commercial purposes” which we believe may cover many end-user situations. However, Section 63 dealing with criminal infringements only covers “Holding a infringing copy of a creation, in order to trade it.” Since end-user piracy does not normally involve a “trade” (monetary exchange), it appears this form of piracy is left out of the criminal statute, in violation of TRIPS.¹⁹

¹⁹ 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.

Other Criminal Offenses Limited by Necessity to Prove “Trading Purpose”: A major shortcoming in the Draft’s criminal provisions is the apparent necessity to prove “trading purposes” for criminal liability to attach. Such proof requirements are problematic in the digital environment, and run afoul of Israel’s obligation under TRIPS to criminalize at least piracy on a commercial scale. “Commercial scale” piracy may cause significant “commercial scale” harm to a right holder notwithstanding that there is no purpose to trade in infringing materials. Examples would include uploading pre-release films onto 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 “trading purpose.”

No Provisions to Protect Technological Protection Measures from Circumvention: There are no provisions to protect against circumvention of technological protection measures (TPMs) used by creators to protect their works from unauthorized copying/use of exclusive rights or from unauthorized access, or against trafficking in circumvention devices/providing circumvention services. TPMs are key enabling technologies for healthy electronic commerce, and protection of TPMs is a key feature of the WCT and WPPT.²⁰ Israel should implement this key WIPO Treaties protection (as nearly 90 countries have now done) and join the WIPO Treaties. There are also no provisions dealing with “rights management information” (RMI), which right holders may use to facilitate licensing. RMI protection is another feature of the WCT and WPPT that the government of Israel should take the opportunity presented by the current amendments to implement.

Unclear Whether Draft Affords Broad Communication to the Public Right: Section 11(5) provides the exclusive right of “Publicizing [alternatively translated as ‘provision’] of “Making Available of the creation as stated in paragraph 15 – as to all types of creations.”

²⁰ Below is an example of specific implementation language that we believe adequately addresses the WCT/WPPT requirement on TPMs:

- (1) Any person who
 - (a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that (a) controls access to a protected work, or other subject matter, or that (b) restricts the exercise of an exclusive right provided in this Law; or
 - (b) manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, which:
 - (i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
 - (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
 - (iii) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;shall be liable, upon the suit of any injured party, to civil relief by way of damages, injunction, accounts or as otherwise provided in this Law. Any person, other than a nonprofit library, archive, or educational institution, that is found to have engaged willfully in such activities and either (a) for purposes of commercial advantage or private financial gain, or (b), in the case of a violation of (1)(b), on a scale which inflicts commercial injury on any party, shall be guilty of a criminal offense as provided in Section 62 of this Law.
- (2) ‘effective technological measure’ means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, or other subject matter, or protects any copyright or any rights related to copyright as provided by this Law.
- (3) The prohibition in this Section prohibits circumvention of technological measures and does not require an affirmative response to such measures. This Section does not require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure. This subsection does not provide a defense to a claim of violation of Section (1), so long as such product does not otherwise violate Section (1).
- (4) A violation of this Section is independent of any infringement that might occur under this Law.

Section 15 provides, “Making available of the creation is the making an act with the creation that allows members of the public to access it at the place and time they choose.” This newly enumerated right apparently does not provide the broad “communication to the public” right of Article 8 of the WCT (i.e., it is only the “making available” right – the interactive right).²¹ The explanation to Section 11(5) states,

This new right, anchored in the proposed provision, is the right for making available of the creation, such as making it available for internet surfers. This right is based on new international conventions (see the Explanation to the proposed paragraph 15), and it is suggested to implement it on all kinds of creations, including records, all above in coordination with this said conventions.

The explanation to Section 15 states,

The right of making available is based on the new conventions of WIPO 1996 – WCT Convention and WIPO Convention on the rights of recording producers and performers WIPO Phonograms and Performances Treaty-WPPT, and its aim is to determine the right which specifically refers to making the creation available to internet surfers.

It appears from the explanations that the drafters intended to cover the broad communication to the public right (by specific reference to the WCT), but that the wording chosen may not be broad enough. It may be that, as an application of what Dr. Mihály Ficsor (former Deputy Director General of the World Intellectual Property Organization – WIPO – who presided over the 1996 Diplomatic Conference which resulted in the conclusion of the WCT and WPPT) has referred to as “the umbrella solution,” Israel intends to come into compliance with WCT Article 8 (and the respective rights afforded in the WPPT) through a combination of the Section 11(5) and 15 right, and the traditional rights of broadcasting and public performance.

Reproduction Right (Temporary Copy Protection): The reproduction right in Paragraph 12(1) along with the exception in Paragraph 26 apparently confirms that Israel protects temporary copies. However, the wording and explanation is awkward and may give rise to confusion. First of all, it is unclear what is meant by “in a tangible way.” The explanatory note indicates this concept may be a crystallization of court cases over the years, and yet, it is unclear whether “in a tangible way” can be reconciled with protecting reproductions “in any manner or form” as required by the Berne Convention and TRIPS. Nonetheless, Paragraph 12(1) seems to answer this question in the affirmative since by its own terms “[s]torage of the creation in an electronic device or any other technological device” is one example of reproductions “in a tangible way.” That phraseology could be improved by making it technology-neutral, as opposed to the phrases “in an electronic device” or “technological device” which may be read or interpreted to limit the scope of reproductions to something less than “in any manner or form.”

The WIPO Copyright Treaty confirmed that the reproduction right should not be limited depending on the duration of a copy. The Agreed Statement concerning Article 1(4) of the WCT (and the comparable provision in the WPPT) states, “[t]he reproduction right, as set out in Article 9 of the Berne Convention ... fully appl[ies] in the digital environment, in particular to the use of

²¹ An alternative translation provided to us translates Section 10(5) as “provision of the work to the public” which is defined in Section 14 as “provision so that individual members of the public shall have access to the work [at] such [a] place and at such time as they may personally choose.”

works [performances and phonograms] in digital form,” and that “storage of a protected work in digital form in an electronic medium constitutes a reproduction....” As WIPO has explained, the 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. The Israeli drafters appear to intend the above interpretation, since they intend to meet the requirements of the Berne Convention “in any manner or form,” and since Paragraph 26 draws out an exception for certain indispensable transient reproductions. To better reflect this outcome in the Draft, we believe Paragraph 12 should be amended to read:

12. The duplication of a creation is making a copy of a creation in any ~~concrete~~ way, **directly or indirectly, temporarily or permanently, in whole or in part**, including –

(1) Storage of the creation in an ~~electronic form device or any other technological device~~;

Point of Attachment – Need Issuance of Order to Ensure Protection: Draft Section 9 provides that foreign works/phonograms that do not otherwise qualify for protection (e.g., by first publication in Israel) will be protected on the basis of international treaties pursuant to a Ministry of Justice “order.” Since, therefore, this confirms that there is no express point of attachment for foreign creations provided in the Draft, an appropriate “Order” would have to be issued referring to the Berne Convention, TRIPS Agreement and other bilateral and international agreements, before the transition period for the Draft has elapsed in order to ensure continuous protection. Preferably, the Draft should be amended to expressly provide a point of attachment, such as:

The provisions of this Law shall also apply to works, phonograms that are eligible for protection in Israel by virtue of and in accordance with any international convention or other bilateral or international agreement to which Israel is party.

Draft Rental Right Violates TRIPS: The Draft rental right in Section 11(7) as modified by Section 17 violates TRIPS and must be fixed. First, Article 11 of TRIPS refers to the rental of “originals or copies” of their works (applied *mutatis mutandis* to sound recordings in Article 14.4 of TRIPS). Section 17(1) of the Draft only refers to copies and must be amended. Second, and more importantly, Section 17(b), which exempts from copyright protection renting out creations by “a public library or a library of an educational institute,” apparently does not carve out computer programs and phonograms. To the extent that computer programs and phonograms are subject to the Section 17(b) exclusion, the provision probably violates TRIPS; rental even under the terms of Section 17(b) would certainly impinge on the exclusive right, would conflict with a normal exploitation of the work and would unreasonably prejudice the legitimate interests of the right holder. Other laws contain minor allowances of lending a computer program for a nonprofit purpose by a nonprofit library, but only on condition that the library affix a notice regarding the rights involved to the package.

Exceptions: In light of the long list of exceptions, it is essential that the law implement expressly the well established Berne “three-part test” (incorporated into TRIPS), preferably by adding the test in Section 18 and making it applicable to Sections 19-32. In other words, it should be codified in Section 18 that no exception in Israel’s law (whether fair dealing, “fair use,” or a specific exception) may be applied: in other than special cases; in a way that conflicts with a normal exploitation of the work; or in a way that unreasonably prejudices the legitimate

interests of the right holder. Such a provision would provide needed guidance to the courts that they must respect international norms in their interpretation of fair dealing (and other exceptions). We note that some of the exceptions listed in Sections 19-32 of the Draft run afoul of the Berne three-part test, especially if applied in the digital environment. We note the following as among the specific problems/issues that must be addressed in the exceptions sections:

- **Proposed Application of U.S.-Type “Fair Use” Factors (Draft Section 18(b)):** At the outset, we note that Section 19(a) attempts to adopt the U.S. “fair use” test by stating that “fair dealing with the creation is allowed, among others, for the following purposes: self study, research...”. Section 19(b) includes a list of factors that are similar to those in place in the United States and the explanatory notes clarify the intention to enact a non-exhaustive list of purposes, which would allow enough flexibility to the courts in determining whether a particular use is “fair.” We are very concerned that the result of this change is that considerable case law interpretation in Israel on “fair dealing” may be thrown out in favor of as yet undeveloped factors in Section 19(b). By contrast, in markets like the U.S., which employ very similar factors to those set out in proposed Section 19(b), many years of jurisprudence have provided society with considerable clarity on the boundaries of “fair use.” There is a significant risk that in Israel the adoption of these factors at this time might be viewed by the community as a free ticket to copy. This would have disastrous consequences, and thus we urge the Israeli Government to re-examine whether it is wise to introduce these factors, rather than relying on Section 19(a), which sets out the long-established “fair dealing” principle, followed by specific exceptions dealing with certain special cases (Sections 19-32, but see comments below). Finally, if the factors in Section 18(b) are to be ultimately adopted, Section 19(b)(1) especially needs to be amended to properly narrow the scope of the “fair use” inquiry:

(b) In order to examine the fairness of a use of the creation for the purposes of this paragraph, the following shall be considered:

(1) The aim of the use and its type, ***including whether the use is of a commercial nature or is for non-profit educational purposes;***

- **Computer Program Exceptions (Backup and Interoperability) (Draft Section 24):** The current Draft exceptions as to computer programs run afoul of international standards and must be more narrowly tailored. First, Section 24(a) must be limited to a single copy for backup purposes. Section 24(b) appears to allow for reproduction or adaptation for purposes that go beyond interoperability, and do not contain the safeguards to ensure that the copy being made is not otherwise available, is limited to the portion of the work needed for purposes of achieving interoperability, etc. The explanation of Section 24(b) is not that helpful, as it simply states that its purpose is in part to allow “using computer software to develop new programs as well as more effective use of the subsisting programs.” Assuming the purpose is to enact a provision that allows lawful users to achieve interoperability, but keeping in mind the three-part test for exceptions, the vague language used in the current Draft exception must be narrowed to comport with international standards. Cf. European Directive on the Legal Protection of Computer Programs,²² Articles 5 and 6. We propose that Section 24(b) of the Draft be changed as follows:

²² 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

(b) The duplication of computer software or the making a derived creation is allowed when a person has a licensed copy of the computer software, to these purposes, and to the extent needed for [these] purposes:

(1) ***use of the computer program by the lawful acquirer in accordance with its intended purpose, including for ~~G~~correcting errors in the computer software;***

(2) ~~or obtaining the information necessary for fitting it to an independently created computer program with other programs, provided that the following conditions are met: the computer system or other computer systems or other computer software, for usage purposes;~~

(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) Fitting a computer system or other software to enable the creation by use of said computer software.~~

(3) ***The provisions of paragraph 24(b)(2) 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.

- **Temporary Copy Exception (Section 26):** As noted above, Sections 11(1), 12, and the exception in Section 26 confirm that the drafters intend that there be protection for temporary copies in Israel. We have suggested above how the drafters can expressly provide for this in Section 12. The Draft exception language is vague enough to cause great concern, e.g., “for other legal use of the creation” is overly broad, and this language must be narrowed in order to meet the Berne and TRIPS standards. We also suggest other changes which are needed to ensure that the exception for certain temporary reproductions comports with the Berne Convention’s well established three-part test as follows:

26. A temporary duplication of a creation ***is allowed if it:***

(a), is merely incidental, and as an integral part of a technological process aiming only to allow the transmission of the creation between the sides in a communication network by a mediator, or is a temporary duplication of a creation that is within an operation that makes a digitally stored ~~for~~ other legal copy of a work accessible; and

(b) the reproduction use of the creation is made by a person allowed authorized by the right holder or by law; and

(c) the reproduction is undertaken within an incidental, technologically inevitable step for performing an authorized act consequential to the transmission or to rendering the work accessible, is within the normal operation of the apparatus used, and is carried out in a

manner which ensures that the copy is automatically erased and cannot be retrieved for any purpose other than that provided for in the preceding sub-sections, ~~on condition that the temporary copy does not have an pecuniary value in itself.~~

- **Inappropriate Expansion of Artistic Work Exception (Draft Section 27):** Draft Section 27 as currently crafted violates Berne and TRIPS. The explanation describes this Section as adopting from the U.K. Act the exception in Section 2(1)(ii) of that Act whereby a visual artist could re-use a mold, so long as the “main design” of the work was not repeated or imitated. In this case, Paragraph 27 refers to not repeating the “essence” of a work; essentially, this invites the author of any work (including sound recording) to create adaptations or derivative works, regardless of whether the author has already transferred rights in the work/phonogram. This in essence grants a new moral right to continue to exploit a work, and thus not only impinges upon several exclusive rights, but imposes a severe restriction on the ability to freely contract. This Section must be curtailed to the original purpose of the U.K. Act or deleted.
- **Public Performance Exception (Section 29):** Draft Section 29 creates an exception for certain public performances of plays, but also possible phonograms or motion pictures, mainly in school settings. The exception must be further limited in order to meet international standards; most importantly, it should be limited to a face-to-face educational setting, and to a performance where no profit is made, *cf.* 17 U.S.C. § 110 (U.S. Copyright Act) (“without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if there is no direct or indirect admission charge or if the proceeds are used exclusively for educational purpose and not for private financial gain”). Also, if a copy is involved, the copy used must have been lawfully made.
- **Library/Archive Exception (Draft Section 30):** Draft Section 30 as written fails to meet the Berne/TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and since the explanation makes clear that this would allow a “digital” copy to be made, the statute must provide assurance that the reproduction in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the physical premises of the library or archives. Otherwise, it violates Berne and TRIPS. Section 30(b) as drafted is too open-ended to comport with international standards. By contrast, 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) allows for limited inter-library transfer of a single copy of one article from a compilation or periodical, in limited circumstances, or of an entire work, but only where the work cannot be obtained at a fair price. The drafters should reexamine provisions such as Section 108 of the U.S. Copyright Act to ensure that the Berne/TRIPS standard is met in the Israeli draft.

Term of Protection for Audiovisual Works and Sound Recordings: 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.²³ The international trend is to provide at least seventy

²³ 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.

years for both audiovisual works and sound recordings, and the government of Israel should not do the creators of audiovisual works and sound recordings the extreme disservice of prejudicing them by providing shorter terms.

Parallel Importation: The definition of “infringing copy” in Paragraph 1 would exclude from protection any import for which distribution in Israel is not authorized, i.e., so-called “parallel imports.” Parallel imports of copyright material ultimately harm local distributorships, and increase the likelihood that piratical product will be “mixed” in with shipments of parallel imports, making piracy harder to detect and enforcement more difficult. The government should reconsider.

Civil Remedies (Statutory Damages): Section 58(a) proposes statutory damages in the amount of NIS100,000 (US\$21,277). These statutory damages are awarded at the discretion of the court (“the court is allowed, at the claimant's request”) rather than at the election of the claimant, which is a major weakness. However, we commend the drafters for increasing the maximum, while noting that abolishing the minimum may make claimants reluctant to request statutory damages. We continue to be concerned that, even with the higher maximum, the failure to consider a “per-copy” damage award decreases the likelihood, especially in a case causing countless infringing copies of numerous titles, that the statute will have a deterrent impact on piracy. Further, Draft Article 60 makes it even more unlikely that civil cases can ever be deterrent in Israel, since no compensation will be awarded when “the offender did not know or could not have known, at the time of the violation, that there is a copyright on the creation.”

Destruction/Forfeiture Not Adequately Provided (Draft Section 62): Draft Section 62 provides for the possibility of destruction of infringing goods, but also gives courts the ability to order the “transfer of the ownership of the infringing copies to the claimant, if he had asked for, in exchange of payment their value as if the copyright was not breached or in exchange of any other payment as the court shall see fit.” The explanation given as to why this latter provision is necessary is that “the ownership of infringing copies by the claimant might be unreasonable, especially when the infringing copies, being physical objects, have a pecuniary value much higher than what is implied from the violation of the creation copyright (for example, the copy of a sculpture poured in gold, the pecuniary value of the raw material might be higher or equal to the pecuniary value of the creation).” This example seems far-fetched, and it is highly unfair to force right holders in mass-market copyright materials to pay the infringer's costs for the infringement, e.g., for the polycarbonate used to make the pirate CDs and the glass or metal used to make the masters of the disc. This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort.”

Ex Parte Civil Searches (Violations of TRIPS): In accordance with the TRIPS Agreement, Israel must provide for search orders to be available even without the presence of the defendant. This is not provided in the Draft.

Injunctive Relief: Nowhere in the draft is injunctive relief provided for.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

LEBANON

EXECUTIVE SUMMARY

Special 301 Recommendation: Lebanon should remain on the Priority Watch List in 2006. In addition, because Lebanon fails to meet the criteria for benefits under the Generalized System of Preferences trade program, Lebanon's GSP benefits should be immediately suspended.

Actions to be Taken in 2006:

- **Immediately Establish Special IPR Unit:** Piracy in Lebanon remains serious. Interior Minister Hassan Sabaa agreed to and officially supported the establishment of a Special IPR Unit in the Lebanese Judicial Police with 25 officers. This Unit must be made operational as a matter of the highest priority. The new Unit should take actions *ex officio*, running market sweeps, seizing pirate materials (optical discs, pirate photocopies of books, offset print books destined for export, etc.), arresting infringers, and forwarding case files to prosecutors for criminal proceedings. Market raids should result in seizure of all suspected pirated goods, as well as tools and implements (i.e., computers) used in piracy. IIPA cannot emphasize enough that leaving computers with copyshops after a raid is the most detrimental thing the authorities can do. These machines should be immediately seized and removed. Otherwise, pirates quickly make back-up copies via USB ports before the authorities return (often weeks or months later), when they finally have a court order to confiscate the computer.
- **Immediately Cease Onerous Market Access Barriers:** IIPA has become aware in 2005 that Lebanese authorities are increasingly not permitting legitimate product into the market through non-transparent and discriminatory censorship processes. This discriminatory treatment is further exacerbating an already serious piracy problem in Lebanon.
- **Address Cable Piracy:** Rampant cable piracy continues to be the major piracy problem for the motion picture industry, seriously damaging legitimate markets. The pay television market in Lebanon is nearly 100% pirate. For years, hundreds of small cable systems have engaged in the unauthorized re-transmission of broadcast programming, charging customers for these "pirate" pay television services. The Lebanese Government must take actions against all unauthorized cable facilities, including, where necessary, raids and shut-downs, including seizures of equipment used in the unauthorized transmission of right holders' programs.
- **Monitor Optical Disc Plant:** The Lebanese Government needs to monitor the one known optical disc plant in the country for illegal activity. If investigation determines illegal activity at this plant, steps should be taken to prevent such activities from occurring.
- **Take Significant Customs Actions Against Pirate Imports and Exports:** While much pirate product in Lebanon is now produced inside the country (factory-produced, "burned" to order, photocopied, printed, etc.), there are still significant imports of pirate product into Lebanon from the Far East as well as transshipped through Syria. In addition, Lebanon is one of the few countries in the world where pirate offset prints of books are produced for export, in this case, flooding the rest of the Middle East with pirate editions. Customs

authorities should step up *ex officio* actions to interdict and seize pirate product entering the country or destined for export.

- **Bring More Prosecutions and Increase Deterrent Sentences in Lebanese Courts:** Part of the hope placed in the new IPR Unit is that it will work closely with prosecutors to prepare cases for criminal proceedings. IIPA recommends training a number of prosecutors who will become expert in bringing IP cases, creating an enforcement reporting mechanism between ministries, Lebanese Customs, and prosecutors, and improving the efficiency of the court system through assignment of specially qualified judges to hear copyright cases.
- **Amend Copyright Law to Comply With Key Copyright Treaties:** The Lebanese copyright law remains TRIPS-incompatible in key ways. It should be amended to fix these deficiencies, as well as to protect copyright on the Internet consistent with the WCT and WPPT.

For more details on Lebanon's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

LEBANON Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music²	3.2	75%	3.0	70%	2.5	70%	2.0	65%	2.0	65%
Business Software³	17.9	75%	15.0	75%	14.0	74%	3.5	74%	1.1	79%
Books	4.0	NA	3.0	NA	2.0	NA	2.0	NA	2.0	NA
Entertainment Software⁴	NA	NA	NA	75%	NA	80%	NA	NA	NA	NA
Motion Pictures⁵	NA	NA	10.0	80%	10.0	80%	8.0	80%	8.0	80%
TOTALS⁶	25.1+		31.0		28.5		15.5		13.1	

GENERALIZED SYSTEM OF PREFERENCES REVIEW UPDATE

GSP Petition Accepted, Review Ongoing: 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

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² Loss figures for sound recordings represent U.S. losses only.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Lebanon, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ Total losses due to piracy of records & music, business software, and books went up from \$21 million in 2004 to \$25.1 million in 2005.

of many of Lebanon's key products into the United States, USTR must be satisfied that Lebanon meets certain discretionary criteria, including that 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.

Update on Review – Lebanon Should Lose GSP Benefits: Since the GSP Petition was accepted, IIPA has testified twice, most recently on November 30, 2005, and made several supplemental submissions in the GSP Review.⁷ On all of these occasions, as in this filing, IIPA states its view that the GSP Subcommittee should recommend to the President of the United States that he make a determination that Lebanon fails to meet the eligibility requirements of the GSP program, and remove Lebanon's eligibility to participate in the Program until such time as it has achieved adequate and effective copyright protection and enforcement as contemplated by the GSP statute. During 2004, Lebanon exported \$33.2 million worth of products into the United States duty-free, or 44.6% of its total imports into the U.S. In the first 11 months of 2005, Lebanon exported \$30.4 million worth of products into the United States duty-free, or 37.4% of its total imports into the U.S.

PIRACY AND ENFORCEMENT UPDATES IN LEBANON

Promised Special IPR Unit and *Ex Officio* Actions Are Badly Needed: A main feature of the enforcement system that has been missing in Lebanon is a dedicated unit of police officers to take raids *ex officio* and follow up with prosecutors to achieve deterrence in the market.⁸ Instead, the Ministry of Economy and Trade had previously been tasked with copyright enforcement, but without the devotion of the Police, right holders were left with the unfortunately paltry resources of the MOET, which at one time included only six investigators for all of Lebanon, and which has always refused to take actions *ex officio*. In 2004, MOET was more responsive,⁹ but with the recent departure of Director General Fadi Makki, it is unknown whether

⁷ On October 7, 2003, IIPA testified regarding the deficiencies of Lebanon's protection of copyright that warranted immediate suspension or withdrawal of Lebanon's GSP benefits. On February, 14, 2004, IIPA provided the GSP Subcommittee a copy of IIPA's February 2004 Special 301 report on Lebanon to supplement the public GSP file on this investigation. On May 25, 2004, IIPA wrote to the GSP Subcommittee advocating the immediate suspension or withdrawal of Lebanon's GSP benefits for its continuing failure to comply with the IPR obligations under the GSP program. On November 9, 2005, IIPA filed a pre-hearing Brief advocating withdrawal of GSP benefits, and on December 14, IIPA filed answers to post-hearing comments (the GSP hearing was held on November 30, 2005).

⁸ A major shortcoming of the Lebanese enforcement system has been the requirement of private criminal complaints to obtain copyright enforcement, as *ex officio* public criminal actions against copyright infringers had never been taken in Lebanon.

⁹ Indeed, in late 2004, hopes were raised that the Lebanese Government had finally made the commitment long sought to eradicate piracy, as the authorities ran several raids, including one on November 25, 2004 against three warehouses in one of the most dangerous areas of Beirut (Sabra & Chatila), resulting in seizure of an estimated 200,000 pirate DVDs, computer programs, music CDs, and videogames (some of the DVDs were determined to be sourced from China). It was the largest ever copyright enforcement action in Lebanon's history, leading to arrests and indictments. On January 10, 2005, a local court refused the warehouse owners' application to be released on bail. However, as of February 2006, the three pirates are no longer in custody, and the prosecutor is still in the course of preparing the case. Also, in 2004, IIPA had been given assurances by then Director General of MOET, Fadi Makki, who was removed from office in November 2005, that he would see to it that manpower increased from 10 personnel (4 MOET and 6 Consumer Protection Division) to 20 dedicated IPR officers, and 120 additional officers from the Consumer Protection Division who would be available for copyright piracy matters. This never materialized.

MOET will reinvigorate its efforts to stamp out piracy. That is why it is quite positive that the Lebanese Government has agreed (most recently in industry visits in November 2005 with Interior Minister Hassan Sabaa) to establish a Special IPR Unit of 25 officers of the Lebanese Judicial Police. This Unit must be made operational immediately.¹⁰ Industry has offered technical assistance and already provided training for this new Unit in late 2005. IIPA calls upon USTR to press the Lebanese Government to make the IPR Unit operational as soon as possible. It is extremely important that this Unit take actions *ex officio*, running market sweeps, seizing pirate materials (optical discs, pirate photocopies of books, offset print books destined for export, etc.), arresting infringers, and forwarding case files onto prosecutors for criminal proceedings. Market raids should result in immediate seizure, securing, and eventually destruction of 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. Too often, key equipment used in the course of illegal activity is left on the spot and pirates are back in operation again within 24 hours using the very same equipment.

Longstanding Cable Piracy Problem Is No Closer to Resolution: A look back at IIPA's past filings on Lebanon reveals a stark reality: copyright owners in television programs/motion pictures have been dealing with broadcast-related piracy issues for over a decade. There remain an estimated 650 cable operators serving over 80% of the Lebanese population. These operators retransmit domestic and foreign terrestrial and satellite programming without authorization to their subscribers (estimated to number about 720,000) for an average monthly fee of US\$10. Occasionally, these systems also use DVDs to emit unauthorized broadcasts directly to their subscribers, including the unauthorized broadcasting of recent popular movies and TV shows. Each cable operator retransmits about 100 different television channels, including a minimum of four movie channels that broadcast motion pictures 24 hours a day. 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 of piracy in Lebanon. Local broadcast television stations have canceled long-standing licenses with copyright owners because they cannot compete with the pirates. One legitimate cable operator, Econet, is reportedly on the verge of bankruptcy.

Many lawsuits have been brought over the years against various cable operators. However, in each of these cases, as in cases in which the authorities have inspected cable operators and induced them to sign declarations that they would not broadcast certain programming, there has been little deterrence either against the specific cable operator targeted, or the pirate cable community. The one cable piracy case decided in 2005 demonstrates how long it can take to achieve justice: a court in Beirut handed down a decision in April 2005 for a criminal case that was filed back in June of 2000 – more than five-and-a-half years ago – against four cable TV pirates for the unauthorized transmission of certain titles owned by U.S. motion picture companies.¹¹ Without severe fines and without imprisonment in commercial piracy cases, there will never be a deterrent in Lebanon against this sort of piracy.

¹⁰ Commander of the Judiciary Police (Internal Security Forces) General Anwar Yehya undertook to have the Special IPR Unit established by November 25, 2005 and operational shortly thereafter, even before the issuance of rules and regulations, so that piracy actions could occur in advance of the Christmas season exhibitions, traditional hot-spots for pirate sales. This unit, albeit in existence on paper, is still not fully operational, as the required personnel has not yet been allocated, which in turn delays the transfer of equipment and related training, offered by the copyright sector.

¹¹ The court convicted the four defendants, with sentences consisting of fines of US\$4,667 for each of the pirates, and damages of US\$1,334 each awarded to each of the six plaintiff companies (a total of US\$8,004 in damages to be paid by each of the four defendants), plus confiscation of the equipment, court fees, and costs.

Two criminal complaints were filed in 2005 – one against all the cable operators in February 2005. However, due to the assassination of Prime Minister Hariri, the investigation of that complaint was cancelled; as of February 2006, the complaint sits in the drawer of the public prosecutor.¹² In December 2005, a new complaint was filed with the Ministry of Economy and Trade requesting it to inspect the operations of 10 pirate cable operators in Beirut. No further action has been taken in regard to this complaint. Previous cases have resulted in some convictions and fines, but as noted, there has been no deterrence against cable piracy.¹³

Book Piracy Worsens, Including Pirate Books Produced in Lebanon for Export:

Book piracy is unfortunately on the rise in Lebanon. Lebanon is one of the few countries in the world where offset print pirate editions hurt not only the domestic market, but are being produced for export. These pirate editions, especially in the scientific, technical and medical sectors, flow out of Lebanon into Jordan, Saudi Arabia, and the United Arab Emirates, among other countries. This makes book piracy in Lebanon a major problem for publishers, and warrants high-level attention. In addition, 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 – American University of Beirut and Lebanese American University in Beirut and Byblos – 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 to serve educational institutions with illegal copies of books. Other universities have taken little or no action to even discourage use of photocopied materials on campus.¹⁴ Enforcement and education officials should work together to target the massive illegal photocopying taking place in and around these institutions.¹⁵ In 2005, the publishers began working with MOET to educate university communities about copyright and the importance of using legal materials.

Retail Piracy Remains Open and Blatant: Piracy in Lebanon remains serious, running at around 75-80% depending on the industry sector, giving Lebanon the dubious distinction of having one of the highest compound piracy levels in the Middle East. Retail piracy in brick-and-mortar shops is rampant, including optical discs (predominantly “burned” CD-Rs) of sound recordings,¹⁶ movies,¹⁷ entertainment and business software. Some of the “burned” CD-Rs are

¹² The February 2005 complaint followed a similar complaint in 2004 against 400 cable pirates, nearly all of whom confessed that they were engaged in unauthorized transmissions of copyrighted materials. At the time, 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 shelved the complaint.

¹³ In 2003, for example, a different approach was attempted to beat back cable piracy, as motion picture companies, working with satellite broadcasters, pursued actions based on the channels’ broadcasting rights. In August 2003, a judge in Beirut issued the first ever injunction against seven cable pirates, based on the broadcasting right. In July 2003, the criminal trial court of Beirut convicted 40 cable pirates and sentenced them to pay a total of US\$317,000 in fines and damages, the first court-imposed penalty on cable pirates in Lebanon. The court also ordered the confiscation of equipment and directed that details of the convictions be published in two local newspapers. After two and a half years, the case is still pending before the court of appeals.

¹⁴ 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 University.

¹⁵ 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.

¹⁶ Music piracy (music CDs and cassettes) is currently estimated at around 75% of the total market for recorded music (the highest levels for the entire Middle East region).

sourced back to Syria¹⁸ and the Palestinian territories. Several large and small-scale CD-R burning facilities are operational, while quantities of pirated pressed discs are still imported from Asia, particularly Malaysia, with some discs from China and Eastern Europe. Because of the rise of CD-R burning “to order,” it is essential that, when raids take place, these computers and all servers to which they are directly or indirectly linked be immediately seized and removed – just sealing them and leaving them at the target location is not enough. Syria remains a major transit country for pirated optical discs smuggled into Lebanon.¹⁹ Some street vendors disappeared from the market after the withdrawal of the Syrian armed forces in early 2005, but a number returned later in the year. In addition, a letter from the Minister of Economy and Trade to trade expo and trade fair organizers in October warning them that they would be held personally liable if pirate trade were to take place on their premises has had some effect on the amount of piracy available in trade shows.²⁰

Business Software Piracy: The business software industry continues to suffer 75% piracy rates in Lebanon, attributable to the unauthorized use of software in a business setting as well as the loading of illegal or unlicensed software onto hard drives of computers for sale, so-called hard-disk loading. While there have been some MOET raids against hard-disk loaders, resellers, and end-users, the MOET has generally not been able to stop this brand of piracy.²¹

Optical Disc Plant Remains in Operation: There is one known optical disc production factory in Beirut, Lebanon (Skyline) that 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. As noted below, Lebanon should consider regulations to facilitate monitoring of this plant, and any others that might migrate to Lebanon.

Internet Piracy: Due to the high cost of telecommunications and the absence of broadband Internet there is not a predominant amount of pirated material downloaded online in Lebanon yet.²² However, IIPA became aware in the recent past of some online services offering illegal music compilations for sale in Lebanon via the Internet or e-mail. The 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%

¹⁷ Pre-theatrical and pre-video release piracy sourced from camcorder copies and from pirate and parallel imported optical discs is widespread in Lebanon. Illegal copies of new U.S. cinema releases are on the market within days.

¹⁸ 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.

¹⁹ In 2005, unfortunately, Customs took a less active role than in previous years. Nonetheless, they did seize a number of shipments containing pirated business and entertainment software as well as films. Three seizures in 2005 are of note: in July 2005, they seized a shipment of 19,000 pirate DVDs and CDs from China, transshipped through Dubai; in October 2005, they seized 21,000 pirate discs; and in December 2005, they seized a further 7,000 pirate DVDs, 2,400 pirate videogames and over 2,000 pirate copies of business software. Criminal complaints have been filed in all three cases.

²⁰ Unfortunately, despite the warning, there are those who continue to defy these directives. Recently, MOET raided system builders at IT fairs who were using pirate software on their machines.

²¹ The MOET sympathize with shop owners that sell pirated products, and lack technical expertise which would boost their confidence when performing raids.

²² A recent survey of broadband statistics worldwide indicated that Lebanon is not a regional leader in bringing broadband to its country as it, along with Saudi Arabia, Libya, and Algeria “suffer a variety of problems including poor infrastructure, with ADSL demand exceeding supply capabilities, or delay brought on by the national regulators.” Point-Topic, Inc., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

of which are licensed. The availability of illegal mobile download services for music is on the rise.

Courts Have Failed to Deter or Adequately Compensate for Piracy: The U.S. copyright community has pursued criminal complaints, e.g., against cable pirates, and civil cases have also been pursued to a limited extent. Unfortunately, these cases have not led to deterrent results. The Lebanese Government must encourage judicial authorities to adjudicate promptly all intellectual property cases and to impose the maximum penalties allowed under Lebanese law. Inefficiency in the judicial system is a major obstacle to reducing the level of piracy in Lebanon. Postponements in court, even of urgent matters, are the norm, and criminal cases can take years to reach judgment. Private criminal complaints must be filed to obtain copyright enforcement, as *ex officio* public criminal actions against copyright infringers have never been taken in Lebanon.

In one very disturbing development in late 2004, the Beirut Court of Appeals 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 copyright law as well as the problem of piracy and its implications.

TRAINING, PUBLIC AWARENESS AND SPECIAL PROGRAMS

The copyright industries provided training in 2005. For example, the Motion Picture Association together with the Business Software Alliance and International Federation of Phonographic Industries provided a two-day training seminar for the 25 members of the special police unit.

Publishers worked with the MOET in late 2005 (and continuing into 2006) to raise awareness of the importance of copyright on university campuses. The Ministry has agreed to partner in the production of promotional material to be distributed to bookshops, libraries and universities during the high copying season toward the start of the university terms in early February 2006. Publishers are also working with the Ministry to organize educational seminars and are asking university presidents to get involved by sending letters to their deans and department heads about illegal photocopying. IIPA will be closely monitoring this partnership between industry and MOET and encourages the Lebanon government to lend its full support to these endeavors.

The software industry ran two major programs in 2005 to help promote the use of genuine software.²³ The MOET also assisted with a telephone hotline which calls to end-users of business software to license their products, but these activities are not undertaken on a regular basis and thus are not very effective.

²³ One program offered by business software interests in Lebanon is called "Student PC," which offers Windows, Office and Encarta in addition to a free three-year MSN Internet subscription and other value added items for a monthly fee. The other is called "National PC" program, which offers similar advantages. Both programs represent an investment of more than \$2 million from local partners.

MARKET ACCESS

Censorship Results in Discriminatory Practices Against Foreign Copyright Contents: After the Syrian military was ousted in early 2005, the new Lebanese government formed adopted discriminatory (and bigoted) censorship rules, applying them in secret, and in most instances, against sound recordings which have a Jewish or Israeli musician or producer, etc. This outrageous policy shift has in practice had a serious impact on the ability of foreign right holders to release sound recordings in Lebanon. Releases that had previously been allowed are even being removed from shops *post facto*. There are dozens of titles that are being banned without valid explanation, and without notifying right holders (or providing a copy to review and appeal the ban).²⁴

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law (1999) Remains Berne- and TRIPS-Incompatible: 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,²⁵ including stiff penalties (in theory) 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 outlaws the trafficking in satellite or cable decoders (i.e., devices that receive, or arrange the receipt of, unauthorized transmissions of broadcasts “dedicated to a section of the public who pay a fee to receive such broadcasting”). The law further 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).²⁶ 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,²⁷ including:

²⁴ Examples of banned albums include: the Kanye West (Rap) album, banned after one year of being released without notification, because they discovered there was a violinist "Miri Ben Ari" (from Israel) playing violin on one of the tracks; and Pavarotti albums and classical albums, banned because of the presence of one Jewish composer or orchestra director; and many others.

²⁵ 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.

²⁶ 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 trafficking in circumvention devices or provision of circumvention services. Finally, while broadband is still only on the horizon, legislation should provide sufficient remedies against piracy over the Internet, including notice and takedown provisions so that Internet Service Providers will cooperate with right holders seeking to protect their rights.

²⁷ 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 is no direct point of attachment for U.S. sound recordings (however, a 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).
- There are certain other overly broad exceptions to protection (e.g., Article 32).
- The law does not accord a right of action to exclusive licensees, which is a significant obstacle to efficient enforcement, given that the exclusive licensee in a territory is invariably the party with the strongest interest in stopping piracy and has the best information about it.
- Most significantly, 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 licensing 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.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PEOPLE'S REPUBLIC OF CHINA (PRC)

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List, pending a revisiting of this recommendation based on the outcomes of the scheduled April 2006 U.S.-China Joint Commission on Commerce and Trade (JCCT).

Actions to be Taken in 2006:

- **Follow Through on Key JCCT Commitments:** The Chinese Government committed in April 2004¹ and again in July 2005 to take some significant steps to improve copyright protection. The Chinese Government must take the following actions, among others, to make good on its commitments, including the general commitment to “significantly reduce” piracy levels:
 - **Bring a Significant Number of Criminal Prosecutions for Copyright Piracy:** Due to a reluctance on the part of many in China to provide a meaningful criminal remedy in copyright cases, which are effectively thwarted by continued overly high and complex thresholds and structural difficulties in the transfer of cases for criminal prosecution to the People's Procuratorate, the Chinese Government has still not met this JCCT commitment from 2004, or its TRIPS obligations. It is essential that the Supreme People's Procuratorate begin taking significant numbers of criminal cases, leading to deterrent sentences, and that the new Regulations on Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law allow for “on the spot” referrals where there is a “reasonable suspicion” that the infringer has done acts which, upon further investigation, would meet the criminal thresholds. Failure to bring more prosecutions for copyright piracy raises a serious question about China's compliance with its international legal obligations by failing to provide a deterrent to further infringements.
 - **Prosecute Software End-User Piracy:** The Chinese government declared that “software end-user piracy is considered to constitute ‘harm to the public interest’ and as such will be subject to administrative penalties nationwide,” and that “software end-user piracy is subject to criminal penalties in appropriate circumstances.” IIPA is unaware of a single criminal case against end-user piracy; without such cases, China cannot live up to this JCCT commitment or its international obligations.
 - **Bring Criminal Cases Involving Sound Recordings as Well as Other Works:** The Chinese Government confirmed that “the criminal thresholds in the 2004 Judicial

¹ In April 2004, China agreed to “Significantly reduce IPR infringement levels,” “Increase penalties for IPR violations by ... [s]ubject[ing] a greater range of IPR violations to criminal investigation and criminal penalties ... [, a]pply criminal sanctions to the import, export, storage and distribution of pirated and counterfeit products ... [, and a]pply criminal sanctions to on-line piracy.” On services, China agreed to “accelerate steps necessary to allow U.S. companies to import, export, distribute and sell their products in China,” including to “[i]mplement its WTO trading rights obligations by July 1, 2004,” meaning “U.S. companies will be free to ship American products into China without using local middlemen.” China promised to “publish its draft implementing regulations on trading rights for public comment by June 1, 2004,” and to provide distribution rights to “allow U.S. firms to engage in wholesaling and retailing of U.S. products directly within China, as well as providing related services.”

Interpretation (JIs) are applicable to sound recordings,” and yet, IIPA is unaware of a single criminal copyright case in China involving sound recordings.² The commitment in the JCCT to cover sound recordings is meaningless if the Chinese Government does not bring a single case.

- **Bring Criminal Cases Against Exporters:** The Chinese Government confirmed that the “JI makes exporters subject to independent criminal liability,” and yet, IIPA is unaware of a single criminal copyright case in China convicting a pirate for the crime of exporting pirate product. Meanwhile, once again in 2005 significant quantities of pirate product seized around the world, particularly optical discs, were sourced from China.³
- **Ensure Use of Legal Software by Government and SOEs:** China promised that “[b]y the end of 2005, the Chinese government will complete its legalization program to ensure that all central, provincial and local government offices are using only licensed software, and will extend the program to enterprises (including state-owned enterprises) in 2006.” We have seen no evidence indicating China has met this 2005 goal, nor have we seen final plans to implement the promise with respect to SOEs in 2006.
- **Ensure Pre-Release Enforcement for Motion Pictures, and Include Other Works as Well:** China promised to “regularly instruct enforcement authorities nationwide that copies of films and audio-visual products still in censorship or import review or otherwise not yet authorized for distribution are deemed pirated and subject to enhanced enforcement.” This should also apply to other subject matter, such as entertainment software, sound recordings, books and periodicals. In particular, the content review process for entertainment software products on all platforms should be conducted in as expeditious a manner as possible so as to reduce delays in getting legitimate products to market.
- **Crack Down on Internet Piracy:** China promised to run a “nationwide crack-down on Internet piracy, including through enforcement at Internet cafes.” Such efforts must be sustained far beyond a few months and significantly enhanced in 2006 in order to stem the massive and growing Internet piracy in China. Important steps to ensure proper legal norms governing the Internet include issuance of improved regulations (now in the drafting stage) regarding enforcement of copyright on the Internet (discussed below) and the establishment of a dedicated government task force to be responsible for strictly enforcing these regulations.
- **Join the WCT and WPPT:** China promised to “submit to the National People’s Congress the legislative package needed for China to accede to the WIPO Internet Treaties” by June 30, 2006. China should join these important treaties in 2006.
- **Impose Deterrent Administrative Penalties:** The Chinese Government must, in addition to providing deterrent criminal enforcement, significantly increase the level of administrative penalties/remedies imposed on pirates, including shop closures, if it is ever to lower piracy levels.
- **Legitimize Book Distribution Practices on University Campuses:** The National Copyright Administration (NCA), in cooperation with local copyright bureaus and rightholders, should take action to ensure that universities throughout the country are distributing only legitimate books to their students. Rampant unauthorized photocopying at

² One case, involving defendants WANG Jinsheng, SONG Chundong, and LIU Chunshu, reportedly involved “570,000 optical discs” but the type of work involved is unspecified in published reports IIPA has seen. All the other criminal copyright cases known to IIPA involved product other than sound recordings.

³ EU statistics from 2004 show that 30% of IP-related contraband (which includes but is not limited to copyright piracy) seized in EU ports emanated from China, making it the number one country of origin, and 26% of all cases involving pirate “audio CDs, games, software, DVDs etc.” were from China, again leading the pack. Thailand came in second (21%), followed by Malaysia (9%), Pakistan (8%), Indonesia (6%), and Hong Kong (5%). *DG TAXUD European Commission*. These statistics on seizures from the EU demonstrate anecdotally that China is not providing effective deterrence against piracy, including exports.

university textbook centers across China is causing tremendous harm to the market for both Chinese and English language educational materials. Photocopied textbooks, either kept in stock in a warehouse separate from the textbook center storefront or produced on demand, often bear the crest of the universities themselves.

- **Issue Revised Internet Regulations with Robust Notice and Takedown:** The State Council is set to issue a set of regulations governing copyright protection on the Internet, including notice and takedown. IIPA has recommended changes necessary to provide adequate protection for temporary reproductions and communications to the public (including an interactive “making available” right), and effective “notice and takedown” mechanisms. These important recommendations should be adopted so that judges, law makers, and enforcement authorities will have clear and fair rules to protect content in China in the digital age.
- **Amend the Criminal Law to Bring It into Compliance with TRIPS:** China must at least criminalize copyright piracy “on a commercial scale,” including piracy involving acts not currently cognizable under China’s Criminal Law. Criminal enforcement of copyright piracy also continues to be burdened by the fact that in order for any act under Article 217 to be punishable, it must have been done “for the purpose of making a profit.” An amended law should ensure that thresholds are low enough to criminalize all “copyright piracy on a commercial scale” as required by the TRIPS Agreement. China is also the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices.
- **Investigations by Foreign Right Holders:** Foreign right holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate suspected infringements. China should open the way for foreign right holders and their association representatives to do so, and make evidence rules for administrative and court actions more transparent and logical.
- **Assign Specialized IPR Judges to Hear Criminal Cases, and Move Cases to the Intermediate Courts:** The record of China’s development of a cadre of well trained IPR judges to sit on specialized IPR tribunals at the Intermediate level courts in China to hear civil cases has been a success. Now China should commit and implement similar reforms in the criminal justice system to enhance deterrent enforcement against copyright piracy.
- **Provide Effective Market Access for All Copyright Materials:** In addition to fully implementing China’s minimum WTO market access commitments (particularly in the area of trading rights), the Chinese Government must, if it wishes to address rampant piracy in the country and foster the growth of creative industries in China, provide effective market access to all copyright industries, looking beyond the bare minima of WTO toward a fairer and more open market for all.

For more details on China’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

PEOPLE'S REPUBLIC OF CHINA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005⁴

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures⁵	244.0	93%	280.0	95%	178.0	95%	168.0	91%	160.0	88%
Records & Music⁶	204.0	85%	202.9	85%	286.0	90%	48.0	90%	47.0	90%
Business Software⁷	1276.1	88%	1488.0	90%	1787.0	92%	1637.3	92%	1140.2	92%
Entertainment Software⁸	589.9	92%	510.0	90%	568.2	96%	NA	96%	455.0	92%
Books	52.0	NA	50.0	NA	40.0	NA	40.0	NA	130.0	NA
TOTALS	2366.0		2530.9		2859.2		1893.3		1932.5	

PIRACY AND ENFORCEMENT UPDATES IN CHINA

Physical Piracy Remains Rampant: It is not surprising, with the lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China, that piracy rates of physical copyright products remain virtually the highest in the world, at 85-95% depending on the industry sector and product format (e.g., 95% of DVDs in China are pirate). Raiding activity continued in 2005, under Vice Premier Wu Yi's leadership. A 15-month national anti-piracy campaign ended in December 2005 (IIPA is unaware of any decision to maintain this enhanced anti-piracy campaign). Despite seizures of millions of discs in raids run by the Beijing Copyright Administration or the Guangzhou and Shenzhen Municipal General Culture Market Administrative Enforcement Task Forces (many jointly with the Motion Picture Association,⁹ with the recording industry,¹⁰ and with a local video distributors' group),¹¹ IIPA members report no deterrence and no meaningful decrease in the widespread availability of pirate products. Thus, this campaign resulted in no meaningful reduction in piracy rates. None of the raids involving sound recordings will apparently result in criminal prosecution despite massive seizures; stores

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ The estimated losses to the sound recording/music industry due to domestic piracy are US\$202.9 million for 2004, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology. 2005 loss estimates were unavailable.

⁷ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in China, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁸ 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.

⁹ The Motion Picture Association reports 125 joint raids with the two authorities against 49 warehouses, 6 packing factories and 70 retail shops resulting in the arrest of four persons, revocation of eight audiovisual licenses and seizure of over 5.5 million pirated optical discs.

¹⁰ The recording industry group operating in China, the International Federation of Phonographic Industries, reports 33 raids in 2005, mostly in southern China, resulting in a seizure of well over 2.5 million discs.

¹¹ The Guangdong Chamber of Audiovisual Distributors (GDCAVD) reports that it conducted 907 raids in various cities in Guangdong Province and seized a total of 20,810,000 illegal optical discs. GDCAVD reports that 23 of the raids have been referred to the Ministry of Public Security for criminal investigation; however, to our knowledge, no criminal proceedings have yet been instituted.

raided are often back in business the day following the raid.¹² Recent raids outside the major cities or the South are encouraging indications of hopefully greater transparency of enforcement efforts in outlying cities.¹³ Raids involving product from other sectors, including the book publishing sector, continue to be non-transparent and appear to target only Chinese language publications.

Internet Piracy Threat Rapidly Growing: Internet piracy is progressively worsening as the number of Internet users and broadband penetration increase in China.¹⁴ While the penetration rate per capita and per household is still relatively small, the sheer numbers of broadband lines (reported to be 35 million as of September 2005) makes China one of the world's largest potential markets in terms of Internet delivery of copyright content, and unfortunately, one of the world's largest emerging Internet piracy problems.¹⁵ Hundreds of websites emanating from China now offer streams, downloads or links to unauthorized files of copyright materials (music, films, software, and books). Disturbingly, there are many Bit Torrent (BT) sites based in China now (BT is a recent P2P architecture which allows for faster file sharing due to the way users cooperate in uploading and downloading pirate content simultaneously). There are at least four "eMule/eDonkey" servers; at least seven specialized "MP3 search engines" which offer deep links to thousands of infringing song files for instant downloads or streaming; and at least eight China-based peer-to-peer (P2P) services (including Kuro China, whose Taiwanese affiliate has been found guilty in a criminal court in Taiwan). The largest MP3 search engine is Baidu, the subject of two civil lawsuits in 2005; it lost one in September 2005 but has appealed.¹⁶ Most of the pirate websites in China generate income through advertising, so they are profit-making ventures even though the copyright materials are provided for free. At least three of the P2P services (including Kuro China) charge subscription fees. Unfortunately, the availability and use of these services, spurred by the rapid growth of broadband technologies in China, indicate that Internet piracy will be one of the greatest challenges industry and the Chinese Government must face.

Entertainment software publishers also face the problem of so-called "offline server" piracy in China. These servers make unauthorized or pirate online games readily available or without adherence to terms or conditions set forth in a licensing agreement. The "offline server" operator creates a "mirror" server to the legitimate servers operated by entertainment software

¹² For example, the recording industry reports that a major retail pirate distributor in Shenzhen was raided in May 2005, resulting in seizure of 40,000 pirate sound recordings and motion pictures, but was back in business shortly after the raid and even increased its business volume. Two storage facilities in Guangzhou were raided in August and September 2005, resulting in seizure of over 60,000 pirate optical discs. Again, the facilities were back in business shortly after the raid and have since grown their operations.

¹³ In December 2005, the Chaoyang police department took raids with the Motion Picture Association on two shops, and filed a complaint with the district prosecutor, seeking a criminal charge against a major supplier of pirate product. Unfortunately, the two shops raided were back in business the next day, and no criminal charges are likely to be filed.

¹⁴ China saw rapid expansion in 2005 in terms of the number of broadband lines. By the end of September 2005, there were 35 million broadband lines in China (up from over 25 million in December 2004), with lines split between roughly 25 million DSL lines and 10 million cable lines. See Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Release at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. The Chinese newspaper, Economic Daily, reported in January 2006 that the number of Internet users in China grew by 18 percent in 2005 to 111 million. *In China, 111 Million Net Users Counted*, ZDNet (Reuters), January 18, 2006, at http://news.zdnet.com/2100-1035_22-6027969.html.

¹⁵ *Id.* The Economic Daily (China) reported that as of the end of 2005, 64 million Chinese accessed the Internet via broadband connections.

¹⁶ On September 16, 2005, the People's Court of Haidian District in Beijing reportedly ordered Baidu to pay RMB68,000 (US\$8,400) to mainland music company Shanghai Busheng Music Culture Media for unauthorized downloads of 46 songs. Baidu has reportedly appealed the ruling.

companies, not only diverting traffic and subscription revenue from the legitimate site but also, by bypassing authentication and verification processes, allowing the play of pirated games.

Enforcement against Internet piracy in China in 2005 has been made more difficult by recent Chinese government decisions. In 2003 and 2004, thousands of takedown notices were sent to ISPs and content providers, and, for the music industry, for example, the actual takedown rate was quite high.¹⁷ However, the April 2005 “Administrative Measures on Protecting Copyright on the Internet made such takedowns more difficult and compliance by ISPs fell precipitously in 2005.”¹⁸ The Administrative Measures appear not to allow e-mail notices and require that the notices include, for each infringing site, evidence of all infringements and proof of copyright ownership for each book, song or film infringed, among other things. The ISPs thus ignored notices that do not meet this unrealistically burdensome standard.¹⁹

As discussed below, the State Council is expected soon to issue new Internet regulations which would reportedly replace these Administrative Measures. The current draft, would lessen the notice requirements. However, there are other concerns with the draft Regulations which need to be addressed prior to its issuance (including provisions on protection of technical protection measures, the scope of limitations on liability of ISPs, and the form of the notices to be sent to ISPs).

Record Industry Takedown Rate of Suspected Infringing Websites in China			
	Number of notices	Number of sites	Takedown rate
2003	1320	2509	29%
2004	2632	7170	61%
2005	1778	4711	40%

In October 2005, the NCA together with seven other government agencies (Ministry of Propaganda, GAPP, MII, MPS, National Anti-Pornography and Publication Office, and the Beijing Copyright Administration) announced a special campaign from October 2005 to February 2006 to target Internet piracy. Right holder organizations were asked to provide information on infringing sites. Pursuant to this campaign, the recording industry filed complaints in November with the NCA against about 120 large illegal dedicated music sites and by mid-January 2006, at least 24 of these sites had been closed.²⁰ The motion picture industry made complaints against 88 sites and reports that the PSB handled case investigations involving two websites (these were subsequently returned for failure to meet the criminal threshold). Criminal charges also may be sought against a third site. NCA and the Motion Picture Association are also working on formalizing closer relations to combat Internet piracy.

¹⁷ The music industry achieved takedowns of three China-based servers of at least seven international sites (Supermusic, Crazymp3, 21century-mp3, Mp3explosion, Easymp3s, Realalbums, and Finestmp3s), infringing music files hosted on large Chinese portals like Wanwa, Hitmusic, Sohu, and 9sky (9sky has since become a licensed music site, as have four other sites), and 17 “eDonkey” servers based in China.

¹⁸ From September to November 2005, the takedown rate by ISPs was as low as 25%.

¹⁹ Administrative Measures on Protecting Copyright on the Internet, issued by the National Copyright Administration of China (NCAC) and the Ministry of Information Industry (MII), effective April 30, 2005.

²⁰ In one case, the recording industry requested NCAC to take action against a large fee-charging site claiming to be the largest Chinese music site, against which the industry had filed a formal complaint with NCA in April 2005. The site’s web records include false information and the site switched service providers seven times to evade takedown notices. We have no further information on the results of this or other complaints, or whether any of the recording industry cases were dealt with by administrative fines or were referred to the Ministry of Public Security for criminal investigation and possible prosecution.

Internet piracy in China is also infecting neighboring markets. For example, of 154 pirate websites found in Taiwan in 2002, the recording industry in Taiwan found that 102 (66%) were located in China. In 2005, the number of pirate websites in Taiwan grew to 469, of which 393 were reported to be located in China, or almost 84%.

China Once Again Takes Center Stage as Mass Producer of Optical Media for Export: We believe there are roughly 86 optical disc plants in China, with 1,374 total lines bringing total disc capacity based on IIPA's conservative methodology to a staggering 4.8 billion discs per year. Most of the production lines are interchangeable, switching easily between audio CD, VCD, DVD, and even CD-R or DVD-R production. Unfortunately, a considerable amount of China's production is once again destined for export. In 2005, infringing product from China has been found in nearly every major market in the world, including (but not limited to): Germany, Italy, Australia, Norway, Belgium, Canada, Mexico,²¹ the United States, Russia, the United Kingdom, the Netherlands, Israel, Paraguay, Lithuania, Singapore, Taiwan, the Philippines, Indonesia, Vietnam, Hong Kong, Malaysia, Thailand, Chile, and South Africa. Some shipments are disguised in container shipments of electronic and other goods or are sent via express mail and courier companies. The known shipments and seizures around the world are, of course, only the tip of the iceberg of the total exports of pirate optical discs from China. China's factories have once again returned to plying the export trade, after enormous enforcement efforts in the late 1990s largely eradicated massive pirate production for export. News also spread in 2005 of China's plans to create its own format of HD-DVD which will not be compatible with any existing player, and that will not be bound by current copy protection.²² The prospect of an unprotected format created in China harkens back to the advent of the VCD, a Chinese-invented pirate format, and raises questions about the Chinese Government's will to deal with the piracy issue.

Piracy of Books and Journals: U.S. book and journal publishers suffer from piracy in three key forms—unauthorized photocopying on a commercial scale, illegal printing of academic books and commercial bestsellers, and Internet piracy encompassing online academic and professional journals and sites offering book titles for download. Well known publishers, especially university presses, suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the university and sold at mainstream bookstores such as the Wangfujing Bookstore in Beijing.

Publishers are especially concerned to learn that universities throughout China are actually reproducing books for distribution to students without authorization from, or compensation to, right holders. These practices, often performed at university "textbook centers," are undermining the market for foreign and Chinese books alike. These books are often produced prior to commencement of a university term and held at a separate warehouse, although some textbook centers operate on a print-on-demand basis. Prestigious universities, such as Tsinghua University, Fudan University, Wuhan University, South China Normal University and many more, have undertaken these practices. Some of the universities even produce their own covers for the illegal books, bearing the university seal. These practices are so widespread and organized as to require bar codes for scanning of inventory. The NCA has been alerted to this problem, and IIPA urges it to work with the local copyright bureaus and the universities to ensure that only legitimate books are given the imprimatur of Chinese universities' centralized distribution.

²¹ The Mexican Association of Gift Producers (AMFAR) reported that during 2005 holidays, nearly 80% of traded merchandise was imported from China through illegal means. *AMFAR: 80% of Chinese merchandise, illegal*, Corporate Mexico, January 18, 2006.

²² *China to Develop New Format Based on HD-DVD*, October 7, 2005, at <http://www.msnbc.msn.com/id/9618578/> (reporting a *Xinhua* news agency report).

Illegal photocopying, of course, is not limited to university campuses and should be brought under control at copyshops outside universities as well. Furthermore, English language teaching programs often use the prospect of high-quality, color materials to lure students to their after-school programs, but then make and distribute unauthorized photocopies of those materials instead of the originals. IIPA urges the Chinese government to work closely with right holders in 2006 during the applicable raiding and monitoring times (typically February/March and September) to remedy this problem.

Illegal printing of books, which is a more sophisticated endeavor than photocopying, continues to plague publishers in China as well. Whether it appears in the form of a high level technical or medical book that looks exactly like the original, or a cheap bestseller sold under a bridge in Beijing, this type of piracy is devastating the market—not only for foreign publishers but also the Chinese companies that have the legitimate reprint or translation rights to these titles. A quick stroll across a pedestrian bridge outside the Beijing International Book Fair venue in September 2005 resulted in easy access to titles such as *The DaVinci Code*, the sixth *Harry Potter* book, and many more. Titles such as these are sold by street vendors throughout major cities and in book markets such as the Tianshuiyuan market in Beijing.

As detailed in previous sections, the burgeoning of Internet use in China has resulted in significant digital piracy problems for the publishing sector, most notably with respect to sites offering download of academic titles and misuse by users of licensed online academic journals. University gateways are often left open to non-subscribers, undermining the ever-popular electronic journals market. Furthermore, the industry has recently run across instances of government institutions engaging in unauthorized delivery of online documents, especially academic journals. In one instance, the Institute of Scientific and Technical Information in China (ISTIC) appeared to be engaging in a practice similar to a document delivery service for journals, without any permission from rights owners. IIPA members are also tracking several sites illegally offering scanned copies of books for peer to peer trading or paid download. The publishing industry is working with authorities to take proper measures against these practices and expects full cooperation from the Chinese government.

Business Software End-User Piracy: Unauthorized use of software within enterprises and government offices in China causes the majority of piracy losses faced by the business software industry. The business software industry also loses revenue due to retail hard-disk loading (as part of the sale of computers), and the production in China (generally for export) of high-quality counterfeit software packages. China made a commitment in the JCCT to complete legalization within all government offices, including provincial and local level government offices, by the end of 2005, and while there have been reports of some software purchases by government offices around China, the level of government purchases would indicate this commitment has not been fulfilled. The industry welcomed China's commitment to extend the legalization program to enterprises (including state owned enterprises) in 2006 and urges the government to complete a plan for the implementation of this commitment and to implement the plan fully in 2006.

Broadcast, Cable and Public Performance Piracy: The unauthorized public performance of U.S. motion pictures continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. Television piracy, particularly at the provincial and local levels, and cable piracy (over 1,500 registered systems which routinely pirate U.S. product) continue to harm U.S. right holders.

Piracy of Entertainment Software Products: The markets for PC games, console games, and games played on handheld devices continued to grow in China in 2005, but these markets are now dwarfed by the market for online gaming. In 2005, there were an estimated 250,000 Internet cafés in China, with only about one percent of these establishments using licensed entertainment software products. Typically, most cafés purchase one legitimate copy, or use a pirated copy and load it on each computer in the café.

The manufacturing and assembly of cartridge-based handheld games also continues to be a massive problem in China, as the country remains the world's primary producer and exporter of infringing *Nintendo* video game products. In 2005, a total of 244,000 counterfeit *Nintendo* products, all originating from China, were seized in 15 countries in Asia, North America, Latin America, the Middle East and Europe. These large export seizures are due to the lack of sustained enforcement against the factories engaged in massive counterfeit production as well as a lack of effective customs inspections procedures to interdict the exports before they leave the country.²³

In 2005, Nintendo of America (NOA), in coordination with local Chinese administrative bodies, conducted 46 administrative actions and seized over 1.2 million counterfeit *Nintendo* video game products and semi-finished components. These enforcement efforts have been focused in Guangdong Province, the center of counterfeit cartridge game production in China. The Chinese administrative authorities (Administration for Industry and Commerce (AIC) and the Technical Supervision Bureau (TSB)) conducted raids against 10 factories, 21 warehouses and 5 retail operations. One administrative action conducted in late 2005 was successfully transferred to the PSB for criminal prosecution. However, after the defendant fled town, the criminal prosecution was indefinitely put on hold. All enforcement action has been driven by complaints initiated by NOA, as the Chinese authorities have not been willing to undertake self-initiated actions against these pirate and counterfeit operations.

As discussed above, entertainment software publishers also face the growing problem of “offline server” piracy in China.

The Criminal Enforcement System Remains Non-Deterrent: Despite China's promise in the JCCT to increase the number of criminal prosecutions for copyright piracy, little has yet been done. The current criminal system in China continues to operate ineffectively and without deterrence.²⁴ Moreover, as discussed below in connection with the copyright law and related laws and regulations, there are on-their-face legal issues of what acts constitute crimes, and what proof meets the criminal thresholds (including, *inter alia*, how to measure harm to meet the thresholds).

Further, there is not one Ministry that takes responsibility for criminal copyright enforcement, including the raid, arrest, seizure, and transfer of a case file for prosecution. Retailers, distributors, warehouse owners, and even pirate producers know that administrative raids will rarely if ever be transferred for criminal prosecution, so they operate for the most part

²³ Hong Kong has become a key transshipment point for counterfeit *Nintendo* products. In 2005, it is reported that over 85,000 infringing *Nintendo* products were shipped through the HKSAR.

²⁴ We focus on the practical issues related to criminal enforcement, but note that as a political matter, a fundamental issue remains that copyright piracy is still viewed by many in China as a problem to be dealt with administratively rather than in the criminal courts. Administrative enforcement of copyright has been under the auspices of the National Copyright Administration of China (NCA), which is neither properly equipped nor staffed with the resources or personnel to address the large-scale piracy problem in China. The failure to have any one agency in charge, which has the wherewithal to do the job of achieving deterrent enforcement, has led to *ad hoc* approaches to enforcement.

in the open without fear of effective enforcement action, much less effective criminal enforcement. Repeat offenders often pay insignificant administrative fines and thus disregard administrative orders to cease their infringing activities. Unless criminal prosecutions are brought, piracy will remain pervasive in the country as mere administrative actions have long been proved to be without a deterrent effect on pirates and counterfeiters.

IIPA has repeatedly stressed the absence of criminal prosecutions. While the Chinese government reports such prosecutions, IIPA and its members are aware of only a very few that have involved U.S. or other non-Chinese works.²⁵ One of these cases was the infamous *Guthrie* case (involving a large DVD wholesale piracy ring run by a citizen of the United States). While this case did involve piracy of U.S. product, it is dwarfed by comparison with the organized criminal activities conducted by Chinese citizens, who are rarely prosecuted for their crimes.²⁶ We do note, however, that the “special campaign” against Internet piracy appears to be targeting some of the websites/services for criminal prosecution. As discussed below, however, it is not yet clear whether and how the new thresholds will be met to enable criminal prosecution of Internet pirates.²⁷

It is not yet evident that prosecutors or police will undertake significant criminal prosecution directly for copyright piracy. For example, a major criminal warehouse case in Beijing was finally prosecuted as an Article 225 “illegal business operations” case, notwithstanding that the criminal thresholds for copyright infringement had otherwise been carefully met.

Civil Cases Brought, Including Against Internet Pirates: The copyright industries have fared far better in the civil courts in China.²⁸ Unfortunately, the average awards do not come close to compensating the right holder for the injury suffered as a result of the infringement. For example, the average damages awarded in the recording industry cases were about RMB3500 (US\$435) per title, which in the majority of the cases does not even cover legal fees and expenses, much less compensate the right holder for its loss. Moreover, awards for legal fees and costs are usually a small fraction of the actual costs incurred. Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome, and ascertaining information regarding defendants sufficient to succeed in these actions is difficult, as the domain name or other registration information for these Internet operators is usually inaccurate or incomplete. Additional burdens are imposed by the Chinese court’s requirement on who may act as the “legal representative” of a party. Under these provisions,

²⁵ Known cases involving foreign product include *In re TONG Yaxi* (People’s Court of Yuzhong District, Chongqing, August 12, 2005), which involved U.S. motion picture product, and *In re Li WENHU, CHEN, SU, ZHONG*, which involved the Belgian literary works *Tintin* (the author’s representatives were reportedly very active in pursuing this case).

²⁶ *In re Randolph Hobson GUTHRIE III, Abram Cody THRUSH, WU Dong and WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005).

²⁷ In October 2005, the Supreme Court and the Supreme People’s Procuratorate issued a clarification to the JIs, specifically stating that transmission over the Internet of sound recordings falls within Article 217 of the Criminal Code and the JIs. IIPA hopes that this change sets the stage for far greater numbers of prosecutions in Internet copyright-related cases, involving sound recordings as well as other works. It is reported that in November 2005, the Guangdong Public Security Bureau raided an Internet café, seizing the equipment and arresting two suspects operating a website which was alleged to have offered thousands of songs for download over the Internet. Investigations are ongoing and it is unclear whether this case will be referred to the People’s Procuratorate for criminal prosecution.

²⁸ Since 2002, the motion picture industry has brought ten civil cases, four against factories and six against retail outlets in Shanghai. All these cases were concluded successfully. The record industry has recently shifted the focus of its civil cases to Internet piracy, filing 87 civil cases against Internet infringers since 2003. As of January 2006, 61 cases have been concluded, 59 successfully, while another 26 cases remain pending.

courts have even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence.

MARKET ACCESS AND RELATED ISSUES

It has been more than four years since China joined the World Trade Organization, but IIPA is still waiting for China to make good on a number of commitments it made in that agreement to open its market. Failure to meet these commitments significantly harms U.S. right holders who would like to do business in China, and subjects China to potential dispute settlement claims over its failure to meet its present obligations.

Beyond its existing commitments, however, it is time that the Chinese Government recognized the inherent connection between the absence of effective market access for copyright products and rampant copyright piracy. It is bad policy at best, and duplicitous at worst, for the Chinese Government to impose suffocating market access restrictions on the U.S. recording, motion picture, entertainment software, and book publishing industries, thereby depriving its own consumers of access to a legitimate supply of copyright materials. This directly aids the pirates in defying the law – the copyright law, the censorship laws and the tax laws.

Ownership/Investment Restrictions (MFN): The Chinese Government does not allow foreign sound recording producers, motion picture companies (for theatrical and home video, DVD, etc. distribution), or entertainment software publishers to enter the Chinese market except as a partner in a minority-share (up to 49%) joint venture with a Chinese company. In a positive development, ownership restrictions on cinemas have been lifted slightly, providing up to 75% foreign ownership in Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing, compared to 49% everywhere else. However, foreign-owned companies may not operate those cinemas in China. In the television sector, wholly or jointly foreign-owned companies are strictly prohibited from investing in the broadcast industry.

Censorship (National Treatment): Chinese censorship restrictions delay or prevent copyright owners from providing legitimate product to the market in a timely fashion. For example, Chinese government censors are required to review any sound recording containing foreign repertoire before its release, while domestically produced Chinese repertoire is not censored (and, of course, pirate product is uncensored). China should terminate this discriminatory practice which violates the basic tenet of national treatment – that foreign goods will be treated on equal footing with domestic goods.

Entertainment software companies face lengthy delays in the censorship (approval) process in China, wiping out the market window for legitimate distribution of an entertainment software product (this window is usually shorter for entertainment software titles than for other works). Each entertainment software title must go through an approval process at the General Administration of Press and Publications (GAPP), which takes several weeks to several months. As has been committed for other industries, and consistent with the JCCT outcome, the Chinese Government should rid the market of pirated game titles which are still under GAPP review. Another serious concern involves the creation of an apparently new approval process with the Ministry of Culture for online versions of games. Since the business model for entertainment software involves games to be played on all kinds of platforms, including computers, consoles, handheld devices, and the Internet, there is no reason for two reviews.²⁹

²⁹ IIPA notes as a general trend that inconsistencies in the laws and regulations in China are beginning to appear (and have detrimental market effects) in the handling of copyright material in traditional media versus content on the

The review function should be lodged with only one agency, either the GAPP or the MOC. Video games distributed on physical optical disc media also increasingly have an online component. Two separate content review processes before two different agencies would be burdensome, adding not only additional costs but also further delay in releasing new product into the market. Further, transparency in the review process is sorely needed.

Restrictions on Investigations (National Treatment): Restrictions on the ability of copyright industries' representatives in China to investigate the activities of pirates in China greatly hamper efforts and create a *de facto* restriction on the ability of copyright owners to do business and enforce their rights in China.

Recording Industry: Record companies are prevented from developing talent in China and from getting legitimate product quickly to market. The fact that U.S. record companies cannot "publish" or release a recording without permission of a state owned company, and cannot manufacture, distribute or engage in retailing of their products, artificially segments China's market, making it extraordinarily difficult for legitimate companies to participate effectively. U.S. record companies are skilled at and desirous of developing, creating, producing, distributing and promoting sound recordings worldwide.³⁰ The universal experience of nations in which the international record companies do business is that local artists have expanded opportunities to have their music recorded and distributed widely. The in-country presence of U.S. companies also has brought jobs and expertise in a wide variety of areas. China should permit U.S. (and other foreign) sound recording producers to engage in:

- the integrated production, publishing and marketing of sound recordings.
- replicating, distributing, and retailing sound recordings (at present, these activities must be performed by other companies, which segments industry activity and drives up costs; even Chinese sound recording producers may not engage in these activities, meaning all musicians, including Chinese, who record in China operate at a competitive disadvantage with those recording music outside China).
- production, publication and marketing their own recordings in China and direct importation of finished products (at present, a U.S. company must (1) license a Chinese company to produce the recordings in China or (2) import finished sound recording carriers (CDs) through the China National Publications Import and Export Control (CNPIEC)).

China should also permit foreign-owned record companies to release sound recordings in China.

Internet. The State Council was long ago charged with creating Internet policy, but several agencies have gotten into the fray (e.g., the State Secrecy Bureau's announcement in January 2000 that all websites in China were to be strictly controlled and censored). Ministry of Culture Regulations require that providers of Internet-based content (with any broadly defined "cultural" attributes) receive MOC approval prior to distribution in China. SARFT also claims some censorship role on the Internet. In addition, from a technological standpoint, China maintains firewalls between China and foreign Internet sites to keep foreign media sites out of China, and regularly filters and closes down Chinese sites that are seen as potentially subversive; the IIPA website was unavailable for a long period of time in China (it is unknown whether it is available now). In September 2002, for example, both the Google and Alta Vista search engines were blocked without explanation or acknowledgement by the Chinese Government.

³⁰ The work of these companies encompasses a wide range of activities, including developing and investing in state of the art recording, mastering and engineering facilities; identifying and training talented singers, songwriters, composers, and musicians; promoting and advertising acts and recordings; establishing efficient and competitive distribution systems to take products from recording studio to replicator to wholesalers to retailer; and using global arrangements and distribution services to release products in markets outside the local market. U.S. record companies have long sought to bring these skills to China to develop and record Chinese artists for the Chinese market and for export.

Motion Picture Industry: There has been no change to the current severe restrictions on market access for motion pictures. These include the following:

- **Onerous and Indefensible Import Quota for Theatrical Release of Films:** Under the terms of China's WTO commitment, China agreed to allow 20 revenue sharing films (theatrical release) into the country each year. However, the Chinese have stated that 20 is a "maximum," not a "minimum," an interpretation of its commitment which is not justified and should be corrected. Censorship and the monopoly import structure (described below) are the tools by which this quota is imposed and enforced. Demonstrably unfair contractual conditions still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office compared to what they would get if the market were opened.
- **Cutting the Screen Quota for Foreign Films:** SARFT regulations require that foreign films occupy less than one third of the total screen time in cinemas. Even where foreign blockbusters are allowed into China under the film quota system, the screen quota then mandates that the distributor restrict the number of prints available to cinemas.
- **Monopoly on Film Imports and Film Distribution:** China Film continues to be one of the entities holding a state-enforced monopoly on the import of foreign films. China Film held the sole monopoly on the distribution of foreign films until "Huaxia Distribution" was authorized by SARFT to be a second distributor of imported films in August 2002.³¹ Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to China Film, thwarting any real competition between the two. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.
- **Restricted Market Access for 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 US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.
- **Broadcast Quotas, Content Restrictions, and Restrictive License Practices for Satellite Channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).³² The China TV Program Agency under CCTV must approve all importation of foreign programming under the guidance of SARFT. The Chinese have also issued regulations restricting who can invest and what kinds of programs can be produced in China, again with the aim of severely restricting foreigners'

³¹ Huaxia is a stock corporation with investment from over 20 shareholders, the largest of which is SARFT, with over 20%, then China Film, Shanghai Film Group and Changchun Film Group, each with about 10%.

³² Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time on any channel other than pay television, without SARFT approval. Other foreign programming (news, documentaries, talk shows, travel shows, etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming may not exceed 40% of total animation programming delivered by each station; and to further complicate matters, only producers of domestic animation programming can import foreign animation programming and no more than an equal share of what they produce.

ability to operate in China, and restricting the kinds of content to be permitted (of course, this belies the fact that pirate content comes in unfettered, unregulated, and uncensored).³³

- **Black-Out Periods:** The Chinese government has decreed “black-out periods” (during which no new revenue sharing blockbuster foreign films may be released) in an effort to restrict competition with Chinese films being released in the same period. This ban artificially drives down foreign right holders’ theatrical revenues and contributes to increased piracy, as pirates meet immediate consumer demand for major foreign titles by offering illegal downloads through the Internet, pirate optical discs, and pirate video-on-demand channels.
- **Local Print Production Requirement:** China Film continues to require that film prints be made in local laboratories, reducing right holders’ ability to control the quality of a film copy and potentially resulting in increased costs.
- **Import Duties Should be Based on Value of Physical Media:** Import duties on theatrical and home video products may be assessed on the potential royalty generation of an imported film, a method of assessment which is excessive and inconsistent with international practice of assessing these duties on the value of the underlying imported physical media.

Book Publishers: Publishers must be, but are not, afforded full trading rights (the right to freely import directly into China), and must be permitted to engage (with wholly owned companies) in wholesale and retail distribution activities. There was some question as to whether China fulfilled some of these commitments with its 2004 Foreign Trade Law, which went into effect on July 1, 2004. It now appears that this law did little to rectify the problem. Regulations subsequent to the law, promulgated in August 2005, have not been released to the public, contributing to the ongoing transparency problem in China. Statements from the Chinese government about these regulations, however, indicate that they tightened rules on private ownership of publishing functions, if anything. U.S. publishing companies have been told that they may not import other than through licensed import agencies and that they may not hold their own stock for distribution in China. It appears that foreign publishing companies are allowed to engage in distribution of Chinese-produced materials, but this does most foreign publishing companies little good, considering they are prohibited from producing materials in China. Core publishing activities such as editorial and manufacturing work, printing, and obtaining International Standard Book Numbers (ISBNs) remain off limits to foreign companies. 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. 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.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA have undertaken hundreds of training and awareness programs throughout China in 2005. The trainings have involved police, prosecutors, judges, customs

³³ The “Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises,” effective November 28, 2004, sets out the 49% minority joint-venture restriction for “production ventures”; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be “specialized radio or TV ventures”; restrictions on access to non-media investors; and perhaps most important from a content perspective, requirements for use of “Chinese themes” in two-thirds of the programming.

officials and administrative agency enforcement personnel. Training and awareness has always been a high priority for the copyright industries in China.

COPYRIGHT LAW AND RELATED ISSUES

Previous years' reports have gone through the legislative landscape in China in detail. The following is intended to provide a summary of latest developments only.

Draft Transfer Regulations: On June 29, 2005, the Supreme People's Procuratorate along with the National Office for Rectification and Standardization of the Market Economic Order, Ministry of Public Security, and the Ministry of Supervision in accordance with the State Council's Regulations on the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs, issued draft "Regulations on the Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law." It is hoped that final issuance of these regulations will in fact lead to more and speedier criminal referrals. IIPA commented on these draft regulations and noted, *inter alia*: 1) it is essential that the regulations allow for "on the spot" criminal referrals where there is a "reasonable suspicion" that the infringer has performed acts which, upon further investigation, would meet the criminal thresholds (not when the administrative body determines the threshold has been met, as the draft currently indicates),³⁴ 2) because the most critical decision in China's enforcement system is whether the "thresholds" have, or have not, been met, the regulations should include a repetition of the various elements of the 2004 JIs so that administrative organs, the PSB and the SPP, have one single term of reference.³⁵ The effectiveness of these regulations will be judged by whether they lead to a greater number of prosecutions of criminal copyright cases, and whether foreign right holders can expect the Chinese Government to refer significant numbers of criminal cases in the future.

Issuance of New "Regulations for Protection of Copyrights on Information Networks" Is Needed to Confirm Protection of Digital Rights, and Foster Stronger Cooperation by ISPs in the Fight Against Internet Piracy: Two sets of Draft Regulations for Protection of Copyrights on Information Networks, intended to implement Article 58 of the Copyright Law of the People's Republic of China (2001), were issued, first on August 1, 2005, and then again, after revisions following comments, including by IIPA, on September 8, 2005.³⁶ Unfortunately, the revised draft was weaker in a number of areas. Overall, IIPA's chief concerns with the September 8 draft include the following (among other concerns identified):

- **Coverage of Temporary Copies:** The draft regulations should re-insert protection for reproductions, including temporary reproductions (the definition was deleted in the September 8 draft).

³⁴ Since the administrative organs do not have the kind of investigative authority that resides in the PSB and the SPP, or the ability to detain suspects or to secure information effectively from suspected pirates that would provide evidence that would help prove that the thresholds have been met, IIPA believes the "test" for when the PSB or SPP gets involved in a case initially commenced by an administrative organ should not be so strict.

³⁵ The Regulations allow for the Procuratorate or the local police to become involved in a criminal investigation, but many important terms which determine whether the police or Procuratorate get involved, such as "complicated" and "large amount of money" (Article 10), "very significant," "complicated," "difficult" (Article 11), and "very significant and have great impact" (Article 12), are vague and left undefined.

³⁶ IIPA understands that it is intended that these regulations when finally promulgated will supersede the April 30, 2005 NCAC and Ministry of Information Industry (MII) "Administrative Measures on Protecting Copyright on Internet." Those Measures contain various rules as to notices to ISPs and takedown of infringing materials from the Internet. While those Measures contain some problems, and remain in force as of this writing, we focus in this report on the draft regulations since they will apparently supersede the Measures.

- **Communication to the Public Must Include Full “Making Available” Right (Not Just Right of “Upload”):** The definition of “communication to the public” should extend to all communications “whether by wire or wireless means, including the making available to the public of the work/sound recording in such a way that members of the public may access the work/sound recording from a place and at a time individually chosen by them.” While the Article 3 description of “communication to the public” appears broad, the next clause, read strictly, could limit the right to the act of “uploading,” which would be insufficient to meet the WCT and WPPT standards.
- **Technological Protection Measures:** The treatment of technological measures does not measure up to the standards required by the WCT and WPPT. Devices and services are not covered (as they were in the prior draft); copy controls are not clearly covered; exceptions to the prohibition against circumvention remain overbroad; the prohibition against right holders using what the draft terms so-called “inappropriate” technological measures must be deleted, as should associated requirements to disclose TPMs (and penalties related to both).
- **Service Provider Liability:** Provisions on the liability of service providers and limitations on such liability are improved from the August draft, since the limitation on remedies (compensation) will preserve the possibility of a right holder seeking injunctive relief against a service provider that does not take down infringing content. It is important that 1) the ISP qualify for the safe harbor only if it does not know of infringements (provided in the current draft) or if it “is not aware of facts from which infringement is apparent” (not in the current draft); 2) the ISP “expeditiously” takes down material once becoming aware of “such facts” (the time period in the draft is five days, which is too lengthy); 3) the notification can be made by a right holder representative (the draft says “the right holder”); 4) in lieu of the actual URL, information sufficient to locate the infringing site should be adequate to make a notice valid; 5) a notice should be valid if it “substantially” complies with the requirements; and 6) Article 16 allows a right holder to request the ISP to identify the user.

The Criminal Law Should be Amended to Cover All “Commercial Scale” Piracy: Articles 217 and 218, the criminal piracy articles of the Criminal Law of the People’s Republic of China (1997), fail to cover all possible commercial scale piracy, and as such, these provisions violate TRIPS Article 61. In addition, China is one of the only countries in the world that requires proof that the act in question was undertaken with the “purpose of reaping profits,” and is the only country we know of that has a threshold (“gains a fairly large amount” or “when the amount of the illicit income is huge”) for criminal liability calculated based on pirate profits or income.³⁷ China should remove the “purpose of reaping profits” standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO “Internet” Treaties), which China has promised to adhere to in 2006. Thus, we propose that Article 217 be amended to achieve the following, among other things: (1) expressly criminalize end-user piracy; (2) add the TRIPS-required reference to all the exclusive rights now provided in the law (and include the WIPO treaties rights and importation); (3) criminalize violations of the anti-circumvention and rights management information provisions; (4) remove “purpose of reaping profits” to criminalize offenses that are without profit motive but that have a “commercial scale” impact on right holders; (5) eliminate distinctions between crimes of entities and individuals; and (6) increase

³⁷ As noted below, the new JI set forth what “other serious circumstances” and “other particularly serious circumstances” are, but nonetheless, as the alternative thresholds such as the per copy thresholds may be difficult to meet even where commercial scale piracy exists, China should instead choose to modernize its criminal provisions by removal of these vague standards or by significantly lowering the thresholds.

the level of penalties overall. China must also make good on its promise to criminalize the importation and exportation of pirate product (under the JIs such acts are actionable under “accomplice” liability, but the penalties available are much lower and generally non-deterrent).³⁸ We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not included in the 2004 JIs; we seek confirmation that the recidivist provision in the 1998 JIs remains intact, since it is not inconsistent with the 2004 JIs.³⁹

Criminal Thresholds Should be Lowered or Abolished Entirely: The 2004 Supreme People’s Court JIs still leave thresholds too high. The 2004 JIs made only minimal decreases in the monetary thresholds and leave in place calculation of “gain” or “illicit income” at pirate prices. Further, to date copyright owners have not found that the copy thresholds (1,000, 3000, and 5,000) have proven helpful in generating new criminal prosecutions, although copy thresholds could be helpful if lowered significantly (in 2004, IIPA had proposed 50 copies of software or books and 100 copies of recorded music or motion pictures for criminal liability, and twice this number for more serious offenses; the Supreme People’s Court adopted a number 30 to 60 times higher than what IIPA proposed). A copy threshold is not even available in Article 218 “retail” cases, so that only the monetary thresholds apply in those cases (which are more difficult to meet particularly since they are measured at pirate prices). A new challenge is how to meet the threshold in the case of Internet infringement. The severity of Internet piracy clearly calls for adjustments to the thresholds in the JIs so that Internet piracy, when on a commercial scale, is actionable even if pirate profit is not proved.

China Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to bootleg “dealers” throughout the world and over the Internet. China should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

³⁸ In the JCCT, the Chinese Government committed that the Chinese Ministry of Public Security and the General Administration of Customs would issue regulations “to ensure the timely transfer of cases [involving pirate exports] for criminal investigation.” The JCCT outcomes indicate that the “goal of the regulations is to reduce exports of infringing goods by increasing criminal prosecution.” A draft has not emerged although IIPA understands that one is due in mid-2006.

³⁹ According to Article 17 of the 2004 JI, “[i]n case of any discrepancy between the present Interpretations and any of those issued previously concerning the crimes of intellectual property infringements, the previous ones shall become inapplicable as of the date when the present Interpretations come into effect.”

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY

Special 301 Recommendation: The Philippines should be on the Priority Watch List if significant progress has not been made to address the action items below.¹

Priority Actions Requested in 2006:

- **Reverse Solid Laguna:** The *Solid Laguna* case sets the proof standard impossibly high for obtaining a search warrant, probably implicating the Philippines' TRIPS obligations. The Philippine Government has indicated that the *Columbia* decision is still the law, with its more acceptable proof standard for obtaining a search warrant, since it was decided *en banc*. It is reasonable to ask the Supreme Court to rehear the *Solid Laguna* case *en banc* to decide it in light of the standing precedent in *Columbia*; the legislature should also pass a law codifying *Columbia* and overruling *Solid Laguna* to ensure that the rule for obtaining a warrant is clear.
- **Significantly Increase Criminal Prosecutions for Piracy in the Philippines:** Inspections of pirate optical disc plants, seizures of pirate imports at the borders, and raids on retailers are not being followed by significant criminal prosecutions, and thus there is little deterrence as a result of enforcement activities in the Philippines. The OMB, Customs, and other appropriate enforcement authorities must, in addition to continued investigations, raids and seizures, significantly step up arrests, and the reconstituted Department of Justice IP Task Force must devote the resources to bring criminal cases against the owners, directors and financiers of pirate optical disc plants, and importers and distributors of pirate product (including optical discs, books, and other media). In cases where convictions have already been achieved and sentences meted out, those sentences must be served.
- **Establish a Mechanism to Investigate Leaks, Judicial Delays and Other Irregularities:** Right holders are consistently stymied by irregularities in the Philippines, including leaks of raid targets, delays in the judicial process, unsuccessful raids due to passage of time, loss of evidence after raids, etc. The Philippine Government needs to establish an independent executive oversight group at the highest level which will handle and investigate complaints by right holders into such irregularities. Where an investigation reveals mistakes or if acts of malfeasance are discovered, the appropriate remedy or disciplinary action should be taken.
- **Re-Establish IPR Court, and Develop IP Expertise in Judges and Prosecutors:** Court cases in the Philippines drag on for years and rarely result in successful judgments or criminal convictions. Due to incessant appeals processes, the chances of a convicted criminal going to jail for piracy are remote. Judicial processes to obtain enforcement of

¹ In making this recommendation, IIPA notes that the USTR is in the midst of its out-of-cycle review (OCR), in which IIPA recommended that USTR retain the Philippines on the Priority Watch List. In response to a paper "Strengthening the IP System" submitted to USTR by the Philippine Government, and the submission from Adrian S. Cristobal, Jr., Director General of the Intellectual Property Office, dated December 12, 2005, IIPA urged the Special 301 Committee to postpone any OCR decision pending resolution of issues for which the Philippine Government's responses were inadequate or raised further questions about IP protection in the Philippines. IIPA's recommendation in this report demonstrates that many key issues remain unresolved.

copyright are now complicated greatly by the *Solid Laguna* case. In other cases, judicial delays are tied to irregularities in the system (e.g., leaks). IIPA strongly supports the Government's reconstitution of the DOJ Special IP Task Force as well as its stated goal of re-establishing specialized IP courts in the Philippines, and the Government must devote resources necessary to devise programs to develop expertise in prosecutors and judges chosen.

- **Address Book Piracy:** Book piracy, in the forms of illegal photocopying, offset print piracy, and CD-R "burning," damages U.S. publishers in the Philippines. The Government must do more to combat these forms of piracy. Key to the success of any plan on book piracy are: 1) more raiding, including *ex officio* action against pirate photocopying and CD-R burning, including on university and school campuses; and 2) effective enforcement against offset pirate printers including remaining abusers of PD 1203.
- **Address Internet Piracy Threat:** In 2005, the Philippines had one of the fastest rates of growth in the world (well over 100%) in number of broadband lines. There are also reportedly many Internet cafés which use unlicensed software. The Government of the Philippines needs to take sustained (not one-time as occurred in November 2005) actions to legalize all usage of copyright content on the Internet. The Government should also pass House Bill 3308 and Senate Bill 1973, which aim to modernize the Philippines' protection of copyright and enforcement system, and to fully implement the key international agreements with respect to copyright, including the Berne Convention, the TRIPS Agreement, and the WIPO "Internet" Treaties, the WCT and WPPT.
- **Permanently Establish PAPT:** The Philippine Anti-Piracy Team (PAPT) was established in 2005 to eradicate software piracy. PAPT should be permanently established, and a body similar to PAPT should be permanently established, to result in cross agency cooperation and communication and hard hitting enforcement actions, with sufficient resources to focus on all forms of piracy and to significantly reduce piracy rates.
- **Pay TV Piracy Must be Curbed:** Cable and satellite piracy remains problematic in the Philippines. More actions such as that taken against Destiny Cable must be taken to curb the estimated 800 pirate cable systems' negative impact on the pay television sector.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.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: 2001-2005²

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software³	43.3	71%	38.0	71%	33.0	72%	25.0	68%	19.9	63%
Entertainment Software⁴	11.3	85%	NA	90%	NA	95%	NA	NA	NA	99%
Books	48.0	NA	48.0	NA	45.0	NA	45.0	NA	44.0	NA
Records & Music⁵	21.0	40%	20.0	40%	22.2	40%	20.9	40%	23.9	36%
Motion Pictures⁶	NA	NA	33.0	85%	33.0	89%	30.0	80%	28.0	80%
TOTALS⁷	123.6+		139.0		133.2		120.9		115.8	

PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES

Solid Laguna: The *Solid Laguna* case,⁸ dating back to 2000, involved suspected massive optical disc production at a manufacturing facility in Manila. The local police applied for a search warrant to raid the facility. In support of the application, three people gave evidence: the police officer responsible for the case; an official from the local Videogram Regulatory Board (now replaced by the Optical Media Board (OMB)); and a private investigator. The police and the investigator had obtained pirate discs from the market and had been given information by an informant that the reproduction was occurring at the *Solid Laguna* plant. The application for a search warrant was supported by affidavit evidence from the copyright holder as to the rights concerned. The warrants were granted by a judge, a raid was conducted, and evidence of huge volumes of pirate production was seized. On application from the factory owners, the warrants were later quashed. Appeals were rejected, and on a petition for certiorari to the Philippine Supreme Court, the Court ruled upheld the quashing of the warrants on the basis that there was no probable cause. The Court stated in its ruling,

To us it is not enough that the applicant and his witnesses testify that they saw stacks of several alleged infringing, pirated and unauthorized discs in the subject facility. The more decisive consideration determinative of whether or not a probable cause obtains to justify the issuance of a search warrant is that they

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in the Philippines, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. For the Philippines, this number represents the value of pirate PC games, not including console or handheld games.

⁵ 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.

⁶ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁷ Total losses due to piracy of records & music, business software, and books went up from \$106 million in 2004 to \$112.3 million in 2005.

⁸ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al* (G.R. No 156804, March 14, 2005).

had *personal knowledge* that the discs were *actually infringing*, pirated or unauthorized copies (emphasis added).

and

It cannot be overemphasised that not one of [the applicants or his witnesses] testified *seeing the pirate discs being manufactured* at [the subject facility's] premises (emphasis added).

This ruling creates an unworkably high evidentiary burden for right holders to simply obtain a warrant. The evidentiary burden here is far higher than that set in the *Columbia* case referred to by the Philippine Government. In that case, the Supreme Court held that the procedure for obtaining a search warrant

does not rule out the use of testimonial or documentary evidence, depositions, admissions or other classes of evidence tending to prove the *factum probandum*, especially where the production in court of object evidence would result in delay, inconvenience or expenses out of proportion to its evidentiary value ...

The *Columbia* case was decided by an *en banc* panel of the Supreme Court. The Philippine Government has claimed that the ruling of the Supreme Court's Third Division in *Solid Laguna* (Sony) could not have established a doctrine or principle abandoning or rejecting that of an *en banc* decision (i.e., the decision in the *Columbia* case), by the terms of the Philippine Constitution. However, we find it hard to conclude anything but that *the rule* set out in the *Solid Laguna* case is at odds with, departs from, and clearly does not follow *the rule* in the *Columbia* case. The Supreme Court should take up the *Solid Laguna* case *en banc*, as it did in the *Columbia* case, to set the record straight about the rule to be applied in obtaining a search warrant. The fact that the Supreme Court declined to consider the Motion for Reconsideration and that this ruling post-dates the *Columbia* decision indicates that *Solid Laguna* remains the law.

The evidentiary standard set in *Solid Laguna* falls well outside the mainstream of other countries with respect to grants of search warrants and seriously jeopardizes the expeditious availability of warrants. The application of the *Solid Laguna* case to other instances could lead to courts not granting search warrants expeditiously in cases involving copyright infringement or piracy. Effective criminal enforcement in the Philippines depends on the expeditious availability of warrants. Lack of availability of search warrants in the Philippines would result in less "effective action," lack of "expeditious remedies" against infringement and lack of "remedies which constitute a deterrent" to further infringement. It is a basic principle of the TRIPS Agreement (set out in Article 41.1) that enforcement procedures must be "available" in practice (not just on the books) in order to meet the TRIPS standard.⁹

The Philippine Court System Does Not Deter Piracy: Two aspects of the Philippine court system thwart successful judicial enforcement in the Philippines. Court cases drag on for years and rarely result in successful judgments or criminal convictions; due to incessant appeals processes, the chances of a convicted criminal going to jail for piracy are remote. Second,

⁹ The WTO Appellate body confirmed as much in the Havana Club case where it held (with respect to Article 42 of the TRIPS Agreement) that it is not sufficient to have the required procedures available in theory; right holders must have actual access to – and be able to make use of – the procedures under the Agreement.

judicial processes to obtain enforcement of copyright are now complicated greatly by the *Solid Laguna* case, and judicial delays are sometimes tied to irregularities in the system.

The slow pace of the judicial system is the cause of greatest concern. Right holders enter the judicial system in the Philippines at their own peril, as cases can drag on for many years, thereby causing an immense financial and resource burden on the copyright holder. An example is the *Beltron* case, arising out of a raid for illegal importation, sale and distribution of pirate/counterfeit software by the target in 1995.¹⁰ On June 21, 2005, nearly ten years after the initial raid, the Supreme Court found in the plaintiff's favor and against Beltron, that the Department of Justice exhibited a "grave abuse of discretion" for dismissing the case. Another example of justice gone wrong is the *Multilinks Book Supply* case, involving the Marquez defendants. Ms. Catherine Marquez was convicted on June 22, 2004, and sentenced to one year in jail and to fines of P50,000 (US\$971) per count for copyright piracy. To this day, she remains free, and she remains in the piracy business.¹¹ Based on evidence gathered throughout 2005, the Marquezes were raided once again on August 3, 2005, and a second prosecution was initiated. IIPA would be interested to know what the terms of Ms. Marquez' release are. IIPA understands Ms. Marquez' motion for reconsideration at the Court of Appeals was denied on September 26, 2005. The availability of never-ending appeals in this case – a cut-and-dried piracy case – signals to others that one can commit brazen acts of copyright piracy, be finally convicted, and never see punishment or jail time. It is difficult to imagine a clearer example of lack of deterrence than what has occurred in these cases.¹²

In November 2005, the Department of Justice Secretary Raul M. Gonzalez, pursuant to a request from the Intellectual Property Office (IPO), reconstituted a Department of Justice Task Force to prosecute cases, limiting the number of prosecutors in Manila to six, but assigning "one (1) prosecutor and one (1) alternate" for each province and city throughout the Philippines to handle IP cases.¹³ IIPA is pleased that such resources are being devoted to prosecute copyright piracy cases in 2006, and hopes to see results in criminal convictions for piracy, with deterrent sentences sought by prosecutors, and meted out by judges, which are then actually served after expedited appeals. It is rather telling that of 1,685 cases reported by the DOJ, 718 were "disposed of" with only 367 "filed in court." Nearly 1,000 of these cases remain "pending" (which we understand to mean the case files are still being investigated/assembled for possible prosecution). With only two convictions to show for all the cases of piracy in the country, and with neither of those convicts having paid a fine or served a sentence in jail, it is no wonder there is no deterrence against piracy in the Philippines. IIPA can only hope the reconstitution of the DOJ Task Force will lead to a dramatic change in results in 2006.

¹⁰ On November 20, 1995, Beltron Computers (a former licensee of Microsoft) was raided under the previous copyright law, resulting in seizure of 35 CPUs, 2,831 PCs, and unauthorized Microsoft software on CD-ROMs. The criminal complaint by Microsoft against Beltron Computer was dismissed by DOJ on October 26, 1999, stating that the respondent, being a former licensee of Microsoft, had business transactions with the latter, making Beltron's alleged reproduction of Microsoft software civil in nature (breach of contract, not criminal). After several unsuccessful appeals and motions for reconsideration, the case went up to the Supreme Court on a Petition for Certiorari, alleging grave abuse of discretion.

¹¹ It appears several government-run universities, hospitals and agencies are ordering photocopied books from her.

¹² To cite one more case, in *People of the Philippines v. Eugene Li*, the defendant was convicted in a joint decision involving copyright infringement, trademark infringement and unfair competition, and was sentenced on February 10, 2005 to two years imprisonment and a fine of PP100,000 (US\$1,942), a totally non-deterrent fine. Mr. Li has appealed the sentence. The seemingly never-ending appeals process leads to an overall lack of deterrence as to the particular defendants involved (as demonstrated by the Marquez case) as well as to society at large.

¹³ This was accomplished as per Department Order No. 657 s 2005.

Proposed Reconstitution of Special IP Courts: IPO Director General Adrian S. Cristobal Jr. has proposed to the Supreme Court the re-creation of special courts that would solely handle intellectual property rights cases in an effort to speed up resolution of IP cases, and the Supreme Court (SC) has acted favorably on the request in an *en banc* resolution dated July 26, 2005.¹⁴ To date, however, such courts have not been established. Of course, the mere “reintroduction” of special IPR courts will not solve the problem of slow case progression. Proper training of IPR court judges is needed. Despite extensive training seminars already given and attended by numerous judges both in the Philippines and abroad, there remain few judges who are fully aware of IPR issues.

Book Piracy: Book piracy in the Philippines remains a major problem, 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. Due to some enforcement efforts in 2005 by the publishers,¹⁵ some awareness is beginning to spread around the pirate photocopy community. Pirate photocopying has traditionally taken place most often in commercial establishments surrounding universities or in street stalls concentrated on a single street or small group of streets.¹⁶ 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 possessing stockpiles of infringing goods by copying on a “print to order” basis, complicating investigations and enforcement actions.¹⁷ It is ironic that one set of photocopiers is in operation near the Philippine Regulations Commission, the government institution which regulates professional businesses in the country.

To address photocopy-shop piracy, U.S. publishers have worked steadily with authorities at the Philippine National Police (PNP) and National Bureau of Investigation (NBI), and stand ready to work with authorities on further cases at any time.¹⁸ By contrast, IPO never raids on behalf of publishers, so it is up to NBI and PNP to provide effective enforcement, and they have not traditionally raided *ex officio*. Since much of the photocopy piracy is done on or around university campuses, it would be important for the Commission on Higher Education (CHED) and the Department of Education (DepEd) to get involved in the issue, especially where on-

¹⁴ As a result of the Resolution, the proposal was forwarded to the Supreme Court’s Office of the Court Administrator to determine which courts would be designated IP courts.

¹⁵ Most enforcement in the Philippine by the publishers is self-initiated. Raids have had a slight effect in 2005 on the open availability of foreign titles, e.g., medical titles, in the copyshops.

¹⁶ 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.

¹⁷ 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.

¹⁸ The Philippine Government, in its December 2005 submission to USTR, indicated that it had experienced “difficulties in obtaining cooperation” from publishers. U.S. publishers, in order to accommodate onerous requirements for proving copyright ownership of individual titles seized in a raid, often require a couple of days post-raid to prepare complaints for submission. Without such preparatory work, foreign right holders risk prosecutions being thrown out for failure to produce proper documentation of ownership. In one case in August 2005, in a raid requested by representatives of U.S. publishers (because PNP does not run raids *ex officio*, a separate concern), the Philippine Government became frustrated by the publishers’ request for time to prepare documents for the complaint, preferring a speedy decision to file a criminal complaint the night of the raid. At no time, however, was there any lack of cooperation by right holders. In such circumstances, it was unreasonable for the Philippine authorities to ask for immediacy with respect to pressing charges after the raid, and it is a mischaracterization to equate the care being taken by right holders to ensure successful application of Philippine laws with “difficulties in obtaining cooperation.”

campus activity is involved.¹⁹ U.S. publishers stand ready to meet with CHED and DepEd to discuss publishers' issues. Furthermore, publishers are encouraged by signs of inclusion from OMB and hope that cooperation with that agency will increase.

The Philippine Government has indicated that "[w]hat is being considered is a plan being crafted by the National Book Development Board (NBDB) to have the universities and schools enter into licensing agreements with copyright owners." While this is only one part of even the photocopy piracy problem, IIPA welcomes a "plan" but insists that right holders must be involved in the process of establishing terms, and publishers are excited about the possibilities offered by the partnership between the Government and the International Federation of Reproduction Rights Organizations (IFRRO) in this regard. However, IIPA notes that such a scheme is distinct from an overall "plan" to fight book piracy, and that licensing organizations do not comprise a "one stop" solution to book piracy in all its forms.²⁰

Pirate reprints are a good example of where licensing cannot solve the problem. In the past, pirate booksellers relied on the "excuse" that their books were produced pursuant to Presidential Decree 1203, albeit that PD was repealed more than nine years ago.²¹ The NBDB published a resolution in January 2006, declaring that "[t]he commercial reprinting of books without the knowledge of their copyright owners is definitely illegal under R.A. 8295."²² This declaration is a good start and should be interpreted to be in effect immediately. While IIPA is encouraged by such an active statement, the more important action will be the follow up to that statement. Prior to the issuance of this statement, the IPO had previously gathered the distributors of books purporting to be reproduced or left over under Presidential Decree 1203, asking them to remove the illegal stocks from their stores. While this no doubt resulted in some improvement, it was not lasting and there has been no follow up by IPO or anyone else. Government monitoring, inspections and enforcement have not occurred, and they are necessary to ensure that there are no more illegal reprints in the Philippines, not just "1203" reprints but all offset piracy.²³

Optical Disc Piracy Production for Domestic Consumption and Pirate Imports Remain Serious: Optical disc piracy in the Philippines consists of imports, particularly from China and Malaysia, less so from Indonesia,²⁴ but local pirate production is increasing, now making up at least 30% of pirate discs. There are now eleven optical disc production facilities, including two mastering facilities and one DVD-9 facility (with two lines); industry estimates there are roughly 38 lines in the Philippines, amounting to production capacity of 133 million

¹⁹ Third party vendors renting space on campuses, for instance, conduct illegal activities with impunity.

²⁰ Indeed, it should never be the goal of a government or a licensing body to simply "legitimize" illegal practices through licensing. Licensing has an important place in a developing market for published materials. However, licenses for photocopies should never replace sale of an entire legitimate book. The Government must be careful in crafting a licensing scheme to ensure a fair and diverse market for right holders and users alike.

²¹ The PD 1203 issue, unlike the Marquez case (which is about illegal photocopying), has to do with booksellers dealing in illegal reprints.

²² Statement by NBDB Chairman Dennis T. Gonzalez, printed in the *Manila Bulletin*, January 15, 2006.

²³ Local publishing representatives report that stores such as "Miriam Webster" Bookstore and Jade Bookstore still sell "1203" copies.

²⁴ Shipments of optical discs into cities in the southern Philippines appear to be rampant because syndicates are aware that the OMB does not maintain a presence outside of Manila, and relies heavily on other law enforcement agencies when conducting seizures outside of Manila. Pirate concert DVDs are becoming more prevalent in the marketplace. The majority of these products appear to be of Chinese origin, although significant numbers of Indonesian and Malaysian discs are being found. The quality of the Chinese finished product is generally better but the DVD functions are frequently limited or defective.

discs per year. There is little authorized production,²⁵ and unfortunately, in the Philippines, the capacity to produce optical discs exceeds the ability of right holders to license production.

The Philippine Government, in its December submission to USTR, indicated that three administrative actions had been taken against plants inspected so far. IIPA is appreciative of OMB's efforts to try to eradicate pirate optical disc production occurring in the Philippines, and encourages the regular (and unannounced) inspections in tandem with industry representatives to continue. Unfortunately, the results of the administrative cases have not been overwhelmingly favorable due in part to lack of OMB efforts, lack of administrative capabilities, and lack of transparency. For example:

- In the *Bright Future* case, the replication equipment was given back to the pirate operator by the court, and its whereabouts remain unknown.
- In the *Alpha Plus* case, this pirate plant was criminally fined but has since been re-licensed by the OMB. An effective optical disc law would not permit the re-licensure of a company just convicted for violating the statute.
- In the *MHN Optical Technologies, Inc.* matter,²⁶ three inspections led to three administrative complaints. While OMB received an Order to remove "injection [molding] machines, downstream equipment, printing equipment, molds, and controllers," the equipment could not be removed and electricity could not be shut off because the plant is in a "special economic zone" and thus would require the involvement of the Philippine Export Zone Authority and the Bureau of Customs. That the equipment was not even sealed, and that no follow up action was ever taken, is indicative of a breakdown in the enforcement against optical disc piracy. OMB claims the machinery remains "locked up" inside the plant, but no industry representatives have been permitted to verify this.

In addition, the problems of storage of seized items (i.e., as of late 2005, the warehouse being used had closed down) are recognized by the Government. In particular, industry has no knowledge of the "rebid" process that the Government reports took place on December 13. The contract process for the storage of seized items has not been made transparent to right holders.

Plant Inspections and Retail Raids Notwithstanding, There Have Been Few Arrests and No Prosecutions: The Optical Media Act as implemented does not fully address the need for proper enforcement against optical disc piracy. All of the registered replication facilities in the Philippines were inspected in 2005, leading to some seizures of pirate discs and machinery (the Government of the Philippines reports seizures in 2005 of more than 3.3 million discs and 11 replicating lines, among other items).²⁷ However, problems remain in the inspections, including

²⁵ The Philippine Government, in a submission to the United States Trade Representative in 2005, claimed that much of the production in the Philippines is licensed, e.g., by "Warner Home Video, Magnavision, and Viva Video." With respect to Warner Home Video, it is true that on one occasion a plant claimed that it was licensed by Warner Bros. to replicate certain titles. However, the documents provided to the OMB were fraudulent. The OMB claimed legitimacy in its report without consulting Warner Bros..

²⁶ OMB Admin. Case Nos. 2005-09-761 and 762. According to the Philippine Government, the plant was inspected on August 12, September 9, and October 7, 2005.

²⁷ One raid in April 2005 appears to have been compromised by a leak – very little pirate product was found. It had been estimated that the plant was putting out up to 320,000 discs per day, including movies, music, and video games. The OMB arrested eleven Taiwanese nationals (none of them was charged; instead, they were immediately deported), and seized eight replicators, five bonding machines, four printing machines, and several sacks of polycarbonate. No information has been forthcoming about the final disposition of the seized items or whether charges were brought against those arrested in the factory raid. More important, there is no information forthcoming about the actual plant owners and whether they have been prosecuted. The machinery in this case was returned after the warrant was quashed by the judge. There is still no confirmation as to the actual owners of the plant. The

leaks and quashals of warrants (see discussion above regarding the impossibly high burden set in the *Solid Laguna* case). Furthermore, the Government is not targeting owners, directors, executives, or financiers of these plants for criminal prosecution. Until problems in the enforcement process are fixed and key figures in pirate production are prosecuted criminally, right holders in the Philippines will suffer from optical disc pirate production. In 2006, OMB should immediately commence a new round of inspections. In addition, to further strengthen the OD regime, the government of the Philippines should amend the law or regulations to require that any licensee of an OD plant be a significant shareholder or office holder (personal liability clause), and to require OD plant owners/operators to declare all foreign investment in the company.

Retail raids in malls where piracy has been prevalent resulted in seizures of several million pirate discs and resulted in some decrease in piracy in certain malls;²⁸ however, the piracy situation remains roughly the same in many malls,²⁹ and is actually reported to have gotten worse in a couple, including one in Quiapo.³⁰ The software industry and publishers also enjoyed some positive raid results in 2005.³¹ However, there have been relatively few arrests³² and criminal copyright prosecutions, and as such there is little deterrence in the market.³³ For example, while Virra Mall – a piracy haven – was closed down in late 2004, a relocation of the pirate vendors to a new entertainment complex called Metrowalk, under the same security coordinator as that for Virra Mall, has meant little drop-off in the sale of pirated product. While OMB has raided Metrowalk, we understand that leaks have compromised the raids.³⁴

Irregularities in Enforcement System Must be Resolved: Right holders are consistently stymied by irregularities in the Philippines, including leaks of raid targets, delays in the judicial process, unsuccessful raids due to passage of time, loss of evidence after raids, etc. For example, items found in inspections are often not seized (as noted in the MHN inspection). Also, in 2004, some recorded music product found on the street dated from 2001-2002, and there is some support for the assertion that there has been some unauthorized release of (and

registered licensee of the plant is allegedly not the real owner. There were three other inspections in 2005, all involving the same manufacturing plant, that resulted in no preventive actions even though illegal manufacture was occurring during the inspections.

²⁸ The Philippine Government notes raids from January to December by OMB, NBI, and/or the Philippine National Police (PNP), including 25 raids in Quiapo, 39 raids in Binondo, and 11 raids in Makati Cinema Square.

²⁹ E.g., at Royal Family Mall in Valenzuela; Coastal Mall in Paranaque; Northmall, LRT in Caloocan; Makati Cinema Square in Makati; Metrowalk Mall in Ortigas; Park Lea, Shaw Blvd. in Mandaluyong; Riverbank Center in Marikina City; and Harrison Plaza, in Manila.

³⁰ According to industry reports, the piracy situation worsened in Quiapo Barter Trade area, and Arlege Street/Elizondo Street.

³¹ For the software industry, for example, the OMB and PNP raided stores selling pirated software in Shoppesville in Greenhills, Harrison Plaza in Manila, Orient Pearl in Recto, MetroWalk in Ortigas and MRT Shaw, Mandaluyong City. In total, between September and October 2005 PhP19 million (US\$369,040) worth of pirated software, computers and servers were confiscated. IIPA also appreciates that the OMB worked in 2005 with local publishing representatives to include the industry's optical disc products in its retail raids.

³² An American and his Filipino partner were arrested by National Bureau of Investigations (NBI) for selling and distributing pirated business software in Cebu.

³³ The Philippine Government report "Strengthening the IP System" mentions only two copyright defendants convicted, and only one defendant convicted in 2005 (Mr. Eugene Li, who is listed three times, in case Nos. 03-0320, 03-0321 and 03-0322; the cases were combined and resulted in one combined sentence), and Ms. Catherine Marquez (case Nos. MC-00-3006 to MC-00-3015), who was convicted in 2004, and still remains not only out awaiting appeal but in the piracy business.

³⁴ OMB staff and PNP have been seen talking to traders before a raid and/or at the end of a "negative" raid and hearsay evidence suggests other irregularities, including the possibility that protection money is being solicited. The security manager employed at Metrowalk was previously employed as the security manager at Virra Mall and has been heard to boast that his stall owners "cannot be raided" by the OMB.

even offers to sell) formerly seized products from their storage areas. Raids are leaked in advance, and even when raids result in pirate seizures, supporting evidence in the form of paperwork, stampers, etc. is not found on the premises. IIPA also expresses serious concerns that the Bureau of Customs is not enforcing against known piracy, while pirate imports, especially optical discs, continue to flood the Philippine market from China and Malaysia, and to a lesser extent, from Indonesia.³⁵ Finally, judicial delays are tied to irregularities in the system (e.g., delays in warrants followed by less-than-successful raid results due to leaks).

Signal Theft (Cable and Satellite) a Growing Problem in the Philippines: Signal piracy is a growing problem in the Philippines, resulting in a decrease in revenue for right holders in broadcast programming. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates revenue losses of US\$70 million in 2005, a 16% increase over 2004. Moreover, industry analyst Media Partners Asia estimates that more than 50% of homes in the Philippines receive pay television illegally.

The two major concerns are that: small cable television operators are moving to the use of pirated programming; and the Government fails to effectively enforce rights in legitimate programming. Specifically, the National Telecommunications Commission (NTC) has failed to invoke its authority to revoke the licenses of the operators that utilize pirated programming. However, it is encouraging that the target of right holders' complaints with the NTC of unauthorized broadcasts (Destiny Cable) was not transmitting unauthorized programming as of January 2006, in compliance with a second cease and desist order in late November 2005 (importantly, the order threatened suspension of the license for non-compliance). This is evidenced by a recent case brought by the Motion Picture Association against a prominent Manila-based cable TV operator openly offering pirated channels to its subscribers. Rather than revoking or suspending the license of the operator, the NTC has merely issued cease and desist orders, which have in turn been ignored by the operator without repercussion.

Also of note is that the Intellectual Property Office (IPO) and the National Bureau of Investigations (NBI) have been extremely cooperative in three recent industry funded criminal raids of pirate operators. These three operators, unfortunately, were able to return to pirated broadcasts within days, re-joining the ranks of the hundreds of cable TV operators throughout the country that use stolen broadcast signals to serve their subscribers. While the support of the IPO and NBI is much appreciated, the signal piracy problem in the Philippines is systemic and getting worse in the absence of a more comprehensive effort to require the over 800 cable TV operators to refrain from using broadcast signals without an authorization or payment. While the support of the IPO and NBI is much appreciated, the signal piracy problem in the Philippines is systemic and getting worse in the absence of a more comprehensive effort to eradicate unauthorized transmission of pay television signals.

It is believed that the NTC wishes to transfer responsibility to consider complaints of unauthorized broadcasts and infringement to the IPO. IIPA urges that the complaints should remain with the NTC, though any complaints involving alleged intellectual property infringement could be referred to the IPO for determination of that matter alone. In March/April 2005, IIPA also learned that the NTC was forming an Intellectual Property Rights Enforcement Action Panel

³⁵ Sources indicate couriers regularly bring infringing DVDs through Manila airport as checked luggage, and reported seizures are non-existent. Movies, music, software, concert DVDs (bootlegs) are from China and Malaysia; many of these pirate discs have SID codes erased. What raids have been run by Customs have involved smaller shipments, but at least demonstrate some cooperation between Customs and the OMB. In two raids in September and October 2005, Customs and the OMB seized 5,000 pirate movie DVDs and around 8,000 pirate movie DVDs in Cebu city (a cargo shipment that had arrived by air), respectively.

("IP-REAP") and published a Circular announcing the formation of IP-REAP and the Guidelines under which it would operate. The Circular has not been implemented, as the local cable TV operators, led by FICAP, have filed a case before the Court of Appeals querying the validity of the Circular and seeking a temporary stay of its implementation. Thus, it is believed that IP-REAP is dormant for the moment.

Broadband Has Brought Internet Piracy to the Philippines: With the increased availability of broadband both in homes and Internet cafés in the Philippines in 2005 (in 2005, the Philippines had one of the fastest rates of growth in the world – well over 100% – in broadband lines), illegal Internet downloads are becoming more of a threat to legitimate sales and distribution in the Philippines. For example, the business software industry reported that there were 1,613 online software infringements traced to Philippine ISPs in 2004, but that number grew to 5,412 in 2005 – translating to a 235% increase year on year, mainly in the P2P domain. The record industry notes similar trending. The Government has yet to take a systematic approach to address P2P piracy and downloading of content.

Roughly 1,500 Internet cafés were in operation in the Philippines at the start of 2005, and virtually all of these establishments profited from unauthorized exploitation of the most popular entertainment software titles. Internet cafés were targeted for enforcement in late 2005, and, for example, in September 2005, many Internet cafés closed down temporarily to avoid being raided on suspicion of piratical activity.³⁶ In late November 2005, the NBI conducted criminal raids in Metro Manila against three Internet cafés using unlicensed software. These raids reportedly led to the seizure of 286 computers.

End-User Piracy: End-user software piracy remains the most serious threat to the business software industry in the Philippines, severely inhibiting the growth of the legitimate market for software.³⁷ The business software industry has generally been pleased with the Philippine Government's response to calls to enforce against this form of piracy. In the first half of 2005, the NBI successfully conducted end user raids against two companies in Manila using pirated and unlicensed software. On August 24, 2005, the National Bureau of Investigation (NBI), the OMB and PNP, together with the IP Coalition, banded to launch the "Pilipinas Anti-Piracy Team" (PAPT), a campaign suggested by the Business Software Alliance that aims to curb software piracy in the Philippines. Since the start of the crackdown in mid-September 2005, NBI has conducted eight raids on corporations suspected of using unlicensed software. The raids were supported by wide publicity, which included PAPT holding a press conference at the end of October to announce the continued crackdown.³⁸ In total, since the crackdown began, Php19 million (US\$369,040) worth of pirated software, computers and servers have been confiscated. The PAPT Team has committed to keep the crackdown ongoing into 2006.

TRAINING AND PUBLIC AWARENESS

IIPA members provided various public awareness and training activities in the Philippines in 2005:

³⁶ Industry sources indicated that the Internet cafés were tipped off of potential raids and thus only shuttered their doors temporarily. At the same time, OMB was warning about some raids carried out by those claiming fraudulently to represent OMB or NBI, resulting in stealing computers and "extortion."

³⁷ The 71% piracy level in 2005 is unchanged from 2004, and is substantially above the Asia Pacific rate of 53% and more than double the world average of 35%.

³⁸ In addition, the IPO has encouraged members of the Call Center Association of the Philippines (an outsourcing firm) to enter into an MOU with the Business Software Alliance designed to ensure that only licensed software would be used within their organizations.

- In August 2005, the Business Software Alliance held a special seminar in Manila on software piracy, investigation and evidence collection for agents of the NBI Intellectual Property Rights Division (NBI-IPRD), OMB and PNP-CIDG Anti-Fraud and Commercial Crimes Division (PNP CIDG-AFCCD).
- On August 24, 2005, the BSA issued positive publicity around the impending crackdown after the formation of PAPT.
- The BSA coordinated education campaigns in 2005, including “Detox Your PC to Keep Your Business Healthy” in March 2005, which renewed BSA’s call to companies to manage their use of licensed software in their business to realize maximum productivity and security. This campaign was publicly supported by the Commission on Information and Communications Technology (CICT) at a press conference.
- The International Federation of Phonographic Industries-Philippine Association of the Record Industry Inc. held a training on optical disc piracy detection and enforcement.
- Other members have offered to provide trainings in 2005.

MARKET ACCESS ISSUES

Restrictions on Foreign Ownership of Mass Media and Advertising: One abiding problem in the Philippines, especially for U.S. interests, is that foreign investment in mass media is strictly prohibited under the Philippines Constitution. The pay television sector, for example, which is classified under mass media, is burdened by such foreign investment restrictions, ultimately impeding further development of the cable television market in the Philippines. Draft cable legislation is reportedly being considered that contains a provision allowing up to 40% foreign investment in cable systems that do not produce their own programs or content.³⁹ 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 2005.⁴⁰

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

Passage of House Bill 3308 and Senate Bill 1973 Needed: IIPA strongly supports passage of House Bill 3308 and Senate Bill 1973, which aims to modernize the Philippines’ copyright protection and enforcement system, and to fully implement the key international agreements with respect to copyright, including the Berne Convention,⁴¹ which is incorporated

³⁹ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

⁴⁰ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

⁴¹ Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on September 28, 1979).

into the WTO TRIPS Agreement,⁴² and the WIPO “Internet” Treaties, the WCT and WPPT.⁴³ This legislation would result in the Philippines adopting a world-class copyright law that complies with the major international treaties related to copyright, importantly including proper protections for copyright materials in the digital environment.

In particular, the Bill would expand the scope of reproduction rights to include temporary copies and would explicitly broaden the right to control all communications to the public, including by providing an interactive “making available” right for the digital world. The Bill would also provide critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.” The Bill would also address other important areas in need of modernization, including increasing the term of protection for works and sound recordings in line with international trends, providing an importation right, narrowing certain exceptions which were arguably overly broad, providing for Berne and TRIPS-compatible protection for pre-existing works, providing criteria for secondary liability (e.g., as to landlords of pirate malls), expressly criminalizing end-user piracy, providing for a Berne and TRIPS-compatible presumption of ownership, strengthening border measures, providing for *ex parte* civil searches as required by TRIPS, providing for disclosure of information to right holders to assist in investigations of infringement, allowing “sampling” to efficiently deal with massive seizures of pirated materials, and lengthening the statute of limitations so it is not tied to the vagaries of the court timetable but rather is tied to the initiation of the case by the right holder.

The House Trade and Industry Committee held a public hearing on the Bill on November 22, 2005 and some IIPA members participated in this hearing. Another hearing was held on December 6.⁴⁴ The hearing concluded with a working committee being formed made up of the IPO, OMB, Intellectual Property Association (IP Lawyers’ Group), the IP Coalition, and a “consumer rights” group that advocates for expanding fair use and academic uses. The working committee is headed by Congressman Jack Duavit. The Committee is tasked to reconcile the

⁴² Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1994).

⁴³ See WIPO documents CRNR/DC/94 (the WIPO Copyright Treaty, or WCT) and 95 (the WIPO Performances and Phonograms Treaty, or WPPT), and, for the agreed statements concerning the treaties, see WIPO documents CRNR/DC/96 and 97. The government of the Philippines joined the WCT and WPPT on October 4, 2002, but has not fully implemented the Treaties. Because of the general nature of some of the key provisions of those Treaties (for example, the provisions on protection of “technological protection measures” from unlawful circumvention), it is not possible simply for the WCT and WPPT to be declared “self-executing”; rather, careful and full implementation of the requirements of the WCT and WPPT must be undertaken.

⁴⁴ At this hearing, it is quite unfortunate that the Intellectual Property Office did not support provisions in the bill that provide protection for temporary copies, holding that this was not a requirement in the WIPO Treaties. IPO is incorrect in its assertion and we urge IPO Staff to reconsider this position and would welcome a dialogue with them. 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. Thus, it is important to take stock of the global trend with respect to protection of temporary copies under the reproduction right. Before the WIPO treaties were concluded, there was significant debate about what the proper status should be for certain types of ‘transient’ or ‘temporary’ reproductions, with some arguing that there should actually be a carve-out from the reproduction right. Most felt that this would create unnecessary legal fictions, and today, there remains little doubt as to the normative standing of temporary copies under the reproduction right in international copyright law. It can no longer be questioned that the Agreed Statements concerning the reproduction right – the Agreed Statement to Article 1(4) of the WCT, and the Agreed Statement concerning Articles 7, 11 and 16 of the WPPT – mean that 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.

proposed amendments with the various positions taken by different interest groups and the IPO. IIPA hopes House Bill 3308 and Senate Bill 1973 will achieve passage in 2006.

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 meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2004, \$965.3 million worth of Philippine goods were imported to the United States duty-free under the GSP program, accounting for 10.6% of its total imports to the U.S. For the first 11 months of 2005, \$935.9 million worth of Philippine goods (or 11.1% 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.⁴⁵

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

2006 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY

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

Priority Actions Requested in 2006

- **Appoint Independent Commission to Combat Corruption:** The copyright enforcement system in Thailand is so riddled with raid leaks, evidence of payoffs and undue influence that effective enforcement against large-scale pirate production facilities in Thailand is stymied. IIPA recommends the formation of an independent commission to collect instances of irregular practices, followed by recommendations to prosecute individuals who have been found to have illegally tampered with legal or enforcement processes.
- **Tackle Optical Disc Pirate Production:** Optical disc piracy in Thailand continues to devastate the domestic market and Thai-produced pirate product continues to be destined for export. Thailand's Optical Disc Act went into effect on August 29, 2005 to regulate the 42 known plants (155 lines, 542.5 million disc production capacity) and to smoke out underground plants. In addition to requiring the use of internationally-recognized SID code, Thai authorities must adopt a plant visit and exemplar collection strategy in 2006. After plant visits, follow-up enforcement efforts should aim at dismantling pirate production capabilities, investigating pirate production, and prosecuting those responsible. Nothing short of substantial reductions in the amount of pirate product produced in and exported from Thailand in 2006 will be viewed as a success by the copyright industries.
- **Effectively Curtail Pirate Imports and Exports:** The industries report increasing imports from Malaysia and China, among others, and continue to note pirate exports from and transshipments through Thailand. Royal Thai Customs officials must seize more pirate copyright product in 2006 and must work with express mail carriers to establish mechanisms to inspect express shipments as other countries have done effectively in recent years.
- **Legitimize Usage of Published Materials:** Book piracy (mostly in the form of illegal photocopying) in Thailand continues to thrive, as neither the Royal Thai Government nor the universities will take a stand and ensure use of legitimate textbooks. The courts continue to recognize exceptions in the law that place Thailand out of the mainstream of international norms; the law must be amended.
- **Establish Continuous Enforcement Against Retail Piracy:** Enforcement against retail piracy in Thailand is impressive at times but depends on who is in charge and is rarely sustained. Enforcement against retail optical disc piracy was very effective during the first nine months of 2005, but then fell off precipitously. Thai authorities must establish predictable mechanisms so that pirates do not return full scale to the retail markets once major enforcement campaigns cease.
- **Effectively Deal with End-User Piracy:** Unauthorized use of business software in commercial settings causes the greatest losses to the business software industry in Thailand. While all requests made by the business software industry to the police for end-user and retail actions in 2005 were actively supported, the high rate of software piracy (77%) suggests that more needs to be done to get the message across.

- **Modernize Copyright Law and Join WCT and WPPT:** The draft Copyright Law amendments contain some positive elements, but should be further revised before passage to fully implement the WIPO Internet Treaties, the WCT and WPPT, and to include modern and effective enforcement provisions to eradicate all forms of piracy, including in the digital environment.

For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

THAILAND Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	149.0	62%	30.0	60%	28.0	60%	26.0	70%	24.0	65%
Records & Music	21.9	45%	24.9	45%	26.8	41%	30.0	42%	16.6	45%
Business Software ³	107.9	77%	100.0	78%	84.0	80%	57.3	77%	32.6	77%
Entertainment Software ⁴	NA	75%	NA	76%	NA	82%	47.3	86%	29.1	93%
Books	30.0	NA	30.0	NA	28.0	NA	28.0	NA	28.0	NA
TOTALS	308.8		184.9		166.8		188.6		130.3	

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Irregularities in Thai Enforcement System: The issue of copyright piracy will never be adequately addressed until irregularities affecting the enforcement system are addressed. It has long been suspected that high-ranking influences have been involved in the piracy business. Piracy, as compared with drug trafficking, for example (which was subject to a massive crackdown by the Royal Thai Government in 2004), is a relatively high-profit, low-risk activity (very few people have been convicted for copyright piracy and even fewer have ever served jail time for it).⁵ There is evidence of tampering directly with specific enforcement actions, including

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Thailand, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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

⁵ In 2005, 356 motion picture industry cases adjudicated by the IP Court (CIPIT) resulted in criminal convictions. However, only one case resulted in the accused (a factory manager) actually serving a custodial sentence. Another defendant in an unrelated factory case was given a custodial sentence but remains out on bail pending his appeal to the Supreme Court.

payments. Leaks of raid targets are common and uniformly experienced by all the copyright industries in Thailand.⁶

Optical Disc Pirate Production Remains Severe: Pirate production of optical discs in major plants (CDs, VCDs, DVDs, CD-ROMs) remains a major hurdle to the growth of legitimate copyright industries in Thailand. There are 42 known plants in Thailand, with 155 optical disc production lines. A very conservative estimated capacity for production in Thailand stands at 542.5 million discs per year in the plants alone, greatly exceeding any rational legitimate domestic demand (estimated legitimate domestic demand stands at roughly 60 million discs).⁷ Most of the known plants (35) are in Bangkok or the provinces surrounding Bangkok, while the others (7) are in neighboring provinces to the East and Southeast of Bangkok closer to the Cambodia border (see Figure 1). Press has reported that there may also be plants near the borders of Laos and Burma; product sourced from Laos was seized in Thailand in 2005.⁸ The plants can generally produce any format, including audio CD, VCD, or DVD, employing kits to change formats (even from a blank CD-R or DVD-R line). Pirate optical discs manufactured in Thailand have shown up in 2005 in the United Kingdom, Belgium, South Africa, Taiwan, Sweden, and other parts in the EU, the U.S., and countries in Latin America. In 2004, the EU reported that 21% of all IP cases arising from pirate imports of copyright products involved imports from Thailand.⁹

In addition to plant production, there is increasing “burning” of all kinds of copyright content onto recordable discs (CD-R, DVD-R, etc.).¹⁰ In addition to Thai-produced product, piratical imports from Malaysia and China (as well as Laos, as noted above) are becoming an increasing concern.¹¹ Pirate product is being consumed domestically or exported for international consumption.

Retail Piracy (Optical Discs) in Thailand: As noted, pirate optical discs, whether factory produced or burned onto recordable discs, devastate the local market for copyright

⁶ The flow of information within the Economic Crime Investigation Division (ECID) is apparently the cause of many leaks. For example, on the day that authorities were preparing to raid retail shops in the Fortune IT Mall, all the targets had stopped selling and would only accept orders for CDs to be sent to customers by mail, explaining that ‘the police would be coming that day.’ The raids were cancelled. About two weeks later, another attempt was made; industry informed the police at 10 a.m. (at which time it was confirmed that product was still being sold in the shops), but by 1 p.m., the stores had ceased selling product and indicated the police would be coming that day.

⁷ See IIPA’s 2004 Special 301 report, at <http://www.iipa.com/countryreports.html>.

⁸ 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. On September 29, 2005, Royal Thai Police intercepted a private van which had just entered Thailand across the Nong Kai Laotian border control point. On being searched the vehicle was found to contain approximately 33,000 infringing discs, including pirate sound recordings. The driver was arrested and charged.

⁹ EU statistics from 2004 show that 20% of IP-related contraband (which includes but is not limited to copyright piracy) seized in EU ports emanated from Thailand, second only to China in terms of country of origin, and 21% of all cases involving pirate “audio CDs, games, software, DVDs etc.” were from Thailand, second only to China’s 26% and well beyond Malaysia (9%), Pakistan (8%), Indonesia (6%), and Hong Kong (5%). *DG TAXUD European Commission*.

¹⁰ Several raids are illustrative of the “burning” problem. For example, in 2005, the Motion Picture Association raided two “burner” facilities and seized a total of 133 CD-R and DVD-R burners. On July 5, 2005, the Metropolitan Police Bureau conducted a raid in Bangkok, resulting in seizure of eight CD-burner towers (40 writers in total), 14,775 burned pirate CDs, 3,650 blank CD-Rs and more than 100,000 inlay cards. The occupant of the premises, a 35-year-old male, was arrested and charged. On October 16, 2005, officers from the Thong-Lor Police Station raided residential units, seizing seven CD-burner towers and 33,400 burned discs, predominantly pornography (but including more than 1,000 pirate music CDs). Both cases are being reviewed by public prosecutors for further action.

¹¹ Industry reported that on March 13, 2005, Royal Thai Customs of Songkhla Province intercepted 30,000 pirate discs suspected to have originated in Malaysia.

materials.¹² The Royal Thai Government response has been to run sometimes effective but usually short-lived campaigns to weed out retail piracy from notorious pirate markets. Reasons for the mixed results include changing personnel, but more important is the failure to sustain such campaigns.¹³ For example, under the leadership of General Pol. Noppadol Soomboonsupt, significant progress was made in 2004 and well into 2005, until his retirement in October 2005. Progress was also seen from March through September 2005 in reducing retail piracy in Bangkok and vicinity, as General Jarumporn Suramani of the Bangkok Metropolitan Police Bureau was very active in carrying out *ex officio* raids against street retailers, particularly in the so-called "red zones" and "yellow zones" in the Bangkok area.¹⁴ The efforts of these committed men significantly reduced the availability of piracy, and for example, led some stalls (e.g., on Silom Road and Suan Lum Night Bazaar) to go out of business.¹⁵ Unfortunately, General Jarumporn was transferred to a new assignment in October 2005, and many street retailers immediately reopened their businesses, driving legitimate sales for U.S. copyright materials down almost immediately. The successor to General Jarumporn, General Chachawal Sooksoomjit, has established nine "Centers," one for each police station in the Bangkok area, where right holders can file complaints, after which a raid would be carried out without the need for filing another complaint with the local police station.

In mid-November 2005, a new Special Task Force from the Criminal Investigation Bureau (CIB), under the command of Police Lieutenant General Ek-karat Meepreecha, Deputy Commissioner of CIB, was appointed, and by early December 2005, raiding activity of this Task Force had commenced. However, again, this Task Force is only scheduled to undertake six months of operations, ending April 30, 2006. This fairly illustrates the contrast between temporary measures and long-term, structured, fully financed enforcement. We strongly advocate that this task force's mandate be extended for a much longer period and that the Royal Thai Government provide adequate funding for such campaigns.¹⁶

Camcorder Piracy: The vast majority of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release

¹² Piracy affected the legitimate market considerably, leading to loss of jobs; some local Thai record labels went out of business in 2004-5. Larger record labels like GMM Grammy and RS reported revenue losses for the first time.

¹³ Thailand has employed various "campaigns" to address piracy in the past. In 2004, "Operation Eradicate" yielded seizures of pirated discs in the millions, as well as significant amounts of optical disc production equipment. This initiative was maintained through large raids in 2005 as part of "Operation Heat Wave." The largest raid of 2005 occurred on July 11, 2005, when police raided a townhouse in Thon Buri, seizing 102,000 pirated CDs estimated to be worth 35 million Baht (US\$884,696). Seven people were arrested. Also seized in the raid were 400,000 CD covers. The case has yet to proceed to prosecution and is currently being reviewed by the public prosecutor.

¹⁴ 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, Sukhmvit 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, Bangsrinuang, Hua Hin). Other Bangkok malls where pirated products are readily available include: Future Randi, Seacon, Seri, Future and Gankee. 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. As of October 2005, there were as many as 136 pirate vendors operating in Bangkok alone (compared with 109 vendors in 2004).

¹⁵ The motion picture industry reports that between January 1 and December 31, 2005, its representatives participated with the authorities in 1,490 raids resulting in the arrest of 1,138 suspected pirates.

¹⁶ The Special Task Force has around 80 policemen assigned to it with full authority to combat anti-piracy enforcement nationwide. The record industry reports that by early December 2005, 16 joint raids had been run with the record industry with over 25,000 audio discs seized. The Motion Picture Association reports that it undertook 866 joint raids with the Task Force in 2005 resulting in the seizure of 244,883 optical discs.

(e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the U.S. theatrical release and well before their international debuts. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. Although in Thailand this may amount to a violation of the copyright law, there is no specific provision on the subject, and the penalties would be extremely limited absent proof of a “commercial purpose.” We urge the Royal Thai Government to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

Signal Piracy: Piracy of cable and satellite broadcasting signals remains rampant, with over 50% of the pay TV subscribers receiving unauthorized content and revenue losses estimated at US\$160 million.¹⁷ Thailand has yet to establish an effective system to license and regulate broadcast and cablecasting facilities, one that has the authority to take actions that will deter illegal broadcasters. In 2005, establishment of a National Broadcasting Commission to perform this role again stalled, perhaps indefinitely.

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,¹⁸ where university presidents, professors, and students exhibit blatant disregard for the law and the rights of copyright owners.¹⁹ Photocopy shops routinely make copies of entire books, or copy chapter-by-chapter. Many of these books have been pre-copied to fulfill demand in accordance with the students’ reading lists, but copying is also done to order. Unauthorized compilations of materials for the university market continue to hurt academic publishers. Despite regular contacts with lecturers and university authorities about the problem, they have taken little action and Government authorities have not stepped in to help. Books are also being reproduced and passed off as originals through professional-style offset printing houses capable of producing large quantities. In addition, unauthorized translations of English books into Thai continue to be a problem.²⁰

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.²¹ If Thai law continues to permit what these judges

¹⁷ 2005 revenue loss estimate taken from The Cable & Satellite Broadcasting Association of Asia’s (CASBAA) October 2005 “Cost of Piracy: Asia-Pacific Cable and Satellite Industry.”

¹⁸ Photocopying and print piracy is rampant in primary and secondary schools as well.

¹⁹ University campuses where piracy of published materials is particularly prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.

²⁰ Amazingly, professors at two universities have used their names on unauthorized translations; no actions have been taken to curtail this clearly illegal practice in Thailand.

²¹ 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,

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. Conservative estimates indicate that in 2005, the industry lost potentially 180,000-270,000 genuine book sales to students in Bangkok alone due to the above-described problems.²² Action is past due.

End-User Piracy Rate of Business Software Remains One of Highest in Asia: The rate of unauthorized uses of business software in business settings remains unacceptably high in Thailand, at 77% in 2005 and revenue losses continue to increase year-on-year. Only Vietnam, China and Indonesia have a higher rate of piracy in the Asia-Pacific region, where the average piracy rate is 53%. Thus, while the business software industry has been able to get full cooperation from enforcement authorities in conducting end-user and retail raids (by the first week of October 2005, the police had conducted six end-user raids based on complaints filed by the Business Software Alliance), these raids do not seem to be having a significant deterrent effect on the overall piracy rate in Thailand.

Customs Enforcement is Key: Everyone involved in the piracy struggle in Thailand recognizes the important role that Royal Thai Customs plays. Concerns over the importation of product manufactured elsewhere in Asia (Malaysia and China, and possibly Laos) must be taken seriously, and proper steps must be taken to stop massive exports from leaving Thailand and infecting other markets. In addition, the Royal Thai Government must recognize the danger that its ports are being used as transshipment points for pirated products produced in other countries. IIPA is pleased that Royal Thai Customs is beginning to take actions *ex officio* and is now administering cases on its own. IIPA also calls upon Royal Thai Customs to work with right holders to help protect their rights, including by providing information regarding importers and exporters of seized goods. Neighboring countries have established mechanisms to inspect goods from the major express mail companies, and Thailand must work hard in 2006 to do the same. This is a matter of a great concern since large quantities of infringing goods are exported from Thailand by express mail and freight forwarding services. These services must be properly regulated to ensure that they do not continue to be used as a means of exporting pirated products.

Internet Piracy Has Grown: Internet piracy is growing steadily in Thailand. In 2004, the business software community reported 1,304 online software infringements traced to Thailand-based ISPs. By the end of 2005, this number grew to 8,915, representing an increase of 583%

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.

²² There are over 30,000 students in Bangkok. According to survey results, 60% of students copy entire books; if those 60% were to buy the average number of books per year (estimated to be between 10-15), 180,000-270,000 displaced sales to students result. This does not include the copying carried out by teachers or offset print piracy.

from the year before, mainly involving P2P networks. The Royal Thai Police conducted two Internet raids based on information supplied by the business software industry. There was one court verdict in one of these Internet cases, but the result was a non-deterrent 25,000 Baht fine (US\$632) as the initial three month prison sentence was reduced to 45 days in a plea bargain, and then suspended to one year probation. Such a sentence would not serve as a deterrent to those engaged in similar crimes.

Though there is no legislation in Thailand on ISP liability, ISPs are generally cooperating in taking illegal websites down. While it is estimated that 3.5 million Thais use the Internet, the broadband penetration rate remains low.²³ Because of this, much of Thailand's Internet usage is limited to mobile applications and Internet cafés. The Royal Thai Government must ensure that all Internet cafés allow use of only legal copyright materials, including entertainment software products. However, despite the requests of entertainment software companies that the Royal Thai Government include in regulations governing these Internet cafés provisions mandating the use of legitimate licensed video game products, to date, there has been no move to do so.

Cable Piracy and Unauthorized Public Performances of Audiovisual Materials:

Cable piracy – the unauthorized transmission of U.S. programming over cable television systems (from original cable or satellite transmissions) – is widespread in Thailand, especially in rural areas. Illegal decoder boxes and smart cards are widely available. Enactment of cable regulatory controls and broadcast legislation is necessary to afford protection for the broadcast, transmission, and retransmission of copyright programming.²⁴ A regulatory system is needed to control cable piracy by conditioning the issuance and retention of cable licenses on compliance with copyright, as in other countries. Simply, anyone wishing to engage in broadcasting or cable-casting must certify, as a condition to receiving a license, that the facility will not transmit or retransmit signals or content without the authorization of right holders of the content or signal. Deterrent penalties should follow from cases involving false certifications, including, in appropriate cases, revocation or non-renewal of the license. In addition, broadcasting or cable-casting in Thailand without a license should be an offense. Public performance piracy also thrives in Thailand, as many unlicensed cable operators, particularly in provincial areas outside of Bangkok, now transmit continuous, unauthorized motion pictures on dedicated movie channels operating on their systems. Hotels also screen 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.

Entertainment Software Piracy: Piracy of entertainment software products remains prevalent in Thailand, whether optical disc (either imported factory-produced discs or locally produced burned discs) or cartridge-based games. ESA member companies have been conducting “mall sweeps” with local police, which in the last four months of 2005 netted thousands of pirated products. Local police must be encouraged to undertake these “sweeps” or actions on their own initiative as it is only through sustained action that the mall/retail outlets will be cleaned up. Entertainment software publishers also face piracy in the following form: a

²³ Recent reports indicate that in 2004, the number of broadband subscribers suddenly increased six-fold, but that broadband penetration remains low, at fewer than two subscribers per 10,000 people. Research and Markets, *2005 Telecoms, Mobile and Broadband in Asia report Cambodia, Laos, Myanmar, Thailand and Vietnam*, summary at http://www.researchandmarkets.com/reportinfo.asp?report_id=302150&t=e&cat_id=20.

²⁴ 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\$50,553). Stronger penalties are needed if this law is to be effective. Unfortunately, the bill remains pending. Other legislation passed in January 2000, the Frequencies Management Act, created a National Broadcasting Commission, but selection of its members has been unduly delayed.

console is housed in an arcade-type shell and is operated by depositing tokens or coins into the machine. However, the console housed in the shell is typically modified or has a circumvention device (mod chip) installed, and thus, the console is rendered capable of playing pirated games. These coin-operated consoles can be found all over Thailand.

Cartridge-based entertainment software continues to be heavily pirated in Thailand. In 2005, pirated and counterfeit cartridge-based video game products continued to be imported from China. Local law enforcement actions continue to be weak. In all of 2005, there was only one seizure of counterfeit cartridge games in Thailand, and there were no customs actions. Thailand continues to be a major transshipment point for pirated Nintendo video game products, especially to Europe. In 2005, there were 27 actions worldwide involving the seizure of counterfeit cartridge games from Thailand, with products being seized in Austria, Belgium, France, Germany, Sweden and the United Kingdom.

Organized Crime: Evidence of organized crime involvement in piracy in Thailand continued to mount in 2005. Threats to right holders and their representatives are commonplace, and right holder representatives were physically attacked and injured on several occasions in 2005. Investigative irregularities abound, including substitution of low-level defendants for major ones after raids, delays in post-raid inquiries, and leniency of police officers during raids. To directly confront the problem of organized crime and its relation to copyright piracy in Thailand, the Royal Thai Government must grant authority to the Royal Thai Police and others to thoroughly investigate links between piracy and other serious crimes, and prosecute owners and financiers of pirate operations. One way to stop organized criminals who engage in copyright piracy is to include IP violations in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).²⁵ Unfortunately, while the government had intended to include copyright piracy as a predicate offense in a draft bill to amend the MLPSA in 2004, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.²⁶ The decision remains up to the Cabinet, and IIPA in the strongest terms urges the Cabinet to add copyright piracy back as a predicate offense for the enforcement of the MLPSA.

Courts Fail to Met Out Deterrent Sentences: The Thai Intellectual Property and International Trade (IP&IT) Court has long stood as an 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 have long plagued right holders. Again in 2005, the Court meted out some impressive results. Notwithstanding the Court's relative successes, there remain some serious weaknesses in adjudication of copyright cases, most notably in the failure of the courts in some cases to mete out deterrent sentences. In some recent judgments, no punishment has been imposed beyond community service, while most other cases result in suspended sentences and/or non-deterrent fines. Several other problems include the following:

²⁵ 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\$5,055).

²⁶ 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>. 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.

- **Difficulty Obtaining Anton Pillar Orders and Preliminary Injunctions:** Another major problem experienced by right holders in 2005 is the relative difficulty in obtaining Anton Pillar orders and injunctions in a timely manner from the IP&IT Court. Judges have become increasingly strict when reviewing and granting search warrants, especially for *ex parte* orders. The percentage of rejected orders has increased compared to 2004.
- **Lack of Continuous Hearing Schedule:** Hearings in copyright cases in Thailand are scheduled at lengthy intervals (e.g., one-month intervals or more in some instances), which is causing undue delays even in straightforward piracy cases. These delays and lengthy breaks defeat any deterrence which may result from a successful case outcome.
- **Problems with Non-Acceptance of Forensic Evidence:** Copyright owners face problems in their use of forensic evidence from lab testing conducted on pirated optical disc products from Thailand. For example, while testimony from an independent expert as to the source or origin of a pirate optical disc is accepted as evidence of production by a certain plant, the testimony alone is unlikely to be sufficient to initiate proceedings against the factory owner of that plant. This presents problems for copyright owners whose forensic testing is done outside of the country. It has also been reported that the plant owner may challenge that the tested disc was produced before the Act on the Production of Optical Disc Products (2005) came into force.

One positive development has been that, as of January 1, 2006, the threshold has been lowered for the Ministry of Justice's Department of Special Investigation (DSI) to take criminal investigations. Now when the value of pirated product seized exceeds 500,000 Baht (US\$12,638), down from 5 million Baht (US\$126,380), or involves at least 500 units, the police are required to report the case to DSI, and DSI may decide to take the case for prosecution (or can leave it with the police under DSI supervision). This is a welcomed development, as it is expected to reduce reliance on the ECID for all enforcement actions and allows for more prompt actions.

THAILAND CRIMINAL ACTIONS 2005	SOUND RECORDINGS	MOTION PICTURES
Raids Conducted	427	1,490
CDs Seized	267,633	323,408 (VCDs)
DVDs Seized	24,996	524,356
CD-Rs Seized ("burned")	9,980	54,694
Investigations	-	1,702
VCD Lab/Factory Raids	154	
VCD/DVD Production Lines Seized	-	2
Printing/Package Machines Seized	-	1
Stampers Seized		32
Cases Settled	-	
Cases Commenced	427	356
Number of Indictments	427	356
Number of defendants indicted (including guilty Pleas)	455	
Acquittals and dismissals	-	
Number of cases pending	265	10
Number of Factory cases pending	-	
Total number of cases resulting in jail time	157	
Suspended prison terms	-	
Maximum 6 months	150	
Over 6 months	4	
Over 1 year	-	

THAILAND CRIMINAL ACTIONS 2005	SOUND RECORDINGS	MOTION PICTURES
Total suspended prison terms	154	
Prison terms served (not suspended)	-	
Maximum 6 months	1	
Over 6 months	1	
Over 1 year	1	
Total prison terms served (not suspended)	3	
Number of cases resulting in criminal fines	151	
Up to \$1,000	125	
\$1,000 to \$5,000	26	
Over \$5,000	-	
Total amount of fines levied (in US\$)	-	

TRAINING AND PUBLIC AWARENESS

Copyright owners engaged in many training and public awareness activities in 2005:

- Publishers undertook an educational campaign in August and September 2005, in the form of mailings to and direct educational sessions with university lecturers and related personnel, reminding them about copyright law and the importance of using legal materials.
- In January 2005, the Motion Picture Association and the IP&IT Litigation Department co-organized a seminar in Chiangrai on IP enforcement.
- In March 2005, the MPA organized a seminar on IPR training for the Central Investigation Bureau in Bangkok.
- In April 2005, the MPA co-organized a seminar on IPR training with police officials in Surattani and Songkla provinces, as well as a seminar in Hua Hin with CIPIT officials on IP Judicial Procedure.
- In August 2005, the MPA participated in a workshop on the Act on the Production of OD Products B.E. 2548 organized by the Department of Intellectual Property (DIP) in Bangkok.
- In September 2005, MPA participated in a symposium in Bangkok sponsored by the DIP highlighting cable piracy and associated regulatory issues.
- In October 2005, MPA participated in a seminar on "Copyright Related Issues in Digital Technology" organized by the CIPIT in Bangkok.
- In December 2005, the MPA participated in an EU-ASEAN symposium on "IP Enforcement by Specialized Courts: Challenges and Recent Developments in IPR."
- Entertainment software publishers participated in a training seminar in November 2005 at the Bangkok International Law Enforcement Academy.
- The Business Software Alliance co-sponsored seminars with the Department of Intellectual Property on Software Asset Management in Bangkok, Chiang Mai and Khon Kaen. The seminars, besides dealing with licensing issues, promote the legal use of software and the need to respect software copyright. The support from the DIP led to a favorable response from the business community.
- The recording industry group in Thailand participated in a five-day conference (organized by the European Union) for Royal Thai Customs personnel in Bangkok in November 2005. The program, which was opened by the Director General of Customs Dr. Sathit Limpongan, included briefings from Thai Customs personnel on Thai legislation and operating procedures. Record industry representatives gave a two-hour presentation on how better to address piracy problems.

- The recording industry group in Thailand coordinated training for 75 Bangkok Metropolitan Police Department officers in a “Music Piracy Investigation Workshop” in January 2005.
- The recording industry group in Thailand participated in the “Thailand Intellectual Property Fair,” a public event organized by DIP in March 2005 in Bangkok.
- The recording industry group in Thailand participated in the “Ministry of Justice Day,” a public event organized by the Ministry of Justice in March 2005 in Bangkok.
- The recording industry group in Thailand participated in two programs in April 2005 on administration of rights (collecting societies), one a session with Royal Thai Government officials, and the other a seminar held for over 200 participants in Bangkok.
- The recording industry group in Thailand held a session with top police officer officers during a visit in September.
- The recording industry group in Thailand participated in “Intellectual Property Capitalization,” a program organized by DIP in September 2005 in Bangkok.
- The recording, motion picture, and business software industries co-sponsored with DIP the “IP Cultivation Program,” a program from September to October 2005, in Bangkok, aiming to educate students of six famous high schools in Bangkok on “copyright awareness.” Overall, 2,400 students participated in this program.
- The recording industry participated in a “Seminar on the IP Culture” in November 2005 in Bangkok. The program was part of “Thai Economic Growth Promotion” and reached over 200 participants.
- The recording industry group in Thailand participated in a “Workshop on Thai IP Strategy,” a program organized by DIP in November 2005 in Bangkok. The program reached 300 participants.
- On January 27, 2006, the local entertainment content industry group (TECA) brought about 30 judges of the IP&IT Court to visit an optical disc factory, MPO (Asia), in Cha-seong-sua Province. Judges had a chance to learn more about how optical discs are produced.

COPYRIGHT LAW AND RELATED ISSUES

Optical Disc Act Comes Into Force: In 2005, a long-awaited Optical Disc Act was passed into law, published in the Royal Gazette on May 31, 2005, and went into effect on August 29, 2005.²⁷ While the Act is by no means ideal legislation (and falls far short of what the U.S. will ask for in the context of a U.S.-Thailand Free Trade Agreement, see *below*), it does provide a basis for enforcement against licensed facilities. The law is missing some essential tools necessary for a first-class law:

- **No License Regime:** The Act requires only “notification,” not approval, for a plant to begin producing optical discs. There is no provision governing the term for which a plant may produce discs, nor for a renewal process. There is no means by which one’s ability to produce can be revoked.
- **Unclear Whether SID Code Will be Adopted:** Industry informs us that the Royal Thai Government has rejected to date use of the IFPI-standard source identification (SID) code, opting to create a *sui generis* Thai code. In virtually every country that has implemented an optical disc law, the government has opted to use SID Code.
- **Unclear Whether Identification Code Must be Applied to Stampers/Masters:** The Act defines “mould code” as the code by which the source of the disc can be determined, which apparently means it need not be attached to the stamper or master but could be on the Laser Beam Recorder (LBR). The definition of “mastering code” is also confusing, defined

²⁷ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

as the code “to demonstrate the work has been copyrighted.” We had earlier understood the Department of Intellectual Property had agreed that the stamper and master must include SID Code and we hope this will be clarified in practice and in regulations.

- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Act contains after-the-fact “notification” requirements (with lengthy grace periods), and there is no provision for monitoring transfers of stampers/masters.
- **No Inspection Without Notice at Any Time and Possible Forcible Entry:** The Act does not specify whether inspections can take place without notice to the target and at any time day or night, although the language “from the sunrise to the sunset or during the Production hours of such Business Operation Place” could be construed as authorizing an inspection any time the plant is operating, even if after hours or at night. This should be confirmed.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Act fails 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.
- **Criminal Penalties Strengthened, But Still No Mandatory Minimums:** The Act contains increased criminal penalties over the previous draft IIPA had reviewed, which is a plus, but still includes no mandatory minimum fines and no mandatory imprisonment.
- **“Mastering Code” May Inadvertently Create Burden on Right Holders:** The definition of “Mastering Code” would appear to create burdens on the ability of legitimate copyright owners to do business in Thailand. Under this definition and other provisions, copyright owners must apply for and affix a “mastering code” to all legitimate discs. This requirement creates a formality that may run afoul of Thailand’s international obligations.

Free Trade Agreement and Copyright Act Revisions: Negotiations toward a Free Trade Agreement between the U.S. and Thailand began in June 2004. The talks remain ongoing as of February 2006. IIPA notes that with respect to copyright, it is expected that the FTA will contain obligations to ensure that Thailand’s Copyright Act reaches the level of protection afforded by the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and contains other strengthening measures. As mentioned above, misunderstanding about the nature of illegal photocopying as a form of piracy abounds, largely due to misinterpretations of Article 32(6) of the law, which must be amended as part of the FTA process. The Optical Disc Act discussed above falls short in important respects of what an FTA should aim to achieve. Notwithstanding that the FTA negotiations are not yet completed, and perhaps because of the desire to enact a law that addresses many of the FTA issues, the Thai Government has reportedly been working on a new draft amendment to its Copyright Act. The draft has not been made available for public comment, but we understand it is in many respects similar to the draft released in 2003.²⁸ We note that, to meet the requirements generally called for in FTAs with the United States, Thailand, even if it passed the latest known draft legislation, would still need to make further important revisions in many areas.

ISP Liability: 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,²⁹ and went into force in early 2000, but the National

²⁸ Please see IIPA’s analysis of that draft in IIPA’s 2005 Special 301 report, at <http://www.iipa.com/rbc/2005/2005SPEC301THAILAND.pdf>

²⁹ Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

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.

MARKET ACCESS

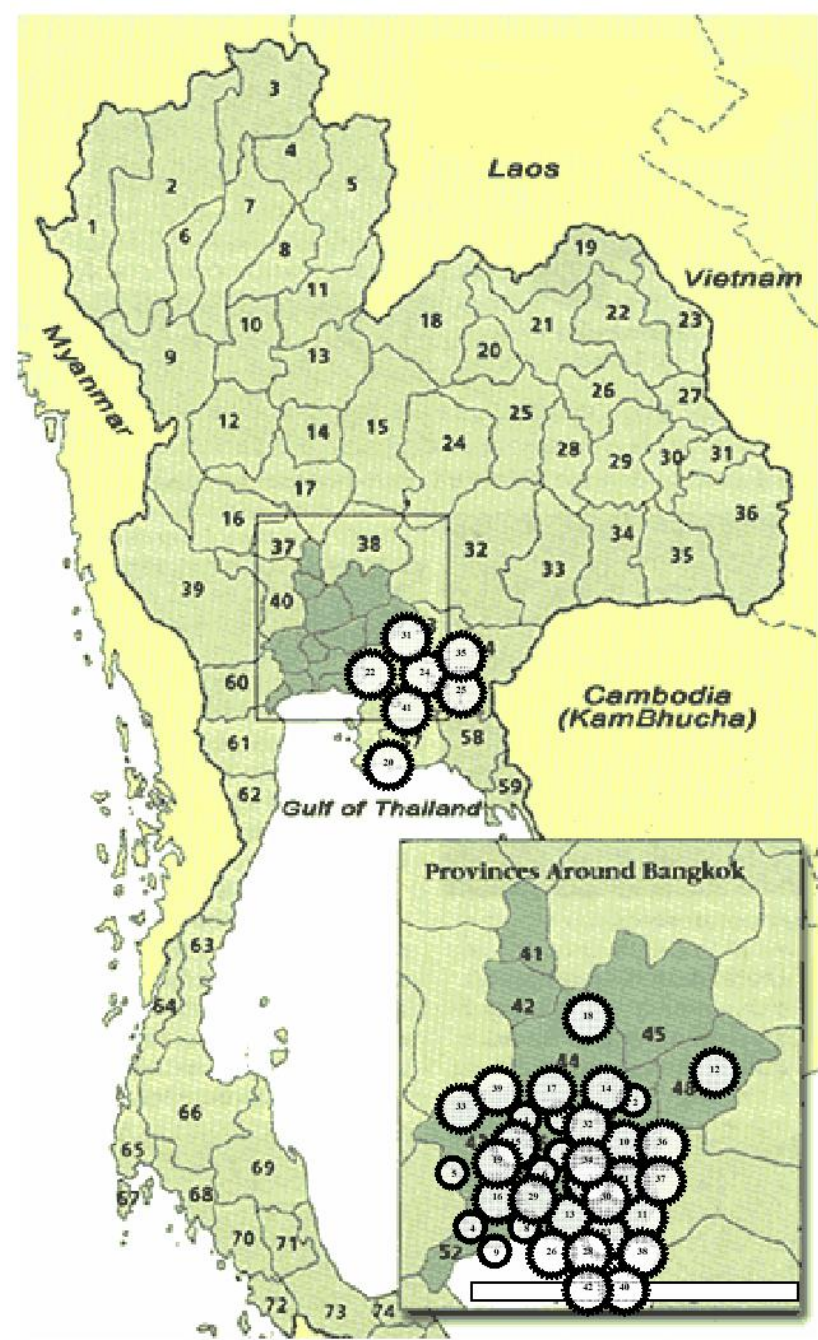
Investment Bans in Broadcasting: Foreign investment in terrestrial broadcast networks is prohibited. A draft Act on Broadcasting and Television Business operations would allow foreign investment in free and pay television but would limit such investment to a 25% equity share. Advertising is prohibited on pay television systems under the 1992 amendments to the Radio Communications Act of 1955. The draft Act on Broadcasting and Television Business Operations contemplates the establishment of criteria within which business operators may seek advertising income, but would require that a portion of received advertising income be deposited in a national development fund. In October 2005, the Thai government allowed original advertising carried on foreign satellite channels to ‘pass through’ on local pay-TV networks.

Censorship: The Tape and Video Cassette Law puts heavy burdens on the motion picture and recording industries. Since the transfer of authority for administering this law moved from the Police Bureau to the Ministry of Culture, the process to get approved and obtain a Censorship Code for music videos and live performances is lengthy – ranging from 2 to 30 days. In addition, strict enforcement of guidelines prohibiting the depiction of “objectionable” content in home video products has an adverse affect on the importation of DVDs, due to the cost-ineffectiveness of deleting such scenes from the DVD master simply for the Thai market.

GENERALIZED SYSTEM OF PREFERENCES

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 2004, \$3.1 billion in Thailand’s imports into the United States entered the country duty-free, accounting for 17.9% of its total exports to the U.S. During the first 11 months of 2005, \$3.2 billion worth of Thai goods (or 17.8% of Thailand’s total exports to the U.S. from January to November) entered the U.S. duty-free.

Figure 1: Approximate Locations of Optical Disc Plants in Thailand



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY

Special 301 Recommendation: We recommend that Turkey remain on the Priority Watch List.

Priority Actions Required in 2006:

- **Continue Vigorous Enforcement, Including More Book, Retail, and Optical Disc Targets:** Turkey remains one of the world's worst book piracy markets. However, significant raiding toward the end of 2005 and key criminal convictions point to signs that the tide is turning. The motion picture industry similarly noted a dramatic up-tick in the sheer number of raids in 2005. This raiding must be sustained in 2006, and key pirates of all kinds of products (books, motion pictures, recorded music, business software, entertainment software) need to be driven out of business before right holders will be able to claim solid success in opening up the Turkish market to legitimate business.
- **Address Business Software Piracy:** The business software industry suffers from some unique problems – hard-disk loading and unauthorized use of software in a business setting. In 2006, the authorities should work with the software industry to launch meaningful campaigns to rid the country of as much unauthorized software usage as possible.
- **Increase Court Efficiencies:** Courts are backlogged, and while many cases moved through to successful conclusion in Turkey in 2005, particularly some important criminal cases, other cases languished or were beset by a number of procedural hurdles. The simplest approach would be to establish more courts (and judges in each of them specially trained to deal with IP cases), since court dockets remain overflowed, and ease restrictions on the ability for right holder representatives to assist in case management without the need to hire local counsel for every step of a litigation.
- **Improve Customs Procedures:** With pirate imports increasing again in 2005, Customs should be, but is not, getting more involved in interdicting pirate imports. Customs procedures are marred by bureaucratic hurdles (such as filing an application with each Customs official throughout the country on a monthly basis). Turkish Customs should strictly enforce copyright at the borders, including by taking *ex officio* actions to interdict shipments of suspected pirate goods and materials and implements used to produce pirate goods.
- **Stop Fake Banderoles:** There were instances once again in 2005 of the use of fraudulent banderolles in the Turkish market on blatantly pirate materials. The Turkish authorities must run a market sweep to clear the shelves of product with fraudulent banderolles if the credibility of this program is to be preserved. Otherwise, as right holders continue to find the program burdensome, it should be scrapped.
- **Improve Optical Disc Regulation:** The remedies for operating an optical disc plant without certification should include seizure and forfeiture of all equipment and goods found in such a plant, closure of the plant, and criminal liability including deterrent fines and imprisonment, and including individual liability to pierce the veil of the company engaging in uncertified production.
- **Amend Copyright Law to Prohibit Circumvention of Technological Protection Measures, and Join the WCT and WPPT:** The Copyright Law of 2001 omits protection for

technological measures used by right holders to protect their products. The law should be amended to prohibit the act of circumvention of technological protection measures and the trafficking in circumvention devices. The Government of Turkey should also accede to the WCT and WPPT.

For more details on Turkey's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

TURKEY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Books²	23.0	NA	23.0	NA	25.0	NA	25.0	NA	27.0	NA
Records & Music	18.0	80%	15.0	70%	15.0	75%	18.0	75%	3.5	35%
Business Software³	119.2	64%	107.0	66%	81.0	66%	38.5	58%	22.4	58%
Entertainment Software⁴	NA	NA	NA	NA	NA	NA	NA	NA	23.7	90%
Motion Pictures⁵	NA	NA	50.0	45%	50.0	45%	50.0	45%	50.0	40%
TOTALS⁶	160.2+		195.0		171.0		131.5		126.6	

PIRACY AND ENFORCEMENT UPDATES IN TURKEY

Book Piracy Continues to Be Serious, But Publishers Worked Toward Some Enforcement Successes in 2005: 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, nonfiction 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.

In 2005, publishers redoubled their efforts to lead a new campaign in Turkey against book piracy, gathering intelligence, conducting raids, and seizing pirated books. Since piracy

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² Local estimates of book piracy in Turkey range from 40% to 90% (photocopying), depending on the kind of book. 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.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Turkey, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ Total losses due to piracy of records & music, business software, and books went up from \$145 million in 2004 to \$160.2 million in 2005.

impacts local publishers as much as it does international publishers, international publishers have been able to ally themselves with the Turkish Publishers Association and, more specifically, its anti-piracy committee, EDISAM. From July through November 2005, working with the Police, this group conducted 57 raids, resulting in the seizure of 21,000 pirate books and 10,000 pirate book covers. Unfortunately, outside of Istanbul and Ankara, police have been reluctant to act in a timely and vigorous manner; there are also some indications of leaks/collusion by police and the pirates in outside locales. There have been some successes in the courts, including five prison sentences since January 2005. One conviction against key Ankara pirate, Ince Mehmet, who received a sentence (for book piracy only) of four years imprisonment, and three pending cases against Metin Can, described as the biggest book pirate in Istanbul (mainly of educational and academic books) are positive signs that the court system can work and the authorities in Turkey are taking book piracy more seriously than before.

Retail Piracy: As with book piracy, the retail markets in Turkey have long been plagued by rampant street piracy, which is now predominantly in digital formats like “burned” optical discs (VCDs, DVDs, CDs, etc.). The number of imported discs once again increased in 2005,⁷ with Customs procedures not working efficiently to interdict such shipments.⁸ For the first time in 2005, right holders detected some locally produced pirate discs (see discussion below). In 2004, after the passage of amendments banning street sales, the immediate increase in enforcement actions reduced the number of street vendors, especially in Istanbul (a decrease of 80%) and Ankara (a decrease of over 50%). The year 2005 once again saw some impressive raid results including pirate product, and materials and implements used in producing pirate product.⁹ Remaining street vendors offer pirate product to order, but not as openly as before. Still, the sale of pirate “burned” CD-Rs remains a serious problem, especially in cities outside Istanbul and Ankara (such as Izmir and Antalya), and continues to have a detrimental effect on the legitimate market for copyright materials.¹⁰ There is also at least some evidence of organized criminal involvement in the piracy trade.¹¹ The good news is that the Istanbul Security Office Department has started to take *ex officio* actions with the authority given to them by the 2004 Copyright Law amendments, although these actions appear to be limited to big cities such as Istanbul, Ankara and Izmir.

Business Software Interests Not Served: The experience of the business software industry has not been so positive. While the Ministry of Culture is tasked with dealing with copyright in general, they claim to lack authority for enforcement against hard-disk loading, leaving it to the Police; unfortunately, they remain largely unaware and/or refuse to act *ex officio* against this type of piracy. When software companies try to take self-help measures, computer

⁷ Imported discs are reportedly coming in from Russia, Malaysia, Thailand, and Bulgaria, and possibly transshipped through Ukraine. Pirate DVDs of newly released titles with Turkish subtitles 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.

⁸ The motion picture industry reports that Customs procedures are too complicated and time-consuming. The local anti-piracy group apparently needs to apply every month to every Customs office with tens of copies of the same application form, as one copy is required for each Customs official. Despite these efforts, cooperation with Customs authorities did not improve in 2005.

⁹ In the first three quarters of 2005, 600 raids were conducted involving motion picture piracy, resulting in the seizure of 569,122 CD-Rs, 15,909 DivX, 129,170 DVDs, 5,882 DVD-Rs, 86 PCs, 279 CD-Writers, 68 DVD-Writers, 19 DVD ROMs, 37 CD-ROMs, 7 Silk Screens, 1 Raw Material Dryer and 11 Mould Parts.

¹⁰ The business software industry notes that the continued presence of these vendors has a marked negative impact on consumers, who believe it is acceptable to use pirated software as a result. The motion picture industry reports that box office revenues slightly increased due to some popular local movies, but not for U.S. theatrical releases, and that the decrease in piracy levels is not reflected in greater legitimate sales of CDs or DVDs.

¹¹ In a house raid on September 11, 2005 during an operation against the terrorist group PKK/KONGRA-GEL, some pirate CDs and music cassettes were seized.

resellers resort to selling stripped PCs to avoid detection. In addition, unauthorized use of business software by company end-users causes right holders significant losses in Turkey. Unlike other industries, which have benefited from market sweeps, the dilemma of unauthorized use of business software in corporate settings requires a slightly different approach, including campaigns aimed at getting inside information from companies using illegal software, inspections against such companies, and hands-on programs to explain to the Government and businesses the basics of software asset management. The business software industry has found the current approach of the Turkish Government to be inadequate.

Entertainment Software Piracy: Piracy of entertainment software is rampant, with a piracy level of over 70%. Pirated entertainment software for play on personal computers and PlayStation® consoles are imported into Turkey from Bulgaria, possibly Iran, and possibly transshipped through Ukraine, while counterfeit cartridge-based games continue to be imported from China. Though cooperation with Turkish Police and Customs authorities has been good, the retail market remains dominated by piracy. Of increasing concern are reports that the country is serving as an export and transshipment point for pirated entertainment software products from Asia and the Middle East.

Internet Piracy Threat Emerging: The growth of broadband connectivity in Turkey in 2005 is at once an exciting development, providing the prospect for healthy electronic commerce which can benefit all in Turkey, and a deeply disturbing one, since the Government has not shown signs of being readily equipped to tackle the issue of Internet piracy. Broadband connectivity grew rapidly in 2004 and 2005. In the second half of 2004, Turkey added over 150% to its broadband installed base, and broadband connectivity grew 73.6% during the second quarter of 2005, ranking first in the world.¹² Turkey ranked fourth overall in the world in 2005 in terms of percentage of growth of broadband, and ninth overall in the world in terms of absolute number of lines added through September 2005. There are already signs that these gains in broadband are translating into increased online piracy, and it is particularly disturbing that Turkish Telecom, in promoting broadband Internet connections, advertises its services by pointing to how many songs or movies can be downloaded in a particular time frame with a particular speed connection. There also remains trade in hard goods advertised through websites or newsgroups. Some industries now regularly send cease and desist letters to Internet service providers and site operators, and organize raids with the police against the homes of pirates engaging in such activities.

Optical Disc Production Capacity Grew Again in 2005: There are now 10 optical disc production plants in Turkey with a total of 25 production lines (including at least 3 DVD and 21 VCD lines). While pirate production had not been a problem in previous years, in 2005, illegal locally pressed DVDs appeared for the first time, even including some Turkish-produced product destined for export.¹³ In April 2005, a Regulation requiring certification of all optical disc plants went into force. Almost immediately, the Turkish authorities worked with industry to inspect the plants to collect “exemplars” (samples of discs to do forensic tests). Upon detecting some illegal activity, investigations ensued,¹⁴ and on July 6, 2005, a major raid was carried out against “Uçar CD,” located in the Kagithane district of Istanbul, by fifteen officers from the Security Department at Istanbul Police Headquarters, accompanied by motion picture industry representatives and technical experts from the recording industry. The raid resulted in seizures

¹² Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

¹³ In late 2005, a seizure of over 2,000 pirated videogames, originating in Turkey, was made in Germany.

¹⁴ After the initial plant visit, samples of pirate discs with fraudulent stickers (“banderoles”) found in the local market were tested and found to match exemplars collected during the earlier plant visit.

of pirate VCDs, DVDs, and silkscreens (used for printing professional-looking labels),¹⁵ including pirate copies of *Sin City* (not yet theatrically released in Turkey), *Batman Begins*, *Monster in Law*, and *Coach Carter*. Unfortunately, due to a mistake in the initial warrant, the lines could not be sealed that day, and by the next day they had vanished (the DVD line was eventually found on October 27).¹⁶ At the first hearing in October, the owner of the plant was taken into custody and imprisoned for two months for having removed the evidence (the lines that had vanished), but was released after appealing his detention in late December 2005. Finally, on January 17, 2006, the owner of the plant was sentenced to a term of imprisonment of 5 years, 7 months and 15 days for copyright offenses and for distributing products without banderoles. The court also ordered that the sentence be published in three newspapers having a circulation of over 100,000. The defendant was also fined approximately US\$120,000 with respect to the two missing VCD lines that were wrongfully removed from the plant after the July 6 raid.¹⁷ This is the most severe penalty ever imposed in a piracy case in Turkey and IIPA hopes this case will have a considerable impact on piracy in the market. The press coverage of this case has been very positive, and hopefully reinforces the deterrent message of this arrest.

Successful Court Actions Increased in 2005, But Bottlenecks Remain: The courts in Turkey meted out more deterrent results in 2005, the above case being one key example. The motion picture industry oversaw initiation of 581 legal actions in 2005, almost all criminal, and nearly 50 court decisions have been obtained.¹⁸ Finally, some important decisions were also obtained from the Adana Court, sentencing pirate street vendors to unsuspended prisons terms and/or fines because of their recidivist nature.¹⁹ These favorable decisions obtained from different provinces of Turkey demonstrate that the judiciary is finally beginning to recognize piracy as a serious crime and is imposing more serious sentences.

¹⁵ The raid lasted a total of five-and-a-half hours, and the plant owner was temporarily detained for questioning. Unfortunately, the original search warrant issued by the judge did not allow for the sealing of the lines at the plant, but upon obtaining a warrant and proceeding to the plant to seal the lines the following day, the machines had been moved. A number of other locations associated with the plant were then raided, but these yielded little additional information or evidence. In all in that raid, 8,650 pirate VCDs, 4,700 pirate DVDs, and 10 infringing silkscreens ready for printing were seized.

¹⁶ The missing DVD line and a silkscreen printer were found on the top floor of a two-story building in Umraniye. Three individuals were found on the premises, one of whom is understood to be associated with a textile business, whose premises were also searched in July 2005 and that is believed to have also been once used for pirate disc production. When the raiding party entered the building, the three men were conducting test runs on the DVD line. The raid also yielded 50 silkscreens, 39 DVDs, and 3 stampers, together with order documentation, files and contact lists. The equipment and the premises were sealed by the Police, and the other materials and documents were all confiscated. Following this operation, the operating license of Uçar CD was cancelled by the Ministry of Culture and Tourism.

¹⁷ It should also be noted that a further prosecution has been instituted against the defendant's sister, whose name appeared on the rental contract for the building where the missing DVD line was found in October 2005.

¹⁸ For example, on December 8, 2004, a local warehouse owner was fined TL50 billion (US\$37,764) by the Izmir Specialized IP Court. On March 9 2005, two video shop owners in Istanbul were each sentenced to unsuspended prison terms of two years by the Istanbul Specialized IP Court, with the severity of the sentences based on the fact that these pirates had been raided several times but had continued to engage in illicit activity. The judge in the case noted that the two individuals had been raided several times in 2004 but had not been deterred. Thus, deterrent sentences had to be imposed because people were ignoring the rights of copyright owners and the State was losing significant tax revenues?. He also emphasized that IP crime was a field where organized crime would proliferate unless a deterrent environment was established. The raids leading to the prosecution in this case were conducted by the police (with assistance from industry) on January 18, 2005, resulting in the seizure of 27 pirate CD-Rs and 8,500 inlays.

¹⁹ In one case which arose from an AMPEC (the motion picture industry's anti-piracy group in Turkey) operation against a street vendor in 2005, a defendant was sentenced to 14 months imprisonment and a fine. Although the case involved only 56 pirate CD-Rs, the court refused to suspend the sentence, because the defendant was a repeat offender. In a second case, the defendant was sentenced to five months imprisonment, but the sentence was suspended, because of his previous good conduct.

Despite the recent relative successes, problems still remain in court adjudication in Turkey. The courts' dockets remain seriously overloaded (leading to delays in adjudication of copyright cases). Courts take six months to two years to decide such cases and an additional 18 months to decide appeals.²⁰ There are simply too many files and too many actions brought every year, but there are only two civil courts and three criminal courts dealing with IP matters. New courts with greater numbers of specialist judges should be established. Additionally, seeing criminal actions through the court process can often be cumbersome and expensive for injured parties under the current system.²¹ The courts still do not provide presumptions of ownership to right holders, but instead impose burdensome documentary requirements on right holders to prove ownership.²² Another problematic feature of judicial enforcement in Turkey involves the difficulty of obtaining *ex parte* civil searches, as required by TRIPS.²³ Finally, courts must award reasonable costs and fees in civil and administrative actions.

Fraudulent Banderoles Continue to Cause Problems in Turkey: 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. Some plants continue to hold unnecessarily large quantities of unused banderoles, which are not secured adequately. As noted above, in the "Uçar CD" raid case, fraudulent banderoles were found on pirate discs in the market. The entertainment software industry faces the same situation, with banderoles being issued and applied to pirated video games in the market.²⁴ If the government decides to keep the banderole system, it must

²⁰ 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.

²¹ A typical criminal action in Turkey starts with a complaint by the right holder to the Public Prosecutor and a raid with the police under the Copyright Law. In order to ensure that pirate products are confiscated, private parties must file criminal complaints, and the public prosecutor has to approve a police raid. As an additional burden in force since mid-2003, public prosecutors always require a special search warrant from the judge giving approval for any action. In addition, the Attorneyship Law requires a local lawyer to be hired to act on behalf of the right holder 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. Following a raid where suspect material is seized, the public prosecutor presses criminal charges, and the industry representative in the country (for example, on behalf of the motion picture industry, this is AMPEC) must immediately submit a petition to intervene, to avoid procedural hurdles dooming the case. Securing practical copyright protection can thus be a long and expensive process.

²² In cases brought by publishers in the past, many judges demanded notarized translations of original contracts between the author and publisher in order to prove copyright ownership for each title. Since this contract is in English, it must be translated and notarized. The notaries in Turkey have apparently added to the burden by charging inordinate fees. The audiovisual industry 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. 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.

²³ 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.

²⁴ Entertainment software publishers continue to be plagued by the banderole system which is already severely compromised as pirates have been able to obtain these stickers with great ease. Although pirates use false documentation claiming to be authorized distributors for a company, MOCT has refused to take action, claiming they are not responsible for verifying the authenticity of the documents being used to obtain the banderoles. In one case, a

take immediate steps to ensure that those who are caught dealing in copyright works without banderoles, using banderoles without authorization, or using fraudulent banderoles, are prosecuted to the full extent of the copyright law (Article 81 provides for fines and imprisonments for such offenses). Otherwise, with the system so severely compromised, the government would do well to simply abolish the program entirely.

Unauthorized Public Performances and Broadcast Piracy: Other problems for the motion picture industry include unauthorized public performances of new and popular films using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers, and unlicensed video theaters,²⁵ and broadcast piracy. 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 made-on-the-spot, 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.

TRAINING

Copyright owners organized several trainings and participated in many more in Turkey in 2005. For example:

- The Business Software Alliance organized an IP training for prosecutors and judges jointly with Ministry of Justice and Ministry of Culture to discuss enforcement issues in general.
- The Business Software Alliance participated and supported a couple of trainings jointly with the European Union and local Chambers of Commerce's to educate regulatory bodies and owners of small and medium-sized business about the importance of copyright protection.
- The motion picture industry's local anti-piracy representatives, AMPEC, organized or attended several training seminars in 2005:
 - In March 2005, AMPEC participated in the training seminar "The Struggle on the Violations of Intellectual Property Rights" attended by the Directors of Security Departments of all 81 provinces of Turkey. The training seminar was organized in Antalya by the Directorate General of Security Forces in cooperation with the Ministry of Culture and Tourism.
 - In October 2005, AMPEC organized a technical training seminar for 30 police officers of the Istanbul Headquarters' Security Department (that is the main authority dealing with piracy in Istanbul and having the *ex-officio* power to do so).
 - AMPEC also participated in seminars put on by the Istanbul Bar Association and Turkish Patent Institute (Trademark Office) organized in cooperation with local universities, and these seminars were also important for raising public awareness.

COPYRIGHT LAW AND RELATED ISSUES

New Regulation on "Certification of Businesses" Includes Some Key Components of Good Optical Disc Regulation: The Ministry of Culture and Tourism (MOCT) issued the

pirate seller had over 70,000 pirated products for which he was able to obtain banderoles, yet the Ministry refused to revoke the banderoles.

²⁵ AMPEC is very active in this area and is regularly sending cease and desist letters and organizing raids with the police.

“Regulation on the Certification of Businesses Undertaking the Distribution or the Recording, Reproduction and Sale of Materials on which Intellectual Property and Works of Art Are Fixed” on April 18, 2005, requiring facilities involved in recording (including optical disc), exhibiting, and distributing copyright works to receive certificates from the MOCT. Although all concerned premises were supposed to obtain such certificates by October 18, 2005, the MOCT had to postpone the deadline to December 2006 due to the very low number of applications received.

These regulations provide some essential elements of effective optical disc regulation, including the following:

- **Coverage of Any Business Engaged in Producing Discs Containing Content:** The Regulation does not seem to distinguish between businesses that produce large-scale factory produced discs and those that “burn” content onto recordable discs. This means all those businesses must be certified, and failure to do so can lead to fines.
- **SID Code Required for “Fixing Facilities”:** All facilities “where intellectual property and works of art are fixed and reproduced” must use SID Code (mastering LBR code and mould code are not specified, however, and should be?).
- **“Fixing Facility” Information Requirement:** “Fixing facilities” must furnish reports indicating their “capacity and that they have the necessary technical equipment,” “[a]n itemised list of the technical equipment at the premises as well as copies of invoices or sale transfer documents of the same,” and “SID code document” and to “inform the General Directorate of all changes in the type of activity, equipment and capacity within ten days and to place the SID code and the certificate numbers on the fixing materials.”
- **Inspection Authority:** MOCT appears to have broad authority to run surprise inspections.
- **Cancellation Remedy:** The sanction for a breach of the Regulations is cancellation of the certificate, if “it is determined that the certified facilities no longer meet the requirements for obtaining certificates,” or “there exists a finalised court conviction arising from having violated the law,” upon notification of such “by the rights owners, professional associations of the relevant field of activity or local authorities.”
- **Administrative Fines:** The only remedy for operating one of the businesses specified without a certificate is an “administrative fine.”

This Regulation requires that optical disc production facilities in Turkey (the 10 known plants and any more that come on line in the future) obtain a certificate from the MOCT (including production of blank recordable discs, see Article 5(a)). This is very positive. In addition, it appears that any premises engaging in “burning” of content onto recordable optical discs also must be certified (such operations would, on their face, be included in locations where “intellectual property and works of art are fixed and reproduced”).

Unfortunately, the Regulation suffers from two major weaknesses. First, the certification authority is overly broad, veering into areas like “[m]ovie theatres and similar places undertaking public display and transmission of cinematographic films,” “[p]remises ... importing, distributing or selling empty fixing materials,” and “[p]remises undertaking sale, distribution, importation and marketing of intellectual property and works of art and fixing materials concerning productions entailing intellectual property and works of art through any means and techniques including digital transmission and those that rent these out.” This broad certification authority unfortunately undercuts the purpose of the legislation, since it requires legitimate businesses (in sectors where the risk of piracy is low) to be certified and subject to the regime, while illegal businesses will never come forward to be certified. This has already proved to be the case, as noted, since MOCT had to postpone the deadline. While it is true that one category of operators

having to be certified includes those engaging in Internet distribution, again, we underscore that legitimate businesses with legitimate business models in the Internet environment will be burdened by such a certification requirement, while those engaged in online piracy will ignore it. Second, while the Regulation calls for “administrative fines” for operating without certification, in the case of optical disc factories, it is feared this remedy is not enough to deter going underground. The remedies for operating an optical disc plant without certification must include seizure and forfeiture of all equipment and goods found in such a plant, closure of the plant, and criminal liability including deterrent fines and imprisonment, and including individual liability to pierce the veil of the company engaging in un-certified production.

Copyright Law Still Missing Protections Against Circumvention of Technological Protection Measures: 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. A notable exception is the failure to prohibit the act of circumvention of technological protection measures and the trafficking in circumvention devices. The Government of Turkey should amend its law to provide such protections as soon as possible and should also accede to the WCT and WPPT.

Proposed Trademark Law Provision Would Exempt Infringing Goods Produced Outside Turkey: A draft amendment to the Turkish trademark law was recently proposed by a member of Parliament, providing that “in order that a penalty may be imposed for a trademark infringement, infringing goods or services should be produced in Turkey.” This bizarre provision, which would certainly violate TRIPS, would appear to exempt all counterfeit goods not produced in Turkey. IIPA understands that it is very unlikely that this proposal would be accepted by the Parliament. Nonetheless, we are watching this situation closely, and all steps should be taken to ensure that such a provision is never enacted in Turkey.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

UKRAINE

EXECUTIVE SUMMARY¹

Special 301 Recommendation: Effective on January 23, 2006, at the conclusion of an out-of-cycle review by the U.S. Government, Ukraine was placed on the Priority Watch List. IIPA recommends that Ukraine remain on the Special 301 Priority Watch List.

In 2005, Ukraine adopted significant amendments to its optical disc laws to improve its enforcement regime. This was a major accomplishment by the Government of Ukraine and IIPA applauds the addition of this important tool in the enforcement regime. In addition, the Ukraine Government agreed to participate cooperatively with the copyright industries in Ukraine on enforcement—including the commencement of joint surprise plant inspections. If implemented properly, these changes will regulate the legal production and distribution of optical media material in Ukraine. IIPA strongly urges the Government of Ukraine to fulfill its obligations and remain vigilant on its pledges of cooperative enforcement in order to improve on-the-ground efforts.

The adoption of amendments to the optical disc law (effective August 2, 2005), a key legislative reform, was a crucial step toward Ukraine's implementation of the 2000 Joint Action Plan which was agreed upon by the Governments of Ukraine and the United States. There are still improvements in Ukraine's enforcement regime that the Government of Ukraine must immediately undertake to ensure proper implementation of the new laws. These include: the adoption of regular surprise plant inspections; the creation of an "evidence repository" of sample copies of all productions runs of master stampers and finished disc produced in Ukraine; and the proper prosecution and imposition of deterrent sentences against commercial pirates of optical disc and other copyright materials. If these steps are taken, Ukraine will come a long way toward improving its copyright enforcement regime for the betterment of the local economy and the protection of domestic and foreign copyright owners. Proper implementation will ensure that the production and export of pirate optical media product cannot be resumed and that other key enforcement steps, that remain unfulfilled, are addressed. We firmly believe that, when fully implemented, the adoption of an effective copyright enforcement regime in Ukraine will benefit not only U.S. copyright owners, but also the government and people of Ukraine, by encouraging foreign investment and growth within the Ukrainian copyright industry.

A major "missing" component of the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing, especially against large-scale pirate operations (involving music, film, and/or entertainment software). This, coupled with ineffective border enforcement, invites wide-scale commercial piracy operations to continue in Ukraine or to work in conjunction with operations in neighboring countries, such as Russia. The Government of Ukraine must turn its attention to effective criminal enforcement. In our view, these improvements

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

are also necessary for Ukraine to fully comply with the TRIPS obligations of the World Trade Organization.

Actions That the Government of Ukraine Needs to Undertake

In order to provide more effective enforcement, we recommend that the Ukrainian Government take the following steps:

First, the Government of Ukraine must: (a) fully and completely inspect the optical disc plants, including surprise inspections with copyright right holder cooperation; (b) close plants that have been found to be involved in illegal production (in breach of the licensing rules and/or the copyright law); (c) seize and destroy illegal material, including the materials and equipment used in the course of illegal production (plus the spare parts and pieces of equipment); (d) properly monitor the importation of raw materials (optical-grade polycarbonate) used in the production of optical disc media; and (e) properly license new plants and/or lines at existing plants (for example, the Rostok plant which received new lines without proper review), including requiring the adoption of SID Codes. In addition, criminal cases and convictions against illegal plant operators and others involved in commercial piracy must follow proper plant inspections.

There are two optical media disc plants in operation that are the subject of detailed complaints from the recording industry (IFPI). Unfortunately, the relevant authorities in Ukraine, specifically the State Department for Intellectual Property (SDIP) and its State Inspectors, have to date failed to take meaningful and decisive action on the basis of these complaints. Despite the fact that the complaints reported large-scale illegal production, neither of the plants nor their owners/managers has faced criminal investigation, let alone prosecution. In fact, both plants are still in full operation. Note, however, that pursuant to a Ukrainian forensic report, which supported IFPI's findings of illegal production, SDIP fined one of the plants (CD Master) for illegal production of a music disc by a U.S. artist. The fine was subsequently overturned by the Kiev Commercial Court, on appeal from the plant. One of the complaints dates from 2004. The Government of Ukraine could have taken action against the plant in question under the old optical disc regime but it failed to act under that law, and has not made any progress since the adoption of the new law either. Passage of the new optical media disc law is not a substitute for enforcement.

Second, retail piracy in markets and in the streets—especially at big outdoor markets, such as the Petrovka Market in Kiev, which doubled in size in 2005, and the Radio Market in Kiev, as well as at street stalls and kiosks—has unfortunately not seen any significant decrease. The Government of Ukraine did a good job of reducing such piracy, temporarily, for the May 21, 2005 Eurovision event in Kiev – so it is clear that this type of activity can be undertaken if it is made a priority of the government. Indeed, the Government of Ukraine has demonstrated that it can effectively prevent retail piracy when the political will and resources are allocated to this problem. However, the open availability of pirated materials has once again reached previous levels as Ukrainian law enforcement has failed to clamp down on street and market piracy on an on-going basis.

Third, the Ukrainian Ministry of Science and Education should issue written and irrevocable instructions to the licensing body to automatically suspend an operating license and seal the relevant production facilities if and when it is presented with forensic evidence of breach by a given optical disc plant of the licensing rules (including copyright infringement). We recommend that this suspension should endure for at least the duration of an in-depth investigation into

infringing behavior, and the possible subsequent criminal or administrative investigation, even if this evidence is presented by a private sector representative organization.

Fourth, we recommend that the appointed department within the Ministry of the Interior which carries out forensic expertise in cases of copyright crime should receive appropriate training and assistance to improve its working methods and expertise.² Its handling of, for example, the CD Master case shows that there is much room for improvement, including how pieces of crucial evidence are physically handled (for example, forensic investigation of optical discs requires the delicate treatment of relatively fragile objects).

Fifth, the Government of Ukraine should provide the specialized intellectual property rights unit within the customs service with the mandate, and operational competence, as well as sufficient resources to act (*ex officio*) against intellectual property rights crimes. This step is necessary for effective enforcement at the border. In sum, the Government of Ukraine must move away from creating yet another bureaucratic entity at the central headquarters and instead devote more resources and show more willingness to effectively enforce intellectual property rights crimes at the border. It should be highlighted that these specialized customs units be instructed and trained to focus on illegal shipments and smuggling of pirated product, rather than the creation of massive bureaucratic hurdles for legitimate importations.

Sixth, the Government of Ukraine should take affirmative steps to stop on-line piracy. Websites offering pirate material continue to thrive in Ukraine, with the support of local Internet service providers. Internet service providers must be liable for allowing illegal material to reside on their servers, or for inducing the distribution of illegal materials by third parties, and they must act to block rampant Internet piracy.

COPYRIGHT ENFORCEMENT

The bill of amendments to the optical disc law and related enforcement legislation (which was adopted in the RADA on July 6, and entered into force on August 2, 2005) included many critical elements to secure better enforcement of illegal product, and to encourage an open market for legal product. The law's provisions included: (1) clear mandates for surprise inspections; (2) the licensing of the production of matrices (two mandatory copies of each production run/order for the licensing authorities) used to produce optical discs; (3) improved criminal sanctions for violations; and (4) the abolishment of a requirement for SID (source identification) coding for imported finished product (discs being imported into Ukraine).

More recently, CD-R production piracy by organized criminal syndicates continues to flourish because of Ukraine's weak criminal enforcement regime.

It is clear that over the past few years, optical disc production has slowed in Ukraine, at least for most industries. For the entertainment software industry, production (mostly involving CD-R material) appears to have increased as have exports of pirated entertainment software products on optical media. In 2005, optical disc production capacity increased with the arrival of two new plants in Odessa and Kiev, respectively (the recently installed new lines in Ukraine add an

² One positive step worth noting was the government's establishment of a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior. This unit has the exclusive authority to deal with intellectual property rights crimes. In addition, the General Prosecutor reconstituted economic crime status to criminal violations of author's and neighboring rights.

additional capacity of up to 40 million discs per year, as well as new mastering equipment). This is why proper implementation of an effective enforcement regime is so critical.

Recent shortcomings have meant that: (1) most inspections of the plants have lacked the required element of surprise (and have instead consisted of pre-raided information leaks where plants have ample time to sanitize their premises); (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.

In December 2005, the Government of Ukraine pledged to participate in an "Enforcement Cooperation Group" with copyright owners—hosting regular meetings to coordinate enforcement and to share information and expertise. This is a step in the right direction. But, more important are regular surprise inspections and stepped up activity (raids and seizures) against organized crime operations. The Government of Ukraine has indicated its willingness to improve its enforcement while IIPA and its members await actual implementation of these plans—these must include frequent (monthly) surprise inspections jointly undertaken by right holders and government enforcement agents, coupled with 24-hour security measures at the plants, and the maintenance of a comprehensive evidentiary database of samples, polycarbonate usage, production and sales statistics and the like. When, during an inspection, machinery is claimed to be temporarily inoperable, a subsequent surprise inspection must be arranged to obtain exemplars from that plant.

Ukraine remains a major transshipment point 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.

Ukraine is obligated to provide effective monitoring of plant production and the licensing of new lines of production. In June 2000, the Joint Action Plan was announced in a joint statement issued by then-President Clinton and then-President Kuchma aimed at optical disc piracy enforcement. The Joint Action Plan consisted of three parts: (1) to close the illegal optical disc plants, to seize illegal material, and only to reopen the plants when there was a legal licensing scheme in place; (2) to adopt proper optical media production and distribution regulations, including identification (SID) coding and the monitoring of raw material and manufacturing equipment, as well as of exports of product; and (3) to improve significantly the copyright law and to introduce other legal reforms, including criminal and administrative penalties, necessary to implement a modern copyright regime.

As noted, there are four steps that the Government of Ukraine must undertake to complete its implementation for proper optical disc production and distribution regulation. These are steps that the government is either not currently doing or not doing properly: (1) effective surprise plant inspections—the only means of effective plant production enforcement; (2) the issuance of SID codes upon proper verification at the time of issuance (with comprehensive and in-depth follow-up inspections and maintenance of codes on all equipment and molds and mirror blocks); (3) monitoring of equipment used at the plants in operation to make certain that source identification (SID) codes are in fact properly engraved on molds, matrices and all relevant equipment used in

the production of optical discs; and (4) creation of a database by the enforcement authorities 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 90 million units per year. The estimated demand for legitimate CDs in Ukraine is still less than one quarter of this total.

Three plants were inspected once each with IFPI and state inspectors present in 2005: the Rostok, ZMS Prod and Amitron plants. The CD Master plant was inspected twice with IFPI and state inspectors present. Two other plants, Media Park and Odyssey Disc (which opened in 2005 with a total capacity of at least 7.5 million discs per year), were inspected by Ukrainian officials in 2005, but these were undertaken in the absence of copyright owners (IFPI). However, both were separately visited by IFPI. The Government of Ukraine reports that, as of December, it was commencing “weekly” inspections of all the plants, but there was no indication that these would all be surprise inspections, which are necessary for effective enforcement. IFPI responded favorably to the government’s invitation to join the government in all of its future inspections. However, there have been to date no actual invitations to join inspections since that announcement. In fact, plant inspections have taken place without IFPI or other rightholders present. In addition, IFPI encourages the government to be more open and cooperative with the forensic evidence that it acquires during inspections. The failure of SDIP to disclose to the rightholders the evidence SDIP has obtained, and the conclusions it has reached, based on past raids has been a stumbling block to effective plant enforcement.

One 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 the legitimate copyright owners while it permits suspect companies to receive thousands of holograms for foreign releases (music, film, entertainment software) 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. IIPA understands that SDIP is considering new regulations, which if adopted, are intended to prevent the fraudulent issuance of holograms.

Holograms stickers are frequently issued on the basis of false contracts, which are rarely verified. In such instances, pirate products are *de facto* authorized by the state for distribution. Such materials cannot be seized by law enforcement officials. Practice shows that one out of every two products seized is labeled with a false hologram (either counterfeit or with a reprinted title). In light of this, it is obvious that the hologram program is totally ineffective.

Entertainment software companies, among others, are experiencing problems with the hologram stickering program. An ESA member company reports that the stickering program is highly ineffective, as pirates are clearly able to obtain these stickers to affix to their pirated products. Though the SDIP has apparently agreed to stop issuing stickers or “control marks” for games that have the English titles or a direct translation of the title of that company’s products, it remains difficult to prevent the issuance of a sticker to a pirate that merely adopts a slight variation

in the title.³ The same company reports that though it only entered the market last year, 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.

The Business Software Alliance (BSA) also reports that the hologram stickering system is acting as a hurdle to legitimate businesses and has become an effective marketing tool for the pirates it was intended to thwart.

In 2003 the Ukrainian Ministry of Education and Science passed an “order” requiring the SDIP to organize a voluntary registry for software manufacturers and distributors in Ukraine. This registry 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. 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 BSA reports that the registry, to date, has not fulfilled its intended function to distinguish legal software manufacturers/distributors from illegal ones.

Broadcast television piracy also remains a major problem for the motion picture industry, especially with regard to regional broadcasts. There is also a large number of cable operators who transmit pirate and other product without authorization.

The business software industry (BSA) reports that there were some changes regarding software copyright enforcement in 2005. Specifically, Internet-based piracy increased, in particular, the resale of software in violation of licensing agreements (for example, software was obtained using privileged licenses for definite users and then resold to the public on the Internet). One company reported significant increases in sales of legal software products following the legislative improvements of the past few years. The company also reported that the numbers of new PCs sold with legal operating systems preinstalled (versus illegal operating systems hard disk loaded) has grown much faster than the PC market, indicating that at least this form of piracy may be decreasing.

Ineffective Criminal and Border Enforcement

Two additional key enforcement tools are needed: (1) 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.

³ As one example: the game “Need for Speed: Most Wanted” was issued a sticker, but the word “speed” was translated into Russian while the rest of the label was in English.

Criminal Enforcement

The copyright industries report that there have been some welcome raids conducted over the past year, but not enough action has been directed at large-scale commercial piracy. Further, there are too 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. With some notable exceptions, virtually all of the reports of activity in 2004 and 2005 were directed against sellers and small-scale distributors, with the criminal gangs involved in organized large-scale piracy remaining largely unscathed.

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\$5,210), 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.

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 both Russian and Ukrainian 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 often bear the “marks” or “logos” 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 motion picture industry reports that over the last two years, there have been some encouraging signs of increased and geographically wider police activity, both in Kiev and elsewhere, against the retail sale and distribution of pirate products. For example, in April 2005 a massive operation called “Intellect,” with participation of many government departments and public anti-piracy organizations, resulted in the seizure of 217,724 pirate items valued at an estimated US\$600,000: 98,343 optical discs (DVDs, CD-Rs and CDs), 28,214 VHS cassettes and 91,167 audio cassettes. Administrative Code sanctions were applied against 1,014 individuals. Separate raids resulted in the seizure of significant quantities of pirate products and the discovery of CD-R/VHS duplicating laboratories.

A March 2005 raid by the Economic Crime Police, with the cooperation of the IFPI/MPA Kiev office, resulted in the seizure of 63 CD-R/DVD-R burners and thousands of blank and recorded CD-Rs (music, video, and games) and inlays. The raided lab was one of the suppliers of illegal product to wholesalers in Kiev and in other regions of Ukraine, and had previously been raided in 2004 but remained operational because of lack of evidence. Another raid by the same groups in May on a warehouse belonging to one of the biggest distributors of pirate optical discs in the Lugansk region netted over 53,000 pirate DVDs, over 43,000 CDs and over 16,000 inlays. Unfortunately, a similar raid undertaken a year earlier, in which about 100,000 DVDs and CDs were seized, was not followed by a criminal prosecution because the pirate had the support of the former regional administration.

Among other raids in 2005 were one in Kiev targeted against street vendors, pirate warehouses, and CD-R labs that resulted in the seizure of over 14,600 pirate DVDs and some 29,000 pirate CDs; one on a large pirate distribution warehouse in Khmel'nitsk city that resulted in

the seizure of 773 DVDs and 6,820 CDs, together with hundreds of VCDs and discs containing MP3s and software; and one on a warehouse in Lugansk that resulted in the seizure of 58,236 DVDs and 24,616 CDs imported from Russia.

It is common, unfortunately, for cases to end without deterrent penalties, and worse, for pirates to petition the court successfully to have illegal products returned to them. Here are two such examples. The first resulted from a final ruling on November 10, 2005 (*In re: Zhovtnevyi*) in the district court of Lugansk City. An Article 176 Criminal Code violation was dismissed and amnesty granted to the defendant, and pirated product consisting of 41,543 CDs and 45,785 DVDs (that was seized by the police) was returned to the defendant as his “personal” property. All claims by the rightholders for damages were dismissed. In the second example (*In re: Dzerzhinsky*) in the district court of Kharkiv City on December 12, 2005, a criminal proceeding under Article 203(1) of the Criminal Code (pertaining to the illegal distribution of optical discs) was dismissed and pirate product consisting of 6,200 DVDs and 800 CDs was returned to the defendant.

Border Enforcement

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—including Poland, Hungary, Lithuania, Romania and Slovakia, and other countries such as Israel. In fact, border enforcement is probably the weakest link in Ukraine’s enforcement regime, as it allows large-scale smuggling operations to move pirate product mainly produced in Russia into Ukraine for the local market or for shipment to other countries. The common trade regime among Russia, Ukraine, and Belarus will only exacerbate the border enforcement problems, putting additional pressure on neighboring countries. 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.

One lingering border problem supposed to have been fixed in August 2005 has not been implemented yet. The 2005 optical disc law made it clear that SID coding for imported finished product (discs being imported into Ukraine) was not required. But, in January 2006, there have been complaints that border officials are preventing the importation of finished CDs without SID codes. The Government of Ukraine must properly implement this new law immediately.

The IFPI and MPA report that Ukrainian customs officials have demonstrated better cooperation for enforcement of IPR crimes at the border than in previous years. But, overall, much more needs to be done 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. The motion picture industry (MPA), for example, reports that a lingering major piracy problem as a result of poor border enforcement remains the influx of pirated DVDs from Russia.

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 right holder 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

right holders 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).

Other Enforcement Issues

Article 203(1) of the Criminal Code was modified as part of the amendments adopted in August 2005. It is now no longer necessary for right holders to file complaints before the police can initiate criminal actions. Without proper implementation of this clear authority on the part of police and border officials, and without proper confiscation of pirate materials (which we understand can only constitutionally be undertaken by the courts), the problems will continue to worsen. 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).

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 2005, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels at around 60% for international repertoire, and losses estimated at \$30 million (including losses from the export of pirate product from Ukraine).

Pirate films continue to appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Street kiosks sell pirate optical discs off the spindle and package them on the spot. Video retail stores stock pirate product, including pre-release material that is available within days of U.S. theatrical release.

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). There have also been some shipments to the U.S. which though of some regularity, are always in low quantities – an apparently deliberate move by the pirates to avoid detection as well as enforcement action. Many are shipped with fake documentation claiming that the shipper has the appropriate licenses for the products shipped. The pirated video games also bear the “marks” or “logos” of the pirate operation which is producing and distributing the pirated games. It appears that both Ukrainian and Russian syndicates are operating in the country, and have adopted the practice of “branding” their pirated products. Forensics identification information indicates that these pirate entertainment software discs are being made in well known factories in Ukraine.

BSA reports (and appreciates) 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.

The Ukraine law enforcement officials reported the following: in 2005, there was a total of 483 criminal IPR cases opened (compared with 455 in 2004, and 374 cases in 2003). Of these, 298 cases were Article 176 cases (52%). The figures for 2004 and 2003 were 311 and 297 cases, respectively. There were 115 Article 203(1) cases involving the illegal circulation of optical discs—new provisions adopted in July 2005. These involved music, video and software games.

Further, the SDIP reported the Government of Ukraine seized a total of 850,000 items in 2005, compared with 600,000 in 2004 and 300,000 in 2003. A total of 100,000 items were destroyed in 2005, compared with 70,000 and 80,000 respectively in 2004 and 2003. There were 5,100 administrative cases undertaken in 2005, compared with 4,300 in 2004 and 2,000 in 2003.

The Tax Police seized a total of 280,000 items (including 60,000 discs) in 2005. In 2004, they seized 340,000 items (including 150,000 discs); in 2003, they seized 200,000 (including just 5,000 discs). The Customs authorities reported 350,000 discs seized compared with 100,000 in 2004 and just 34,411 in 2003. The State Inspectors (in all 16 regions) reported 400,000 discs and tapes seized, 100,000 destroyed, 450 administrative protocols, and 100 criminal cases opened. The figures for 2004 were 270,000 items seized, 40,000 destroyed, 390 administrative protocols, and 58 criminal cases opened. In 2003, the figures were 50,000 items seized, 25,000 destroyed, 110 administrative protocols, and 40 criminal cases opened.

The business software industry (BSA) reports significant improvements in its relations with the Ministry of Internal Affairs, in addition to good national police cooperation, although relationships with local police departments remained the same. The sum total of activities included 165 police raids; 112 criminal proceedings; 53 administrative proceedings; and 20 civil proceedings. In most cases raids were taken *ex officio* by the police. Most police enforcement activities were directed against CD pirates. Other forms of piracy were almost “untouchable”—IIPA and BSA urge the police to broaden their focus from CD piracy actions to include actions against PC manufacturers and corporate end-users. Last, the police must act not only against small resellers and end-users but against organized crime operations. One note of success was the sweeps that began in July 2005 against stalls in a well known flea market (making it difficult today to find pirated CDs, especially including Microsoft® business software at this and other flea markets in the largest cities). At present, there does not appear to be much pirated business software material (on CDs) in retail chains.

History of GSP Petition

As a result of Ukraine’s serious optical disc piracy problem, the IIPA filed a petition on June 16, 1999 to request the withdrawal or suspension of Ukraine’s GSP benefits. That petition was accepted by the U.S. Government on February 14, 2000; in support of that petition IIPA testified at a public hearing on May 12, 2000. The U.S. Government suspended Ukraine’s GSP benefits on August 24, 2001. On August 8, 2005, the IIPA requested that the suspension remain in place (i.e., that the automatic 4-year sunset provisions not take effect) in a letter to Mr. William Burris, Chairman, Section 301 Committee.

After Ukraine’s adoption of the optical disc law in August 2005, the U.S. Government announced on August 31, 2005 that it was terminating the 100% *ad valorem* duties that had been in place since January 2002 on Ukrainian exports. It then announced an out-of-cycle review in October 2005, which concluded in January 2006. Effective on January 23, 2006, the U.S. Government announced that it was lowering the designation of Ukraine from a Priority Foreign

Country to placement on the Priority Watch List; coupled with that designation, the U.S. Government also announced, effective on January 23rd, the reinstatement of GSP benefits for Ukraine.

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>.

The key missing legal reforms 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 or the onerous registration and fee requirements for IP-related materials); and (3) the addition of key administrative remedies. The law of 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. In 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 in spite of the new civil procedure code (since the civil code does not apply to administrative remedies).

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.

The Government of Ukraine is currently considering major copyright law reform. The current draft bill, prepared for Inter-Ministerial review, over-regulates the collective management of rights and includes unwarranted government intervention in the exploitation of copyrights, to mention two of the many shortcomings of this draft bill. The Government of Ukraine should consult with right holders and international copyright experts before moving forward with this legislation, to simplify the provisions and to ultimately make its law compatible with international norms and business practices.

Criminal Code and Criminal Procedure Code: The criminal code was completely revised in 2001, and further revised in 2003. Article 176 now 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 provide an increase for repeat 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

finances 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 twice-a-year calculation of minimum tax-free incomes entered into force in January 2004, applicable to the Article 176 provisions. In 2005, the minimum monthly wage was UAH 262 (US\$49.31) for purposes of the threshold calculation applied to actual fines; however, the minimum tax-free income of UAH 17 (US\$3.20) is also applied in other calculations (making it very confusing to apply). 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\$640). But the thresholds rose as follows: in November 2004, the threshold was UAH 14,220 (US\$2,676) and on January 2005, it rose to not less than UAH 26,200 (US\$4,931). This year, it will rise to UAH 45,120 (approximately US\$8,492). If the value of seized illegal product is below the threshold there 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 a very difficult threshold 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. Even though these are far short of deterrent sanctions, if properly implemented and prosecuted, those penalties can provide some relief for certain low-level offenses. In sum, 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, 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. Amendments to consider lowering the threshold were considered but never adopted in November 2005. IIPA urges the government to reconsider this issue in 2006.

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.

The Criminal Procedure Code 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 right holders 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. IIPA understands that the proper remedies exist but are not being used effectively 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.

Customs Code: 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 (Art. 257) 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 notification and registration requirements, and the fees were not repealed by the new law. They should be abolished; these provisions act as a bar to effective border enforcement action by causing a confusing maze of unnecessary regulation.

Civil Code: 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 urges the enforcement agencies and the judiciary in Ukraine to rely on the copyright law, not the Civil Code Chapter IV, for effective enforcement.

Dubbing Law: Amendments to a draft media law have been introduced in the Parliament that would call for mandatory dubbing in Ukrainian for films shown in cinemas and on television. If these, or similar, amendments were to be adopted, they would have a significant impact on audiovisual market development, particularly for MPA member companies and other foreign companies in the Ukraine.

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. BSA reported substantial progress and cooperation on the legalization of government software in 2005. These encouraging efforts by the Government of Ukraine provide a positive example for the private 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.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

VENEZUELA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Venezuela remain on the Special 301 Priority Watch List in 2006.

Actions Which the Venezuelan Government Should Take in 2006:

- 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 to the U.S.;
- 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.
- Improve border enforcement, including using the new law and the regulations against smuggling and the transit of pirated goods.
- Repeal music quotas required by the recently passed general broadcasting law.
- Congress passed an amendment to the 1993 Film Law in 2005 which contains a number of highly damaging provisions to the audiovisual sector and which may serve as a negative precedent for other countries. MPA is monitoring the draft of the implementing regulations and will intervene in this process, when necessary.
- Complete the deposit and ratification of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

COPYRIGHT LAW AND RELATED REFORM IN VENEZUELA

Copyright Law of 1993: 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). In addition, ratification of the two WIPO "Internet" Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)) remains a priority for the copyright industries.

Objectionable Proposed Copyright Law Reform (2004): There appears to have been no movement in 2005 to halt or derail the very objectionable copyright reform package introduced in late 2004. 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 radical legislation was approved in the first reading on February 2, 2005, essentially without discussion and without ever having been first assigned to any committee. Later in 2005, the bill was then assigned to the Permanent Committee of Interior Politics, Justice, Human Rights, and Constitutional Guarantees, which will make recommendations for the second reading in the National Assembly. It is expected to be approved in 2006.

This legislation, if adopted as originally drafted, would severely undercut not only the current 1993 law, it would violate the IPR criteria in the Generalized System of Preferences (GSP) trade program,¹ the Berne Convention, and 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. As IIPA described in our 2005 Special 301 report, the legislative history section (*Exposición de Motivos*) of this bill indicates that this legislative effort arose from the earlier “political distortions” and a “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 ownership in favor of movies and software producers;
- Lowering criminal penalties from 1–4 years to 1–2 years;
- Making it very difficult to assign or transfer works;
- Removing all *ex parte* injunctions and actions;
- 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 other classes of works, such as artistic, musical and literary works. Transfers would also be limited in term based on whether the contracting party has made a financial investment in the project for which the transfer is sought.
- Providing very broad and expansive exceptions to protection;
- Providing an unclear making available right;
- Not covering point-to-point transmission, ISP liability, or providing notice and takedown provisions;
- Not establishing an importation right, and not providing statutory civil damages and criminal penalties for unauthorized parallel imports of copyrighted materials
- Not providing civil or criminal remedies against the alteration of electronic rights management information (ERMI) or against circumvention of technological protection measures (TPMs);
- Not providing effective 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.

These provisions would severely hamper any ability of national or international right holders to create exploit their works in Venezuela.

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. During the first 11 months of 2005, \$679.5 million worth of Venezuelan goods (or 2.2% of Venezuela's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an 8.8% decrease from the same period in the previous year. For more information on the history of Venezuela under Special 301 review, see Appendices D and E of this submission: Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>).

Customs Regulations (2005): In October 2005, the Venezuelan Tax and Customs Superintendent (SENIAT, *Servicio Nacional Integrado de Administración Aduanera y Tributaria*) issued administrative rules applicable to the import and transit of IPR goods through customs. These regulations appear aimed at better implementing TRIPS' border provisions to enable customs authorities to deal (intercept and seize) with suspect shipments, including those in free trade zones and customs warehouses. Customs authorities may ask agents or consignees to show authorizations granted by the right holders in order to show the lawful nature of the goods. [good or bad?]

Law on the Crime of Smuggling (2005): Adopted at the end of 2005, the National Congress adopted a law penalizing smuggling. Sanctions for smuggling are imprisonment of 4 to 8 years. Fines and destruction of the seized goods and implements are also enumerated. The Attorney General's office has primary jurisdiction for investigation and prosecutorial decision-making, with the input of SENAT. The copyright industries hope that this law will be implemented effectively in practice in 2006.

Film Law Amendments (2005): In August 2005, Congress passed a comprehensive amendment to the 1993 Film Law, which contains a number of highly damaging provisions to MPA member company all-media operations in Venezuela and which may serve as a negative precedent for other countries. Its provisions superseded those included in Decree No. 2430 published in the Official Gazette on May 29, 2003. The damaging provision included, for example: (a) a 20% local theatrical printing obligation based on the number of imported prints; (b) a progressive screen quota that requires theaters with more than 5 screens to fulfill a 12-week quota per complex; those with 2 to 5 screens have a 6-week quota per complex; and those with one screen, a 3-week quota; (c) a 20% distribution quota of national films calculated on total annual title distribution; (d) mandatory registration of exhibitors, producers, importers, exporters, distributors, broadcasters, etc and national and foreign films. This could lead to the release of confidential information to competitors and government officials; (e) mandatory exhibition of short films without remuneration; (f) an obligatory control stamp for home entertainment products; (g) mandatory theatrical holdover; and (h) numerous and onerous taxes. Currently, the government is drafting the implementing regulations of the law, which will be subject to a process of public hearing. MPA is monitoring this process and will intervene.

Broadcast Quotas on Music (2004): In December 2004, Venezuela's Congress passed a general broadcasting law that creates specific quotas in favor of domestic music repertoire. The quotas require that at least 50% of all music being broadcast be 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.

COPYRIGHT PIRACY AND ENFORCEMENT IN VENEZUELA

Continuing economic and political instability in Venezuela has fostered a high level of copyright piracy. Furthermore, in recent years, the copyright industries' ability to engage in commercial distribution and conduct anti-piracy campaigns safely and effectively has been quite limited. For these reasons, the streets are now flooded with pirated products and CD-R burning is widespread. The legitimate music industry in Venezuela has almost disappeared. The audiovisual industry reports that optical disc piracy in retail and street markets in Caracas and in other urban centers has grown appreciably. Entertainment software companies also report that the piracy

situation has worsened for the industry, and it has also become increasingly difficult to pursue legal action.

VENEZUELA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005²										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ³	33.0	83%	31.0	80%	29.0	80%	29.3	75%	54.0	62%
Business Software ⁴	40.9	78%	39.0	79%	33.0	72%	27.1	52%	25.7	55%
Motion Pictures ⁵	NA	NA	25.0	NA	25.0	50%	25.0	65%	25.0	65%
Books	NA	NA	NA	NA	NA	NA	18.0	NA	20.0	NA
Entertainment Software ⁶	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	73.9+		95.0		87.0		99.1		124.7	

Demand for pirated discs of films has grown with the wide availability of low-cost DVD players. Consequently CD-Rs and DVD-Rs now dominate the counterfeit market by a four to one margin over VHS copies. Video store piracy remains pervasive in Venezuela, supplied by large-scale laboratories with national distribution systems. Three years ago, the DVD market was one of the region's most encouraging, the video store market had improved with a coordinated MPA anti-piracy effort and television piracy had been significantly reduced. In 2004-05, however, the legitimate DVD market is diminished significantly, with far fewer video stores, and television piracy is increasing once again. The situation was so difficult that MPA closed its anti-piracy program in Venezuela. Pirated videogames are widespread, with most imported from Taiwan, Hong Kong and China, transshipped through Paraguay. Book publishers continue to experience widespread unauthorized photocopying, especially at secondary schools and universities.

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. Lowering the business

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³ Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

⁴ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Venezuela, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ 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.

software piracy rate could contribute to the Venezuelan economy.⁷ During 2005, BSA undertook 19 judicial inspections and 15 administrative inspections, seizing 1.5 million copies of pirated CD-Rs of which 265,000 contained software programs of BSA member companies.

AAP reports continued high levels of illegal photocopying in and around universities, affecting a wide variety of academic books. In addition to enforcement by authorities against photocopy facilities making unauthorized copies, the publishing industry would like to see involvement by university administrations themselves in encouraging the use of legitimate materials on campuses.

Enforcement of the copyright law by Venezuelan government authorities remains poor. Enforcement against street sales is non-existent, which has allowed piracy to flourish. Frequent public demonstrations and court strikes and closings continue to make efforts to enforce the law difficult. Due to changes in the Special Prosecutor's Office for IP Crimes, cases have not gone smoothly. For example, when a criminal complaint is filed with the office, there is no certainty that a raid will ever take place. However, there are other divisions, such as the Electronic Crimes Division, which are able to move cases through the system more expeditiously. Finally, it should also be noted that cases languish too long in the courts. Both prosecutors and judges should be provided with additional training on IPR crimes so that sentences, when eventually meted out, are actually deterrent.

- The Copyright Office (SAPI) has no real enforcement powers, though it is able to impose minor administrative remedies. The industries report that their relationship with SAPI is not very strong or positive.
- COMANPI, the anti-piracy brigade which was once well regarded in the region, had its budget cut years ago and copyright actions declined dramatically, and it now focuses on trademark actions.
- 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 with the excuse that judges are not familiar with the copyright law and its application.
- The Special Law Against Electronic Crimes (*Ley Especial contra Delitos Informáticos*) passed in December 2001. We do not have any details as to whether or not this law has actually been applied in practice in 2005.

Training: BSA and other industries do interact regularly with the SENIAT Subcommittee on IPR crimes, and work together on joint public awareness projects as well as trainings. During 2005, BSA took part in 18 events, training more than 600 Venezuela officials.

⁷ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Venezuela.pdf), using 2004 data, found the following: a 10-point drop in Venezuela's piracy rate (from 79% to 69%) could add \$600 million to its economy, increase local industry revenues by more than \$400 million, and pump an additional \$45 million into Venezuela's tax coffers. The 10-point reduction could also create 2,400 new IT jobs. See <http://www.bsa.org/idcstudy/pdfs/Venezuela.pdf>.

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WATCH LIST

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

THE BAHAMAS

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that The Bahamas be kept on the Special 301 Watch List in 2006.

Actions that the Government of Bahamas should take in 2006:

- Implement the 2004 amendments to the Copyright Act which remove the objectionable and overbroad compulsory license.
- Issue regulations to correct longstanding problems by:
 - Reducing overbroad discounts on cable retransmission royalties to hotels (by eliminating any discount) and schools and hospitals (by ensuring they are for private, non-commercial use only);
 - Providing a cable royalty rate that affords equitable remuneration to rightsholders;
 - Announcing a procedure under which rightsholders may file claims under the compulsory license.
- Protect U.S. sound recordings.
- Implement the 1996 WIPO Treaties.

COPYRIGHT LAW AND RELATED ISSUES

Letters of agreement regarding overbroad compulsory license: On February 18, 2000, the Motion Picture Association (MPA) and the Television Association of Programmers (TAP) filed a Special 301 petition that highlighted the fact that the Government of The Bahamas had created an overly broad compulsory license permitting the unauthorized re-transmission by cable television systems of any copyrighted work transmitted over its territory, including encrypted transmissions; such a compulsory license violates international copyright norms. The Government of the United States entered into negotiations with the Government of The Bahamas to address this problem. The resulting exchange of letters dated October 26 and November 9, 2000 constituted an Agreement between the two parties. Under that Agreement, The Bahamas committed to conform its cable compulsory license to international norms. Details of the issues involved and the resulting agreement appeared in IIPA's 2001 Special 301 report.¹

Four years passed without any legislative action on the copyright law until (the industry found out, belatedly) amendments were passed in June 2004. The 2004 amendments did remove the objectionable compulsory license from the law. Proper implementation of these

¹ See IIPA's 2001 301 report on The Bahamas at <http://www.iipa.com/rbc/2001/2001SPEC301BAHAMAS.pdf>.

amendments would limit the scope of the compulsory license to the unaltered retransmission of free, over-the-air broadcast signals and would not permit retransmission of encrypted signals or extend to retransmission over the Internet.

Nevertheless, MPA continues to report that the government of The Bahamas has not fully implemented its 2004 law amendments and the 2000 Agreement. First, the government explicitly refused to implement the 2004 amendments until the commercial demands of Cable Bahamas were fulfilled. As part of the 2000 Agreement, the U.S. government promised to “encourage” U.S. rightholders to negotiate licenses on commercial terms. MPAA has taken a number of specific steps to assist its member companies and U.S. programmers in evaluating their options regarding licensing additional product to Bahamian cable operators. It is important to note that the MPAA member companies are not the sole U.S. rightholders who have interests in distribution and programming in Bahamas and the rest of the Caribbean region.

Second, remaining problems about the cable compulsory license rates, exceptions and claims procedures all could be resolved via regulations, since they already appear in regulations, not law. Yet to date, The Bahamas has provided no indication that it intends to address the other elements of its existing regulatory regime that also represent violations of the Berne Convention. These three problems are:

- Existing regulations give hotels a 75% discount and schools and hospitals a 100% discount on cable royalty rates. MPAA believes that the exception for hotels is indefensible. The exception for schools and hospitals might be tolerable if and only if the regulations clarified that the use by hospitals and schools was non-commercial use only.
- The cable royalty rate also fails to provide equitable remuneration to rightholders. The rates established in the regulations are far lower on a per-signal basis than rates paid for television broadcast signals under compulsory licenses permitted by international norms, and fail to meet the “equitable” standard under Berne. The 2000 Agreement contained a provision which had the Bahamian Copyright Royalty Tribunal (CRT) consulting with U.S. rightholders to provide equitable remuneration for the compulsory licensing of such free-over-the-air broadcasts and to amend the royalty rate structure of the Regulations.
- The government has never announced a procedure under which rightholders may file claims under the compulsory license.

Until these problems are resolved, the entire system in The Bahamas fails to provide any compensation to rightholders.

Copyright law: Copyright protection in The Bahamas is based on its Copyright Act, 1998, including the Copyright (Amendment) Act 2004 (discussed above).

However, the current copyright law does not provide a point of attachment for U.S. or foreign sound recordings. The Bahamas has not joined the Geneva Phonograms Convention, nor the WTO, nor has it ratified or implemented the WIPO Performances and Phonograms Treaty (WPPT). This means that U.S. sound recordings are not protected in The Bahamas. This untenable situation is startling, because The Bahamas is a beneficiary country of the U.S. preferential Caribbean Basin Initiative (CBI) trade program, which requires adequate and

effective protection for U.S. copyrighted materials, including sound recordings.² 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 interested in the exploitation of local and international repertoire in public locations, including cruise ships, and by broadcasters. 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 in the Bahamas.

In terms of other international trade obligations, The Bahamas is not a WTO member. In May 2001, the government submitted a request for accession, and a Working Party was established in July 2001. The Bahamas has not yet submitted a Memorandum on the Foreign Trade Regime and the Working Party has not yet met, according to the WTO. Furthermore, with respect to other works, The Bahamas is a party to the Brussels Act (1948) of the Berne Convention (it has adhered only to the administrative provisions, Articles 22-33, of the Paris 1971 text). The WTO TRIPS Agreement incorporates, by reference, the obligations of the 1971 Berne Convention.

In brief, The Bahamas has many steps to take to improve its national legislation, including, at a minimum, ratifying the WPPT, the WIPO Copyright Treaty (WCT), and the substantive provisions of the Paris Act (1971) of the Berne Convention.

² 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.” During the first 11 months of 2005, \$99.7 million worth of Bahamian goods (or 15.2% of The Bahamas’ total exports to the U.S. from January to November) entered under the CBI, representing an increase of 20.9% from the same period in 2004.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

BELARUS

IIPA recommends that Belarus remain on the Watch List for its failure to adopt the legal reforms noted in this report, and for its overall lackluster enforcement of IPR crimes.

In 2005, the U.S. Trade Representative retained Belarus on the Watch List noting that Belarus had not “fulfilled its intellectual property commitments under the 1993 U.S.-Belarus Trade Agreement and ... continues to have deficiencies in its IPR regime.” There were no reports of either legal reforms or enforcement successes in Belarus in 2005. Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WIPO Performances and Phonograms Treaty (WPPT) (2002), and the Geneva Phonograms Convention (2003). Belarus’ failure, until very recently, to join a neighboring rights treaty (Geneva and WPPT) allowed a large back-catalog of unprotected sound recordings to flourish in the marketplace, making enforcement that much more difficult, even today.

IIPA and USTR have reported in the recent past on the troubling problem of optical media production facilities migrating into (and out of) Belarus from neighboring countries. We have no reports of any recent such cases. However, the failure of the Government of Belarus to properly police their borders, and to investigate and prosecute one such case (the Armita plant), only underscores the need for more effective regulation of optical media production and distribution, including criminal sanctions for violations.

IIPA continues to urge the Government of Belarus to improve its border enforcement — to prevent other plants or equipment from Russia (or other neighboring countries) to relocate in Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs, CD-Rs, etc.). IIPA is aware of one optical disc plant (opened in October 2004). The Vigmaplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of 7 million discs a year. We understand that it was assigned a source identification (SID) code.

In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral Trade Agreement which detailed 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. The 1998 amendments were intended to, among other things partially implement the WIPO digital treaties (WCT and WPPT).

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.

There are, however, a number of serious legal deficiencies that are preventing effective enforcement in Belarus. The IIPA recommends the following changes to the Belarusian legal regime:

- 1) Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply for IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- 2) Amendments to the Criminal Code to: (a) adopt a “significant amount of use criteria” calculated on the basis of the price of legitimate product, instead of the existing too high threshold based on “large-scale damage” for IPR crimes; and, (b) lowering the actual amount of the current threshold (in Art. 158) to commence liability, which is now BR12.1 million (US\$5,580).
- 3) Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 4) Amendments to the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 5) Amendments to the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases. At present, a statement from a rightholder is required to commence an administrative case. The administrative remedies are applicable for violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.
- 6) Amendments to the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 7) Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 8) Amendments to the Copyright Law (1998) to provide clear protection for pre-existing works and sound recordings. Belarusian officials insist this protection currently exists, at least for works (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). While this may be a correct reading of the law, it should be clarified by statutory amendment or decree to avoid any confusion on the part of police, prosecutors, and judges tasked with enforcement of these rights.
- 9) Amendments to the Copyright Law (1998) to fully implement the WIPO digital treaties (WCT and WPPT). The current anti-circumvention and copyright management information provisions are not fully compatible with the WIPO digital treaties. In particular, the law needs to 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.

Enforcement

Under the Copyright Law (Article 40), civil penalties for copyright or neighboring rights violations include injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, as well as statutory penalties of between 10 and 50,000 times the minimum wage. Belarusian officials also point to the Civil Code (1999) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. In 2004, Belarusian officials reported that the Council of Ministers (an Inter-Ministerial committee) had adopted a program for IPR protection for the coming years focusing on legislative reforms (including copyright, patent and trademark laws). First, the government must adopt the numerous reforms recommended. In addition, the Government of Belarus needs to focus on enforcement: running raids and seizures, commencing criminal cases against commercial pirates, and using administrative remedies to curtail street piracy.

As Belarus moves to accede to the World Trade Organization, it must bring its laws into full compliance with the WTO TRIPS obligations by adopting the revisions noted above and by improving on-the-ground enforcement. We continue to urge the government to take action against any known production facilities (reports persist of cassette piracy facilities) and to monitor optical disc production in particular (at the one known plant), using the criminal law remedies.

The level of music piracy is estimated at about 70%; trade losses for 2005 were estimated at over \$25 million. There are no comprehensive enforcement statistics as in recent years (for example, a reported 141 raids in 2004 according to local enforcement agencies). Rather, in 2005, the industry reported that the trend was of an increasing number of raids, but raids aimed only at small-scale retailers of illegal material. While these are helpful, they have little deterrent effect on the overall piracy problem. Plus, the administrative fines that were imposed, even against these retailers, were insignificant. There were also reports in 2005 of more criminal cases initiated but the sentences that were imposed, if any, were almost all either conditional or suspended. This too has little deterrent effect. There were no statistics provided by the government (or industry) in 2005 of the number of border seizures or investigations.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

BOLIVIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Bolivia stay on the Special 301 Watch List in 2006.

Actions That the Government of Bolivia Should Take in 2006:

- Revise Bolivia's copyright law up to the international standards of the TRIPS Agreement and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
 - Any new copyright bill that is drafted should be considered separately from any industrial property legislation.
 - Any consideration of the proposed copyright legislation drafted in 2001 should be discontinued because that bill is severely deficient.
 - 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
 - Adopt ISP liability measures, including notice and takedown provisions;
- Ratify the WCT and WPPT, and fully implement these obligations in any copyright law reform (as referenced above);
- Adopt and implement a national anti-piracy effort to combat copyright infringements;
- Significantly improve on-the-ground anti-piracy enforcement efforts;
- Elevate the level of penalties for copyright infringement to more deterrent levels (in both the criminal code and in any copyright law reform).

IIPA supports the Free Trade Agreement process. The U.S. began FTA negotiations with Colombia, Peru and Ecuador, with Bolivia participating as an observer, in May 2004. Negotiations with Colombia and Ecuador continue in early 2006, after Peru concluded its FTA negotiations with the U.S. It is not yet known how the new Bolivian government will approach the FTA negotiations. IIPA believes that 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 has recommended for years that it is essential that Bolivia take immediate steps to improve its poor enforcement record. Bolivia currently receives preferential trade benefits under two U.S. trade programs — the Generalized System of Preferences (GSP)¹

¹ For more information on Bolivia under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. During the first 11 months of 2005, \$25.1 million worth of Bolivian goods (or 9.1% 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 64.8% increase over the same period in the previous year. Another

and the Andean Trade Preferences Act (ATPA)² — both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners. 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; that commitment has not been met, almost seven years later.

Furthermore, at the multilateral level, the WTO conducted a Trade Policy Review (TPR) of Bolivia on November 1 and 3, 2005. Both the Report by the Secretariat and the Minutes of this TPR Meeting reflect concerns raised by several WTO member nations regarding the adequacy of Bolivia's copyright legislation as well as the effectiveness of its enforcement system.³

BOLIVIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2005⁴						
INDUSTRY	2005		2004		2003	
			Loss	Level	Loss	Level
Records & Music	15.8	90%	16.0	90%	16.0	90%
Business Software⁵	6.0	80%	5.0	80%	7.0	78%
Motion Pictures⁶	NA	NA	2.0	NA	2.0	100%
Entertainment Software⁷	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	21.8+		23.0		25.0	

\$149.2 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2005, representing an increase of 33.8% from the same period in 2004.

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 8, 2005 at

<http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>.

³ See WTO Trade Policy Review of Bolivia, Minutes of the Meeting, WT/IPR/M/154 (issued 16 January 2006), and Trade Policy Review on Bolivia, Report by the Secretariat WT/TRP/S/154 (issued 16 January 2006). Both documents are available on the WTO website, www.wto.org.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bolivia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁶ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁷ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of 1992: Bolivia passed a copyright law on April 29, 1992, which replaced its antiquated 1909 law.⁸ Although the 1992 law represented an improvement in legal protection in Bolivia, it unfortunately left the implementation of many of its provisions, including enforcement, to subsequent regulations.⁹ The 1992 law predated many of the substantive copyright and enforcement measures adopted in the WTO TRIPS Agreement.

Efforts to amend the Copyright Law: Efforts to overhaul the 1992 Bolivian copyright law have been underway for almost a decade. In 1996, the National Secretary of Culture and the National Secretary of Industry and Commerce started to develop a proposal for a special law on intellectual property protection which would complement the existing copyright law. 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 contained 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. While a good start, that draft would have required additional amendments to bring its copyright provisions up to acceptable standards.

Industry was under the impression that this 2001 bill was abandoned by the government a few years ago. However, Bolivian officials informed the WTO that this 2001 bill remains pending review. Industry had heard that SENAPI presented a new IP 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 whether this 2004 version contains identical proposals to the 2001 version or not. We do support its severance from industrial property legislation.

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. Importantly, 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. IIPA encourages the government of Bolivia to add ratification of the WIPO treaties to the 2006 legislative agenda.

⁸ Bolivia's copyright regime must also comport with decisions made by the five members of the Andean Community, especially Decision 351 (of December 1993), which outlines a common regime for copyright and neighboring rights, including remedies like injunctive relief, seizure and confiscation of unlawful copies and devices, and damages.

⁹ As IIPA has reported previously, 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.

Criminal Codes: In May 2001, a new Code of Criminal Procedure, providing for criminal proceedings for IPR infringements, was adopted. In August 2003, the Bolivian Criminal Code was amended. Article 362 provides criminal sanctions for copyright infringement of three months to two years in jail and a fine of 70 days. The one glaring problem with this provision is that it requires a commercial purpose intent ("*con animo de lucro*"), an intent which cannot always be satisfied, especially in Internet-related cases.

COPYRIGHT PIRACY AND ENFORCEMENT

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 closed their offices several years ago. Domestic music 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 in 2005 continues to be 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; however, the motion picture industry does not have an anti-piracy presence in Bolivia. 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. SENAPI, the National Intellectual Property Service, was created by decree in 1998 and is in charge of administering IP rights in Bolivia.

Failure to Provide TRIPS-Compatible Civil *Ex Parte* Search Measures: BSA reports no improvement in 2005 in the longstanding problems they have encountered with obtaining civil *ex parte* searches. BSA's enforcement efforts were almost completely unsuccessful in Bolivia during 2005. In the only civil case attempted, the judge rejected the presentation of evidence. The reason given by the judge was that more time was required for the other side to respond to the presented evidence. This was despite the fact that the time was identical to times provided for response in previous years. Over the years, 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 violates the *ex parte* standards in TRIPS Article 50.2.

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. 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 and Ineffective Criminal Enforcement: Enforcing copyrights through the Bolivian criminal system has proven to be completely ineffective. The business software reports no criminal cases were brought in 2005.

Border measures in Bolivia must be strengthened: In January 2004, SENAPI signed an agreement with the National Customs Authority and the Taxation Service aimed at preventing the entry of pirated products into Bolivia. During 2005, 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 laws and/or regulations should contain provisions under which the competent authorities can act on their own initiative (*ex officio*) and suspend the release of suspect goods. According to WTO's review of Bolivia, SENAPI can order Customs to suspend the clearance of goods which are suspected of IPR infringement; once the IP infringement is proven, Customs may seize the goods and order their disposal.

Inadequate Civil Copyright Damages: The Bolivian 1992 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. The IP legislation drafted in 2001 included a positive concept by proposing to add a statutory damages provision of between three to five times the retail value of the protected work. It is unclear whether the new, bifurcated version of the bill as introduced by SENAPI in 2004 preserves this provision. As indicated above, other provisions of the 2001 version of the copyright reform bill fail to meet TRIPS and WCT/WPPT standards.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

BRAZIL

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Brazil be removed from the Priority Watch List and placed on the Special 301 Watch List in 2006, and that an out-of-cycle-review be conducted later in 2006 to evaluate progress and results achieved on copyright piracy and enforcement under the Bilateral Consultative Mechanism.

Brazil is one of the most important markets for the U.S. copyright industries. Its tremendous market potential is undermined by one of the highest piracy rates in the region. Widespread piracy in Brazil inflicts huge losses. The year 2006 marks a critical turning point. Last year, Brazil showed a definite and palpable shift in political willingness and took actions to combat piracy on a scale not previously seen. As a result, on January 13, 2006, with the support of IIPA and its members, USTR terminated the five-year review of Brazil's copyright 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, and three special out-of-cycle GSP reviews were held between 2004 and 2005. The 2006 decision was based on progress made by Brazilian authorities, and their commitment to work through the U.S.-Brazil Bilateral Consultative Mechanism to address copyright piracy and enforcement problems in Brazil. The copyright industries look forward to continuing our work with Brazilian authorities to stop the illegal actions which undermine the economic vitality of a vibrant cultural marketplace.

The copyright industries' overarching goals in Brazil consistently have been, and remain, (1) reducing copyright piracy and (2) generating effective criminal enforcement. Achieving these twin goals will increase the sales of legitimate product and significantly increase the output of Brazil's cultural, educational and technical products. Piracy for U.S. copyright materials remains very serious in Brazil, contributing to at least \$4 billion in estimated trade losses due to piracy over the last five years (2001-2005). Retail piracy in well-known street marketplaces remains rampant throughout the country. Notwithstanding the tremendous progress made by the Government of Brazil in organizing itself to fight piracy, the fact remains that as of now, the number of criminal prosecutions and convictions for copyright infringements remains small, thus contributing to the lack of meaningful deterrence.

IIPA believes that the Brazilian government should, at a minimum, take the following actions:

- Implement and achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process, including:¹

¹ USTR's notice terminating the Brazil's GSP investigation did not identify the seven factors which will be monitored under the Bilateral Consultative Mechanisms; see 71 Fed. Reg. 2292 (Jan. 13, 2006) at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-368.pdf>. These factors were provided to IIPA by U.S. government sources. See IIPA's Press Release on the Brazil GSP IPR review, at <http://www.iipa.com/pdf/IIPA%20BRAZIL%20GSP%20case%20terminated%20Press%20Release%2001132006.pdf>. (issued Jan. 13, 2006).

- (1) Increase anti-piracy raids in well-known marketplaces;
 - (2) Encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces which focus on priority locations;
 - (3) Take enforcement actions on the Brazil-Paraguay border;
 - (4) Enhance deterrence through criminal prosecutions and the application of deterrent penalties;
 - (5) Continue work to complete the 99 action items in the national plan developed by the National Council to Combat Piracy and Intellectual Property Crimes (CNCP);
 - (6) Pursue educational and media anti-piracy campaigns sponsored by the federal government, working with the private sector to raise public awareness of the anti-piracy fight; and
 - (7) Continue working with the industry through the CNCP.
- Adopt anti-piracy legislation (specifically Bills No. 3.964/2004, No. 3.965/2004, and No. 3.966/2004).
 - Create specialized IPR courts with copyright jurisdiction.
 - Establish minimum prices on imported blank media.
 - Remove market access barriers on computer software and impose no new barriers (such as a theatrical window) on films.
 - Conduct effective enforcement against copyshops, located both inside and outside university campuses that make illegal copies of books and related teachers' notes that go beyond the bounds of the law, and engage university administrations in efforts to encourage use of legitimate materials on campuses.
 - States and municipalities must establish a routine of prevention and repression against piracy, instead of disconnected actions.

BRAZIL Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005²										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	334.5	52%	343.5	52%	338.7	52%	320.4	53%	302.0	55% (MC99% CD47%)
Business Software ³	385.2	65%	359.0	64%	309.0	61%	260.8	55%	272.3	56%
Motion Pictures ⁴	NA	NA	120.0	30%	120.0	30%	120.0	35%	120.0	33%
Entertainment Software ⁵	120.8	77%	120.4	74%	125.7	56%	NA	NA	NA	99%
Books	18.0	NA	18.0	NA	14.0	NA	14.0	NA	14.0	NA
TOTALS	858.5+		960.9		907.4		715.2		708.3	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Brazil, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

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.

For more details on the history of bilateral copyright engagement with Brazil under both the Special 301 and the GSP IPR trade mechanism, see IIPA's appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Previous IIPA reports on Brazil also can be found at <http://www.iipa.com/countryreports.html>.

COPYRIGHT WORK TO BE DONE IN 2006 UNDER THE BILATERAL CONSULTATIVE MECHANISM AND BEYOND

IIPA and its member associations in the recording, music, film, computer software, entertainment software, and book publishing industries are heartened by developments in Brazil, including the cooperation between the copyright private sectors and the National Council to Combat Piracy and Intellectual Property Crimes (CNCP), under the direction of officials Luiz Paulo Barreto and Marcio Gonçalves. The CNCP resulted from a two year legislative process,⁶ and was officially launched in March 2005. Membership in the CNCP involves a growing number of Brazilian government agencies and also includes the private sector. The CNCP has promulgated a 99-point action plan, and has held numerous meetings and has established a methodology to implement these actions by creating thematic working groups (Enforcement, Economic, Educational, Legislative and Institutional) and breaking down the actions into short-, medium- and long-term. IIPA and its members appreciate that this is the first time that the Brazilian government has outlined such a national plan and has involved private sector representatives in identifying such actions. This positive change in attitude toward the private sector is greatly welcomed, and the industries are committed to continuing to work collaboratively with the CNCP as well as other state and local officials. Approximately 35 of the 99 actions already have been implemented. In March 2006, the CNCP will meet to discuss and analyze the actions already implemented as well as the actions that remain to be fully implemented.

In mid-September 2005, the CNCP released an English translation of its report on the first six months of its operation, entitled Brazil Against Piracy (posted at www.mj.gov.br/combatepirataria). The Brazilian government has conducted numerous enforcement operations, especially on the border between Brazil and Paraguay, at Foz de Iguacu, by the federal, state and military police. These actions, including the public destruction of pirated products, have been widely publicized in the media. Specific units have been created to fight piracy within the Federal Police Department and the Internal Revenue Department, and soon the government will be announcing the click-lead hotline. Perhaps the most important institutional steps regarding the CNCP have been the addition of the SENASP (National Secretary on Public Security), and SUSP (National Public Security System) to the CNCP. The inclusion of these two agencies will provide the necessary link to state enforcement agencies.

⁶ 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. 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, and policy and legislative recommendations to begin to improve the situation. The report noted the lack of national leadership and coordination to date. 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 new National Council to Combat Piracy and Organized Crime held two preparatory meetings in Brasilia in late 2004. Its official launch was in March 2005.

As reported above, the Brazilian and U.S. governments have identified seven areas of action to be reviewed in the context of the Bilateral Consultative Mechanism. Many of the seven items are already included in the CNCP action plan, and all seven have the support of the copyright-based industries.

IIPA's overarching goals consistently have been, and remain, reducing copyright piracy and generating effective criminal enforcement in Brazil. Achieving these goals will result in the increase in the sales of legitimate product and a significant increase in Brazil's cultural, educational and technical output. To this end, IIPA offers the following specific goals that largely overlap with and refine the bilateral goals. The industries are looking to concrete and sustained actions which result in less piracy and better enforcement.

(1) The authorities should initiate, on their own, continuous raids of well-known pirate marketplaces, including points of sale, such as —

- São Paulo - Stand Center, 25 de Março, Galeria Pagé, Santa Ifigênia, Feira de Santana, Lapa e Santo Amaro
- Rio de Janeiro - Uruguaiana
- Brasília - Feira do Paraguay
- Pernambuco - Feira de Caruarú
- Recife – downtown points
- Belo Horizonte –Shopping Oyapoque, Caetes
- Salvador – street markets
- Campinas – Camelódromo
- Riberao Preto
- Sao Jose do Rio Preto

Status: Enforcement actions have been initiated. Recently the CNCP coordinated enforcement actions against most of the above mentioned markets. In some cases, such as Stand Center, the local authorities in December 2005 were able to make the seizures and close down the area for a good period of time, creating severe financial losses to pirates. These sorts of actions must be permanent and constant in order to really affect the pirates.

A few actions have been initiated to convert street vendors to legitimate sellers, for example, at São Paulo's municipal level: "Praça Benedito Calixto" and "Cracolândia." To succeed, these initiatives need task forces that coordinate enforcement actions and social investments at the above mentioned markets. The local authorities have to be able to make repeated raids at each area until pirates suffer substantial damages. At the same time, each area must have a social development plan to convert street vendors.

(2) The Brazilian government should strengthen existing state and municipal anti-piracy task forces in priority capitals and states of São Paulo, Rio de Janeiro, Minas Gerais, Bahia, Distrito Federal, Pernambuco, Rio Grande do Sul and Paraná (Municipalities — São Paulo, Rio de Janeiro, Belo Horizonte, Salvador, Recife, Fortaleza, Belém, Campinas, Ribeirão Preto) and create task forces in areas not presently served.

Status: Some task forces already exist, such as those in São Paulo and Rio de Janeiro. Again, the success of this initiative will be achieved by the constant and permanent presence of the CNCP leadership in this area.

(3) The authorities should conduct more inspections and seizures at the Brazil-Paraguay border which result in cases forwarded for prosecution. While IIPA applauds the increased numbers of inspections and seizures, those alone will not result in deterrence; those responsible must be prosecuted.

Status: Action has been initiated. Seizures in the border with Paraguay have increased significantly. There have been big increases in the seizures of blank CD-Rs and DVD-Rs. Seizures of blank DVDs increased from 191,000 units in 2004 to more than 2 million in 2005; and CD-Rs from 3.5 million units in 2004 to 8.2 million units in 2005. This effort must continue. Customs authorities must develop

intelligence to followup the constantly changing operations by the pirates; reportedly, Uruguay is starting to be a key port for transshipments of raw material.

- (4) **The government should issue recommendations to both state and federal public prosecutors to make all efforts to expedite criminal copyright prosecutions.**

Status: Action has been initiated. The CNCP is developing this proposal. The new participation of SENASP in the CNCP will be essential in this regard. The success of this particular initiative will only be achieved if it remains a permanent action item for the CNCP and SENASP.

- (5) **The authorities should continue to produce federal- and state-level educational and media campaigns** about the anti-piracy fight and how piracy threatens national cultural, scientific and economic interests. Specifically, the Brazilian government should ensure that educational campaigns are developed in conjunction with the private sector, and are disseminated as public service announcements by television networks and other media.

Status: Not yet initiated. In December 2005, the CNCP used the media in general (TV networks etc) to disseminate information regarding anti-piracy actions. The CNCP and private sector have been discussing and planning an educational campaign, which is expected to be released in March 2006 and to last the whole year. December 3 is the Anti-piracy Day, as created by Law 11.203/05, (published on December 12, 2005). The copyright private sector is willing to participate in this endeavor, as public awareness and educational issues have been a part of the industries' work in Brazil for years. There is no Brazilian Government educational campaign against piracy just yet; the CNCP has been articulating its educational campaign among private sector and several government agencies. To this end, the CNCP has held numerous meetings and has established a first project for a National Educational Campaign Against Piracy called "Campanha Nacional Educativa de Combate à Pirataria e ao Contrabando" (<http://www.mj.gov.br/combatepirataria/projetos>).

- (6) **In conjunction with private-sector representatives, the Brazilian government should design a strategy to centralize all imports of blank media such as CD-R and DVD-R in a single port of entry such as Santos.**

Status: Not yet initiated. Customs has been more active and helpful in intercepting and seizing these materials (usually due to false registrations or documentation) but port centralization is still needed.

- (7) **The Brazilian government should urge the inclusion of intellectual property rights and piracy as mandatory subjects of study for prosecutors, judges and in police academies.**

Status: Not yet initiated. This component will be very important in order to improve the prosecutorial and judicial bottlenecks in criminal copyright cases.

- (8) **Passage of the anti-piracy bill proposed by the CPI**, that is, to amend Articles 184 and 186 of the Criminal Code (as well as corresponding provisions to the Criminal Procedure Code) and the first and third paragraphs of the Law No. 9609/98 to increase imposable sentences for piracy, from a minimum of two years, to two years and two months.

Status: There are three relevant bills — No. 3.964/2004, No. 3.965/2004, No. 3.966/2004 — all of which are before the Committee of Constitution and Justice, the first sub-committee of the Brazilian House of Representatives. This initiative has been discussed in the CNCP, but has not yet been presented in Congress. Moreover, reports indicate that the CNCP is resistant to any increase of criminal penalties. In addition, the Motion Picture Association (MPA) wants to include specific penalties for unauthorized camcording in theaters, but the CNCP rejected MPA's suggestion based on the argument that the term "reproduction" includes the act of recording.

- (9) **Apply stricter custom controls at dry ports, also known as EADIs, to prevent the importation of blank optical media.**

Status: Not yet initiated. It is necessary to increase the number of Customs officials and modify administrative procedures to establish new routines for this specific Customs activity.

COPYRIGHT PIRACY IN BRAZIL

Most of the industries continue to place estimated piracy levels at or above 50% of the market, meaning that more than half of each market in Brazil 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.

Music and Recording Piracy: Piracy of music and sound recordings still remains at 52% of all CD sales in Brazil. The latest piracy survey shows a total number of 73 million pirate CDs being duplicated, which translates to trade losses that exceed US\$334 million. The legitimate market suffered a significant decrease during 2005 of 15 percent in units and 10 percent in local currency sales. This decrease is attributable to the still high piracy levels in Brazil and a higher volume of illicit files being traded on the Internet. The latest estimate based on a third party survey is that approximately 354 million illegal music files are being downloaded annually. Nevertheless, 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 CD-Rs. While a small amount of finished product may be imported from Paraguay or elsewhere, the great preponderance is locally reproduced in hundreds of facilities spread out around the country. These CD burning facilities range from large operations in commercial warehouses with over 100 burners, to small outfits operating out of residential houses producing only a small amount of product. The original source of the blank CD-Rs continues to be Southeast Asia, primarily Taiwan and China.

Audiovisual Piracy: 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. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs. As with CD-Rs, the vast majority of pirate DVD-Rs are locally reproduced in hundreds of facilities of varying sizes spread out around the country. 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. Furthermore, retail video piracy continues to be of concern in Brazil because of the continuing importance of video store revenue for local home entertainment operations. Finally, Ciudad del Este remains the principal port of entry and the source of both hardware and blank optical discs (mainly 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: 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 and non-commercial 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, and there are lengthy delays. BSA continues 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, Espírito Santo, Bahia, Pernambuco, Ceara, Goias, Mato Grosso do Sul, and the Federal District of Brasilia. Preliminary estimated trade losses due to software piracy are \$385 million, with a 65% piracy rate. Lowering the business software piracy rate in Brazil would improve the local economy.⁷

Entertainment Software Piracy: 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 (for example, a truck attempting to smuggle in pirated entertainment software was intercepted in Rio Grande do Sol on its way in from Montevideo, Uruguay). 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. Pirated entertainment software products are sold in a variety of venues. Large quantities of piratical and counterfeit factory-produced discs are still readily available in the “promocenters,” which are small retail booths renting space in larger markets and galleries, as well as through street vendors. Unfortunately, despite an increase in the number of enforcement actions in 2005, these raids have only had the effect of cleaning out the on-site stocks of pirate products, which are replaced within days of the action. Flea markets and street vendors continue to be sources of pirate products. The Internet is still largely used to advertise pirated products for local CD-R burning operations, either through websites, email solicitations or through auction sites such as mercadolive.com and arremate.com. Internet cafés are also of concern, as of the 2,000 cafés in the country, only 20% are licensed. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Brazilian marketplace was \$120.8 million in 2005, with a 77% piracy rate.

Unauthorized Photocopying and Book Piracy: The publishing industry reports that very little about the book piracy situation in Brazil changed in 2005. 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. The Association of American Publishers (AAP) estimates losses to its members of US\$18 million in 2005, and those losses multiply sharply for local Brazilian publishers. Many universities tacitly or actively condone copying of *apostilas* (teachers’ notes or folders), and anthologies made up of chapters from various books copied illegally, both in English and in translation. Some estimate that the annual number of unauthorized photocopies ranges from 3 to 5 billion pages. Universities must take a role in fighting these illegal activities in and around their campuses. The Ministry of Education should engage on this issue during 2006 as well. Apart from the rampant on-campus copying, illegal copying flourishes in commercial establishments adjacent to institutions of higher learning. Illegal photocopying of academic materials cost both domestic and foreign publishers millions of dollars and cost the Brazilian government thousands of jobs and millions in tax revenues, but the government response is practically nonexistent. The Ministry of Education and the administrative bodies of universities and colleges should 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 Associação Brasileira de Direitos Reprograficos (ABDR) has been working with authorities to conduct

⁷ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: A 10-point drop in software piracy in Brazil, from 64% to 54%, could add \$4.8 billion to the economy, directly create 21,000 high-wage technology jobs, increase local industry revenues by \$3.7 billion, and generate an additional \$550 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Brazil.pdf>.

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: The audiovisual, business software, music, recording and entertainment software industries all report positive responses to their campaigns to take down websites and web pages in Brazil which offer piratical copyright content.

- MPA reports that, in 2005, more than 1,899 websites in Brazil were shut down, and 14 people were arrested at the request of MPA anti-piracy campaigns. Unfortunately, this is not enough to stop the trend of growing hard-good or download piracy in the net. 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 collect-on-delivery. In 2005, 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.
- In 2005, the recording industry reports that through a local Internet anti-piracy campaign over 2,200 web and FTP sites were taken down, of which 1,100 were offering hard goods.
- The business software industry reports positive responses in auction sites and specifically in the biggest one (Mercadolivre.com which claims an 85% market share). In 2005, 27,401 Internet sites were removed. 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 (known as *hotwarez*). The takedowns of *hotwarez* have been increasing insufficiently to combat software Internet piracy efficiently in Brazil.
- With respect to videogames, the domestic enforcement program of the Entertainment Software Association (ESA) continues to take action against local websites and auction listings. In 2005, 57 websites and over 1,200 auction listings for pirated entertainment software products were taken down. The stepped-up local enforcement efforts against online piracy and increased cooperation from the operators of the domestic auction sites has resulted in a decrease in the monthly volume of auction listings of pirated games.
- In 2005, over 44,000 business and entertainment software advertising and websites were taken down.

Optical Media Piracy: Replication of pirate optical discs 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. Reports indicate that Brazil has as many as 13 optical disc plants, with 88 production lines; most of these plants are believed to be operating legitimately and are not a significant source of pirated optical disc 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. 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 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 has been convicted under organized crime laws and is in jail.

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 only sporadic police activity at the federal 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. In order to be more efficient, the Federal Police must coordinate operations and information with state police and create a permanent structure.

COPYRIGHT ENFORCEMENT IN BRAZIL

The year 2005 marked a significant improvement in the attitude and willingness of many Brazilian agencies to focus on piracy and enforcement. Unfortunately, the industries cannot report a sea change of improvement in actual results in 2005 compared to prior years. The major criminal enforcement problem in Brazil continues to be the failure of Brazilian authorities to emphasize serious prosecution and deterrent sentencing. Police raids have been moderately successful (depending on the jurisdiction), but these result in few prosecutions and fewer criminal convictions. The civil system on the other hand has offered some relief in some cases involving computer software. The copyright industries believe that tangible progress on improving copyright enforcement — from raids through criminal sentences — may be within reach in 2006.

Organized Actions at the State and Local Levels: The level of governmental anti-piracy attention varies throughout Brazil. The copyright industries report good cooperation with certain Brazilian states. The industries strongly support efforts by the CNCP and other government agencies to create task forces to focus on copyright anti-piracy efforts. For example:

- In January 2006, the Governor of the State of São Paulo signed a decree creating an inter-secretarial committee to fight piracy. The committee includes the following agencies: Casa Civil, Segurança Pública, Justiça e Defesa da Cidadania, Fazenda, Cultura, Emprego e Relações do Trabalho, Tecnologia e Desenvolvimento Econômico e a Procuradoria Geral.
- The State of Rio de Janeiro created 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.
- A few years ago, the state government of São Paulo created a specialized police unit for piracy cases, the DEIC, which is part of the Organized Crime Office. The participation of DEIC in the combat of piracy has been far below the level expected or hoped for by the industries.
- The municipality of Porto Alegre in Rio Grande do Sul has established a municipal effort to fight piracy.
- Other state-level anti-piracy efforts have arisen on an ad hoc basis, including police task forces in Goiás, Pernambuco and Minas Gerais;
- The industries have identified the need to have anti-piracy task forces in additional cities/states such as Belo Horizonte, Salvador, and Fortaleza e Curitiba.

Police Raids: While isolated police raids have been moderately successful, the actions they take rarely produce results 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, Polícia Federal, Polícia Civil, Polícia Militar, Polícia Fazendária, Alfândega) 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). Even in 2005, most industry-led enforcement efforts end up being handled by state and local police officials. According to the MPA, in 2004 and 2005, at the request of the audiovisual sector, police authorities performed 32 arrests “in flagrante delicto” and 63 persons were indicted.

BSA and the Brazilian Association of Software Companies (ABES) report that, in 2005, a total of 1.7 million counterfeit CDs (both business applications and entertainment titles) were apprehended in more than 656 search and seizure raids staged over the course of the year throughout the country. This led to the closure of 19 counterfeiting laboratories and to 57 arrests of people caught in the act of committing crimes. Under the 2005 campaign, 99 lawsuits were filed against companies using pirate software. Fines imposed, which can reach as much as three thousand times the value of each software application used, totaled US\$1.55 million. The cases were executed in São Paulo, Rio de Janeiro, Minas Gerais, Goiás, Bahia, the Federal District, Paraná and Rio Grande do Sul. Over the last year, 3,036 cease and desist notices were sent out as a result of anonymous complaints, surpassing the 2,063 complaints registered in 2004. Because of this, companies in violation which acquired licenses to legalize their situation made payments totaling US\$4.9 million. 540 websites selling counterfeit programs were taken down, in addition to 44,400 online ads dedicated to publicizing this service.

ESA saw a positive enforcement trend in 2005, with more police actions focused on laboratory operations involved in the production of video game software, as well as the market-places notorious for selling it. Police cooperation has also been a factor in raids against retail outlets, storage warehouses and even against street vendors in São Paulo, Rio de Janeiro and Rio Grande do Sul. In April, the São Paulo police raided an optical disc factory, the Digimatic Oficina Replicador, and seized 8 replication machines, along with 30,000 pirated entertainment software products on optical discs (primarily PlayStation® games). The facility reportedly had a production capacity of 15,000 discs per day. The police arrested the owner, a Jordanian national, who subsequently posted bail. There has, unfortunately, been very little progress on this case in the ten months since the raid, with no one being charged.

In June 2005, two enforcement actions at two shopping outlets in São Paulo (the Super Shopping Center and the Stand Center) resulted in the seizure of close to 30,000 pirated video game products. In September, the São Paulo police raided a warehouse that netted approximately 53,500 video game software products. The raid on the warehouse coincided with actions against nine retail outlets at the Stand Center that resulted in the seizure of close to 40,000 pirated products, as well as actions against street vendors in the vicinity from whom about 5,800 pirated video game products were seized. A similar operation was also carried out in Rio de Janeiro, where police raided a CD-R burning lab, resulting in the seizure of 612 DVDs, 95 pieces of packaging material, 125 CD games, 3 CPUs and 12 CD burners. Various other raids were also conducted in Rio Grande do Sul against retail outlets and CD-R burning labs.

In December 2005, a São Paulo law enforcement operation (“Operation Sagitario”), involving 700 agents from the Federal Police and the Federal Revenue, was carried out against the Stand Center shopping outlet. The operation was reportedly a success and the timing was helpful, as it coincided with the beginning of the holiday shopping season. Although the action was

significant, the government did permit the Stand Center to re-open within weeks of the raid. The Stand Center, with approximately 214 retail “kiosks,” reportedly generates \$R20 million (US\$9.2 million) per month.

There are, however, remaining challenges. For example, Nintendo of America (NOA) generally files civil or administrative actions rather than criminal actions, as the latter are more difficult to pursue. The costs associated with pursuing a criminal case are much higher and the outcomes inconsistent. Cases remain unresolved for long periods of time; for example, NOA is awaiting resolution of some cases that have been pending for at least five years.

Brazilian prosecutors pursued very few criminal cases. Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. Prosecution concentrates in Rio de Janeiro and São Paulo, where there are specialized IP units. However, the real problem is in the judicial system. Very often judges do not accept piracy charges or do not issue deterrent sentences. In a recent case the defendant was sentenced to two years and two months in prison, but was suspended and only a fine was imposed. Case backlogs also constitute a serious enforcement problem, caused by burdensome substantive and procedural formalities and a general lack of resources. Over the last four years, the ratio of convictions for copyright infringement to the number of raids run each year have never exceeded 1% (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 2005, 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. 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). 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. However, suspensions remain the norm.

Delays by police, prosecutors and judges in criminal cases. Industries report that it still takes a long time for a criminal case to wind its way through the Brazilian courts; no improvement was noted in 2005. Delays in criminal copyright infringement cases can extend 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). MPA reports that it has currently more than 8,200 pending cases of audiovisual copyright piracy in Brazil.

BRAZIL
COMPILATION OF CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS
AS REPORTED BY THE MEMBERS OF THE
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2002 – 2005

ACTIONS	RECORDING INDUSTRY -2002- *2003* 2004 (2005)	MOTION PICTURE INDUSTRY -2002- *2003* 2004 (2005)	BUSINESS SOFTWARE & GAME SOFTWARE INDUSTRIES -2002- *2003* 2004 (2005)	TOTAL -2002- *2003* 2004 (2005)
NUMBER OF COMPLAINTS FILED WITH POLICE	-206- *190* 113 (86)	-- 1,825 – *2,995* 3,361 (3,045)	-253- *351* 668 (656)	-2,284- *3,536* 4,142 (3,787)
NUMBER OF RAIDS CONDUCTED	-870- *1,018* 936 (1,457)	-- 1,640 – *2,995* 1,829 (2,552)	-253- *175* 626 (656)	-2,763- *4,188* 3,391 (4,665)
NUMBER OF PIRATE COPIES OR MATERIALS SEIZED	-3.78 million- *5,686,253* 5.6 million CD-R/CD; 11.4 million blank CD-R (6 million CDR's/DVDR's 31.7 million blank CD-Rs and DVD-Rs)	-253,805 VHS, 56,037 blank OD- *254,230 VHS and 134,417 CD-R* 254,996 VHS; 139,741 CD-R; 229,001 DVD; 9,134,880 blank OD (154,407 VHS; 315,447 CD-R; 1,139,978 DVD; 17,640,383 Blank OD)	-355,156- *Business software- 574,341 Game software- 845,977* Business software 352,457; Game software- 861,637 (Business Software 493,147 Game Software 1,224,190)	-4.4 million- *7.5 million* 28.0 million (58.7 million)
NUMBER OF CASES SUSPENDED OR DISMISSED	-40- *29* 96 (5)	-144- *23* 766 (1,259)	-0- *0* 15 (NA)	-184- *52* 862 (+ 1,264)
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	-11- *8* 17 (21)	-13- *14* 15 (14)	-0- *0* 1 (NA)	-24- *22* 32 (+ 35)
CRIMINAL SENTENCE ISSUED	-Ranging from: 1-year community service; 2 years community service and fines; 2 years in jail plus small fine; 6 years in jail plus 20 days' fine- *Minimal fines*	-Community service, probation- *Minimum 1-year, maximum 18-months, all suspended* Minimum 1 year, maximum 18 months, all	-None- *None* Commuted sentences (NA)	-Minimal- *Minimal* Minimal (Minimal)

BRAZIL
COMPILATION OF CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS
AS REPORTED BY THE MEMBERS OF THE
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2002 – 2005

ACTIONS	RECORDING INDUSTRY -2002- *2003* 2004 (2005)	MOTION PICTURE INDUSTRY -2002- *2003* 2004 (2005)	BUSINESS SOFTWARE & GAME SOFTWARE INDUSTRIES -2002- *2003* 2004 (2005)	TOTAL -2002- *2003* 2004 (2005)
	Minimal fines (Community Service and minimal fines)	suspended (Ranging from 1 year of community services to 2 years of community services plus 10 to 20 days' fine)		
RATIO OF CONVICTIONS TO THE NUMBER OF RAIDS CONDUCTED	-1.26%- *0.79%* 1.82% (1.4 %)	-0.79%- *0.47%* 0.8% (0.54 %)	-0%- *0%* 0% (NA)	-0.87%- *0.53%* 0.9% (~ 0.7 %)

Note: Statistics for this enforcement chart are provided by IFPI Latin America (IFPI), the Motion Picture Association (MPA), the Business Software Alliance (BSA) and the Entertainment Software Association (ESA). 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.

Border Enforcement: During 2005, the Brazilian government improved its efforts to combat the importation of piratical and counterfeit materials. Customs authorities have been very active not only at the border of Paraguay where the seizures of blank optical discs increased significantly, but also in ports like Santos and Paranaguá. At a January 2006 conference in Washington, D.C., a CNCP official said that approximately 85% of infringing products in Brazil come from outside Brazil's borders. Regarding audiovisual piracy, almost all pirate products are produced locally; however, the blank optical media are imported or smuggled into Brazil. Various agencies have been involved in intercepting and seizing shipments full of pirated and counterfeit product. For years, the copyright industries have recommended that controls at the major transshipment points be strengthened, and we are pleased that improvement is underway. Border enforcement will continue to be enhanced if Brazilian authorities can better coordinate with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. 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 mis-declared and infringing blank CD-Rs, continue to enter as infringing imports.

- 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 returned to Brazil. This initiative operated well during 2005.

- 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. There were numerous actions by the highway police in 2005 to intercept buses transporting pirated materials.
- Brazilian pirates 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 was done about this in 2005.
- The software industry continues to be 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. This was still true in 2005. Specific action is needed on this issue, focused on hardware parts and components.
- The ESA reports some positive developments on border enforcement in 2005. In April, Brazilian authorities seized over 10,200 pirated videogames (including 1,600 counterfeit cartridge-based games) crossing the border from Parana, Paraguay. In August and September, again at the Paraguay border, an enforcement action netted 37,000 pirated entertainment software products (including over 3,100 counterfeit video game cartridges). In August, federal highway police in Rio Grande do Sul intercepted a truck that had attempted to evade a roadblock set up by the local law enforcement authorities. Upon inspection of the truck, the police found approximately 538,000 pirated PlayStation® and PlayStation2® video games. The truck had originated in Montevideo, Uruguay, and its driver and accompanying “salesman” were arrested. Both were residents of Rio Grande do Sul.

Civil Damages, Delays and High Bonds: In 2005, the business software industry continued to bring civil search and seizure actions, usually followed up 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. However, 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. Second, Brazilian courts also continue to require extremely high expert fees and bond requirements. In some BSA cases during 2005, for instance, bonds of US\$50,000 to US\$100,000 were required, and BSA had no option but to terminate the cases. On average, BSA has paid up to US\$5,000 for experts’ fees and up to US\$25,000 as bonds.

Training: The copyright industries conduct numerous trainings, seminars and workshops with Brazilian enforcement officials, at the national, regional and state levels. In 2005, MPA conducted 11 training, seminars and workshops for enforcement authorities. The recording industry reports organizing two seminars and participating in another eight seminars aimed mostly at police and prosecutors. BSA and ABES (Brazilian Association of Software Industry) have conducted numerous trainings, workshops, and seminars with Brazilian enforcement officials, in partnership with the music and movie industries. In 2005, ESA and ABES participated in training events conducted in Rio de Janeiro, including the Global Congress to Combat Counterfeiting, at which more than 200 police officers were trained, as well as a training seminar for the Military Police of the State of Rio

de Janeiro. IIPA and its members support the August 2005 State Department/INL announcement to devote funds to Brazilian prosecutors on IPR/cybercrime enforcement.

COPYRIGHT LAW IN BRAZIL

1998 Copyright Law and 1998 Software Law: The Brazilian government unfortunately continues to refuse 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.⁸ 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, and pre-set statutory damages for copyright infringement. Brazil already affords a term of life plus 70 years for works and 70 years following first publication for sound recordings and audiovisual works.

Proposal on student copying of works: A new issue that has recently come to IIPA's attention involves pending legislative provision, No. 5046/2005, which modifies article 46 of the Copyright Act. The provision, which is currently under analysis by the Educational Commission of the Brazilian Congress, seems to grant overbroad privileges to university students to make copies of entire works as long as those copies are not directly for commercial use. The provision is expected to move to the Constitutional Commission of the Brazilian Congress within the next two months. The Congress should ensure that any provision it passes comports with international legal standards.

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.⁹ The maximum penalty of 4 years' imprisonment 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 were significant because penalties of one year or less of jail time, at the state level, could be commuted to a fine, or a judge could suspend a case indefinitely (Law 9099.95). The 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.¹⁰

⁸ Brazil also has implemented at least some of the provisions of the two WIPO Internet treaties, such as civil sanctions against circumvention of technological protection measures and removal or alteration of electronic rights management information. On the other hand, Brazilian law does not establish ISP liability and notice and takedown procedures, and criminal sanctions for circumvention of technological protection measures and removal or alteration of electronic rights management information. The Copyright Law also needs to be amended to provide a comprehensive right of making available.

⁹ 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\$110) 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.

¹⁰ The 2003 amendment is helpful in three additional 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

The business software industry, however, is concerned that these 2003 criminal code amendments fail to increase sanctions for the infringement of computer programs; 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.

Pending Anti-Piracy Legislation: The CPI drafted and presented to Congress five anti-piracy bills, two of which particularly implicate interests of the copyright industries.

(1) Bill Number 3964/2004: This bill proposes to amend Articles 184 and 186 of the criminal code (as well as corresponding provisions to the Criminal Procedure Code) and the first and third paragraphs of the Law No. 9609/98, in order to increase imposable sentences for piracy, 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. This bill was in the House of Deputies in 2004 and is currently before the Constitutionality Commission. The reporter was designated, but the report has not yet been issued. .

(2) Bill Number 3.965/2004: This bill proposes to increase the penalties in the Software Law 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. Amendments introduced in the lower house of Congress in June 2004 now await a committee ruling to determine their constitutionality. The bill is before the Committee of Constitution and Justice, the first sub-committee of the Brazilian House of Representatives.

The CNCP is also preparing bills to be presented to Congress to expedite piracy investigations and legal actions. Reportedly the CNCP's Legislative Working Group is preparing a new substitution bill that will gather all ongoing bills and new legislative amendments in order to enhance intellectual property protection in Brazil. After the approval of CNCP's members, this proposal will be sent to the Brazilian Congress.

Tax Evasion: A "fiscal crime" provision was inserted, with the approval of the software industry, in the 1998 Software Law. Under the Software Law, 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 on lowering software piracy in Brazil, especially by medium-sized and large companies. No improvements were reported in 2005; it seems clear that the Receita Federal and the respective state tax authorities are dedicating no resources to pursuing these tax evasion cases.

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.

ADDITIONAL ISSUES

Specialized IPR Courts with Copyright Jurisdiction: The CNCP has been holding meetings with judges to discuss the creation of specialized IP courts. 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. However, 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.

Declared prices on Blank Media: To make it easier to intercept mislabeled blank media imports—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. This issue is not included in the CNCP Action Plan.

Government Software Management: The Brazilian government should be encouraged 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, and also help it make the most 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: Several barriers have been identified in prior IIPA 301 reports, and no progress was reported in 2005. First, 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 attract additional foreign investments in the technology sector and help further develop the technology industry in Brazil. One of the main issues deals with a law passed by the previous administration. Law 10.332 imposes an additional 10% tax called “CIDE” (*Contribuição de Intervenção no Domínio Econômico*) on international payments for technology and royalties of any nature. CIDE essentially raises taxes on foreign remittances of royalties, etc., to 25%, as there is currently a withholding tax of 15% on the remittance of payments related to software licenses. The constitutionality of CIDE is also questionable; 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. Second, the Central Bank requires (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.

Third, high tariffs and taxes plague the entertainment software industry and serve as a significant barrier to market entry as these additional costs translate to higher prices for legitimate goods in the market. Nintendo of America (NOA) reports that tariffs range from 17.5% to 20% on video game products and video game software. Additional taxes are also imposed on entertainment software products, and include: (1) a federal industrial products tax of 50% of the value (i.e., cost, insurance and freight [CFI]) of the article; (2) a miscellaneous tax of 1%; (3) so-called social security taxes at a combined percentage of 9.25%; and 4) a value-added tax of 17% or 18% imposed by

state governments. These tariffs and taxes are imposed cumulatively, and as such, the actual cost to the consumer for a legitimate entertainment software product is three times the cost of a counterfeit product. Obviously, these costs are not borne by pirate operations that smuggle counterfeit and pirated products into the country. Brazil's taxes on videogame products are the highest in the hemisphere, and serve as an impediment to the ability of legitimate companies to develop a market presence and provide consumers with reasonably priced legitimate products.

Possible “Theatrical Window”: It has been reported that ANCINE, the Brazilian National Film Agency, intends to impose a mandatory theatrical-to-video window, largely as a result of pressure by exhibitors. MPA strongly opposes any kind of windows regulations and defends the distributors' right to freely determine release dates, especially in the face of high levels of piracy and technological advances offering alternative delivery platforms to the public.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

BULGARIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Bulgaria remain on the Watch List for 2006.

Actions Which the Bulgarian Government Should Take in 2006:

Law Reform

- Revise the recently adopted Optical Disc Law in order to incorporate all amendments submitted by the copyright industry;
- Amend the Criminal Code
 - to criminalize the possession of pirate products for commercial purposes;
 - to increase criminal and administrative sanctions for copyright infringement to deterrent levels;
- Amend the Copyright Law to fill gaps (especially with respect to injunctive relief, protection of technological measures, and border measures);
- Amend the Criminal Procedure Code to streamline prosecutions and permit rightsholder participation;
- Ban street sales of cultural and copyrighted products nationwide, and enforce these bans.

Enforcement

- Vigorously enforce the new optical disc regulatory system;
- 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;
- Take action against Internet piracy, especially ISPs and LANs facilitating illegal traffic in copyright materials in the online environment;
- Increase *ex officio* enforcement actions against retail piracy, and in support of local decrees banning street sales of copyrighted products;
- Reorganize the judiciary and require prosecutors to take the IPR training course, and order them to give priority to IPR infringement cases;
- 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: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	7.0	80%	6.5	75%	7.0	80%	7.2	83%	3.0	65%
Business Software²	20.5	73%	18.0	71%	16.0	71%	6.2	68%	8.3	75%
Motion Pictures³	NA	NA	4.0	35%	4.0	25%	3.0	20%	3.0	20%
Entertainment Software⁴	21.0	81%	NA	50%	NA	NA	21.9	91%	NA	84%
Books	NA	NA	NA	NA	0.3	NA	0.3	NA	0.3	NA
TOTALS	48.5+		28.5		27.3		38.6		14.6	

Over the years, several trade tools have been used to engage Bulgaria to improve copyright protection and enforcement, including Special 301⁵ as well as the Generalized System of Preferences (GSP)⁶ trade program. Bulgaria presently has three bilateral agreements with the U.S. which contain IPR obligations.⁷ IIPA and its members look to Bulgaria to improve its on-the-ground copyright enforcement which, we believe, is imperative to reducing the high levels of piracy in that country.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bulgaria, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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 For more details on Bulgaria's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Bulgaria are posted at <http://www.iipa.com/countryreports.html>.

⁶ During the first 11 months of 2005, \$45.5 million worth of Bulgarian goods (or 11.1% of Bulgaria's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 24.1% increase over the same period in 2004.

⁷ First, in April 1991, the U.S. and Bulgaria signed a bilateral trade agreement, under which Bulgaria agreed to provide "adequate and effective protection and enforcement" for copyrights and other intellectual property. That bilateral provided clear and explicit enforcement obligations for Bulgaria to adopt. Second, in 1994, a Bilateral Investment Treaty (BIT) between the U.S. and Bulgaria took effect. This BIT is important as it has 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.

COPYRIGHT PIRACY IN BULGARIA

General Overview: Physical (hard goods) piracy in Bulgaria remains a very serious problem; this includes problems caused by optical disc piracy. Also, Internet piracy is on the rise. These forms of copyright crime combined seriously hamper the development of the creative sector. Pirated CDs of all types of copyrighted materials, and an increasing number of illegal DVDs, are still easily available in all major cities. Although there are no recent indications of large-scale illegal optical disc production as used to be the case in previous years, the capacity of Bulgaria's plants continues to grow without any apparent commercial justification. This reinforces the need for Bulgaria to have very strong optical disc regulations in place.

Music and Sound Recordings: The piracy of U.S. sound recordings and music remains unacceptably high in Bulgaria, with around 80% of all foreign sound recordings sold being illegal copies. In comparison, the overall level of music piracy in Bulgaria (including domestic repertoire) is lower, at about 60%. Streets and markets in major cities, as well as at the seaside resorts, are full of pirated music CD-Rs. Some of the pirated music is imported from Russia and possibly Ukraine, though a greater proportion is likely to come from unauthorized recording onto Bulgarian produced blank media. The business of music piracy is run by organized criminal syndicates. Optical media piracy in Bulgaria remains a very serious problem. 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 is high. In addition, Internet piracy of recorded music is rising dramatically and has become a major problem. 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 \$7.0 million in 2005.

Entertainment Software: The Entertainment Software Association (ESA) reports that piracy affecting its member companies remained a major problem in 2005. Estimates indicate the piracy rate rose to 81% for 2005. Pirated entertainment software products are openly sold on the streets, even in Sofia and other large cities such as Plovdiv and Varna, and 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 pirated products at informal street markets. CD-R burning, silver (or factory-produced) discs remain the primary forms of pirated product in the country, most of which is shipped from Russia, Ukraine, or Turkey, or from as far away as Malaysia. Piracy of cartridge-based entertainment software products is also of concern with pirate and counterfeit product still being shipped into Bulgaria. The entertainment software industry reports a continuing problem of piracy at Internet cafés, where only 40% of the 3,000-4,000 cafés have licenses with entertainment software companies. It is believed that some cafés have ties to and are operated by organized criminal groups. The estimated value of pirate entertainment software in Bulgaria was \$21.0 million in 2005.

Business Software Piracy: 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 (end-user piracy). 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. BSA estimates the piracy rate for business software at 73%,

inflicting losses to U.S. companies estimated at \$20.5 million in 2005. BSA continues to acknowledge 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. Indeed, certain categories of software use appear to be entirely legalized among government users. Lowering the business software piracy level in Bulgaria could contribute favorably to the local economy, and increase tax revenues.⁸

Audiovisual Piracy: The Motion Picture Association (MPA) reports that, for the second year in a row, the most significant problem the industry faces in Bulgaria is optical disc piracy, primarily discs burned locally. These locally produced DVD-R and CD-R discs are increasing in the market, distributed by street vendors, via mail order, and by Internet auctions. There are some factory-replicated counterfeit discs still being imported from Russia, Ukraine and China for export to other European markets (Chinese imports typically contain only Chinese, Spanish and French subtitles), but local burning is the predominant problem. Although there is some concern regarding local production of counterfeit DVDs, BullACT, the local motion picture anti-piracy operation (of which MPA is a member) has not found evidence of it to date. 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. The distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of pirate product.

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

Overview of Optical Disc Piracy in Bulgaria: Bulgaria's OD plant licensing system is far from watertight. The legitimacy of foreign orders for OD manufacturing is not properly verified by the authorities. Efforts had been underway for years to implement a new optical media licensing system. But unfortunately the optical disc law adopted by Bulgaria's parliament in 2005 is inadequate and fails to include key amendments proposed by several copyright industry sectors to strengthen the legislative proposal (see further discussion in law section, below).

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 nine plants operating in Bulgaria: CHSL, Media Plant, TOT 2002, Euro Silver Group, Crystal Ton, Media Sys, Optical Storage, Silver First, and Alexander Group (alternatively called East European Authoring and Encoding Centre). The nine operational plants have a total of 18 licensed production lines, giving a likely operational capacity of some 63 million discs per year. The legitimate demand for optical discs in Bulgaria (all formats) is far below 10 million copies per year.

⁸ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Bulgaria's piracy rate(from 71% to 61%) could add \$212 million to its economy, increase local industry revenues by nearly \$130 million, and pump an additional \$23 million into Bulgaria's tax coffers. The 10-point reduction could also create more than 2,000 new IT jobs. See <http://www.bsa.org/idcstudy/pdfs/Bulgaria.pdf>.

OPTICAL DISC PLANTS IN BULGARIA	
	DESCRIPTION
OPERATIONAL PLANTS (9)	
CHSL	Sofia-based. Has one licensed production line.
MEDIA PLANT	This plant in Sofia has one licensed production line.
TOT 2002	Sofia-based. One line.
EURO SILVER GROUP	Located in Sofia, three production lines, with CD-R and DVD-R and DVD production capability.
MEDIA SYS	This is a DVD plant operating in Stara Zagora. It has one DVD and 2 DVD-R lines. The plant itself reports 15 million discs produced in 2005.
OPTICAL STORAGE	This is a CD-R and DVD-R production line operating in Stara Zagora. Two CD-R lines, one DVD-R line.
SILVER FIRST	This is a CD-R production line with 2 lines operating in Plovdiv, with a reported production capacity of about 18 million CDs or blank CD-Rs annually.
CRYSTAL TONE 2	This is a Sofia-based plant with one CD and one DVD production line.
ALEXANDER GROUP (alternatively, EastEuropean Authoring and Encoding Centre)	3 DVD lines.
TOTAL	Based on a conservative average estimate of 3.5 million units per year (IIPA methodology) and overlooking some figures used above, the annual production capacity in Bulgaria is 63 million discs . It is understood that Optical Storage did not use one CD-R and one DVD-R throughout 2005; however, the lines are understood still to be in place and should be reflected in the potential capacity.
SOURCE: IFPI, FEBRUARY 2006	

Burning and 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 stance 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. 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 co-operation of certain plants. These burned CD-Rs are subsequently printed with content-related label information and artwork in order to look like originals. In fact, the recording industry filed two criminal cases in 2004 against two of these plants; to date, there has been no consequence for these plants.⁹

⁹ Two major seizures by Bulgarian Customs in April 2004 revealed that one of the Bulgarian DVD plants was producing hundreds of thousands of pirate DVDs. Ample evidence against another plant shows that it produced pirate music CDs. Industry submitted detailed complaints against both plants to the Bulgarian authorities in September 2004. So far, apart from one inspection of the DVD plant (and a follow-up forensic examination in conjunction with a Bulgarian specialist, which according to IFPI vindicates the accusations against the plant), there has been no consequence whatsoever for either of these plants. Although Bulgaria is still used for transshipment of pirate CDs from Ukraine and Russia to the Balkans, Greece and Turkey, the seizures and the forensic evidence referred to above show that this country is not capable of preventing the activity of pirate producers and exporters.

Following two years of intensive investigations, BullACT and the police dismantled a major pirate gang operating in the cities of Sofia, Vratza and Bourgas. In coordinated, simultaneous raids on apartments, warehouses and shops on August 31, 2005, the police made ten arrests and seized 64 DVD and CD burners, over 50,000 pirate discs containing movies, music and games, along with over 20,000 blank discs, 3 to 4 million inlays, 8 computers, printers and other equipment. The pirate gang, which supplied pirate discs to tourists in the country's Black Sea and mountain resorts, first came to BullACT's attention in 2003. Test purchases were made and suspects were put under surveillance to try to locate their duplication labs. The gang distributed pirate products via mail and couriers, and also used cars, buses and trains. When BullACT had gathered sufficient intelligence on the operation, it brought the matter to the attention of the Police. For a year and a half, BullACT and the police kept suspected members of the gang under surveillance and eventually located the gang's duplication facilities. At the end of July, police officers from Sofia, Vratza and Bourgas gathered to plan the raid the following month. Over 90 police officers took part in the raids that, in Sofia alone, netted 44 burners, 6 printers and thousands of pirate and blank discs in an old textile factory, over 10,000 pirate discs in the gang leader's apartment, and 4 burners, 9 hard discs and thousands of blank DVDs and CDs in a printing company's warehouse. In Vratza, the police raided 7 locations and seized computers, 16 burners, about 5,000 pirate discs, millions of inlays and thousands more blank discs. Six shops and a warehouse were also raided in and around Bourgas, where over 4,500 pirate discs were seized. This was the biggest operation carried out by the police in the last ten years. Disappointingly, however, judging by recent press reports, the judicial system appears to have dismissed all charges on those arrested in relation to CD piracy, taking further action solely against two people who were arrested for distribution of child pornography.

On January 20 and 21, 2006, simultaneous police raids were conducted on fifteen locations across the country, including seven addresses in Sofia, as well as sites in the cities of Plovdiv, Bourgas, Rousse and Vidin. The operation was undertaken by the Economic Department of the National Police, with the assistance of the tax authorities and BullACT. The most successful of the raids was at a residential address in Sofia where a small lab was discovered comprising 4 computers, 22 burners, 5 printers and a scanner, plus 8,329 pirate discs and 7,000 inlays. The 27-year old pirate was detained overnight before being released on bail. Other raids in Sofia resulted in the seizure of 764 pirate optical discs from a storage unit at the market in Lyulin, and of 2,210 pirate discs from the cellar of a building in Slaveikov Square. A vendor with a previous conviction for copyright infringement, trading at Vitosha Boulevard in Sofia, was also found in the possession of 1,500 pirate discs.

Internet Piracy: The introduction of high-speed cable Internet created a favorable environment for a substantial increase in illegal online distribution and use of computer programs, music, films, and entertainment software. 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 fee for access to a local server storing unlicensed software and other information resources. The problem lies with tracking down servers containing pirate product as well as with smaller ISPs and Internet clubs that have their own networks closed to outside access and that cannot be investigated centrally. Bulgaria also has approximately 3,000–4,000 Internet cafés, which often serve as centers for consumers to rip and copy DVDs and CDs, and trade files of copyrighted materials. MPA reports that the distribution of films through informal networks and chatrooms has made the Internet one of the most popular methods for distribution of pirate product. ESA also reports serious problems involving game piracy occurring at these cafés.

Active police investigations, raids and prosecutions are needed to combat Internet piracy. In December 2005, the Director of the Copyright and Neighboring Rights Directorate in the Ministry of Culture indicated that the closure of illegal LANs will be one of its IPR priorities in 2006.

Simultaneously, the chief of the “IP, trademark, computer crime and gambling”/IPR sector of the National Services to Combat Organized Crime (NSCOC) publicly expressed his agency’s determination to focus on combating illegal upload and digital distribution of protected material via the Internet. Consequently, and in light of expected structural reforms in the Ministry of Interior, it is crucial that the trained and experienced officers of this agency remain an integral part of law enforcement activity against IP and Internet crimes. (The NSCOC IPR sector is a material participant in the IP industries’ Internet strategy launched in early 2005. This strategy provides for involvement of the right holders’ organizations, major local ISPs and the NSCOC in conducting a number of Internet anti-piracy initiatives: (i) identification of alleged offenders on behalf of the film, music and software industries; (ii) a local notice-and-take-down campaign; (iii) issuance of police protocols of warning and instructions to ISPs knowingly hosting infringing material; (iv) police raids against LANs as well as against Internet customers uploading illegal content; (v) joint enforcement PR. This strategy, however, needs the support of both enforcement agencies and the judiciary in order to be successful.) The recording industry is concerned about the lack of fast, effective and adequate measures to counteract violations on the Internet. Authorities have shown interest in this field and have run checks on the net, identified infringements and informed ISPs. Some of ISPs recently have started to cooperate with the local industry group and have deleted the information that the industry identified. Disappointingly, there are many cases where pirates have returned to a former site.

Organized Crime. The connection between organized crime and OD piracy in Bulgaria is no secret. Even the National Police report that there are five major organized crime groups in Bulgaria, and they share the markets for illegal businesses (like piracy) and drugs. The undeniable fact that organized crime elements are involved in piracy makes it very dangerous for the private sector to take anti-piracy actions. 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. Furthermore, many Internet cafés seem to be heavily controlled by organized crime. However, Bulgaria’s 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.

COPYRIGHT ENFORCEMENT IN BULGARIA

Overview: On the enforcement front, although cooperation between right holder organizations and police authorities has generally improved, authorities are seriously hampered in their task because the possession of pirated materials for commercial purposes is not criminalized in Bulgaria’s Criminal Code. Pirates only offer empty jewel boxes for sale. The illegal discs are stored elsewhere and are thus kept out of reach of law enforcement agents. The main reason for continued high levels of piracy, 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 understaffed and under-equipped government office (Copyright Office of the Ministry of Culture) is allowed to provide, typify the obstacles to effective judicial enforcement of copyright.

Interagency coordination with industry. In late 2005, the Bulgaria government established a new inter-government council on IPR to include deputy ministers. Including more senior officials in

this council is important because the prior interagency body was not very effective.¹⁰ The industries hope that this council will invite more participation from the private sector, and listen to industry expertise. This Council, headed by the Ministry of Culture, held its first meeting on December 22, 2005, and agreed they will seek a formal Council of Ministers' decision regarding its formation; this will help identify the format and duties of this new group. The copyright industries invest much time in meeting with senior enforcement and trade officials in the Bulgarian government, to raise the problems experienced by the industries and offer possible solutions.

Street bans need to be enforced in practice. This situation in 2005 remained similar to that experienced in 2004. There has been a slight increase in street raids. Although the city government of Sofia introduced strict regulation of street sales of copyright product over two years ago, and ordinances banning street sales were issued in 2004 in Bourgas and Plovdiv, there has been little meaningful enforcement (for instance, enforcement was carried out only during normal office hours). The Sofia ban was signed in June 2005, but has now been suspended by a court after a complaint from a music producer who distributes legitimate local repertoire on CDs via street sales. All industries believe that the street sale ban against pirate products should be imposed nationwide and vigorously enforced.

Police cooperation is good, but significant problems remain. Last year there were several high profile raids. For example, in October 2005, Bulgarian tax authorities destroyed more than 40,000 pirated CDs, DVDs and videos seized from retail stores. One tax official said that some vendors of pirated products make a daily profit of 1,000 leva (US\$612), and often these businesses help fund organized crime.

The motion picture industry reports that in 2005, BullACT continued to work numerous cases and enjoyed excellent cooperation from the law enforcement authorities. Through the third quarter of 2005, BullACT seized 17,096 CD-Rs, 9,900 DVD-Rs, 3,336 counterfeit DVDs (from Russia, with Bulgarian and Russian subtitles), 16,027 music CD-Rs, 848 videocassettes, 167 VCDs, 30,591 Sony PlayStation® discs and PC games, 57 DVD-R burners, 41 CD-R burners and 568 PCs. As in the case of prior years, these raids have had a positive impact, but this was diluted by the lack of follow-up in terms of prosecutions and deterrent sentencing.

In 2005, the local sound recording industry participated in 74 operations against the manufacture and distribution of pirate music carriers, 62 of which were successful. During these operations, enforcement agencies seized 106,124 units of optical and magnetic carriers (cassettes) with music, films, entertainment and business software; 18 computer systems with 23 burners for DVD-R and CD-R; 1 color printer as well as huge numbers of inlays and materials advertising the sale of pirate products. In addition, 4 servers were seized containing over 1 million illegal MP3 tracks from the catalogues of the major record labels. On December 20 and 21, 2005, officers from DNSP and National Revenue Agency (former General Tax Directorate) carried out an operation in Sofia, Vidin, Rousse, Plovdiv and Bourgas. 15 targets were checked, 7 of which were in Sofia. Seizures totaled 13,000 DVDs, DVD-Rs, CDs and CD-Rs, 4 computer configurations, 5 printers, 22 burners and a scanner. Five preliminary investigations were instituted and 2 exchanges of letters and statements of infringements were drawn by the Tax Administration. These kinds of actions will only

¹⁰ In November 2002, an Inter-Ministerial Council for the Protection of Copyright and Neighboring Rights was formed by an ordinance issued by the Minister of Culture. The council was organized to better coordinate and direct Bulgaria's anti-piracy enforcement efforts. It was headed by the Director of the Copyright Department in the Ministry of Culture and included representatives of several ministries and of various law enforcement agencies, including the Customs Service, National Police, National Service for Combating Organized Crime (NSCOC), and other agencies. However, this Council rarely invited participation from the private sector.

have lasting effect if they are followed by tough and swift prosecution/sentencing, which is the main issue in Bulgaria today.

The recording industry understands that there have been 3 inquisitorial cases carried out by the investigation authorities, 21 preliminary investigations carried out by the police supported by documents about crimes under Article 172a of the Penal Code, 20 statements of infringements drawn by the Tax Administration, and 2 administrative cases instituted by the Customs Agency and the Inspectorate Department at Metropolitan municipality. But the recording industry has not received any information about penalties handed down and imposed against persons convicted of intellectual property crimes in Bulgaria.

BSA continues to report good cooperation with the IPR sector of the National Services to Combat Organized Crime, the economic police departments in most regions, and with the General Tax Directorate. 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, nine end-user raids and eight reseller (HDL and CDR) actions and three Internet raids were conducted by the police, resulting in a total of 20 criminal cases initiated. 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).

BSA also reports that 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 several years this program has produced notable results in raising awareness; many companies have legalized their software assets. In 2005 alone, 766 police protocols of warning and instruction were issued to corporate end-users. Feedback on the targeted companies' compliance with the protocols is necessary to measure the effectiveness of the program. The lack of such feedback to the right holders is one of the major shortcomings of the program. To bridge this gap, in 2005 BSA and the National Police Directorate reached an agreement whereby a computerized center for information exchange would be set up, and BSA would provide the necessary IT training for the police officers in charge. Anticipating structural reforms within the Ministry of Interior, this initiative was postponed to 2006. Furthermore, 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.

Several entertainment software companies enjoy positive relationships with law enforcement agents who are assisting on the significant problems with piracy in Internet cafés as well as retail piracy. However, the problem remains the reluctance of law enforcement authorities to take action against high-level suppliers and organized criminal syndicate operations. Some police districts remain ineffective in their anti-piracy actions, refusing to focus their enforcement efforts on larger targets and only raiding small companies, computer game clubs or Internet cafés.

In 2005, an entertainment software company concluded a successful prosecution against an Internet café owner who continuously refused to cease his illegal activities and ignored warnings to do so. The café owner was sentenced to six months in jail and three years' probation. This is an extremely welcome development and one that the industry hopes will be sustained, as only through enforcement and the imposition of deterrent penalties will those engaged in infringing activities be

forced to stop. However, despite this promising news, the industry also experienced setbacks. A similar case was being developed against the owner of several Internet cafés engaged in infringing activity, but the case never proceeded as the prosecutor did not appear to be well versed in the prosecution of intellectual property cases. Another entertainment software company reported that in July, in an action on the Black Sea coast, the company's representative had worked with Burgass police to investigate five establishments selling counterfeit games, including a large quantity of the company's games. When the raids were conducted, the company's products were no longer among the establishments' inventory. It appeared that the dealers under investigation were linked to the police and a leak in the force had alerted them to the upcoming raid. Leaks of this nature make it difficult to work with the police.

Prosecutions, court procedures and judicial sentencing remain ineffective. Again in 2005, the bottleneck problems of problems in prosecutions (few cases, many delays) and judicial sentencing (non-deterrent penalties) continued. This means that the practical deterrent impact of all the raids is undercut.

- **Delays from police to prosecutors:** Unwarranted delays dominate criminal enforcement actions, in large part because of the time it takes to move a case from the police, through the magistrate investigator, and on through the prosecutor's office to the court. Although the Penal Proceedings Code provides for relatively short terms within which the investigation should be completed, cases are usually delayed for a much longer time due to incompetence, competing priorities, corruption, and/or heavy workload. 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.
- **Difficulties in pursuing prosecutions:** Both prosecutors and judges fail to appreciate the seriousness of IP crimes. To reduce the number of IP cases that are dropped by prosecutors and to speed up court decisions, more training is needed. No improvement was reported in 2005. 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 have occasionally attended specialized training in the field subsequently do not appear in the courtroom. 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 Criminal Procedures Code, such a claim can be filed only at the first court hearing; thus right holders are excluded from the whole preliminary investigation stage. Even at the court stage, no more than 20% percent of the civil claims submitted are accepted by the courts for consideration in the criminal trial. This deprives the right holders of the opportunity to participate actively in the court hearings, and hence in the entire proceedings.

- **Burdensome expert reports:** 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 Criminal Procedures 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.
- **Ownership rights in music cases:** One of the main problems in criminal prosecution of evident pirate operations is the fact that the Criminal Code does not cover the possession of pirate optical carriers for commercial purposes. For instance, in 2005 in Sofia a man was found in possession of over 50,000 discs but it has been impossible to file a criminal case against him. As a result, he will continue his activity in 2006.
- **Inadequate criminal procedure code:** The Criminal Procedures Code contains a number of gaps and other discrepancies that create pretexts for prosecutors and courts to drop cases on procedural grounds (see discussion above, and below). In sum, 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.
- **Non-deterrent sentencing:** Bulgarian courts fail to impose deterrent penalties in criminal cases. 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 reported that in 2005, only 5 cases were completed with a verdict and 1 civil judgment issued. Compared with the size of the damages to the right holders, the low fines imposed on the offenders are clearly not deterrent sanctions.
- **Difficulties in bringing civil infringement cases.** 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.

- Delays in injunctive relief. Courts are slow to issue injunctive orders.
- Delay in judicial resolutions. No improvement in expediting cases was noted in 2005; court cases in criminal proceedings can still take up to three years to complete.

Border measures need strengthening. Border controls must be significantly improved. 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. 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 industries report mixed results with Bulgarian customs. 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. In June 2005, the Customs Agency signed a Memorandum for IP Protection with the Ministry of Interior, the Ministry of Culture and the Patent Office based upon a template from the EU PHARE Programme.

Trainings: BullACT conducts regular training seminars for judges, police officers, Copyright Department inspectors and Customs officers. It has also pressed the Chief Secretary of the Ministry of Interior and the Rector of the Police Academy for the formal inclusion of lectures on IP crime in police training courses, and continues to have BullACT investigators deliver regular presentations at the Police Academy. For many years, BSA has suggested and provided training for law enforcement agencies and the judiciary. BSA has participated in all conferences and seminars organized by local or international governmental or non-governmental organizations, thus providing consistent training and information on software issues to the targeted groups. The biggest challenge for BSA to date has been the attempt to provide training for public prosecutors. For the past three years such efforts have been stonewalled by the unwillingness of the General Attorney's Office to permit the prosecutors to attend trainings that BSA organizes. A new attempt to organize and hold a training for public prosecutors will be made in the spring of 2006 with the hope that the new Prosecutor General would be more supportive. IFPI reports that, at the end of 2004 and in the beginning of 2005 with the co-operation of the Customs Agency and Crown Agents, training courses were provided for officials of the Custom Intelligence and Investigation Directorate. Officials from all customs departments were trained. Training courses were conducted as well for officials of the General Tax Directorate, Regional Tax Directorate, Sofia and Regional Tax Directorate, Varna.

COPYRIGHT LAW AND RELATED ISSUES IN BULGARIA

Optical Disc Law of 2005: Enactment and implementation of a strong and enforceable optical disc law in Bulgaria has been a top priority for the copyright industries for years. Finally, after two years of legislative consideration, the Bulgarian Parliament adopted the Law on Administrative Control for the Manufacture and Distribution of Optical Discs in September 2005. This new law replaces the Title Verification Decree under which the OD plants were licensed. (From 1998 through

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.)

In sum, the only positive outcome was that blank discs produced in Bulgaria must also carry the SID Code. However, the new law is drafted in such a manner that the obligation does not cover the equipment used to produce the discs, but just the discs themselves; that is, under this new law, it is still possible to possess moulds without the SID Code. Unfortunately, despite the industries' best efforts over the years to improve the provisions in this legislation, the drafting team, headed by the Ministry of Economy, disregarded the bulk of recommendations made by the copyright industries. During the drafting of the law, the industries identified at least four specific areas where improvement was needed. These issues remain problematic now that the law has been adopted:

- Most important, a SID Code obligation is needed for all optical discs, including blank CD-R and DVD-R, produced in Bulgaria, and a SID Code should be engraved on all equipment used to produce masters/stampers in Bulgaria. This is essential for two reasons. 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, moulds, etc. In this way, a plant owner can not possess a clean mould and tell the authorities that it is only used for blank CD-Rs. Second, 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. There is a major problem, though, in that the Parliament at the last minute included an obligation that all imported optical discs carry a SID Code; that goes far beyond what the industry requested. (Industry does support the obligation that imported stampers should have SID Code). There are numerous record companies, software producers and other who have their perfectly legitimate optical discs manufactured at plants in another country which do not apply SID Code (after all, SID Code is a voluntary system). This added obligation is strongly opposed by the copyright industries.
- Private sector experts must at all times and unconditionally be permitted to participate in plant inspections.
- 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.

In IIPA's 2005 Special 301 report, we noted that if the above problems were not amended in the (then-draft) legislation, then the new OD legislation would contain very serious gaps and inconsistencies, even compared to the then-existing licensing regime. We noted that, "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." Industries' main concerns relate to the enforcement aspects of the law. Unfortunately, the law fails to introduce effective enforcement rules essential to ensure compliance. For example:

- The law does not require the control bodies to conduct inspections on a regular basis and upon receiving complaint from right holders;

- During the inspections, the powers granted to the relevant authorities are too narrow to enable meaningful control. For example, control bodies are not granted the powers to seize documents during inspections, resulting in limited possibilities to collect evidence crucial for future prosecution and further investigations;
- The law omits a reference to the participation of experts during inspections conducted by the control bodies. The lack of express provisions allowing for cooperation between right holders and the control bodies reduces the effectiveness of the law and significantly limits the ability of the control bodies to achieve meaningful application of the licensing regime;
- The law now contains an obligation for imported optical discs with content to contain an SID Code or comparable identification code. It has always been the industry position that such obligations seriously hinder the import of legitimate product while adding nothing to the fight against cross-border trade in pirate product (which is predominantly smuggled in). Imported stampers, however, should be subject to an SID Code requirement.

Unfortunately, industries' predictions appear to be coming true. The new OD law has serious gaps and inconsistencies which will make effective enforcement very difficult. The industries believe that the Bulgarian government must move forward to enforce the new law. The Ministry of Culture and Tourism is in charge of issuing the various registrations. The National Service for Combating Organized Crime (NSCOC) is involved in enforcing control over OD manufacturing, insofar as it is member of the licensing committee. At the same time, Bulgaria must undertake renewed efforts to correct their inadequacies in this legislation.

Law on Copyright and Neighboring Rights (1993, amended through 2005): In contrast to the industries' disappointment over the adequacy of the new 2005 Optical Disc Law, the industries were generally pleased with the refinements made in 2005 to the existing Copyright Law.

To summarize, Bulgaria's Law on Copyright and Neighboring Rights entered into force on August 1, 1993.¹¹ Further amendments to the copyright law were made in 1994, 1998, 2000, 2002 and, most recently, in 2005. Bulgaria deposited its instruments of accession to both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty in March 2001. The 2002 amendments, which entered into effect on January 1, 2003 and were aimed at implemented various EU directives, contained several improvements, including a requirement for obligatory licensing of CD manufacturers to be outlined by the Council of Ministers. However, the 2002 amendments included several troubling provisions and left significant gaps, including shortfalls in proper implementation of the WIPO Treaties.¹²

¹¹ 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.

¹² Among the more troubling features of the 2002 amendments were the following: (1) 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. (2) 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. (3) 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. (4) Fines provided under administrative and criminal sanctions are too low and not deterrent. (5) The term of protection for sound recordings remains at only the TRIPS minimum level and should be extended. 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. (6) Another troubling problem is the maximum ten-year duration of agreements for the transfer of rights, which was originally introduced in the

Further amendments to the copyright law were made in 2005, again aiming at addressing existing shortcomings and looking forward to possible EU accession in 2007. The copyright industries believe these 2005 amendments represent good progress. Amendments included issues such as: expanding the scope of civil remedies; revising the scope of provisions on criminal and administrative sanctions, seizures and damages; and amending existing provisions on resale royalties, transmissions by satellite, and rental and lending rights.

There are, however, continuing concerns about several issues:

- **Injunctive relief:** Article 96a aims to implement Article 8(3) of the EU Copyright Directive. However, the wording of the current provision is incorrect. The Directive obliges Member States to grant injunctive relief against intermediaries whose services are used to infringe copyright by third parties. This means that an injunction can be obtained against intermediaries such as mere conduits, access providers, possibly caching providers, and hosts, even in the absence of a copyright infringement. The new Article 96a offers an injunctive relief against third parties on the condition that they have willingly assisted to commit the infringement. This is inconsistent with the Directive, and must be modified.
- **Protection of technological measures:** The Bulgarian Copyright Law already had a basis for the protection of technological measures at the standard created by Article 6 of the EU Copyright Directive. The industries welcome the good definition of the technological protection measures in Article 2(14) of the Additional Provisions. However, the current Paragraphs (6) and (7) of Article 97 fail to comply with the Directive by not implementing properly: (a) the prohibition on the act of circumvention and (b) the full list of circumventing devices and, in particular, services as established in Articles 6(1) and 6(2) of the Directive respectively. Consequently, we recommend revising current Articles 97(6) and (7).

Criminal Code: The levels of fines for copyright piracy fall far short of deterrent levels. The fines in the Criminal Code have not been increased since 1997, and range from 1000-3000 BGN (US\$612-1836) for a first offense, and 3000-5000 BGN (US\$1836-3060) 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 Criminal 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.”

1993 Copyright Law. Proposals to eliminate this transfer provision were made twice (in 2000 and 2002), but were not accepted. (7) There is an exception from the importation and exportation right for amounts of less than commercial quantities. (8) 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. (9) 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. (10) 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.

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

- (1) introduce a presumption of rights ownership in criminal infringement cases;
- (2) allow rights holders or their representative organizations to assist in preparing expert opinion reports concerning infringement of their IP rights;
- (3) improve existing procedures to reflect the specifics of the digital environment with regard to the investigation and prosecution of Internet-related crimes;
- (4) provide for criminal liability of the managers of entities where IP crimes are committed;
- (5) re-establish the option for rights holders to file civil claims at any stage of the criminal trial; and
- (6) refine the definition of "injured party" in the criminal trial to cover rights 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.

The Tax Procedure Law of 2002: 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. 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. BSA reports that the tax authorities, using tax law violations as the basis for action, did make some seizures of pirate OD products containing business software, in the streets in Sofia during 2005.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

CANADA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Canada be maintained on the Watch List in 2006, and that an out-of-cycle review be held no later than September 2006.

Actions Which the Canadian Government Should Take in 2006:

Copyright Law Reform

- Enact legislation bringing Canada into full compliance with the WIPO "Internet" Treaties (WIPO Copyright Treaty [WCCT] and WIPO Performances and Phonograms Treaty [WPPT])
- Create strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy
- Amend the Copyright Act to clarify the scope of the private copying exception for sound recordings
- Amend the Copyright Act to clarify that illicit file-sharing services authorize infringement
- Make unauthorized camcording an indictable offense

Enforcement

- Make legislative, regulatory or administrative changes necessary to streamline the process for *ex officio* seizures of counterfeit product at the border
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada
- Direct the RCMP, CBSA, and Crown prosecutors to give high priority to intellectual property rights enforcement, including against retail piracy and imports of pirated products and to seek imposition of prison sentences for material infringements

CANADA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2005¹

INDUSTRY	2005	
	Loss	Level
Records & Music	NA	NA
Business Software ²	580.6	36%
Motion Pictures ³	118.0	8%
Entertainment Software ⁴	NA	NA
Books	NA	NA
TOTALS	698.6+	

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Canada remains far behind virtually all its peers in the industrialized world with respect to its efforts to bring its copyright laws up to date with the realities of the global digital networked environment. Indeed, most of the major developing countries have progressed further and faster than Canada in meeting this challenge.

The globally accepted benchmark for modern copyright legislation can be found in the WIPO "Internet" Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Canadian copyright law remains far out of compliance with the standards set in the WCT and WPPT. In 2005, the Canadian government unveiled legislation (Bill C-60) that was ostensibly aimed at closing this gap; but this legislation, while positive in some respects, fell far short of meeting the WCT and WPPT benchmark. Bill C-60 died when a federal election was called on November 29, 2005. We urge Canada's new government to take advantage of this opportunity to jettison the approach taken by Bill C-60 in favor of legislation more consistent with that of other nations that have already implemented these treaties.

Notably, the provisions of Bill C-60 deviated sharply from the approach taken by every other country that has sought to implement the provisions of the WCT/WPPT on the use of technological protection measures (TPMs) by copyright owners. Indeed, the approach taken in Bill C-60 appeared better suited to a country seeking to establish itself as a worldwide producer and supplier of protection-cracking tools than one wishing to join the global mainstream by appropriately modernizing copyright legislation to provide for the levels of protection necessary in the current technological environment. IIPA urges Canada's new government to choose a

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Canada, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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.

different path and to make that choice concrete by proposing TPM provisions that fully comply with the WCT and WPPT. This means legislation that:

- comprehensively protects TPMs, both in so far as they manage access to copyrighted works and in their use to prevent unauthorized copying and the exercise of other exclusive rights;
- outlaws trafficking in devices aimed at circumventing TPMs, or providing circumvention services, and defines violations without imposing onerous intent requirements;
- defines defenses with care so as to avoid the creation of a market for circumvention devices or services; and
- provides strong civil and criminal remedies for violations.

Bill C-60 also fell far short in terms of encouraging Internet Service Providers (ISPs) to cooperate with copyright owners in combating online infringements. The blanket liability exemptions in the bill could have been interpreted to shelter illicit p2p services or websites established expressly to facilitate collection, location or dissemination of infringing materials. The exemptions would have applied even when ISPs had actual knowledge of and control over infringing material, and would have barred even injunctive relief. The legislation that succeeds Bill C-60 must close these loopholes and condition liability limitations for ISPs on affirmative cooperation with copyright owners in combating online infringements. As recommended by the Supreme Court of Canada in *SOCAN v. CAIP*, legislation should also provide a true "notice and takedown" system that offers an expeditious means of shutting off access to infringing online activity, rather than confining itself to the mere "notice and notice" regime of Bill C-60. While an obligation for an ISP to forward notices from copyright owners to end-users would be a useful supplement to a system that gives ISPs strong incentives to "take down" infringing materials, it is no substitute for it.

Other features of Bill C-60 also deserve careful re-examination before they are included in the successor copyright reform bill. For instance, Bill C-60 included an ill-defined new exception for use of a work in a "lesson, text or examination" in educational settings. Another provision had the effect of creating a compulsory license for digitizing and online dissemination of a work to any student, wherever located, so long as the student's institution was covered by an existing collective license for printed copies, even if the Canadian publisher had no rights over digital dissemination of the work. A third problematic feature of Bill C-60 eliminated the existing provisions for interlibrary loan and replaced them with a provision that authorized interlibrary distribution of digital copies, a proposal that would have had a significant detrimental impact on publishers of scientific, technical and medical materials in particular. The new Canadian government should ensure that any legislative proposals it makes on educational and library exceptions to copyright can pass muster with its existing and anticipated international obligations, and that they provide ample room for market solutions.

New legislation should also address other issues, notably the scope of the private copying exception for sound recordings. While IIPA hopes that further judicial interpretation of Canada's current law will more clearly establish that the private copying exception applies only to individuals who make copies for their own use, a legislative amendment is also required to clarify that the exception applies only to copies of non-infringing recordings owned by the person who makes the copies. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations.

New legislation should also clarify liability under Canadian law for illicit peer-to-peer (p2p) services. In contrast to the international trend, exemplified by the successful lawsuits in Australia, Korea, Taiwan and the U.S. against p2p services that were facilitating massive worldwide infringement, recent Canadian case law on liability for authorizing infringement raises questions as to whether a comparable enterprise would be found liable under Canadian law.

Bill C-60 contained several positive features, notably the specification of an exclusive right of "making available," and a new section banning dissemination or public performance of a copy of a sound recording made under the private copying exception. IIPA urges the new Canadian government to build on these positive elements while significantly revamping other provisions of Bill C-60, including those summarized above. In this way, the new legislation can become a vehicle for Canada's long-delayed implementation of the WIPO Internet Treaties and its re-entry into the global copyright protection mainstream.

COPYRIGHT PIRACY AND ENFORCEMENT

Most copyright industry sectors report disturbing features of the Canadian landscape with respect to copyright piracy. For example:

- In 2005 more than 500,000 counterfeit audio-visual products in optical disc format - mostly DVD-Rs - were seized in Canada; more than twelve times as many as the year before. This pirate audio-visual product is readily obtained from street vendors and even from retail stores in the Toronto area.
- Pirate videogames and entertainment software also abound in the Canadian market, much of it imported from Asia. Retail stores in major cities⁵ not only sell pirate videogames - often virtually to the exclusion of legitimate product - but also offer products and services to circumvent technological protections in videogame consoles, thus further perpetuating the pirate market.
- The estimated piracy rate for business software in Canada in 2005 of 36% far exceeds that of the U.S. or of many Western European countries.

These realities point to serious deficiencies in enforcement against piracy, starting at Canada's borders. Canadian customs officers (Canadian Border Services Agency, or CBSA) lack authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained, only the Royal Canadian Mounted Police (RCMP) can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred. CBSA officials also lack training in identification of pirate imports, and both agencies are short of dedicated resources to attack this problem. However, there have been encouraging situations in which customs authorities functioned effectively within these limitations. For example, on two occasions in the summer of 2005, customs authorities in Vancouver, while unable themselves to seize counterfeit videogames being transshipped through Canada to Mexico, alerted Mexican authorities, who seized the goods (a total of 115,000 units) when they arrived there.

USTR should press the Canadian government to initiate and adequately fund a coordinated and nationwide program to crack down on importation of pirate goods at all major Canadian points of entry. The new government should also move swiftly to identify which

⁵ The Entertainment Software Association (ESA) reports conducting over 60 investigations in 2005 in the cities of Vancouver, Toronto, Montreal, Quebec City, Calgary and Edmonton.

statutes, regulations or policies must be amended in order to confer meaningful *ex officio* authority on border enforcement agencies, and act promptly to institute the needed changes.

The continued prevalence of pirate product in the retail market indicates another enforcement shortcoming: the RCMP's long-standing reluctance to target retail piracy. Its record of cooperation with right holders to attack piracy is also spotty at best. Examples of unwillingness to share information, reluctance to disclose the inventory of pirate entertainment software product seized, and insistence on formalities such as Canadian copyright registration are all too common. Some industries have noted promising recent developments in enforcement, such as the seizure in November 2005 of more than 250,000 pirate DVDs in raids carried out at three malls, as well as significant criminal actions against vendors of pirated entertainment software; criminal cases were filed against three retailers in Toronto, one of whom has pleaded guilty and been fined. Notwithstanding raids and seizures conducted by law enforcement, the availability of pirated products will not be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences. Crown counsel should be encouraged to take on more copyright infringement cases, and be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistently deterrent sentences, including jail time for piracy cases. Canadian authorities should be encouraged to build on the increased enforcement efforts in 2005 by according a high priority to the serious retail piracy problems within their country, and devoting adequate resources to the investigation and prosecution of these cases.

One of the most unsettling new trends is the exponential growth of unauthorized camcording of films in Canadian theaters. Counterfeit optical discs seized in 23 countries have been traced back to "masters" camcordered in Canadian theaters. In 90% of all cases the first pirated copy of a film is sourced from theatrical camcording, and more of the theaters in which this occurs are in Canada than in any other country. Three-quarters of all illegally camcordered films in Canada come out of theaters in Montreal, which was recently identified as the "no. 1 [city] in the world for surreptitious camcording," since pirates can readily create both English and French language masters there.⁶ Thus, Canada is a major contributor to audio-visual piracy worldwide. It is imperative that Canadian authorities step up to the problem by making unauthorized camcording an indictable offense.

⁶ "Pic Pirates hit Canada bilingually," *Weekly Variety*, Dec. 12-18, 2005, at 12.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Ecuador remain on the Special 301 Watch List in 2006.

IIPA supports the Free Trade Agreement process. The U.S. began FTA negotiations with Ecuador and other Andean countries in May 2004; the negotiations with Ecuador continue in early 2006. 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 has recommended for years that it is essential that Ecuador take immediate steps to improve its poor enforcement record. 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)¹ — both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners

Actions Which the Government of Ecuador Should Take in 2006:

- Create special police anti-piracy task forces in Quito and Guayaquil and Cuenca to take anti-piracy enforcement actions against pirate street vendors, distributors and manufacturers;
- Implement and execute the tools and remedies provided in the Copyright Law of 1998 and regulations, such that petitions for *ex parte* civil orders are excluded from the random assignment process;
- Have the National Judiciary Council appoint specialized judges for intellectual property matters;
- Educate judges on intellectual property issues until the specialized IPR courts are created (the creation of such courts were required under the 1998 Copyright Law);
- Provide IEPI with the necessary budget and national plan to combat piracy effectively;

¹ 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 8, 2005 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>. During the first 11 months of 2005, \$51.2 million worth of Ecuadorian goods (or 1.0% 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 20.6% increase over the same period in the previous year. Also during this same 2005 time frame, \$3.5 billion entered under the ATPA, representing a 44.8% increase from the same period in 2004.

- Amend Article 78 of the Education Law of 1999 to clearly eliminate overbroad provisions which suggest a compulsory licensing scheme for software in educational institutions;
- Adopt copyright legislation to establish notice and takedown provisions and create ISP liability (obligations which will be included in any FTA with the U.S.);
- Improve border enforcement, especially to track importation of optical media.

ECUADOR Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2005 ²						
INDUSTRY	2005		2004		2003	
			Loss	Level	Loss	Level
Records & Music	26.3	90%	20.0	95%	19.0	95%
Business Software ³	7.9	70%	7.0	70%	7.0	68%
Motion Pictures ⁴	NA	NA	NA	NA	NA	95%
Entertainment Software ⁵	NA	NA	NA	NA	NA	NA
Books	2.5	NA	2.5	NA	2.3	NA
TOTALS	36.7+		29.5		28.3	

COPYRIGHT PIRACY IN ECUADOR

The Business Software Alliance (BSA) reports that for 2005, 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 in 2005, burned CD-Rs remained 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. In contrast, the official market for Ecuador in 2004 was calculated at 500 thousand units. 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 at least 90% of the total pirate market in Ecuador, with no signs of improvement. Although piracy could be pursued *ex officio* by 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 at www.iipa.com/pdf/2005spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bolivia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 piracy level data has been revised and is reflected above.

⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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.

authorities, only a few sporadic raids are conducted every year, and the resources dedicated to IEPI's enforcement activities are insufficient. In 2004, the majority of international record companies closed their offices in the country, and two local independent companies are barely managing to stay afloat. The market has decreased by approximately 60% since 2003. 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 continues to be commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported. Video piracy remains a consistent problem throughout the Andean region, reaching 90% in Ecuador (MPAA does not have an anti-piracy presence in Ecuador). The U.S. entertainment software industry suffers from piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

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IEPI's anti-piracy enforcement efforts remained ineffective in 2005. The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. IEPI can impose various administrative remedies, including inspections, requests for information, and fines. However, since its creation, IEPI has experienced staff shortages, low salaries and even strikes. IEPI, despite having national jurisdiction, usually performs its enforcement activities in Quito, rarely outside the city. IEPI has only a few well-trained personnel on intellectual property issues.

BSA reports that in 2005, its relationship with local enforcement authorities (IEPI) has improved, and they have been satisfied with most of the goals achieved in the cases run in 2005. BSA conducted five actions in 2005. However, a problem remains with the limited support or lack of awareness from local authorities in the municipalities. These local jurisdictions simply do not see piracy as a legal problem but rather a social problem, and do not engage in anti-piracy actions.

With respect to *ex officio* actions, BSA reports that IEPI still 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.

Criminal actions are also ineffective and not deterrent. The recording industry reports that isolated prosecutors and custom agents have shown an interest in the piracy problem as a result of ongoing requests by the recording industry to take action. In view of this interest, IFPI organized an anti-piracy training seminar during mid-November, 2005 in Quito for 16 prosecutors and 16 high ranking police officers interested in the subject. Following the seminar, these authorities, with support from the local industry, carried out a brief holiday campaign that included 5 raids and the seizure of 59 thousand pirate units and 2 burners in Quito. Prior to these actions, Customs had also started taking an interest in music piracy and in September seized 300,000 units of pirate product. While these operations are grossly insufficient to have an effect on piracy, the local industry views them as a good start.

The creation of special anti-piracy task forces in Quito, Guayaquil and Cuenca will improve controls on streets, distributors, and manufacturers. Music piracy is rampant in the streets of 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.

BSA reports that in 2005, the Attorney General Office, IEPI and the Police conducted three actions in the city of Quito, mainly in shopping centers, to seize pirate CDs and DVDs. As a result of these actions, approximately 300,000 CDs and DVDs were confiscated. No prosecutions were initiated.

Civil cases: BSA reports that in 2005, it had no experience with the Ecuadorian courts. BSA did file some cases in 2001, and again in 2002 and 2003, but experienced so many difficulties that it did not file any cases before the courts in 2004 and 2005. Below is an illustrative list of the problems BSA's local counsel has experienced in filing civil cases:

- Even though the current law 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.

Judicial inaction remains pervasive, and specialized IP courts still have not been established. 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. BSA anticipates testing this system in 2006.

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. BSA did not initiate any action in 2005, in part because of an upheaval in the court system (the entire membership of the Supreme Court was removed in December 2004 and not replaced until December 2005).

Delays in the creation of specialized IP courts (which have only civil jurisdiction) continue despite a requirement in the 1998 copyright law requiring their creation.

Poor Border Controls: There is a serious need to improve customs control regarding the importation of blank optical discs. Possible solutions include limiting the ports of entry for optical media products (including blank media). More formalized working relationships with industry representatives — for example, the recording industry — would help inform customs officials. The recording industry believes that some exported pirated music is going to Colombia.

Training: BSA reports that it provides workshops, seminars, and training programs to different audiences, such as businessmen, universities, and others. BSA has conducted trainings for enforcement officials and the recording industry also organized an anti-piracy training seminar in Quito for 16 prosecutors and 16 high ranking police officers.

COPYRIGHT LAW AND RELATED ISSUES IN ECUADOR

The Intellectual Property Law of 1998: Ecuador enacted a comprehensive intellectual property law (IPL) on May 28, 1998, 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, and also incorporate some of the obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms (WPPT). Amendments to the copyright law will be required to fully implement the IPR obligations in any Free Trade Agreement with the United States.

The 1999 Education Law: Ecuador passed an Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to 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, Article 78, conflicts with Ecuador's constitution as well as its obligations under the Berne Convention, TRIPS, and Decision 351 of the Andean Community. Since the law was issued in 1999, BSA has stated repeatedly that it believes that Article 78 is unconstitutional and should be amended. Because of 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; as of early 2006, no opinion has yet been issued.

Corporations must certify compliance with copyright law in annual reports. In March 2004, the Superintendency of Companies issued a regulation (No. 04-Q-IJ) 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. The BSA has been working in coordination with the Chamber of Commerce in Quito to educate the business community about the compliance requirements of this new regulation. BSA reports that this resolution has had a positive effect, persuading an important group of medium-sized and large corporations to improve their management of IP and information technology matters.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

GREECE

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Greece be placed on the Watch List in 2006.

Actions Which the Greek Government Should Take in 2006:

- Improve inspections and anti-piracy activities by police, and greater involvement by the tax police (YPEE) in anti-piracy actions affecting all copyright sectors. Have YPEE impose administrative fines for both sellers and buyers of pirate music and other pirated copyright products.
- Give law enforcement authorities the ability to pursue investigations on university campuses where Internet and hard goods piracy is rampant. Police apparently do not have jurisdiction to pursue IPR cases on university campuses.
- Take action against copyshops making illegal photocopies of books around university campuses, especially at the University of Pireas and Deree College, and coordinate campus policies to prohibit use of illegal materials on campus.
- Have YPEE continue its software audits when it does tax inspections. In addition, YPEE should make music and sound recordings audits when inspecting commercial enterprises like bars, restaurants, etc.
- Direct prosecutors to bring cases more swiftly and argue for deterrent penalties.
- Instruct courts to issue deterrent sentences, including imprisonment and fine as provided by the law, and not suspend sentences or fines in practice (suspensions of fines are not permitted under the law).
- Improve IPR training and education for police, prosecutors and judges.
- Adopt the amendments to the copyright law to permit administrative fines, taking note of one industry's request to be excluded from the scope of this provision. The goal should always be effective anti-piracy measures which work in-practice.
- Work toward full implementation of the EU Enforcement Directive.
- Encourage government ministries and agencies to proceed to legalize business software usage in public agencies.

GREECE Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2005 ¹				
INDUSTRY	2005		2004	
	Loss	Level	Loss	Level
Records & Music	26.0	60%	20.0	60%
Business Software ²	58.3	60%	60.0	62%
Motion Pictures ³	NA	NA	10.0	15%
Entertainment Software ⁴	NA	NA	NA	70%
Books	NA	NA	NA	NA
TOTALS	84.3+		90.0	

COPYRIGHT PIRACY IN GREECE

Record and music piracy: Piracy of sound recordings and music in Greece is rampant, with piracy levels well over 50% for both international and local repertoire. The piracy rate for U.S. repertoire is estimated to be close to 60% of the market. During the 2004 Olympics, the police took tough measures to fight music piracy. In 2005, the number of the people involved in music piracy increased significantly, yet the average quantity seized by the law enforcement authorities dropped slightly. Similar to the situation in Spain, criminal syndicates of illegal immigrants (90% of which are estimated to be Nigerians). These criminal networks are expanding day by day because the Greek government does not strongly apply its immigration laws and has a court system that does not effectively deal with copyright offenses. Over 98% of total pirated music discs are burned CD-Rs. Instances of industrial pressed pirate CDs are rare, and those usually contain international repertoire.

Business software piracy: The widespread use of unlicensed software and distribution of low quality pirated CDs across the country indicate that much more work is needed to protect copyright under Greek law. The Business Software Alliance (BSA) estimates that the 2005 business software piracy rate in Greece was 60%, still well above the EU average of 35% and the highest of all countries in the enlarged EU region, including the countries in Eastern Europe. Lowering the business software piracy levels in Greece will contribute to the local economy.⁵ Due to a lack of

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² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bolivia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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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 BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing](#)

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. Meaningful progress can be expected only if the National Police and the Tax Police (YPEE, formerly SDOE) energize their enforcement activity. Such activity began slowly in 2006. YPEE issued a circular, requiring that auditors must include in their regular audits, special audits for unlicensed software. Furthermore, YPEE auditors were trained by BSA, in a step-by-step seminar, on how to execute these audits. BSA also activated a hotline telephone number, with a technical expert standing by to answer questions posed by tax policemen while performing software audits.

Entertainment software piracy: Piracy levels for entertainment software products (including video games on optical disc and cartridge-based video games) remain at high levels. 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 Greek customs authorities has generally been good, it is essential that border enforcement be further strengthened to adequately address continued importation of pirated entertainment software. Piracy on university campuses is prevalent, for both Internet and hard goods piracy, as the police apparently do not have jurisdiction to pursue cases on university campuses. This situation needs to be remedied so as to facilitate enforcement actions against those engaged in copyright infringements at universities. Furthermore, obtaining an expeditious resolution to a criminal case has long been a frustrating problem for the industry. For the entertainment software industry, where video game titles have a very short shelf life, a criminal case that takes over five years to be resolved is of little value in providing any relief or remedy to a publisher damaged by the prevalence of pirated products in the market.

Audiovisual piracy: The Motion Picture Association (MPA) reports that in 2005, the main piracy problem for the film industry in Greece concerns pre- or post-release titles, locally burned mainly on DVD-Rs in a vast number of small illegal duplication labs and either advertised in magazines and newspapers, via e-mail, through Internet websites or just sold through legitimate retail outlets (video retailers) or by street vendors. The Greek pirate market continues to shift from VHS cassettes to DVD-Rs. Although “burning” is the predominant problem, one case of industrial production has, however, been investigated and charges have been filed. Audiovisual piracy levels are getting worse in the northern part of the country, but decreasing in other areas. MPA has not been able to pinpoint the reasons for this difference, but it seems, at first glance, that those areas with the heaviest concentration of pirate activity are the areas heavily populated by immigrants, both legal and illegal. Downloads of films from the Internet are not significant for the time being because broadband penetration is still very low. The only legislative deficiency involving Internet piracy cases pertains to Internet Service Providers (ISPs) requiring a Court or Prosecutor’s order to disclose the names of their subscribers. However, this presents no real obstacle as the local anti-piracy organization, EPOE, can always ask the Cybercrime Division of the Greek Police to obtain the orders. There are “organized” communities such as gypsy families and families of immigrants involved in piracy, but this cannot be considered “organized crime,” in the usual sense of the term. MPA suspects that there are some imported DVDs from Russia, with either Russian subtitles or just in the Russian language. This may be connected with off shoots in Greece of Russian organized crime, but it has been impossible to collect credible information. In sum, Greece is a very fragmented market for the duplication [replication applies only to pressed discs],

Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Greece’s piracy rate (from 62% to 52%) would add \$411 million to its economy, create 1,300 more jobs, and increase local industry revenues by more than \$261 million. That, in turn, would generate an additional \$130 million in tax revenue to help the Greek government pay for critical benefits and services. See <http://www.bsa.org/idcstudy/pdfs/Greece.pdf>.

distribution and sale of pirate DVD-Rs, usually by foreigners who seek political asylum and who rent small apartments or storage areas everywhere, equip them with a computer and go to work.

Book piracy: Illegal commercial-scale photocopying of academic textbooks has reached unprecedented levels in Greece, causing extensive damage to higher education textbook publishers. Photocopy shops near university and college campuses are routinely processing orders for entire classes of students. As a result, sales for many of the major publishers in Greece are down 20-40%. All universities and colleges suffer from these practices, but two recent cases have been reported at the University of Pireas and Deree College. Photocopy shops are making cover to cover, bound copies for distribution to students, with little or no deterrent. In fact, bulk discounts for students are common. The authorities should take notice of this issue, tackling the copyshops through effective enforcement and encouraging universities to implement policies that encourage use of legitimate materials on campus.

Optical disc plants: Industry reports indicate that there are 12 operating optical disc plants in Greece, with upwards of 40 production lines. This indicates a relatively high production capacity for OD product for this marketplace.

COPYRIGHT ENFORCEMENT IN GREECE

Despite excellent cooperation between industry sources and police officials, numerous raids have been conducted, yet few are prosecuted effectively and swiftly. In those few cases which reach the merits, Greek judges issue non-deterrent penalties.

Police cooperation and raids: MPA reports that the relationship between the Greek anti-piracy organization (EPOE) and local law enforcement authorities has been excellent and is constantly improving – especially in northern Greece (a major area of pirate activity) where EPOE, with the assistance of the U.S. Consul General, has held a series of training seminars and has laid the foundation for a Task Force composed of Police officers, Customs Agents, and Tax Police personnel. As of October 2005, EPOE had conducted 775 investigations, 79 raids and brought 65 criminal actions against infringers. The Economic Crimes Divisions of the Greek Police and YPEE (the Tax Fraud Units) have increased their *ex officio* actions substantially. (Sometimes, out of sheer “overshooting,” the police have arrested video retailers and seized hundreds of what they thought were pirate DVDs, only to find out that these people were completely legitimate.) In cases of *ex officio* actions, EPOE is usually called upon to identify the confiscated DVDs or DVD-Rs, resulting in a widespread assignment of investigator teams traveling throughout Greece, by boat, airplane, car, bus, train or any other means of transport available, since the arrested person has to be taken to a prosecutor’s office for arraignment within 24 hours of the commission of the alleged offense.

The recording industry reports that in 2005, the Greek Police arrested 2,045 suspects of copyright infringement in a total of 1,953 raids. IFPI Greece’s anti-piracy team participated (either during the raid or called upon afterwards for identification of confiscated pirate music products) in 1,418 raids that took place mainly in the center and surrounding areas of Athens. In other cities and towns outside Athens, raids were carried out *ex officio* by the police. In all the cases where IFPI Greece’s team participated, law suits were filed and the majority of the cases, which had to do with street vendors, were heard at the “All-Day Court” the following day. The cases regarding duplication and wholesale distribution of pirate music products were dealt with by prosecutors and will now appear in a felony court in about 2 to 3 years.

Few prosecutions and low penalties: Although this is slowly changing in major Greek cities (such as Athens, Thessaloniki and Patras), Greek 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 the film industry organization (EPOE) to take advantage of the criminal “flagrant crimes procedure” which helps to reduce the court load when a case is postponed indefinitely. 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, usually more than a year later.

The immediate problem is not with raids and police; rather, the key criminal enforcement problem in Greece rests primarily with the Greek courts:

- At the Misdemeanour (All-Day) Courts for low-scale offenders, judges hand out very light sentences, which are often suspended. This is in particular the case for the courts outside Athens. Sentences given by the courts of Athens and Piraeus are somewhat more severe, due to the presence of IFPI representatives as complainants and witnesses. However, when appeals are filed, no bail is set to guarantee the appearance of the defendant in the higher court and the sentences handed out in first instance are suspended. In most cases the infringers therefore do not appear at the hearing organized by the higher courts, especially as 90% of the music pirates are immigrants. In addition, the appeal courts do not impose any fines.
- At Felony Courts for large-scale offenders, the infringers are released until trial by the prosecutors without any bail and in many cases without any limitative clauses. As a result, when the case appears in front of the Felony Court after two to three years’ time, the defendant usually does not turn up. Since no measures are being taken to assure the offender’s presence at the trial and remand is out of question, it is not rare to have the same person arrested and charged with felonies more than once and then released. Especially in cases where the felon is an immigrant and cannot be easily located and arrested, this tactic is equivalent to acquittal. As a result of this court policy, the recording industry reports that several offenders have been arrested and charged 2-3 or even 5-10 times, and have returned to their music piracy business.

Penalties continue to be too low for deterrence, and the time span between offense and punishment remains entirely too long, occasionally threatening to activate the statute of limitations. On occasion, judges and prosecutors have erroneously adhered to the provisions of the Criminal Code on sentencing rather than the provisions of the 1993 Copyright Law (but less of that is reported now), a practice which regularly resulted in the imposition of non-deterrent sentences and a general feeling in the minds of pirates that they could get away with minimal sanctions. MPA reports that while there are still no deterrent sentences, at least there are more convictions and fewer acquittals.

Civil actions: BSA initiated six civil raids in 2005; five of these cases have reached settlements (over US\$150,000) including agreements for these entities to make the necessary legal purchases of software. YPEE (Tax Police) is not taking many raids currently, but their attitude to copyright protection is gradually improving. Once the administrative penalty law is enforced (see legal reform, below), YPEE is likely to do many more raids. YPEE has now made it compulsory for tax police officers to audit software licenses when conducting tax audits.

Tax police and software inspections: BSA reports significant progress in working with the Greek tax police, YPEE, in two ways. First, in October 2005, YPEE issued a Circular requiring tax inspectors to conduct software audits while doing tax inspections. BSA has been pressing for this reform for years, and believes that this should help provide a significant deterrent to companies thinking of using unlicensed software. BSA assisted with publicity to inform the local market about this tax circular. Second, the Standing Committee of Parliament has approved a bill that will enable YPEE inspectors to impose administrative, financial penalties on companies found to be using unlicensed software; the full Parliament still has to vote on this amendment (see below).

The recording industry reports that it has not experienced the high level of anti-piracy engagement by the tax police. The recording industry requests that the tax police be directed to get more involved in music anti-piracy actions. (At the present time, the YPEE cannot deal with music pirates, since pirates are mainly immigrants who do not have VAT or Social Security numbers, so YPEE does not have sufficient tax data on the person(s) to whom they are supposed to apply the fines.)

Trainings: The copyright industries continue to offer numerous IPR-related training sessions to Greek enforcement officials. BSA has been providing training and technical assistance to YPEE. BSA's local counsel offer training seminars to the tax police, YPEE. They also regularly meet with senior government officials and Ministers to reiterate the importance of legislative reform and copyright protection. Attendees at the most recent training included 75 YPEE civil servants, the Secretary General of the Ministry of Finance and the Special Secretary of YPEE. In addition, MPAA reports that EPOE has been holding a series of training and information seminars in northern Greece, where the law enforcement authorities seem to be more amenable to training. Also, EPOE, with the assistance of the Greek Copyright Office (OPI), is taking steps to introduce IP courses in Police Academies, while training seminars are being held whenever, wherever and as often as possible. EPOE has established a Traveling Training Team to train law enforcement personnel at their own headquarters throughout the country, but this has met with personnel shortage problems and a rather indifferent attitude by a large number of law enforcement personnel, especially in peripheral areas. Some entertainment software publishers are in the process of scheduling training for the Customs authorities in 2006.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Copyright law and reform: The copyright industries are pleased with Greece's implementation of the Copyright Directive in Greece. Greece was the first of the EC member states to complete implementation of this Directive.

The 1993 Copyright Law (Law No. 2121/93, as amended) is in the process of being amended. One amendment would give copyright infringers the option of paying an administrative fine in lieu of criminal prosecution. This proposed amendment does not have the support of all the local industries:

- The experience of the recording industry, so far, regarding the implementation of the criminal sanctions of the Copyright Law by the Greek Courts is disappointing. The administrative fine aims to guarantee that the copyright infringer will "suffer" a substantial loss of profits. Although these amendments to the copyright law have been proposed, the recording industry believes that, if they are adopted, they should be applied in practice. If adopted, it will operate as follows: street vendors caught in possession of up to 200 music CDs and up to 50 DVD-Rs will

be given the opportunity to pay an administrative fine of 25 euros for each music CD and 50 euros for each DVD-R. This amendment is still in the legislative stage, but is expected to be voted on by the Parliament soon. Unfortunately, no copies of the text are available at this stage as the Draft is undergoing additional changes and the document cannot be released. With respect to other legislative reforms, the proposed administrative fine amendment has been included in the same Draft Bill as measures to implement the Enforcement Directive and the Droit de Suite.

- The MPA did not oppose amendment of the existing law to allow small pirate distributors to escape criminal conviction on payment of an appropriately high monetary penalty (i.e., one that might be considered deterrent if applied in practice), so long as the act of pirate distribution remained a criminal offense and the option of paying such a penalty was not available to an offender who had already availed himself of that privilege on a previous occasion. The MPA's position on the proposed amendment was very firmly against de-criminalization, but that MPA would not be opposed to the imposition of deterrent monetary penalties on small first-time offenders only.⁶ However, according to the OPI, both the first-time offender principle has apparently been removed (in an attempt to make the law operate more practically) and the issue of making the accused's antecedents (including any administrative fines) available to a later court was complicated by general administrative and legal difficulties relating to the availability in Greece of offender information. Accordingly, MPA is now lobbying to remove audio-visual product completely from this amendment, and has sent a letter in December 2005 to the Deputy Minister of Culture arguing for that change.

Administrative remedies: The Standing Committee of Parliament has approved the law amendment that will enable YPEE inspectors to impose administrative financial penalties on companies found to be using unlicensed software. This amendment has the strong support of the BSA. Parliament now needs to vote on the amendment in order for it to go into force. It is hoped that this will happen in early 2006, without much delay.

Government software legalization: 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 business software piracy rate.

Implementation of the EU Enforcement Directive: The Hellenic Intellectual Property Organization has prepared the draft legislation to implement the EU Enforcement Directive. However, reports suggest that the responsible Ministers have not signed the draft text. Once they do so, the draft will be forwarded to the Parliament.

⁶ The local film industry was concerned that if the administrative fine was applied to video retailers, it would exacerbate the level of piracy in Greece and encourage pirate retailers to continue their copyright infringements. The MPA has therefore lobbied for (1) the exclusion of retail shops from the law; (2) the option of paying the fine to be available once only; (3) the fact of payment of the fine to be admissible before any court which subsequently deals with a later offense. Although video retailers have now been removed from the administrative fine provision, MPA is still concerned that the restriction to first time offenders cannot be guaranteed and are therefore now lobbying for the complete removal of audiovisual products from the proposed law. MPA reports that it worked to convince the OPI (Greek Copyright Office) to change the proposal to exclude retail shops, but were unable to limit the procedure to first-time offenders or to secure the third adjustment.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

HUNGARY

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Hungary remain on the Special 301 Watch List in 2006.

Actions Which the Government of Hungary Should Take in 2006:

- 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).
- Put into force the new amendments which implement the EU Enforcement Directive.
- Adopt optical media regulations to combat and control optical media production and distribution.
- 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).
- Introduce legislation to ban street sales of copyrighted products.

In sum, the problems adversely affecting the copyright industries in Hungary include:

- Prosecutorial delays in criminal copyright cases and delays in civil cases.
- Imposition of low fines and weak, non-deterrent sentences.
- Failure to provide TRIPS-compatible civil *ex parte* remedies in practice.
- Weak border enforcement.

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). 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.

HUNGARY
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	64.7	42%	65.0	44%	55.0	42%	32.8	45%	21.3	48%
Motion Pictures ³	102.0	73%	20.0	35%	20.0	30%	18.0	30%	18.0	40%
Records & Music	12.0	30%	11.5	38%	8.0	30%	6.0	30%	4.5	30%
Entertainment Software ⁴	NA	30%	21.5	59%	NA	NA	NA	NA	43.3	90%
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
TOTALS	182.7+		122.0		87.0		60.8		91.1	

COPYRIGHT PIRACY IN HUNGARY

Internet Piracy Affects All Copyrighted Materials: In 2005, CD-R and DVD-R piracy in Hungary continues to be driven, in large part, by the Internet, which is providing an effective channel for the marketing and distribution of pirate discs. Peer-to-peer (P2P) piracy is on the increase, with the estimated number of P2P users standing at between 700,000 and 800,000, out of a total Internet user population of 2.3 million. Locally based web sites linked to File Transfer Protocol (FTP) servers that offer downloads for money remain a problem, but one that has declined with the increase in P2P piracy, where users can, of course, access pirate content free of charge. 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.

Cooperation Agreements: On October 25, 2005, ASVA, the BSA and PROART (the Alliance for Copyright Protection) signed a co-operation agreement with the Anti-Crime Division of the National Police Headquarters, confirming their intention to collaborate in a united effort to address copyright crime. ASVA, the BSA and PROART also signed a similar agreement with the Tax and Financial Control Administration (APEH). The objective of this cooperation is to assist government efforts to crack down on the “black economy” and the losses sustained by Hungary’s economy as a result of piracy. The parties to the cooperation agreements have undertaken to provide mutual help through expert assistance, training and technical information.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Hungary, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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.

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. In 2005, the number of Cease & Desist letters (C&D) sent by the Hungarian anti-piracy group PROART nearly quadrupled, from 282 letters in 2004 to 1,068 notices last year. ASVA reports it sent out 727 C&D letters in 2005.

Enforcement Actions: According to ASVA (the local audiovisual anti-piracy organization), the overall number of public FTP servers is estimated at 100 (compared to 1,000 last year) and the number of web sites offering pay-per-download capabilities is estimated at 1,000 (compared to 10,000 last year). Private and community-driven FTP servers with strict membership rules are an increasing concern and ASVA estimates the number of such FTP servers to be 50. Downloading of infringing entertainment software products is also a serious concern for the video game industry. The following bullets illustrate several major actions against Internet piracy last year:

- In a major assault on Internet piracy in March 2005, authorities in Budapest executed successful raids on ObudaNet (a wireless ISP) and Interware (a broadband DSL ISP). Based on an anonymous e-mail tip, ASVA began an investigation in mid-February into the operator of an FTP server that allowed the download of films for a fee. The investigation revealed that the operator was the IT Manager of the ISP, ObudaNet, in Budapest. Further investigations revealed links between this FTP site and Hungary's largest DC++ Hub, the Matrix Hub (this has been the country's largest DC++ Hub since 2003). ASVA involved the Police after documenting their investigation, and on March 17, they conducted simultaneous raids on the two ISPs concerned and arrested the operator of the FTP server. The police seized the 1.2 terabyte FTP server containing 290 movies together with music and games files, and also seized hardware connected with the Matrix DC++ Hub at the Interware ISP. This Hub had a capacity of 4.5 terabytes and users needed to share a minimum of 36Gb of data in order to connect to it. The Police have been able to secure the logs on the DC++ Hub system, which they may use to initiate criminal actions against its top users. The raid on Interware resulted in a drop of over 50% in the ISP's Internet traffic, or a drop of 1.5 Gb per second (total Internet traffic in Hungary fell by about 10%).
- On June 20, 2005, ASVA's Internet group and the Miskolc Police department conducted a raid on a network selling DVD-Rs. Operating from two DVD rental shops, the pirates promoted a list of available movies (between 800 and 2,000 titles at any one time) on the Matrix DC++ Hub. Customers would then receive their selected titles through the mail or collect them from the shops. As a result of the raid, 1,100 DVD-Rs were seized and the two owners of the rental shops were arrested along with 7 others. In addition to this unlawful business, it was discovered that the two pirates had also created smaller hubs sharing between 50 and 100 GB of film content.
- Following an investigation and information supplied by ASVA, the Budapest Police also took down an FTP server called "DataMine" in July 2005. The server, with a capacity of 1 Terabyte, contained music, games, software and 350 films. "Datamine" operated as a club to which members had access for a monthly fee of US \$15 paid directly into a bank account. The Police estimated that the "club" had around 1,200 registered members. Investigations continue into the identity of the uploaders.
- On September 13, 2005, ASVA investigators and the Police seized 4 FTP servers containing 15 terabytes of audiovisual content from ISP data centers in Budapest. The raid followed five months of investigation. The system, called "Kenyer," was highly sophisticated, and the four "content servers" (three at the Interware ISP and one at the Thenet ISP) were protected by eight proxies (located in different Hungarian hosting facilities). End users only knew of the existence of the proxies and downloaded content from them. Sophisticated route balancing techniques were used to hide the

origin of the files. The system was community-driven, with approximately 1,600 active members exchanging files. New members had to be recommended by at least two existing members and a download to upload ratio of 1:5 was also required. A communication server (private instant messaging among users) containing thousands of e-mail addresses was also discovered in the operation and is currently under further investigation. Immediately following the raid, outgoing traffic at the Interwave ISP dropped by about 700 Mbps and total Internet traffic between all Hungarian ISPs dropped by nearly 20%.

Similarly, the music and recording industries report that illegal sites service CD-R burning and other sites offer files for downloading and file-sharing. Although Internet penetration in Hungary is still relatively low, it is slowly increasing, but an overwhelming percentage of it is broadband, making it easier to transfer larger files (music, movies, etc.). The Internet is used in two ways: (1) marketing and distribution support for offline piracy (ordering burned CDs on the Internet, etc.); and (2) the fast-growing significance of “real” online piracy, such as FTP servers, P2P activity (mostly on a specifically Hungarian network, called DC++), and simple uploading of files to private web pages – the latter significantly decreasing due to C&D messages constantly being sent out. Although the number of sites offering illegal music content decreased significantly, the usage of file sharing services is more and more widespread, and the situation is getting worse due to increasing broadband penetration.

Another difficult problem is the complex interrelationships between various online providers (ISPs, webspace providers, server farms, etc.). For example, it may happen that the provider assists in re-linking the infringing content after a cease and desist procedure was initiated. This is, of course, very difficult to prove, but the industries’ experiences after over 1,000 warning letters seem to suggest this. Other pirate services, such as downloading an illegal file for a fee paid via SMS (short message service, used in mobile telephone text messaging) may actually generate significant revenues for the mobile phone providers: they are entitled to over 50% of the revenue on any SMS sent (revenue split: 50-60% MSP, 10-15% SMS service company, 10-20% web hoster, 10-20% content provider). These providers (which include international companies) are of course legitimate and they pay their taxes, but if they were more cooperative in filtering illegal operations, the pirates would have more difficulty in conducting their activities. Therefore, the recording industry is eager to cooperate more with these companies. This is one of the easiest and most widely used forms of payment today: traditional postage checks are more time consuming while online banking is not very widespread and/or card holders are reluctant to provide their card number to other parties. And finally, those providing broadband access partly owe their increasing revenues to piracy: legitimate broadband services (subscription, etc.) are not common, yet many users sign up for broadband because of all the available illegal material on the Internet.

Optical Media Piracy: 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 of 14 lines in all the plants. 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. as well. 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 in 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. The obligatory SID Codes should be a minimum requirement. 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.

Domestic Problem – “Burning”: 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. CD-burning is also done by private 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).

Following a six-week long investigation by ASVA (the local motion picture anti-piracy organization), the Pest County Police raided a flea market in Erd last April (one of the largest flea markets in the Budapest area) and seized 1,600 DVD-Rs, 1,300 CD-Rs, 4 DVD burners and 5 PCs. Five pirate vendors were arrested (including one off-duty police officer). ASVA and the Pest County Police regularly control the Budapest area and before this raid, they had previously cleaned up flea markets in Gyál and Gyömrő. On July 9, 2005, ASVA and the Police raided a flea market on Verseny Street, one of the largest in Budapest. 1,400 inlays and 2,000 DVD-Rs containing a wide selection of movies, including *War of the Worlds*, were seized. And on December 4, 2005, ASVA investigators and the Budapest Police, as part of an on-going operation targeting the flea market at Verseny utca, discovered a DVD-R lab during a house search. Three PCs with 18 DVD burners, 6 printers, 12 scanners, thousands of inlays and over 5,000 burned discs were seized. This was the largest pirate lab discovered in Hungary to date.

Import Piracy Problem: Hungary remains a major destination for illegal copies of CDs, and especially, in the case of entertainment software, factory-produced CDs, DVDs, DVD-Rs and CD-Rs. The two major sources of pirated entertainment software on optical disc sold in Hungary are Ukraine and Russia. The recording industry does not report a CD-R import problem; its problem is the importation of pirated music CDs from Russia, and to a lesser degree, Ukraine, as well as from Serbia and Montenegro. The film industry reports that the importation of pirate DVDs from Russia and Ukraine has significantly decreased (the number of seized DVDs decreased by 60% in 2005 compared to 2004).

Business Software Piracy: Business Software Alliance (BSA) reports that in 2005, although optical disc piracy of software is still the cause of considerable damage, the incidents and damages caused by Internet-based piracy increased dramatically. This is due to the increased penetration of broadband. While OD piracy is geographically limited (open market, acquaintances), Internet piracy is not, and the software industry experiences a mix of both, namely when the illegal software is ordered through the Internet, and the operator of the site sends the ordered software to the customer via regular mail, who pays for the software afterwards by check. Preliminary estimated trade losses due to business software piracy in Hungary were US\$64.7 million, with a 42% piracy rate. Lowering the business software piracy levels in Hungary will contribute to the local economy.⁵

⁵ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Hungary’s piracy rate (from 44% to 34%) could add \$720 million to its economy, increase local industry revenues by more than \$480 million, and pump an additional \$145 million into Hungary’s tax treasury. The 10-point reduction could also create nearly 2,500 new IT jobs. See <http://www.bsa.org/idcstudy/pdfs/Hungary.pdf>.

Record and Music Piracy: The nature of piracy of music and sound recordings in Hungary has not changed significantly over the past year, but the number of online infringements (see Internet piracy discussion, above) is growing rapidly while the level of “traditional” physical piracy is stagnating. On-line piracy (mostly file-sharing and DC++ system in particular) is now probably the number one concern. However, traditional forms, i.e., pirate optical discs at flea markets (e.g. Petőfi hall, Csarnok, Verseny u. piac, Gyáli piac, Veresegyházi piac), in secondhand CD shops etc are still common. With respect to industrial piracy, most of these discs are produced in Ukraine and/or Russia, and they are of exceptionally good quality, with nearly faultless production and packaging. Thus it is very difficult to determine their illegal nature. Many of these are sold through secondhand CD shops, giving them a legitimate cover operation. In addition, a Hungarian government subsidization program (“*sulinet*”) aimed at providing teachers and students with computers, has given a boost, unfortunately, also to illegal uses (all computers now come preloaded with a CD/DVD burner). Preliminary recording industry estimates suggest that it may have experienced a drop as much as 18% in records sales for 2005. The downsizing at record companies is still a sad necessity, resulting in a further number of lost jobs. Specific record shops have nearly completely disappeared in the country, with retail confined more and more within the walls of hypermarkets. Even the music CD sections in these stores are shrinking rapidly, most of them only carrying a very limited selection of repertoire. The recording industry estimates the level of music piracy in Hungary in 2005 was 30% of the market, with estimated trade losses for the U.S. share placed at US\$12 million. The one bright spot has been (as mentioned above) the creation of PROART, a joint anti-piracy organization of record producers plus collecting societies of film creators, performers, and authors which is aimed at fighting both online and offline piracy. In September 2005, PROART launched a very successful six week campaign entitled “Together for Music” to promote legal ways to obtain music.

Audiovisual Piracy: In addition to the optical disc and Internet piracy problems already described, 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). ASVA reports the conduct of 23 investigations into cable piracy in 2005. For 2005, MPA’s methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Hungary (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Hungary due to audiovisual piracy (including both hard goods and internet) were \$102 million, and the estimated piracy level was 73%.

Entertainment Software Piracy: The entertainment software industry reports a strong legitimate market for its products 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. Pirated cartridge-based games continue to be exported to the country from China; piracy of these 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 still remain readily available at Petöfi 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 1,000 to 3,000 (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. Pirated products on optical media are also being imported from Ukraine. In addition to optical disc and cartridge-based video game piracy, piracy of mobile games is also occurring in Hungary; with this form of piracy, pirated entertainment software is downloaded directly from the Internet onto mobile devices or memory cards used in such devices. ESA reports an estimated piracy level of entertainment software in Hungary at 30%.

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 2005.

COPYRIGHT ENFORCEMENT IN HUNGARY

Criminal Enforcement: Many of the industries report generally good police cooperation on raids and seizures. However, the high levels of piracy in Hungary continue to be at troubling levels because deterrence is not parsed through the end of the criminal prosecution. In addition, actions have not generally been pursued against upstream targets responsible for the importation and distribution of pirated products in the market (particularly the syndicates that operate through the Petofi Stadium).

The BSA, ASVA and PROART concluded a cooperation agreement with the National Police Headquarters on October 25, 2005, in which the police undertook to provide assistance for the professional activities of these copyright organizations (for instance, inform them about the cases, and coordinate the related professional activities of the police). These groups will provide assistance to the police for its crime prevention and investigation activities (including case development, training, technical expertise). As a result, cooperation between the police and the copyright anti-piracy groups became more regularized during 2005.

- BSA reports that in 2005, Hungarian police took *ex officio* actions (85 *ex officio* actions, all against targets of smaller significance) on the basis of Article 6, sub-article 1 of the Criminal Procedure Act. This is nearly the same number of actions as in 2004. In surveying case results for 2005, BSA reports that the courts issued approximately 30 judgments in BSA cases. Most of the sentences resulted in fines (typically US\$500, the maximum fine was US\$1,000). There were also cases in which the defendant was sentenced to probation for one year, or was sentenced to jail for one year (suspended), or sentence to do public service. BSA obtained 20 criminal judgments in 2004 and 30 in 2005.
- 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 recording industry indicates that, in general, the number of cases handled by the police has not decreased (full year data is not yet available). However, only a small percentage of these cases reach court, due to the lack of commitment and/or awareness on the prosecutors' part. In terms of online actions, 1,068 cease and desist letters were issued, and all sites were removed. In terms of raids, the industry reports 327 by police and 38 by customs, resulting in the seizures

of 48,300 pirated optical discs, 107 computer hard drives and 13 servers. The authorities are taking *ex officio* actions, especially in the flea markets.

More detailed discussion of internet enforcement actions appears above, under the Internet Piracy section.

Prosecutorial Bottlenecks: The biggest bottleneck lies with prosecutors who supervise the criminal cases, and judges. Due to the lack of fundamental knowledge, the unfortunate practice of prosecutors is to dismiss most copyright cases as crimes, which seriously de-motivates the police and customs officers. The problem lies also in the general attitude within the prosecutors to accomplish a 100% success rate. This is a leftover from the Soviet era, where all cases that are taken to a court must result in a condemning verdict. It follows that the prosecution takes substantially fewer cases to the court than the police/customs is investigating. The industries are working hard to change the current practice by training prosecutors and holding judicial conferences.

Furthermore, the recording industry reports that on many occasions, the expert opinions given to the police by registered experts of intellectual property are very imperfect at best. There is a number of experts in the Organization of Intellectual Property Experts (which operates under the Hungarian Patent Office) we work together with, who are well aware of the nature of piracy and so on, but it is always up to the authorities to choose the expert they wish to get the official opinion from. The practical problem is that the authorities have developed their “favorites,” who are not necessarily fully qualified. PROART has had difficulties in trying to convince the authorities to use the qualified experts only. At the same time, the right holders are unable to give expert opinions, as they are considered to be interested parties. At best, right holders can only act as consultants in criminal cases.

Delays and Non-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. Despite generally good cooperation from the police, the audiovisual and recording industries 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 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.

In 2005, BSA reports that criminal procedures are getting faster in certain cases (typically criminal actions conducted against targets of smaller significance) in certain regions of Hungary. This is due to the fact that some police headquarters work actively in the intellectual property piracy cases and generate more cases—in cooperation with the right holders—therefore the competent courts gained wide experience in these cases, which results in fewer hearings, and consequently in a faster procedure. Nevertheless, in spite of this progress, and the average duration of the proceedings (two years in both criminal and civil procedures), the problem of the weak sanctions (fines are very low—less than US\$500, and prison sentences are regularly suspended) remained the same in 2005 as they were in 2004.

ESA member companies report that the majority of these cases continue to wind slowly through the courts. Some have been pending since 2002 against small retail outfits (so-called

“small fish”). While police cooperation, as noted above, remains good, the delay in resolving cases does not provide any degree of deterrence in the market.

Border Enforcement: The film industry reports that the importation of pirate DVDs from Russia and Ukraine has significantly decreased (the number of seized DVDs decreased by 60% in 2005 compared to 2004). Weak border enforcement is a longstanding concern, especially because of Hungary’s proximity to Ukraine and Russia, which remain the primary producers and exporters of optical disc materials in the region. ASVA reports increased *ex officio* actions at the border in 2005.

The IPED (Intellectual Property Enforcement Department within Customs) consists of one dedicated IP customs officer in each of the six customs regions. The first impression is that IPED appears willing to cooperate with the copyright industries; it has also expressed a need for additional training on IP matters. ESA member companies did provide training to 50 IPED Customs agents from several ports. As noted above, while the members of these units appear enthusiastic and cooperative, these units have only been in operation for a year. 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).

Civil Enforcement, Delays and Low Damages: The business software industry remains concerned with several civil provisions: (1) the absence of effective civil *ex parte* measures to secure evidence of suspected infringements; (2) generally slow civil proceedings (an average of two years in civil cases); and (3) a tendency by judges to compute harm (damages) to rightholders at less than the retail value of the products concerned. The Hungarian government has taken steps to try to resolve the issue of effective civil *ex parte* search orders, but more work is needed. 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.

BSA did not undertake any new civil *ex parte* raids in 2004 or 2005. During 2004, BSA did have five end-user cases ongoing in the civil courts, and it filed 20 end-user civil claims and obtained settlements in ten cases with end users. During 2005, BSA had four end user cases ongoing in the civil courts, and it filed approximately 70 civil claims, and obtained settlements in 15 cases involving end users.

In software piracy cases, the courts routinely require fact-finding examinations and reports by experts that take two to three months to conduct in civil cases. BSA reports that this expert report is typically conducted during the investigative phase of a criminal case and takes less time. BSA believes that the preparation of expert reports is necessary for its cases in both the criminal and civil context. The report can only impede the progress and outcome in the civil cases if the procedures are commenced against the suspect – rare in Hungary because there are few civil cases to date.

Training: BSA regularly provides trainings, seminars, and lectures to the authorities (police, customs, public prosecutors, judges) in Hungary, including legal discussions and technical questions involving product identification and the like. Entertainment software publishers also conducted training seminars for customs and other law enforcement agencies in 2005 which appeared to have been well received. On April 26, 2005, to coincide with WIPO’s Worldwide Intellectual Property Day, ASVA organized a cross-industry IP conference to increase official and public awareness of the seriousness of IP crime. It was attended by around 100 LEA

representatives. In August 2005, ASVA organized a national training seminar for Customs that was attended by 40 Customs Officers. Instead of organizing planned regional seminars for police, public prosecutors, and judges, ASVA visited the police departments of 15 counties during 2005. ASVA also reports that a PR awareness campaign was launched in November 2005. PROART is training the authorities (customs officers, conferences for judges and prosecutors) on how to handle these illegal activities (to increase the number of the *ex officio* actions), and also delivers them relevant information (new regulations, technical information, the new *modus operandi* of pirate activities, etc.). PROART intends to increase these efforts in 2006, including plans to visit regional police departments and prosecution offices. In 2006, PROART will repeat its successful 2005 public awareness campaign to promote legal uses of music and educate the public against illegal copying, downloading and pirating music.

COPYRIGHT LAW AND REFORM IN HUNGARY

EU Enforcement Directive: The Hungarian Parliament approved a new law (Act CLXV of 2005) on December 19, 2005 to implement the EU Enforcement Directive (2004/48/EC). This package amended the Civil Procedure Code, the Copyright Law and other relevant legal acts, to implement the EU Enforcement Directive. It contains new legal institutions and terms, such as the presumption of authorship, measures for preserving evidence (importantly, *ex parte* actions before commencement of an action), the term of commercial scale, right of information, provisional measures, etc.). The law provides the right holders and the courts with more tools during the civil enforcement cases; therefore civil enforcement presumably will be more efficient. Some elements entered into effect on January 1, 2006, and the remaining provisions will enter into force on April 15, 2006. It is still early to evaluate how these measures will be implemented in practice, but the rights holders hope that these new provisions will improve enforcement.

EU Resale Right Act: The Hungarian Parliament also approved the Resale Right Amendment (Act CVIII of 2005), effective January 1, 2006, to implement the resale right for the benefit of the author of an original work of art.

Copyright Law: Hungary amended its copyright law in 1999 and 2003 in order to comply with international norms and accede 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. As mentioned above, further amendments to the Copyright Law were accomplished in December 2005 to implement the Enforcement Directive.

Optical Media Regulations: 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. 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

2006 SPECIAL 301 REPORT

ITALY

EXECUTIVE SUMMARY

Special 301 Recommendation: Italy should remain on the Special 301 Watch List.

Actions to be Taken by the Italian Government in 2006:

- Continue to implement the Anti-Piracy Law and other recent enforcement improvements with increased raids, prosecutions, and in particular the imposition of deterrent penalties;
- Effectively enforce the 2005 anti-P2P-related provisions to curb infringing uses and provide criminal authorities with appropriate resources and training;
- Invigorate a nationwide anti-piracy campaign which focuses on piracy by organized criminal syndicates, and covers all types of piracy (including Internet piracy and unauthorized commercial photocopying);
- Eliminate the stickering requirement on software;
- Institute judicial reform to speed up criminal and civil proceedings;
- Correct deficiencies in implementing amendments to the EU E-Commerce Directive, and ensure participation of the copyright sectors in those discussions;
- Introduce anti-camcording legislation.

ITALY Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures²	161.0	22%	160.0	15%	140.0	20%	140.0	20%	140.0	20%
Records & Music	40.0	20%	45.0	23%	42.0	22%	42.0	23%	40.0	23%
Business Software³	760.8	48%	779.0	50%	642.0	49%	363.4	47%	338.8	45%
Entertainment Software⁴	639.2	30%	NA	34%	168.5	47%	215.4	55%	NA	74%
Books	20.0	NA	23.0	NA	23.0	NA	23.0	NA	23.5	NA
TOTALS	1621.0		1007.0		1015.5		783.8		542.3	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Italy, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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

COPYRIGHT PIRACY IN ITALY⁵

In 2005, Italy continued to have one of the highest overall piracy rates in Western Europe. In recent years, the nature of piracy has changed in Italy: organized criminal syndicates are assuming more importance; CD-R and DVD-R burning are a major problem; manufacturing and distribution are migrating to smaller, harder-to-detect forms; and Internet piracy is significantly increasing. Other forms of piracy, such as commercial photocopying of books and journals, have stayed the same, with devastating effects on the publishing industry.

Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000, amendments implementing the EU Copyright Directive in 2003 and the 2005 anti-P2P (peer-to-peer) provisions originally introduced by the 2004 Urbani Decree have led to improvements in enforcement in some copyright sectors. However, incorporating meaningful deterrence into the Italian enforcement system remains the key issue for the copyright industries. Additionally, while some industries report some improvement in the civil courts, judges are sometimes still reluctant to take on software end-user piracy cases. It is hoped that the tougher penalties in the Anti-Piracy Law amendments, if regularly imposed, will eventually result in a drop in piracy rates. Now that the 2005 anti-P2P provisions have been passed, it is essential that Italy undertakes aggressive enforcement against online piracy.

Piracy levels remain high across all industry sectors, with Internet piracy growing and the influence of organized crime continuing.

Organized crime: Organized criminal groups (mainly Camorra) dominate the optical disc piracy market, from production to distribution, using illegal immigrant networks to sell their products, 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 component parts) continue to be imported from Asia, and are also distributed through networks run by organized criminal syndicates. Due to pressure from increased enforcement, the mostly immigrant street vendors have increasingly pulled pirate product from plain view and now provide it on order. The organized criminal syndicates confine their pirate production to a large number of small private duplication facilities in which families (generally located in poorer areas of the country) manufacture limited quantities of pirate product (mostly DVD-Rs). The products are then collected by special “postmen” and are distributed to illegal immigrants, who in turn sell the products at street and local markets. This strategy enables organized criminal groups to avoid large seizures of pirate material and to obtain the help of a large, impoverished population economically dependent on piracy. According to Italian anti-Mafia prosecutors, there is evidence of the Napoli-based Camorra’s growing interest in the trade in pirated goods and there are signs of their increased connections with Chinese criminal gangs.

Internet piracy in general: In 2005, 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. Internet piracy is growing as a result of increased broadband penetration (6 million connections in 2005). Additional resources must be given to the criminal authorities to combat online infringements.

⁵ For more details on Italy’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. For a full listing of prior IIPA Special 301 filings on Italy, visit the country page at <http://www.iipa.com/countryreports.html> and scroll to Italy.

While criminal actions against Internet piracy are moving forward, the same cannot be said on the civil side. Right holders considering legal action against Internet pirates in Italy are facing challenges in identifying infringers due to restrictions imposed by the Privacy Code that came into effect on January 1, 2004. Right holders have not been 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 law concerning "Interventions for the Administration of Justice" (Law 45/04 of February 26, 2004). There, Article 3 modified Article 132 of the Legislative Decree No. 196 of 2003, limiting the obligation of the communication companies to keep the data of the telephone traffic for 24 months. These provisions have been changed with the approval of the Law Decree 144 of July 27, 2005 (which became Law No. 155 of July 31, 2005) that provides, in Article 6, for the compulsory retention of telecommunication data, up to December 31, 2007).

Audiovisual piracy: The Motion Picture Association reports no major improvements in the overall piracy situation in Italy during 2005. The problem of Internet downloads and pirate DVD-Rs continues. MPA reports that the pirate DVD problem is predominantly a local burning problem, although there has been one operation concerning pirate replication of DVDs. (On September 22, the Guardia di Finanza carried out an operation at a facility in Avellino, with the collaboration of FPM and FAPAV. The GdF officers seized over 270,000 pirate discs and three DVD lines. The illegal activities emerged through the examination by FAPAV and FPM of license documents and optical disc production contracts.) Reduced seizures seem to indicate that off-line piracy has at least stabilized, but the overall rate, inclusive of Internet piracy, appears to be growing. In addition, there have been increasing numbers of camcording incidents in Italian theaters during 2005. MPA also reports that unauthorized public performance, satellite television piracy and broadcast television piracy by local private television stations continued in 2005. However, these concerns decreased somewhat in 2005 as a result of local enforcement efforts or of technological improvements. The creation of regional communication committees within the Authority for Guaranties in Communication (AGC) has helped in combating broadcast piracy. 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. Satellite signal theft and smart card piracy remains at low levels, due to the new Seca 2[®] encryption system. For 2005, MPA's methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Italy (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Italy due to audiovisual piracy (including both hard goods and internet) were \$161 million, and the estimated piracy level was 22%.

Business software piracy: The Business Software Alliance (BSA) reports there was no major change in the nature of piracy their companied faced in Italy in 2005. 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. In addition, widespread distribution of pirated CD-Rs and DVD-Rs, optical disc burning (mostly in small laboratories) and Internet piracy continue. The use of the Internet to circulate illegal or counterfeit software product is becoming more widespread. The sale of counterfeit software products by street vendors continues, and there is a connection to criminal organizations with this distribution. Preliminary estimated losses in Italy due to

business software piracy were \$760.8 million, with a 48% piracy level, in 2005. Lowering the business software piracy rates in Italy could significantly improve the local economy.⁶

Entertainment software: Entertainment software publishers face piracy at Internet cafés, with few of the 500 establishments being licensed by the video game companies. Pirated video game products also continue to be widely available at flea market-type venues. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Italian marketplace was \$639.2 million in 2005, with a 30% piracy rate. ESA member company Nintendo of America (NOA) reports that its enforcement experience in Italy for 2005 was mixed. While the company obtained good court judgments with infringers receiving tougher penalties and more jail time, police seizures were nonetheless down. The company also reports that for cartridge-based entertainment software products, the market is relatively clean.

Music and record piracy: The recording industry reports that CD-R burning is still the main problem and the most common type of music piracy in the country. Large illegal burning centers are active all over Italy (especially in the South) and consolidated street vendor networks are in charge for the distribution of the pirate products. Italy has one of the highest piracy rates in Western Europe. Approximately 50% of the national music market is local repertoire and the rest is international repertoire. In 2005 there was a 28% increase in the number of seized pirated CD-Rs. Furthermore, Internet piracy of music is a dramatically growing problem. Recent surveys showed that almost 5 million people are downloading music from the most famous P2P platforms. The estimated music piracy level in Italy for 2005 was 20%, a slight decline from the prior year. Estimated 2005 losses due to record and music piracy in Italy amounted to \$40 million.

Unauthorized photocopying: Wide-scale photocopying continued to be a serious problem in Italy during 2005. 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; the law 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 arrangements⁷ were made for both educational institutions and copy shops, and the first payments have been made to SIAE under these arrangements. SIAE is, in turn, facilitating remuneration to authors and publishers under this less-than-optimal agreement. However, users are refusing to enter into new agreements under the scheme, claiming lack of government funding, so what was a promising, if inadequate, solution, is coming to a grinding halt. Furthermore, copying beyond that which is compensable in the law persists at high levels causing, according to the Italian publishers association AIE, tens of 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. Estimated losses due to book piracy in Italy dropped slightly to \$20 million in 2005.

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: A 10-point drop in Italy's piracy rate (from 50% to 40%) could create nearly 15,000 jobs and pump \$8.5 billion into the economy. It could also increase local industry revenues by more than \$6.7 billion and generate \$2.4 billion in additional tax revenues for the Italian government. See <http://www.bsa.org/idcstudy/pdfs/Italy.pdf>.

⁷ For more details on these financial arrangements in the publishing industry, see IIPA's 2003 Special 301 report on Italy, page 503, available at <http://www.iipa.com/rbc/2003/2003SPEC301ITALY.pdf>.

COPYRIGHT ENFORCEMENT IN ITALY

Though piracy levels continue to remain high in Italy, the Anti-Piracy Law continues to have a positive impact on the attitude of law enforcement toward piracy. The AP Law raised maximum fines from €1,549.30 (US\$1,844.90) to €15,493.17 (US\$18,450). 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. In 2005, more raids were conducted, more pirate product was seized and more prosecutions were 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. Judges and magistrates must impose deterrent-level fines and significant jail time for major organized crime figures involved in copyright piracy.

Criminal enforcement: The recording, audiovisual and business software industries all report continued good cooperation with the Italian police forces (including the Guardia di Finanza and Polizia Postale) in 2005.

The business software industry continues to report positive developments on the criminal enforcement front in 2005. BSA directly supported, with its technical experts, more than 170 raids carried out by the GdF, and 75% of these actions had positive results. The GdF appears to be much more willing to take *ex officio* actions in software cases. BSA reports that a very positive development in July 2005 when a court sentenced the owner of a publishing company using illegal software to imprisonment and a fine. This is one of the first decisions involving a criminal end-user case.

The recording industry, as represented by its local anti-piracy organization FIM, reports their coordination with Italian enforcement agencies continued on a positive basis during 2005. The police continue to take *ex officio* actions. In 2005, the industry reports the following: 1.7 million CD-Rs seized, almost 1,500 CD-burners seized, 504 people arrested, and 1,085 people prosecuted. The largest seizure was of 80,000 CD-RS and the largest number of CD-burners seized in one raid was 179. 2005 saw also a big increase in the Internet anti-piracy enforcement; 123 file sharers have been prosecuted for copyright law infringement and the first criminal sentence has been delivered to a P2P user (6 months of jail – suspended – and €3,660 fine).

The motion picture industry anti-piracy group, FAPAV, reports that 351 raids were conducted by law enforcement agencies in 2005, resulting in the seizures of 3,085,680 discs (550,712 DVD-Rs, 132,956 DVDs and 2,402,012 blank DVD-Rs). FAPAV was involved in 78 raids and assisted law enforcement agencies in 28 of them. Concerning court actions, FAPAV reports that in the 12 criminal cases in which it assisted the prosecutor and that ended in 2005, 5 cases resulted in a prison term (with an average of 11 months' imprisonment). Fines of up to US\$1,000 were also imposed in 7 cases. As was the case in 2004, police enforcement of audiovisual piracy in 2005 continued at a similar pace, but the problem remained that many Italian judges are 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.

The motion picture industry also reports some progress on the Internet piracy front. In June 2005, the Postal Police of Pescara dismantled a private and complex pirate network named

“Cucciolandia” that was exchanging copyrighted content throughout the country. The operation involved 54 individuals who were operating 9 different websites over 5 regions in Italy. The Postal Police seized 5,000 pirate discs, 74 computers and 36 burners (one server seized in Rome contained 90 GB of recent theatrical releases). The individuals were charged not only with copyright violations but also with conspiracy offenses. There is also an ongoing investigation against a pirate forum named “Lordylandia” that started at the end of 2005. Lordylandia is a new pirate forum (www.lordylandia.org) that was opened in September/October 2005 and that started to be advertised in some hacker forums as the first to provide a new kind of pirate “service” linking to pirate movies and television series. The case was reported to the Postal Police of Milan, and has recently been submitted to the Public Prosecutor, who appears to be willing to proceed against the owner of the domain, seizing the website and searching the premises of the person to which the website belongs.

Roadblocks with the prosecutors and judiciary continue: There is a variety of roadblocks in the Italian criminal enforcement system, including perhaps the most pervasive problem, which is the unfortunate cultural fact that many judges, and the public, believe that piracy is not a serious offense and need not carry deterrent penalties. First, while police enforcement of the law has been significantly improved at the raiding level, it can still take months between a raid and the filing of charges to commence a criminal case in court. Second, once the case is filed, the cases often take two to three years or more before final judgment, significantly reducing the deterrent value of increased raiding activity undertaken by the police. Third, the industries have seen that, especially in cases involving immigrant street vendors where the “state of necessity” concept has been invoked, some Italian judges have shown a great deal of indulgence. Fourth, the lack of prosecutorial discretion to decide whom to prosecute and the inability of Italian prosecutors to offer small offenders immunity or lower sentences in exchange for testimony against major pirates also hamper IPR enforcement in Italy (although it appears that article 171-nonies of the AP Law enables sentences to be lowered. However, FAPAV reports that it has only been used once). Getting the authorities and judges, in all but the most serious organized crime cases, to take effective and deterrent action remains an ongoing challenge. Fifth, another historical problem has been that 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. In late 2005, a law was passed (over the opposition of the copyright industries) which shortened the statute of limitations for criminal copyright cases, and this could result in the dismissal of, for example, 75% percent of all pending music piracy cases (see discussion in Law section, below).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2005 ITALY				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF RAIDS CONDUCTED	28		505	
NUMBER OF VCDs SEIZED	2000			
NUMBER OF DVDs SEIZED	132,956			
NUMBER OF CD-Rs AND DVD-Rs SEIZED	550,712		1785000	
NUMBER OF INVESTIGATIONS	126		505	
NUMBER OF VCD LAB/FACTORY RAIDS	4			
NUMBER OF CASES COMMENCED	8			
NUMBER OF INDICTMENTS	11			
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	14			
ACQUITTALS AND DISMISSALS	-			
NUMBER OF CASES PENDING	8			
NUMBER OF FACTORY CASES PENDING	-			
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	12		51	
SUSPENDED PRISON TERMS	6		15	
MAXIMUM 6 MONTHS	5		8	

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2005 ITALY				
OVER 6 MONTHS	1		4	
OVER 1 YEAR	-		3	
TOTAL SUSPENDED PRISON TERMS	6		15	
PRISON TERMS SERVED (NOT SUSPENDED)	6		36	
MAXIMUM 6 MONTHS	4		21	
OVER 6 MONTHS	2		10	
OVER 1 YEAR	-		5	
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	5		36	
NUMBER OF CASES RESULTING IN CRIMINAL FINES	12		51	
UP TO \$1,000	7		26	
\$1,000 TO \$5,000	5		17	
OVER \$5,000	-		8	
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	-		113000	
<i>*These data refer only to the raids where BSA provided technical support</i>				

Civil enforcement needs improvement. The situation regarding civil litigation did not improve noticeably in 2005. The Civil Procedure Code amendments in 2002 established strict time limits on civil litigation. It was hoped that these limits would improve the ability of right holders to conclude cases in civil court. However, BSA reports that in 2005, 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, difficult. In addition, 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.

Civil case statistics from the business software and motion picture industries are shown below.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2005 ITALY			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
NUMBER OF CIVIL RAIDS CONDUCTED	0		
POST-SEARCH ACTION	0		
CASES PENDING	5		
CASES DROPPED	1		
CASES SETTLED OR ADJUDICATED	4		
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)	n.a.		
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	122,720		

Specialized IPR courts: In 2003, IIPA 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 civil courts under the auspices of the Justice Ministry. While IIPA then 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.

Trainings: The local motion picture (FAPAV), recording (FPM) and business software industries together offer approximately 10-12 training courses to the Italian police forces (Police, Guardia di Finanza, Customs, etc.) all across the country (through “road shows”). An average of 50-60 police forces officers are trained in each seminar. In addition, the industries also assist the U.S. Embassy in the organization of a yearly IPR off-site workshop for judges, prosecutors and law enforcement officials. FAPAV, FPM, BSA, and the Ministry of Education, University and Research together launched a Sensitization Campaign (Scuola Project) in Italian primary schools in December 2004. During 2005, FAPAV has also distributed 5,000 copies of its updated legal guide listing and describing important legal decisions on audiovisual protection from 1998 to date (400 pages) to magistrates and heads of police forces.

COPYRIGHT LAW AND RELATED DEVELOPMENTS IN ITALY

The EU Copyright Directive: Legislative Decree of 9 April 2003 n. 68, which entered into force on April 29, 2003, implemented the EU Copyright Directive and, for the most part, implemented it correctly. In late 2004, there was a lower court case from Bolzano, Italy, finding mod chips (and modified videogame consoles) to be legal.⁸ That decision has cast doubt on Italy’s implementation of the prohibition against trafficking in circumvention devices required by this Directive and the WIPO Treaties.

There was an effort to undermine the current Italian Copyright Act’s provisions implementing this Directive. During the fall of 2005, the president of the “Advisory Copyright Committee” (*Comitato Consultivo Permanente per il Diritto d’autore*) presented a draft bill that was supposedly aimed to “update” and conform the Italian Copyright Act to the EU Directives and bring it in line with technological developments. Following pressure from right holders and from the Prime Minister’s Office, the draft was shelved due to major controversy over the content of the proposal and on grounds of competency. This bill reportedly included a variety of objectionable provisions, such as extending the private copying levy to peer-to-peer uses, mandating that certain kinds of software are free, and eliminating *ex officio* authority. It appears that most of the proposal was in conflict with relevant international treaties, including WTO TRIPS Agreement, the WIPO Internet treaties, and certain EU Directives. A paper was prepared by local right holder groups highlighting industry concerns, in particular that the work of sub-committees specifically appointed to review different sections of the Copyright Law had been disregarded, stakeholders had not been consulted and changes were being proposed with economic and financial consequences falling outside the competence and responsibility of the Committee.

The EU E-Commerce Directive: In contrast to its implementation of the Copyright Directive, however, Italy’s implementation of the E-Commerce Directive was not as well done, 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. A proper notice and takedown procedure remains to be developed in Italy.

Internet Piracy and the Urbani Law Decree (2004) as Amended (2005): In 2004, legislation criminalizing uploading on the Internet was adopted in the Urbani Law Decree. The Urbani Law Decree was first issued on March 22, 2004; it amended the Italian Copyright Act so as to criminalize certain online infringements of the copyright in cinematographic works, and specifically when those

⁸ An update on this case was not received before publication of IIPA’s February 2006 Special 301 submission.

are committed by use of file-trading networks. During subsequent parliamentary proceedings, the law was extended in scope to cover all copyright works and was confirmed by parliament on May 22, 2004. However, during this process the Italian government was compelled by opponents of the law to undertake to introduce changes to prevent it from applying to domestic peer-to-peer users. This law also contained a very objectionable provision for the software industry which imposed a “virtual sticker” obligation, which would pose particular problems for business and entertainment software.

Aspects of the Urbani Law Decree were opposed by the Internet service provider community, which gave rise to efforts to water it down. Hearings on amending the Decree (then known as the so-called Asciutti Bill) were held in fall 2004 before the Italian Senate. On March 23, 2005, the Italian parliament finally approved a compromise on the anti-P2P provisions originally introduced by the Urbani Law-Decree. The law was published on April 1, 2005 and entered into force on April 2, 2005. Several content industries worked to preserve a criminal penalty for uploaders. Article 171 of the Copyright Act is now amended to create criminal liability for any act of making a work available to the public on the Internet. Liability is imposed on anyone who without authorization “makes a copyright work or part thereof available to the public by entering it into a system of telematic networks [i.e., the Internet], through connections of any kind”. The maximum penalty is a fine of €2,065. If the infringer pays a sum equal to half the maximum prior to his conviction, together with the expenses of the proceedings, the offense is expunged. Although this is a very mild penalization, it should be noted that it applies whether or not the infringement is committed for reasons of gain. It thus preserves the criminal nature of the violation, allowing for investigation by the police. Commercial Internet pirates are dealt with more harshly. Under Article 171ter, anyone who for financial benefit communicates a work or part thereof to the public via a “telematic network” is liable to a fine of some €15,000 and a sentence of 4 years’ imprisonment. This amendment raises the threshold of liability from infringement “for gain” to one of “financial benefit”, excluding the idea of the mere exchange of files as a sufficient basis for heavy sanctions.

This represents a retreat from the version of the law passed in 2004, though it does offer a substantial criminal remedy against financially-motivated online infringers. This 2005 amendment to the Urbani law also resulted, fortunately, in the removal of the troublesome provisions to the software industries which required a kind of “virtual sticker” on all online websites. Uncertainty remains as to how the Italian government’s criminal enforcement of this law will work.

Furthermore, an initiative sponsored by an inter-ministerial commission aimed at promoting cooperation among the various stakeholders (e.g., copyright owners, telecommunication companies, internet service providers, etc.) has stalled. This so-called Vigevano Commission, after its former Chairman, Paolo Vigevano) was established by the Ministry for Innovation and Technology in cooperation with the Ministry of Culture and Ministry of Communications in July 2004 to “draw up proposals for the development of offer and consumption of digital content, while guaranteeing the protection of intellectual property.” This commission fostered the negotiations between right holders and Internet Service Providers and telecommunications companies which led to a final compromise on the Urbani Law Decree, and also developed a “pact” between Government and Industry operators calling for the development of Codes of Conduct. The Pact was officially signed during the 2005 Italian Music “Sanremo” Festival, thus its consecration as the “Sanremo Pact.” Unfortunately, this Pact, announced with some fanfare when it was signed as a pact to address the challenges of the internet by all concerned parties, has had no real concrete follow-up so far. In 2006, this Commission should develop Codes of Conduct, as per the commitment made in the San Remo Pact. Furthermore, cooperation with the ISPs is poor; the Commission needs to follow up and focus on the cooperation between IP industries and ISPs in order to bring about effective measures against infringing uses of p2p networks as a priority.

Eliminate the SIAE Sticker Requirement for Software: This problem remains a major concern for the software industries. Specifically, Article 181*bis* of Italy's Anti-Piracy 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. Notwithstanding this 2002 understanding with the Italian Government, this stickering obligation is still in force and it does not appear that it will be eliminated anytime in the near future. In 2004, the Urbani Law Decree actually made this situation worse; fortunately, however, the 2005 amendments eliminated one of the problems, the one requiring a "virtual sticker" (see discussion above). The fact remains that 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.

Ex Cirelli Law and Shortening the Statute of Limitations: Following the decriminalization policy of the current government and the desire to relieve the inefficiencies of the Italian judicial system (including a huge backlog of cases), a Bill (known as Ex Cirielli) was developed to reduce the duration of certain proceedings involving first offenders. All the copyright industries were concerned that its adoption could have the detrimental effect of potentially causing the dismissal of a large number of criminal copyright cases in Italy. The recording and movie industries, who have a large number of pending cases, urged Italian legislators to reconsider the approach in this Bill in order to prevent cases being dismissed en masse before they could be completed. Despite these concerns, the Italian government adopted this law in November 2005. The law continues to be very controversial, and it remains to be seen as to how the law will be interpreted and applied.

Administrative Fines in New Consumer Law: Although not directed to deal specifically with copyright violations, a new law was adopted in the summer of 2005 which introduced new administrative fines for consumers of counterfeit and pirate goods. Law 80/2005 is aimed at protecting the products "made in Italy." According to Article 1, paragraph 7, of this law, anyone who purchases or accepts counterfeit or pirate products faces an administrative fine of up to 10,000.00 Euros (€ 3,333 if paid within 60 days). Some local administrations already apply this bill in order to fight the sales of pirate CDs, DVDs and trademark goods. Rome, Florence, and Venice have already implemented the provisions and sanctioned many consumers. More needs to be done in order to increase the adoption of this strategy by the more reluctant local administrations like Milan and Naples.

EU Enforcement Directive: The EU adopted the Directive for the Enforcement of Intellectual Property Rights in April 2004, and Member States have two years to implement the text into national law. The Directive provides a number of improvements in pursuing civil actions against piracy, in particular in regard to obtaining information about infringers and injunctions against

intermediaries. Effective implementation should facilitate enforcement efforts, particularly in the digital environment. Implementation of this Enforcement Directive was planned for 2005 but the process was delayed and is expected to be completed before the April elections. The local copyright industries are closely monitoring the process.

Need to Introduce Anti-Camcording Legislation: The illicit recording of movies at theaters (camcording) is a major source for pirate motion pictures available on the Internet, as well as on street corners and at flea markets. There have been 14 occurrences of illegal camcording (or sound recording) traced to Italy during 2005. In order to facilitate prosecution of illegal camcording, anti-camcording legislation should be adopted in Italy to require jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film's ability to recoup the investment made in its production. Therefore, the result is exponentially greater economic harm than what is traditionally experienced as a result of a single act of "theft."

MARKET ACCESS ISSUES

Broadcast Quota: Law No. 122/98 and the "Gasparri Law" of May 2004 require that over 50% of monthly transmission time be reserved, "in any case," for EU works, including prime-time programming. The method of calculating programming that qualifies as EU works excludes newscasts, sports, game shows, advertising, teletext services, teleshopping. The law ignores the "where practicable" language of the EU Broadcast Directive and includes references to prime-time programming and talk shows that are not included in the EU Directive. In addition, this 50% quota must be applied to the various categories of EU works, such as children's animation product, and at least 50% of these EU works must have been produced within the last five years. Law 122/98 requires broadcasters to allot programming time to independent EU producers as follows: (1) private national broadcasters are required to reserve at least 10% of the program quota to works made by independent EU producers and (2) the public service broadcaster, RAI, must reserve at least 20% of the program quota to works made by independent EU producers. Furthermore, following a Regulation of the Communications Authority (Resolution no. 9/99), the 50% quota also must be respected during the specific time band with the largest audience (between 6:30 p.m. and 10:30 p.m.). Exemptions to this rule are only permitted if the Authority is notified in advance by the broadcaster. Italy's broadcast quotas discourage investment, and subsequent growth, in the Italian television industry. Their programming quotas go well beyond those of the 1989 EU Broadcast Directive and eliminate language that provides right holders the flexibility to negotiate content quotas.

Production Quota: Effective January 1, 1999, Law No. 122/98 – as amended by the Gasparri Law of May 2004 — stipulates that the public service broadcaster, RAI, must invest at least 15% of its total revenues in the production of EU works. Private and pay television broadcasters, under Italian jurisdiction, must invest at least 10% of net advertising revenues into the production and acquisition of EU works. This quota is an arbitrary investment requirement that limits the ability of Italian broadcasters to purchase MPA member company television programming.

Taxation: Pursuant to the 2004 revision of the Italian film subsidy law, legislative decree #28/2004, exhibitors in Italy continue to enjoy a number of fiscal benefits linked to the promotion of European Union (EU) and national film productions, including low interest rate loans or subsidies on interest. To enjoy such benefits, implementation decree of June 10, 2004 provides for a 20% EU quota for single-screen theatres and 30% for multi-screen theaters. MPA continues to protest the discriminatory and protectionist nature of these incentive schemes and advocates their revocation.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

KAZAKHSTAN

IIPA recommends that Kazakhstan remain on the Watch List in 2006 for failing to provide enforcement adequate to address its IPR piracy problems. IIPA further recommends that Kazakhstan lose its eligibility to participate in the General System of Preferences (GSP) program because Kazakhstan is not providing the statutorily mandated “adequate and effective” copyright protection and enforcement.

In May 2005, the U.S. Trade Representative noted that Kazakhstan still had “additional steps” to undertake in order to meet its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). In particular, the U.S. Government noted several legal deficiencies and an overall enforcement regime that is weak, particularly in criminal enforcement. The USTR noted, for example, that “there are few convictions, and those who are convicted receive only minimal penalties.” Poor enforcement has been the result, in part, of a high burden of proof in criminal cases combined with a lack of adequate resources and attention to enforcement. Kazakhstan moved to address the statutory deficiency by adopting further amendments to its IPR enforcement laws in November 2005. This was a positive step. IIPA encourages Kazakhstan to properly implement this law, make any other necessary legal reforms (noted below) and to turn its attention to on-the-ground enforcement efforts, especially against organized crime syndicates. Development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. In fact, the software and recording industries, as just two examples, consider Kazakhstan the most promising marketplace of the C.I.S. region, behind only Russia and Ukraine.

The Copyright Law was amended in 1996, in July 2004, and again in 2005. One long-standing legal deficiency which was addressed (in the 2004 amendments) was the incorporation of explicit protection for pre-existing foreign works and sound recordings. Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001), providing a point of attachment for foreign sound recordings; and, the two WIPO digital treaties, the WCT and WPPT, effective November 12, 2004.

Legal Reform Deficiencies

Kazakhstan revised the Copyright Law of 1996 with amendments in 2004 (effective July 9, 2004). 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. The 2004 provision provides a flat 50-year window, so pre-1954 works and sound recordings remain in the public domain. Further, the ten-year delay in adopting this provision means that a lot of (now illegal) back-catalog material remains in the marketplace, which creates further problems for effective enforcement. The 2004 amendments package also updated laws to facilitate electronic commerce and Internet technology, and at least partially, implemented the WIPO digital treaties as well as E.U. directives.

A further package of amendments, meant in particular to address IPR enforcement, was signed into law on November 22, 2005 (in force November 26, 2005). Included in this package were amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, the

Administrative Code, and the Copyright Law of 1996. Perhaps the key amendment in the package was the change to Article 184 of the Criminal Code, which repealed the undefined “huge damage” threshold for criminal cases and replaced it with a threshold based on the harm done or value of the works or recordings exceeding 100 times the government set monthly wage (or for more serious crimes, 500 times that amount). Further, the law repealed the requirement that there be proof of “financial gain” for criminal charges to rest—another improvement. In addition, in 2005, changes were made in commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that it be sold in retail stores. IIPA welcomes this change as well.

Several key legal reforms — notably in enforcement — remain. The Government of Kazakhstan needs to adopt the following changes:

- 1) Adoption in the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 2) Adoption in the Customs Code of *ex officio* authority to permit customs officials to seize illegal material and to commence their own investigations and criminal cases.
- 3) Adoption of provisions in the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods upon a court order.
- 4) Adoption of amendments to the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases. The Administrative Code (Article 129) was amended in 2005 to lower the threshold for bringing cases. However, only the Ministry of Justice (Copyright Office) and not the police can bring charges for such offenses. IIPA recommends that the existing police *ex officio* authority be broadened to include administrative violations as well.
- 5) Amendments to the Copyright Law to fully implement the WIPO digital treaties (WCT and WPPT).
- 6) Adoption of a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.

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. 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 and to consult with local copyright industry representatives, to adopt the proper enforcement revisions in 2006.

Effective in 2003, the Customs Code was completely revised. As noted, it did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement. IIPA hopes that this will be corrected in 2006. In addition, the 2003 amendments adopted a complicated registration system for copyright right holders seeking enforcement, which further weaken, not strengthen, border measures. IIPA recommends that this registration system be repealed.

Enforcement

The Government of Kazakhstan has made strides to improve its enforcement regime, both with its legislative reforms (noted above) and with stepped up police activity. However, the enforcement reports issued by the Government of Kazakhstan’s Economic Crimes agency each year indicate a relatively small number (for the size of the market) of police raids and seizures, and most troubling, almost no criminal convictions for IPR offenses. In fact, IIPA knows of no

criminal convictions with jail sentences imposed in 2005 in the music, film, or entertainment software industries. Instead, we understand that all the copyright criminal cases resulted in either no sentence or a suspended sentence.

The Business Software Alliance (BSA) reports some improvements in enforcement in Kazakhstan in 2005. The BSA reports that “open and notorious” piracy has been reduced because those who sell software or computer equipment and devices now generally understand that there are criminal, administrative, and civil penalties for such activities. For example, where unlicensed discs of BSA-member products were easily found in the marketplace in 2003 and 2004, in 2005, it was more difficult to find such discs. In addition, the sale of hard-disc loaded computers with unlicensed software has been reduced. Generally, companies that sell computers sell them without any loaded software, or only with licensed software. There has also been some progress made against end-user companies, in part because of warning letters sent by BSA, and some raiding activity in 2005 as well.

Enforcement is undertaken by a variety of agencies, including the Copyright Agency within the Ministry of Culture (16 departments) and various enforcement agencies. These agencies have assisted with some raids, including against software pirates. A special IPR Department was created a few years ago within the Finance Police (with national authority). Problems of interpreting the law, in particular the threshold for criminal and administrative action have hampered enforcement. For a marketplace and population the size of Kazakhstan, the statistics reflect the need to do much more to deter piracy and claim effective criminal enforcement. In 2003 and 2004, the copyright industries signed memoranda of understanding with the Government of Kazakhstan; there were also training programs conducted in 16 regions of the country throughout 2005 (and 2004). The software (BSA) and recording (IFPI) industries participated in these and other training programs in 2005. In short, the government pledged to the copyright industries to undertake more and better enforcement. IIPA encourages the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The software industry reported some actions undertaken against hard-disc loaders. In Almaty, in the spring of 2005, officers of the Finance Police assisted with several cases. In one instance, an individual was caught selling unlicensed pre-installed software and a criminal case commenced (under Article 184.2; Article 223.2 of the Criminal Code). The court assessed damages caused by this reseller at \$5,190. He was given a 2-year suspended sentence and barred from continuing this activity (although his property was not confiscated). In other similar instances, however, cases were not taken to court. For example, test purchases were made, in other instances confirming the sale of computers preloaded with unlicensed software and two criminal cases were initiated against companies. In one instance, a criminal case was dismissed (per Article 184) because the “significant harm” threshold was not met and there was no profit motive proven. This was an incorrect result even under the old law. In another matter, a criminal case against the director of Unicomp LLP was dropped because of the “threshold” problem (and a miscalculation of the harm done). Because of the delays in concluding (albeit unsuccessfully) that case, it was too late to bring an administrative action. Overall, BSA reported that though there were some cases brought to court, the majority were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, and an overall ineffective judicial system.

There is no consistency in the sanctions that do result for the few criminal cases that go to trial. As noted, in a software case in 2005, a reseller got a 2-year suspended sentence for piracy that resulted in damages worth about \$5,190. In a music piracy case last year, where

damages were estimated at \$83,000 and which was treated under the “serious crime” proceedings, the defendant also received a 2-year suspended sentence.

BSA reported administrative cases undertaken against two companies (Middle Ural LLP and Lainer LLP) for installed software. Administrative sanctions and a settled civil suit resulted. There have been three other settlements against pirates where sanctions included public apologies. The total enforcement statistics reported in 2005 by the software industry included: 32 raids; 26 criminal cases initiated; 11 cases resolved; 10 administrative cases initiated with 8 resolutions of administrative violations; and, 3 civil suits initiated in 2005.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$158 million in 2004, and \$185.8 million in the first 11 months of 2005 (a 39.6% increase from 2004). To help spur the necessary enforcement improvements, IIPA recommends the withdrawal of GSP benefits. IIPA testified on this point at the latest U.S. government hearing on outstanding GSP petitions in November 2005.

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. In the last year (2004) in which IIPA was presented with enforcement statistics by the Government of Kazakhstan, only about 140,000 copies of illegal copyrighted material were seized (during the first 11 months of 2004).

There are two known optical disc production facilities reported in Kazakhstan at present. One plant has a single operating line, capable of producing 8.1 million discs per year; the second plant opened in July 2005. Both plants now have IFPI-issued SID codes (August 2002; August 2005) and have provided exemplars (examples) of discs manufactured at the plants to be used for forensics evidence. At least to date, there is no forensic evidence of illegal production at either optical disc plant. Still, IIPA recommends the adoption of optical disc regulations to properly monitor the production and distribution of material and equipment at these and any future plants, including tying illegal commercial production to criminal penalties. The absence of such a system, the lack of overall strong enforcement, and the infrastructure in Kazakhstan, makes it ripe for the movement of other plants into Kazakhstan from neighboring countries, such as Russia.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 66%; trade losses for 2005 were estimated at over \$20 million. In 2004, the last year in which a market survey was undertaken, the recording industry estimated that in total 16.2 million cassettes and 10.8 million CDs were sold in Kazakhstan and of these, 11.2 million cassettes and 7.4 million CDs were pirated copies.

In 2005, the recording industry reported that 427 raids were conducted, and that \$267,616 worth of pirate material (39,706 CDs, 7,323 DVDs, 19,981 music cassettes) were seized by local enforcement agencies. Although this number (at least, what is known by the copyright industries) reflects a drop from previous years, there were more criminal proceedings — 18 such cases initiated — and more court sentences, that is, 8 convictions, in 2005 than in prior years. Also, the industries reported that there were 362 administrative actions undertaken in 2005 pertaining to “minor” violations. Of these, 281 legal entities were fined (for a total amount of \$339,735 in fines in 2005). The average fine, however, was under \$100.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY

Special 301 Recommendation: Acknowledging that the Government of Kuwait took some significant enforcement actions against piracy operations in 2005, IIPA recommends that Kuwait should be lowered to the Watch List.

Priority Actions Requested in 2006:

- **The Government Must Amend Copyright Law to Significantly Strengthen Criminal Penalties:** The criminal penalties in the current copyright law are on their face non-deterrent. Given the brazen nature with which pirates have operated in Kuwait, and rampant recidivism, penalties must be increased to provide mandatory minimum fines that will discourage current and would-be pirates, maximum fines that will adequately punish commercial pirates for the significant financial harm caused in large-scale piracy cases, and mandatory minimum imprisonments (and sufficiently serious maximum sentences) to provide a true criminal deterrent. Criminal remedies should also include forfeiture and destruction of pirate goods and tools and implements used in pirating, shop closure, revocation of business licenses, and double penalties for recidivists.
- **The Courts Must Impose Deterrent Sentences:** Piracy rates will not drop substantially until courts impose deterrent sentences. Until the copyright law is amended to strengthen criminal penalties, courts should impose maximum copyright sentences allowable under the law, and prosecutors must seek alternative charges in order to maximize sentences.
- **Sustain Raiding Activity in 2006, and Bring IPR Federalized Task Force Into Operation:** IIPA commends the Kuwaiti Government for taking a significant number of raids in 2005 against pirate duplication sites and storage areas. IIPA also commends the Government for its decision to form the IPR Federalized Task Force, which includes police involvement, and urges the Kuwaiti Government to bring the task force into operation. Further sustained raids are needed, including against street vendors who continue to pirate with impunity. Raids which are publicized and which are followed by swift and deterrent prosecutions, will, it is hoped, have the desired effect of driving piracy rates down in Kuwait and driving pirates from Kuwait.
- **Significantly Increase Seizures of Pirate Imports in 2006:** While the authorities in Kuwait showed unprecedented activity in 2005, the same cannot be said for Kuwaiti Customs. It is known that a majority of pirate optical discs in Kuwait are imported from Southeast Asia (and, at least until a recent crackdown there, from Pakistan). Kuwaiti Customs must become more active in 2006 with monitoring of shipments, including large-scale, courier, and personal baggage, to keep as much of this illegal product out of Kuwait.
- **Amend and Modernize Copyright Law:** In addition to the need to increase criminal penalties, the copyright law amendment must make changes to bring Kuwait's law into line with the TRIPS Agreement, and should establish an adequate legal framework for electronic commerce by protecting copyright in the digital environment. Kuwait should join the Berne Convention and the WIPO "Internet" treaties.

For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>. In particular, since this year's report does not duplicate comments made on the 2004 copyright law draft, please refer to the 2005 Kuwait report at <http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf>.

KUWAIT Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	8.5	70%	8.0	65%	3.0	55%	3.4	64%		70%
Business Software²	30.6	68%	26.0	68%	24.0	68%	4.7	73%	4.5	76%
Motion Pictures³	NA	NA	12.0	95%	12.0	95%	10.0	95%	9.0	85%
Entertainment Software⁴	NA	91%	NA	NA	NA	95%	NA	NA	NA	85%
Books	0.5	NA	1.0	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS⁵	39.6+		47.0		41.5		20.6		16.0	

PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

Establishment of IPR Federalized Task Force Holds Promise: IIPA is pleased that the Kuwaiti Government, and Faisal Al Khendri, the new legal advisor to the Ministry of Information (replacing Khalid Al Hendi, who has been transferred back to the Ministry of Justice), established an IPR Task Force for enforcement of copyright at the end of August 2005. However, we are disappointed that the Task Force has not yet become truly operational. The Task Force includes all the requisite groups for effective anti-piracy operations in Kuwait, including the Ministry of Information, the Ministry of Commerce, the various municipalities, the Kuwaiti Police, and Kuwaiti Customs. The commitment of these resources and the commitment to run a set of sustained raids (see below) should bode well for the prospect of reducing piracy in Kuwait and creating a legitimate market for the first time there. This task force should immediately come into operation; continually set objectives and targets; allocate responsibilities among the group; and set time frames for action. The task force should routinely meet with rights holders to ensure that an effective IPR regime prevails in the country.

Sustained Raiding a First in Kuwait, Must be Followed by Prosecutions: IIPA is aware of 117 enforcement actions in 2005 in Kuwait, against pirate duplication sites and storage

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Kuwait, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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 Total losses due to piracy of records & music, business software, and books went up from \$35 million in 2004 to \$39.6 million in 2005.

areas. It is very positive that all of these actions were taken on an *ex officio* basis. Each action has resulted in criminal charges being filed and has been transferred to the public prosecutor for criminal action. The offenses have involved movie piracy (31 separate actions), pay television (9 separate actions), business software (7 separate actions), music, and entertainment software. However, there has yet to be any action against the street vendors, who continue to operate with complete impunity. In addition, in January 2006, IIPA understands that 8 video outlets were raided, so the signs are good that enforcement will be carried over into retail. In addition, the authorities have taken aggressive action against cable pirates, with raids on seven pirate cable operations, including the seizure of all supporting dishes, decoder boxes, and cables.

Criminal cases must proceed swiftly and result in deterrent sentences actually imposed. Since the current copyright law penalties (even at their maximums) do not provide a deterrent, prosecutors should charge defendants with cumulative offenses where they exist (e.g., fraud) and where the resultant fines and jail terms would be higher than under copyright alone.

Some Troubling Retail Piracy Remains: Despite these actions in 2005 (and perhaps because the pirates know the copyright law lacks teeth), serious retail piracy remains on the streets in Kuwait. Factory-produced DVDs and CDs with pre-release music and motion picture titles continue to be sold at markets. Entertainment software products are also widely available at souks, flea market-type venues and retail stores, and were at least until recently primarily imported from Pakistan, Lebanon and Asia (Pakistan recently closed its plants so product may now be coming from elsewhere). The market for entertainment software products worsened in 2005, with piracy rates at over 90%. Pirated business software is also available in the market.

Kuwaiti Customs Showed Fewer Results in 2005: While Kuwait Customs did a good job intercepting pirate imports coming into Kuwait in 2004, the same cannot be said for 2005. IIPA calls upon the Director General of Kuwait Customs to re-invigorate activities in 2006, to catch imports from Southeast Asia and elsewhere, which will make the job of the IPR Task Force easier.

Optical Disc Production in Kuwait: IIPA is now aware of one optical disc production plant in Kuwait. The plant has been visited once by industry, and while there is no information regarding possible illegal activity, nonetheless, the Kuwaiti Government needs to be aware of this plant and should monitor its activities to avoid Kuwait becoming the next in line of pirate producer nations.

Cable Piracy: Signal piracy remains a problem in Kuwait but it is important to note that cooperation with the Government of Kuwait is improving significantly. The Ministry of Information (MOI) has been very aggressive against the cable pirates and has raided all targets that have been furnished, though piracy remains significant in the absence of stronger deterrent penalties.

University Practices Help Keep Book Piracy Low: Kuwait retains its position as a leader in regulating adoption procedures on university campuses so as to ensure use of legitimate textbooks by students and faculty. U.S. publishers continue to report a high ratio of legitimate sales to known student adoptions and maintain that this is due to the transparent procurement/purchase practices of Kuwaiti universities. 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 commends the Kuwaiti authorities on this success again during 2005.

COPYRIGHT LAW AND RELATED ISSUES

In its 2005 report, IIPA reviewed the 2004 draft copyright law then being considered by the Government of Kuwait ("Draft Law"), that would replace the current law, 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.⁶ IIPA's conclusion is that the Draft Law would have resolved many but not all of the TRIPS deficiencies in the current law. The Draft Law would also have partially implemented the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), but would not have implemented all aspects of these treaties adequately. For example, we conclude that the Draft Law would have insufficiently protected against the unlawful circumvention of technological protection measures.⁷ IIPA understands from Kuwaiti Government officials that the Government is currently revisiting the draft to 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, and looks forward to seeing and having the opportunity to review the next iteration. Since the draft will undoubtedly change, we do not repeat the comments on the 2004 Draft Law here, which can be read at <http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf>. Instead, we take the opportunity here to highlight the need for stronger criminal penalties in Kuwait.

The Need for Deterrent Penalties in Kuwait/Comparison with U.S.: In the current copyright law of Kuwait, criminal penalties for copyright infringement are provided, for a maximum of up to one year imprisonment and/or up to a \$1,700 fine. There are no pre-established (statutory) damage awards possible in Kuwait. The piracy levels in Kuwait are 91% for entertainment software, 70% for recorded music piracy, and 68% for business software piracy. In the United States, by contrast, video and music piracy levels hover around 5%, and the piracy level is 25% for business software. The U.S. retains stronger criminal penalties and high statutory damages to keep piracy abated and deter further infringements (see description below). It is clear that the Kuwaiti system is not working to eradicate piracy or deter further infringements. Stronger criminal penalties on the books, the addition of statutory damages, and application of these provisions in practice, are what is required to reduce piracy in Kuwait.

Compare the United States: According to "Prosecuting Intellectual Property Crimes," written by the Computer Crime and Intellectual Property Section (CCIPS), Criminal Division, of the U.S. Department of Justice (January 2001), available at <http://www.cybercrime.gov/ipmanual.htm>:

⁶ See complete analysis in 2003 Special 301 Report for Kuwait, at the website <http://www.iipa.com/rbc/2003/2003SPEC301KUWAIT.pdf>.

⁷ 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 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.

The penalties available for criminal infringement are codified at [18 U.S.C. § 2319](#). For the misdemeanor violations, a defendant may be sentenced to up to one-year imprisonment and fined up to \$100,000. See [18 U.S.C. §§ 2319\(b\)\(3\), 3571\(b\)\(5\)](#). *For a felony violation*, where the infringement consists of the reproduction or distribution during a 180-day period of no fewer than ten copies or phonorecords which have a total retail value of more than \$2,500, *the maximum penalty can be three or five years imprisonment*, depending on what purpose can be proven. If the government proves that the defendant acted for purposes of commercial advantage or private financial gain, and obtains a conviction under [17 U.S.C. § 506\(a\)\(1\)](#), the maximum sentence for a first time offender is imprisonment for up to 5 years *and a fine of up to \$250,000*. See [18 U.S.C. §§ 2319\(b\)\(1\), 3571\(b\)\(3\)](#). Those with *a prior copyright infringement conviction* are subject to *up to 10-years imprisonment*. See [18 U.S.C. § 2319\(b\)\(2\)](#). If a financial motivation is not proven in a felony case, and the conviction is obtained under [17 U.S.C. § 506\(a\)\(2\)](#), the defendant can be imprisoned for up to 3 years – six years for the repeat offender – and fined up to \$250,000. See [18 U.S.C. §§ 2319\(c\), 3571\(b\)\(3\)](#). [emphasis added]

In the U.S., copyright infringement is a federal offense. In addition to this federal system, the 50 states do have laws which require manufacturers of products to post true names and addresses (TNA) on products; these are not copyright cases *per se*, but the industries and local law enforcement do pursue state actions to get pirated and counterfeited products (which fail to contain accurate TNA information) off the streets. For a listing of these state laws, see list compiled by the U.S. Department of Justice at <http://www.cybercrime.gov/ipmanual/appf.htm>.

In practice, there have been several recent deterrent penalties issued in criminal copyright infringement cases. For example, in 2005, a defendant pled guilty to copyright infringement and computer intrusion and received a 27 month jail sentence and a fine of \$201,000, to be followed by three years of supervised release (see *U.S. v. Jiang*, DOJ press release at <http://www.cybercrime.gov/jiangSent.htm>). In 2004, the defendant involved in a computer game piracy ring was sentenced to 50 months in jail and fined \$690,000, followed by three years of supervised release (see *U.S. v. Breen*, DOJ press release at <http://www.cybercrime.gov/breenSent.htm>). Also in 2004, another defendant was convicted of software piracy and sentenced to 37 months in jail (see *U.S. v. Tobolsky*, DOJ press release at <http://www.cybercrime.gov/tobolskySent.htm>).

In addition to criminal penalties, the U.S. has a system of pre-established, statutory damages that can be elected by a right holder prior to a judicial decision. See [17 U.S.C. §504\(c\)](#). The range of statutory damages, per work infringed, is a sum of not less than \$750 or more than \$30,000. In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000 per work infringed. The range of statutory damage awards vary, according to judicial discretion in each case. However, there have been several very high statutory damage awards. For example, on September 6, 2000, Judge Rakoff, in *UMG Recordings v. MP3.com*, awarded the plaintiffs \$25,000 in statutory damages per CD uploaded on the MP3.com system. MP3.com stated that "no more than 4,700 CDs" owned by the plaintiffs were on the system, while the plaintiffs alleged that the number was closer to 10,000 CDs. The damages were estimated between \$118 million and \$250 million, a very deterrent message indeed.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

LATVIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Latvia should remain on the Special 301 Watch List.

Actions Which the Latvian Government Should Take in 2006:

Enforcement

- The Government of Latvia must put its anti-piracy commitment into concrete action, combating both traditional and digital piracy, and making IPR enforcement a priority among the various enforcement agencies. Success will be gauged by visible reductions in the high piracy levels.
- Commence criminal prosecutions and implement administrative actions against organized crime syndicates.
- Customs officers must strengthen their activities to intercept even more pirate product acting on their own initiative (i.e., *ex officio*) as permitted under the law.
- Impose administrative remedies like removing business licenses and issuing fines, but not as a substitute for criminal actions, as appropriate.
- Implement the new Criminal Procedure Code (effective October 2005) which relaxed and improved the evidentiary legal presumptions and eliminated the need for onerous expert reports in criminal cases involving sound recording, computer software, and audiovisual piracy.
- Implement the new Criminal Procedure Code to improve the speed of judicial proceedings (and investigations under the new shortened deadlines) in copyright cases, and have judges impose deterrent penalties.
- Further improve cooperation between customs and the police, and between the police, prosecutors and the judiciary at the working level of the new Inter-Ministerial committee. Intensive educational training for enforcement bodies including judges and prosecutors has started and needs to continue.
- Continue to take joint anti-piracy actions with Estonian and Lithuanian customs agencies (and continue the cooperation with Russian border officials as well).
- Establish a system at the border 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 (which, IIPA understands is part of a legislative package to be introduced in Parliament in April 2006).
- 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: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	12.0	85%	12.0	85%	10.0	80%	8.0	67%	NA	NA
Business Software ²	12.5	58%	10.0	58%	10.0	57%	7.4	58%	NA	59%
Motion Pictures ³	NA	NA	NA	NA	NA	85%	NA	85%	1.5	NA
Entertainment Software ⁴	1.3	82%	NA	80%	NA	95%	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	25.8+		22.0		20.0		15.4		1.5	

COPYRIGHT PIRACY IN LATVIA

Weak border enforcement and transshipment: Latvia remains a transit country for pirate discs produced in Russia; this material continues to be found in the open air markets in Riga and elsewhere. The Russian-originated CDs are transported through Latvia to Lithuania, Poland, and to the other EU countries as well. The organized crime element is evident in pirate activities. For example, Lithuanian police are investigating a case involving Latvian and Belarusian citizens. There is evidence that the Latvians under investigation are part of a well-formed criminal smuggling operation.

The Latvian Government now estimates that as much as 25% of all customs seizures are part of *ex officio* investigations and searches. This is certainly an improvement. However, border controls need to further improve to prevent the unimpeded flow of pirated goods into and through Latvia. The copyright industries urge the Latvian Customs authorities to take even more *ex officio* investigations/searches. 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 (mostly Russian repertoire) arrives from Lithuania. One method of entry is via bus—Latvia “trade-tourists” frequent the largest Lithuanian

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Latvia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

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.

flea market (Gariunai) and return to Latvia with this material. Most of the illegal prerecorded optical media material containing sound recordings comes from Russia. IIPA understands that this type of border enforcement has been further complicated by EU regulations permitting “personal baggage” exceptions.

CD-R piracy and Internet piracy: The recording industry reports that in 2005, piracy levels remained the same, primarily due to illegal file-sharing and other forms of Internet piracy. Although the level of physical piracy is down, the scale of Internet piracy keeps the overall piracy levels high, at 85%.

The most popular illegal file-sharing programs are DC++ and SoulSeek used widely by young people at home, and in schools and universities. The local recording industry anti-piracy group, LaMPA, has cooperated with the Economic Police to try to combat Internet piracy, but unfortunately, the police have had little success. Traditional physical piracy still prevails; both formats – pre-manufactured and imported illegal CDs and burned CD-Rs – are widely used for the distribution of illegal content with CD-R burning being particularly prevalent. Illegal copying on CD-Rs and the failure to effectively enforcement 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. At the same time, legitimate sales continue to decrease (though not sharply). The local record companies continue to lay off employees; for example, one company terminated its business, and two record companies merged, which resulted in lost jobs.

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 2005, the recording industry identified and sent 12 “cease and desist” notices to 22 infringing sites estimated to contain around 1,000 illegal files. The sites were removed from the Internet. However, several websites have been operating with impunity for over four years without any prosecutorial action to shut them down. It is critically important that the Latvian enforcement authorities begin such efforts especially since the 2004 amendments implementing the WIPO digital treaties were completed.

There has been a noticeable increase in the numbers of illegal CD-Rs, the likely source being local CD-R burning operations. The business software industry indicates, however, that almost all of the illegal software on CD-ROMs found in Latvia was made elsewhere. The entertainment software industry further 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 as well.

High levels of copyright piracy: Piracy of sound recordings and music continues to be widespread in Latvia. The local recording industry group reports that due to ineffective enforcement the estimated level of music remained the same, at 85% of the market in 2005. The biggest distribution points are bazaars in Riga, which have up to 60 sales points for pirated audio and video products. The largest pirate market, “Latgalite” — is still in operation. The ongoing piratical activities at that market are common knowledge, and despite various raids jointly organized with the police and the local industry group (including videos and news reports that have aired), the illegal activities quickly resume a couple of days after each raid. The sellers of pirate content openly standing in front of the market gates and provide customers with music, videos, games and programs. The prices of pirated music CDs rose slightly last year, to approximately US\$5 for international repertoire and US\$6 for local repertoire (most pirated local

repertoire is CD-R). One particularly disturbing form of piracy is the much more difficult to detect “hand-to-hand” piracy, i.e., sales of pirated sound recordings offered in a catalogue but sold in person. In general, the recording industry reports that the police have not taken adequate steps to combat the open markets; there are few seizures or raids, much less prosecutions to report. Estimated piracy losses to the recording and music industry remained at \$12 million in 2005.

The Business Software Alliance (BSA) reports that in 2005, the problems of end-user and re-seller piracy continue to affect the software industry in Latvia, although the increasing problem of Internet piracy (particularly file transfer protocol/FTP server) piracy is growing in “popularity.” There is still a retail piracy problem whereby many of the hard goods come from Latvia’s neighbors. Poor border enforcement and the lack of effective cooperation between neighboring countries (especially Estonia and Lithuania) are problems that need the most attention. The principal problem is not one associated with legal deficiencies as such, but rather on the ground enforcement activities. In April 2005, the BSA and the Latvia State Revenue Service signed a protocol on cooperation, which includes training sessions and BSA experts’ participation in inspections and cooperation to ensure software legalization within companies. Lowering the business software piracy levels in Latvia could contribute significantly to the local economy.⁵ BSA did contribute to a number of training sessions conducted under the auspices of the State Revenue Service in 2005.

The Motion Picture Association (MPA) reports that the video piracy rate in Latvia remains very high. Corruption and organized criminal activity are major problems. Although piracy reportedly 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 exists as well. Pirate sites marketing hard goods are 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 (where they are manufactured) and are distributed by the same organized criminal syndicates operating in the region, with the pirated products often bearing the “marks” of the syndicate that manufactured the pirated game. Internet café piracy continues to be a problem as well, with only a few of the cafés using licensed products. Pirated products remain readily available at retail establishments and particularly at flea market venues. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Latvian marketplace was \$1.3 million in 2005, with an 82% piracy rate. Action must likewise be taken against organized criminal syndicates involved in piracy, using special anti-organized crime statutes if available. Law enforcement efforts against entertainment software piracy continue to be weak due to a lack of resources and a lack of training.

⁵ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in the Latvian piracy rate (from 58% to 48%) could add \$87 million to the Latvian economy, increase local industry revenues by \$54 million, generate an additional \$11 million in tax revenues, and directly create 500 high-wage technology jobs. See <http://www.bsa.org/idcstudy/pdfs/Latvia.pdf>.

COPYRIGHT ENFORCEMENT IN LATVIA

Overview: Reports indicate some progress in 2005 in terms of state enforcement bodies becoming more engaged in intellectual property rights protection. Many of the necessary legal reforms are in place, but on-the-ground enforcement needs improvement.

- In January 2005, the Ministry of Interior established a dedicated IPR enforcement division within the Economic Police, specifically tasked with detecting and preventing violations of intellectual property rights. There are 22 staffers in this unit, and under its supervision, there are units in each region of Latvia. The industries report that, although this unit has been engaged in valuable enforcement work in the greater Riga area during 2005, nationwide enforcement problems remain and the work of this unit needs to be replicated throughout Latvia. Such actions appear to be taken with the assistance of individual companies (several of the IIPA members – such as MPA and ESA -- do not have anti-piracy operations in Latvia). Reports indicate that this unit is focusing mostly on software cases, as there is local industry support in Latvia. The recording industry and the business software industry have anti-piracy operations in place in Latvia.
- Specialized officials dealing with IPR are also assigned in each of the five regional offices of the State Revenue Service. Industry is only aware of one IPR specialist in Customs, although the Government of Latvia reported in January 2006 that there are now 11 dedicated IPR Customs officials, including 4 “floating” specialists dedicated to “hot spots” such as the Eastern border, ports and airports. The Government of Latvia also reported that a total of 230 new customs officers were trained in 2005, and that IPR enforcement is now a standard part of their training. The Government further reported that 3 prosecutors in the General Prosecutors Office are IPR specialists, and there is consideration of creating a specialized unit, which IIPA encourages. All of these reports are positive developments that IIPA hopes will improve on-the-ground enforcement at the border and in the courts.
- In November 2004, a consultative council on IPR enforcement (the “Council”) was established in the Ministry of Interior and became operational in early 2005. It is led by the Prime Minister. The Council includes IPR rightholder groups (copyright and industrial property), as well as government officials from Latvian agencies, including the Ministry of Interior, Ministry of Justice, Ministry of Culture, State Revenue Service, Customs and Economic Police, along with the Ministry of Foreign Affairs. Officially the Inter-Ministerial Council is required to meet twice a year, but IIPA understands that the real enforcement work will be and is being undertaken at a lower operational level. IIPA encourages this group to work regularly, effectively, and in cooperation with right holders.

Weak border enforcement: As already noted IIPA strongly encourages improvements in Latvian border enforcement. If, as the Government of Latvia reports, Customs officials are using their *ex officio* authority in 25% of cases, then even more action is needed to prevent shipments into (and through) the country. There also needs to be better communications between police and customs officials. 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.⁶ In 2002, the Latvian government allocated 20 new customs regional officials and two additional persons to the Customs Head Office solely for IPR protection. Also, IIPA understands that there is a special criminal customs unit that investigates organized crime syndicates – this unit must be fully funded and take more effective steps to stop these syndicate operations, in particular focusing on CD-R and other optical disc piracy production and distribution operations.

Customs officials are now conducting cooperative programs with their Estonian and Lithuanian peers; much more cooperation, and especially actions targeted against crime syndicates is needed (and especially focused on the eastern border with Russia). There should be no excuse for customs officials to permit spindles of optical media found in personal baggage to pass through inspections; discs on spindles are smuggled goods/contraband, and should not be considered a non-commercial importation subject to the EU regulations permitting a personal luggage exception.

Police raids and tax authority investigations: Latvian government sources report that from January to July 2005, there were 36 criminal cases initiated and 98 administrative actions. More than 20% of all seizures of counterfeit and pirated goods were made by Customs, and those were goods designated in transit. IIPA notes, however, that these statistics do not detail the types of cases initiated; they could be trademark counterfeiting cases as well as copyright cases. The Economic Police report that they are running three to five raids a week.

The Business Software Alliance (BSA) reports some cooperation, albeit on a limited number of cases, from the Economic and Finance Police; mostly, these actions have focused on end-user raids. BSA also reports that the Latvian State Revenue Service (SRS) has adopted new policies with regard to its investigation of potential economic and tax violations associated with the use of illegal software. The SRS, when it conducts its financial inspections (usually unannounced), will also check to ensure that no software violations (which in turn lead to tax and economic reporting violations) are in evidence. The Latvian Government says that from April 2005 to the end of 2005, 64 inspections of business software were made and the State Revenue Service did find illegal software in some commercial businesses and retail outlets. The SRS is an agency with a broad range of economic and financial crime enforcement responsibilities.

Prosecutions and the Courts: On a positive note, BSA reports that in 2005, prosecutors of software piracy cases did make these cases a priority; however, the penalties for infractions were generally low. The weakest enforcement point now tends to be the courts and the judiciary, where there is little interest in IPR crimes and their significance, which in turn leads to a generally dismissive attitude with regard to protecting copyrights. The local recording industry reports only one positive development in a court case against music piracy in 2005, in a case in the Valmieras district.

The problems of prosecutorial delays—anywhere from 18 months to two years just to begin a trial—persist. 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 rights holders. It is hoped that the new Criminal Procedure Code (October 2005) with fixed investigative and prosecutorial

⁶ 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.

timetables ranging from 6 months to 18 months (depending on the severity of the crime) will alleviate this problem.

No civil *ex parte* search provision: No improvement in 2005 was achieved in correcting a glaring deficiency of the 2000 copyright law – the omission of a TRIPS-required civil *ex parte* search remedy. 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. It is understood that this provision will be corrected in the package of legislative reforms which the Government of Latvia will present to the Parliament in April 2006 (as part of its implementation of the EU directives). BSA remains concerned with the slow progress on this critical legislative reform.

Inadequate administrative penalties: Copyright infringement cases in Latvia often are pursued as administrative offenses, which can take a short amount of time (anywhere from two to four months). Businesses, especially illegal kiosks and stores that sell pirated material must be properly fined and/or their business licenses revoked. However, deterrent penalties are not being applied in practice. Instead, convicted pirates are fined only 50-100 Lats (US\$92 to US\$183) and, in the case of repeat infringers, a maximum of 250 Lats (US\$458), which is too little to act as a deterrent.

Judicial obstacles and delays: There was no significant improvement in the resolution of copyright cases in the Latvian judiciary during 2005. As noted, a major obstacle has been the slow and burdensome proceedings in IPR cases due to a lack of experience and knowledge (with some IPR procedural rules still apparently based on the former Soviet Union procedural codes). The new Criminal Procedure Code is meant to fix these procedural provisions---IIPA is optimistic that it will and will carefully monitor this situation in 2006.

COPYRIGHT AND RELATED REFORM IN LATVIA

The Copyright Law of 2000 and the 2004 amendments: The 2000 copyright law as amended in 2004 still contain several key deficiencies, most importantly the absence of TRIPS-mandated civil *ex parte* search procedures, and the elimination of a WPPT-compliant definition of “broadcasting.”⁷

Criminal Code: 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, a judge can apply a penalty

⁷ These copyright law deficiencies include, for example: (1) no exclusive rights for phonogram producers, which are provided to other rights holders 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; (2) the 2004 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; (2) Article 63(5) makes the rental right for phonogram and film producers subject to mandatory collective management (diminishing the exclusive rights of producers); (4) no civil *ex parte* search procedure, a TRIPS-required tool, which is especially critical to enforcement in business software actions; (5) low administrative penalties that do not deter piracy; and (6) 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)].

up to, for example, 200 minimal monthly salaries, which is about 16,000 Lats (~US\$30,500). Unfortunately, courts are not, to date, imposing deterrent penalties.

Criminal Procedure Code: As noted, on October 1, 2005, new amendments to the Criminal Procedure Code Law entered into effect. The new law introduces important improvements such as establishing a legal presumption of ownership; this eliminates the need for “expert reports.” (We do not have the text and cannot comment on the actual provisions at this time.) It is now up to the prosecutors and judges to properly process copyright cases, as the current court practice has been inadequate to address the problems in Latvia.

Administrative Offenses Code: In 2003 amendments to the Administrative Offenses Code were enacted (effective July 24, 2003). 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.

Civil Code: There are no known pending amendments regarding civil penalties (although we understand the *ex parte* provisions will be revised, hopefully in 2006). The Copyright Law includes the measures right holders can take in civil proceedings in Article 69. The Civil Code (Articles 1770-1792) does not provide necessary sanctions for copyright infringements.

EU Enforcement Directive: The Latvian Government is currently working toward implementing the EU Enforcement Directive, although progress is slow. Latvian government sources indicated that in its work to draft implementation of this Directive, the Ministry of Justice, consulting with the Economic Police, is developing a legislative proposal to improve IPR enforcement, including *ex parte* searches as well as customs inspections.

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. The government should take all the necessary steps to regularize and legalize its use of business software applications in order to set an example for the private sector.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

LITHUANIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Lithuania should remain on the Watch List in 2006.

Actions to be Taken by the Lithuanian Government in 2006:

Enforcement

- The Lithuanian Government should express a strong political will and a commitment to eradicate copyright piracy and act accordingly in a sustained manner by instructing all enforcement authorities to make piracy a priority problem.
- The IPR Division in the Economic Police (the Criminal Police Investigation Bureau) should focus their work on the key source of persistent piracy in Lithuania, i.e., against organized crime syndicates and large-scale operations in close and active cooperation with the anti-organized crime department and other enforcement agencies.
- The prosecutors should follow up with prompt prosecutions.
- Administrative sanctions should be imposed (for example, withdrawing business licenses from infringing kiosks);
- Customs officers, in particular the Customs Criminal Service, should commence actions, including *ex officio* actions to intercept pirate product smuggled into the country.
- Cumbersome and complicated procedures in criminal and administrative IPR cases should be simplified and eliminated, and the onerous evidentiary burdens in criminal cases relaxed.
- Coordinated and cooperative strategies among enforcement authorities as well as with right holders' organizations should be developed.

Legislation

- Adopt optical media regulations to properly license and enforce the production, distribution, import and export of optical media.
- Introduce the effective enforcement provisions to the Copyright Law by fully implementing the EU Enforcement Directive, in particular, the provisions on sampling and presumption of ownership. Correct the deficiencies in the copyright law as detailed in this report.
- Adopt 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 does have several trade agreements with the U.S., such as those contained in the U.S.-Lithuanian bilateral investment treaty (BIT), including key national treaty obligations, which remain in force.¹

¹ 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/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Also available are previous IIP reports on Lithuania at

LITHUANIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005 ²

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ³	12.2	58%	11.0	58%	10.0	58%	4.6	53%	3.9	56%
Records & Music ⁴	12.0	85%	15.0	80%	13.5	85%	12.0	85%	7.0	85%
Entertainment Software ⁵	1.7	88%	NA	85%	NA	90%	NA	80%	NA	NA
Motion Pictures ⁶	NA	NA	1.5	65%	NA	NA	NA	90%	1.5	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	25.9+		27.5		23.5		16.6		12.4	

COPYRIGHT PIRACY IN LITHUANIA

Piracy at the borders: Piracy at the borders remains a priority problem experienced by the copyright industries. Given its pivotal geographical location (especially to Russia) and weak border enforcement, in 2005 Lithuania remained a major regional transshipment area for pirated material—music CDs and audiocassettes, CD-ROMs containing business software, videos, home-burned CD-Rs and DVD-Rs, DVDs, videogame cartridges and DVDs and CDs containing entertainment software. Most pirate product originates from Russia and is smuggled into Lithuania and Poland either directly or through Belarus. There is also an established transport from Lithuania to Poland. Pirate products are also shipped to other European countries using air traffic routes via Scandinavian countries. This is 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.

Five years have passed since Lithuanian customs officials obtained the proper (*ex officio*) authority to undertake border searches and investigations. But this legal change, while welcome, still has not been used effectively by border authorities. 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.

<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.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Lithuania, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ 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.

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 MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

MPA notes that the pirates are beginning to change their distribution mechanics. Given that transportation of contraband and pirated materials across borders is risky and does have some costs, they are turning more toward producing pirated copies of films inside Lithuania. In contrast, the recording industry reports that the importation of pre-manufactured pirated discs still prevails over CD-R burning.

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 Estonia. Note that BOD opened its subsidiary near Tallinn in Estonia. In 2003, the plant had a single line; in 2004 it had two lines (but only one was reportedly operating). In 2005, the plant had two lines and the total plant capacity was estimated at 7 million discs per year including CD-R (blank disc) replication. 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 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. Despite efforts by the recording industry to organize a roundtable discussion on introducing optical disc regulation, the Government did not engage on this initiative. This seems to indicate that optical disc regulation is not a priority for the Lithuanian Government. Most disappointingly, the recording industry's criminal case against BOD was dropped, as the prosecutor let the two year deadline elapse.

Burning and CD-R piracy: Unchanged for 2005, the most 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 continued at the same level. 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 although it is increasing, composing currently about 15% of the illegal market. The recording industry 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.

Internet piracy: Also unchanged in 2005, Lithuanian websites continued to 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. Notably, no criminal raids were made or any cases (criminal/administrative) initiated by the police *ex officio* against ISPs/host/administrators or websites in 2005. Police targets are only physical persons offering unlicensed software on the Internet. Usually, police place an order by e-mail or indicated telephone number and carry out a trap purchase, followed by the search of premises. The mentioned cases are called “Internet” only because of the lead (advertisement on s/w offer) found on the Internet. 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 business software industry reported a surge in 2005 of unlicensed software communicated to the public via file transfer protocol (FTP) servers.

The copyright industries report that, despite a cooperation agreement concluded on April 26, 2004 between the Internet service providers (ISPs) and local right holders, no actions have been taken against Internet piracy. The recording industry considers the agreement unhelpful and has

suggested terminating or redrafting it. The amended version was communicated to the ISPs in summer 2005, but the right holders never received a reply. This clearly illustrates a lack of willingness by the ISPs to cooperate against copyright crimes on Internet. In 2005 the local recording industry kept sending notifications of the existence of illegal websites to the ISPs and the police, all of which were ignored. IFPI identified and sent 10 “cease and desist” notices to 28 infringing sites in 2005; 26 of those sites (93%) were taken down. The Special Internet Crimes Investigation Unit (in the Economic Police) has not taken any action against Internet IPR piracy (focusing instead on hacking and pornography). 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 right holders. In 2005, BSA sent notifications concerning illegal software on three FTP sites to parties to the ISP Agreement. In each case the specific infringing files identified in the notification were removed, but the FTP sites were left in operation.

A key deficiency in the current Lithuanian law is that the infringement of the right to communicate to the public is not criminalized under the law, and, according to the software industry, criminal liability against the operators of FTP services can only be based upon the infringement of the distribution and reproduction rights. This creates further difficulties because there is a “commercial purposes” standard applied to such offenses, a level of intent which is not always present in these cases. As a result, 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. BSA reports that in 2005, only two criminal cases were initiated against individual resellers of unlicensed software on the Internet. Three preexisting criminal cases were concluded – one resulted in a criminal order to pay a fine of US\$430, one resulted in compulsory medical treatment due to the adjudged insanity of the infringer, and the third case was settled.

High piracy levels across all sectors: Pirate products in Lithuania continued to be sold in markets, kiosks and retail outlets in 2005. As we have acknowledged before, 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. 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, and 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 2005, 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 Litas (~US\$3.45), sometimes 8 Litas for “outdated” repertoire as opposed to the 50-65 Litas (~US\$17-22.40) for full-priced legitimate CD with international repertoire. As mentioned above, CD-R burning is severely harming the legitimate market. Based on police seizures (in 2004), 80% of pirate products in the markets is international repertoire, 15% is Russian and 5% is local repertoire; this breakdown continued in 2005. The legitimate music industry in Lithuania has been struggling for years to survive. In 2004, 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 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 Business Software Alliance (BSA) reports there was a growth in Internet-based piracy during 2005, especially large amounts of unlicensed software communicated to the public via the use of file transfer protocols (FTP) services. The Internet service providers (ISPs) do not engage in monitoring of these servers, and therefore there has been little activity on the part of law enforcement officials against operators of FTP services. The problem of hard disk loading by hardware and software retailers remains a problem, causing significant losses to the local software distribution channel. On the retail side, BSA continues to report for 2005 that the Gariunai flea market in Vilnius and similar markets across Lithuania remain sources of pirated materials, although police activities to address this problem have increased and there has been a drop in the open/visible sale of large quantities of software at flea markets. 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 exact extent to which this has been applied in-practice is unclear. Estimated trade losses due to business software piracy were \$12.2 million in 2005, though overall piracy remained relatively constant at 58%. Reversing high levels of software piracy in Lithuania could improve the local economy.⁷

The motion picture industry (MPA) continues to report that, in 2005, Lithuania remains the least developed market for audiovisual works of the three Baltic nations. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. MPA estimates that in 2005, 80-85% of the pirate DVDs are imported from Russia (and perhaps some from Belarus) and 15-20% are locally manufactured (using DVD-R and CD-Rs burned on personal computers). The pirate discs are sold in rental outlets and on street markets across Lithuania. Internet piracy (both downloading and hard goods) is increasing. TV and local cable piracy are also problems (often screening pirate copies of blockbuster films). The legitimate video industry is still 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.

The Entertainment Software Association (ESA) reports that piracy in Lithuania increased slightly, to 88%. Pirated products continuing to flood the country from Russia, Ukraine, Belarus, and even Poland. 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, with some groups having "branded" their pirated products, purporting to be the legitimate producer of such pirated goods. 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 began recording their trademarks with customs authorities in 2004, but unfortunately, this has not resulted in any border actions, as border enforcement continues to be extremely weak. Internet piracy is also growing concern for the entertainment software industry. The estimated value of pirate entertainment software in Lithuania was \$1.7 million in 2005.

⁷ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a drop in Lithuania's piracy rate from 58% to 48% could add \$76 million to its economy, create roughly 480 new jobs, and increase local industry sales by more than \$45 million. For Lithuania's government, the cumulative effect of this growth could mean an additional \$10 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Lithuania.pdf>.

COPYRIGHT ENFORCEMENT IN LITHUANIA

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. 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).

Currently, the three bodies with responsibility for IPR enforcement are the (1) Special Internet Crime Investigation Unit (formerly the Economic Police), (2) the IPR Division within the Criminal Police Investigation Bureau, and (3) Customs—but still, there is little communication or cooperation among these three organizations. The Lithuanian government indicated that the IPR Division in the Criminal Police is the centralized body which coordinates IPR investigations at the national level. The Economic Police have to date resisted adding IPR investigators because of limited resources, and have focused their actions against small-scale pirates instead of focusing on large-scale pirate operations, businesses, and organized criminal syndicates.

Ineffective border enforcement: Lithuania, as a result of geography, is extremely vulnerable to transshipment problems of pirated materials through its borders, which is why border enforcement is so critical, and unfortunate that it is so critically lacking. Customs officers have *ex officio* authority to inspect, intercept, and seize suspect shipments of pirated product entering the country, but they are not using that authority fully. 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. Customs officials still insist that a major contributor to poor enforcement is the nature of the internal EU market; this excuse, however, obviates the fact that much of the pirated product is coming in over the border with Russia. 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.

An entertainment software company reports that it had two Customs seizures in 2005, resulting in the seizure of approximately 10,000 products. One case was closed without incident. However, the second case remains ongoing. On June 2, 2005, the Customs authorities seized an estimated 1,700 counterfeit Nintendo products. The defendant challenged the seizure, claiming that the products were for her “personal use.” Due to the rather large amount of the seized products, Customs initiated an administrative copyright case. The court surprisingly found in favor of the defendant. The Customs authorities were then prevented from comparing the counterfeit goods to genuine samples during the hearing and the court demonstrated a lack of understanding of intellectual property law, misinterpreting EU and national rules and provisions on Customs actions. The company noted that the Customs authorities’ lack of experience in IPR matters also affected the outcome. It is thus necessary that both the Customs authorities and the courts be better educated on intellectual property crimes.

Raids lead to few prosecutions and non-deterrent sentencing. Despite results with raids, the problem remains that the police do not follow the criminal cases through prosecution and judicial sentencing. In addition, Lithuanian prosecutors gained more tools to use in IPR actions when the new criminal code and criminal procedure code entered into force in May 2003. However, since then, prosecutors have brought only a few IPR criminal cases and their general performance is poor. In some cases (for example, in music piracy), cases have been terminated due to the

expiration of various procedural deadlines (e.g., the recording industry case against the optical disc plant).

According to official government statistics, there were 303 criminal cases and 197 administrative investigations brought against suspected copyright infringers in 2005. The authorities reported seizing a total of 265,700 optical discs. The share of music, film and software of the seized illegal material is unclear. To the recording industry's knowledge, music represents a small share of the overall seized quantities.

Below is a summary of the industries' criminal copyright enforcement actions in 2005:

- BSA reports that its work in 2005 with local economic police in the cities of Vilnius, Kaunas and Kalipda continues to improve, and these officials often implement end-user⁸ raids and reseller test purchases on their own initiative (Kanus City was the most active division and toll many software cases in 2005). However, there are few cases initiated in this manner by the economic police in other cities (like Siauliai, Panevezys and Marijampole); the lack of willingness there may be attributed to the lower priority of IP cases and workload and budget pressures. BSA notes that although criminal investigators express interest and willingness to take cases, the number of investigations initiated in hard disk loading and Internet cases is very small. In 2005, BSA reported 27 criminal cases, 27 administrative cases and 11 civil cases involving the illegal use and/or distribution of business software. This resulted in 7 criminal orders (an alternative to a criminal judgment, where the defendant admits fault and agrees to pay damages), 2 criminal judgments, 22 administrative judgments and 6 civil decisions. In total, fines in the amount of US\$9,102.69 were adjudged in criminal cases (the average fine being US\$1,011.41). In administrative cases the total amount of fines was US\$4,849.56 (the average fine being US\$220.24). While fines remain much too low – administrative fines on average were lower even than a minimal fine provided in the law (approx. US\$355) – the business software industry reports a positive tendency that all the criminal orders and judgments against end-users adopted in 2005 imposed criminal liability both against the individual infringer (i.e., the GM or IT specialist) and the legal entity (company using unlicensed software). 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.
- MPA reports that there were about 12-15 raids conducted monthly in Lithuania during 2005, which is about the same pace as in 2004. The number of pirated produce seized in 2005 seems to have decreased from 2004 (317,000 in 2004 compared to 52,000 by mid-2005). In an interesting move, the number of movies seized actually remained pretty constant because the pirates are now selling 2 to 6 movies on one pirate disc, compared to only one movie per disc in 2004.

⁸ BSA reports that prior confusion over the handling of end-user cases has been straightened out in practice. 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.

- ESA member companies report that the police conducted several actions in 2005. However, the progress of cases is extremely slow, and are typically against small retailers rather than large scale piracy operations. Where cases have gone forward, fines have been imposed.

Civil actions in 2005: In 2005, BSA obtained 6 civil judgments in the 11 reseller and end-user cases brought last year, resulting in damages awards totaling 240,293 Litas (US\$82,777). In addition, 18 settlements with end-users and resellers were reached, for a total value of 118,472 Litas (US\$40,812). These results represent a modest improvement over 2004. The Lithuanian civil search law was utilized for the first time by BSA in January 2004. Two civil searches were carried out under this law in 2005.

Administrative fines remain non-deterrent. Lithuania's administrative penalties are inadequate and cannot act as a deterrent to IPR violations; there was no improvement in this situation in 2005. 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\$345-\$690) in certain copyright piracy cases, although the courts tend to levy fines for only ten percent of that amount, so for 100-200 Litas (US\$35 to 69), 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. Administrative fines that are less than the minimal fine provided in Article 214(10) of the Administrative Law Infringements Code are routinely imposed. Moreover, many administrative cases result in no fine at all, with infringers merely receiving a warning.

Continuing problems with "expert opinions": Problems associated with required expert opinions did not diminish in 2005. First, the reliance on a government expert report is unnecessary and causes delays in trials. 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\$172,300 (~500,000 Litas). The Centre acts to formalize expert reports, even though this practice is contrary to other European systems that rely on copyright industries, rather than government reports. IIPA continues to urge the government to rededicate the resources of this operation to a specialized IPR police unit or similar enforcement operation. In addition, there are reports that the Economic Police are pressing for the development of their own expertise center, in order to centralize control over its cases; that possible development has some industries quite alarmed.

Second, Lithuanian courts still refuse will not apply a presumption of ownership for seized copyright material (such as sound recordings), which results in a burdensome evidentiary hurdle.⁹

⁹ The BSA indicates that this issue regarding presumption of owners is not 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 (as in the case of sound recordings), and in the production of evidence pertaining to the retail value of those works. This is because certain acts only "qualify" as offenses when the retail value of the work exceeds a certain amount (100 times the minimum wage). In those cases "expert" evidence is required to confirm ownership in the work and retail value. The business software industry (BSA) reports that since the new criminal procedures code went into force in 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

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.

Third, the recording industry reports that in 2005, it still 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 international album titles and film titles seized to be translated into Lithuanian before a case can commence. These burdensome requirements were 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. 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 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. The recording industry continues to express dismay that expert reports prepared by the software industry are accepted but not accepted are reports prepared by the recording industry.

Civil court fees remain expensive. No changes in expensive court costs were noted in 2005. 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 right holders 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. That advocacy contains two erroneous views: 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 the industries have recommended should be adopted and applied. Perversely, under Article 82(4) the high court fees can be waived if the civil case is coupled with a criminal case – that is if the damages in the civil case are adjudged to have been caused by a criminal act. This gives plaintiffs a powerful financial incentive to pursue duplicative criminal charges even when they heed the government’s call to bring civil cases.

Training: In 2005, BSA hosted six training seminars for Lithuanian police, prosecutors and customs officials. One of the trainings was a pan-Baltic event, including enforcement officials from Latvia and Lithuania.

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).

COPYRIGHT LAW AND RELATED REFORMS IN LITHUANIA

Copyright Act of 1999, as amended in 2003: Since 1999, Lithuania has enacted a number of significant copyright law reforms.¹⁰ Its 1999 copyright law (Act No. VIII-1185), though a major step forward, also contained some serious deficiencies. Four years later, additional revisions to the copyright law were adopted (effective March 21, 2003) in order to comply with the WTO TRIPS obligations, the WIPO Treaties, and various EU directives. At the time, the copyright industries acknowledged the positive elements¹¹ in the 2003 legislation and also expressed concerns and reservations about several amendments which were (and are) inconsistent with Lithuania's bilateral and multilateral copyright obligations.¹²

Proposed Legislation: IIPA understands that, as part of Lithuania's accession to the European Union, additional revisions to its laws were initiated in 2005.

- Proposed implementation packages of the EU Resale Right Directive and the Enforcement Directive were prepared by the Ministry of Culture, discussed by the relevant ministries, and were approved by the government on December 7, 2005. This legislative package is currently being considered by the Parliament, with adoption expected by the end of April 2006. (IIPA does not have an English copy of the proposal and has no comments at this time on the substance of this bill.)
- Proposed amendments to Articles 192, 193, 195 (1) of the Criminal Code; Articles 154 (1) and 158 (1) of the Criminal Procedure Code; and Articles 9 (1) of the Law on Operative Actions were prepared by the Police Department under the Ministry of Interior in the first part of 2005. The primary issues were increasing sanctions to 4 and 6 years of imprisonment, according to the damages caused by the crime, and adding a right of communication to the public. To date, intellectual property crimes have been considered minor (subject to no more than 3 years of imprisonment). Operative measures may be applied only with regard to

¹⁰ 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/SPEC301LITHUANIA.pdf>.

¹¹ The 2003 copyright law amendments included several positive reforms, such as: included protection for temporary copies (Article 2(1)); 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 to 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).

¹² Problems with the 2003 amendments included, for example: Article 79, which weakened, or at least left unclear, the formulation for the recovery of damages in Lithuania; the right of communication to the public does not clearly apply to all disseminations as it should; the law contains a private copying exception to the right holders' application of technological protection measures which is far too broad and undercuts the copyright owner's rights for digital dissemination; producers of sound recordings do not have exclusive rights with respect to broadcasting and communications to the public (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; 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; and 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).

certain more serious crimes. Thus, by increasing sanctions in the above-mentioned Articles of the Criminal Code, amendments in the Criminal Procedure Code and Law on Operative Actions were made in order to classify intellectual property crimes as more serious crimes and apply operative measures.

Reports indicate that the above-mentioned amendments have not yet been cleared by other responsible ministries. .

Optical media law: This remains a priority for the industries in Lithuania. IIPA and its members have been pressing the Lithuanian government for a number of years, without success, to draft and implement optical media regulations. Despite numerous attempts the Lithuanian Government has not responded to the recording industry initiative to open the drafting process of an optical disc law. IIPA urges the Lithuanian government to seriously consider the key elements of what is considered the international model for optical disc legislation.¹³

Government software legalization issues: 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. 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. 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. BSA has been active over the past several years in training and raising awareness of software legalization in both the government and the private sector. In 2005, BSA provided state officials with a Lithuanian-language guidebook on software management and conducted a number of seminars and conferences.

¹³ IIPA's key elements for effective optical disc regulations appear in our 2003 Special 301 report, and were presented to the Government of Lithuania (see footnote 10, above).

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

MALAYSIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Malaysia should be maintained on the Watch List, and an out-of-cycle review should be conducted to evaluate whether the Government of Malaysia has taken steps sufficient to monitor and significantly decrease pirate production in licensed as well as unlicensed facilities; reduce the number of pirate exports, with special focus on entertainment software; and adequately enforce against piracy for the domestic market, including book piracy in the form of illegal commercial photocopying.

Priority Actions Requested in 2006:

- **Close Licensed (and Unlicensed) Facilities Engaged in Piracy, and Bring “Recordable” Plants into the Fold:** Pirate optical disc production continues in licensed as well as unlicensed factories. The Government has done a good job shutting down plants engaged in piracy, but must do more against licensed facilities known and suspected to be doing so. Plants found to be engaged in pirate production or mastering must not be given second chances. Finally, plants producing “recordable” discs or extending “recordable” facilities must provide exemplar discs and otherwise be subject to the optical disc laws. Inspections must continue, including off-hours and off-site inspections, since stampers, masters and other evidence are sometimes removed prior to the raids. The Ministry of Domestic Trade and Consumer Affairs (MDTCA) must allow for more extensive use of forensic testing.
- **Continue to Increase Seizures of Pirate Exports at the Border, Focusing on Entertainment Software:** The Malaysian Government indicates that it doubled seizures of pirate product destined for export in 2005, to over 700,000 discs. If true, this is a worthy accomplishment, but more must be done, especially since the entertainment software industry reports no improvement for their industry. The Government must continue to aggressively intercept pirated products/materials at the borders (KLIA, Penang, Johor Port, etc.), with special focus on eradicating export of pirate entertainment software. It must also enhance monitoring of exports, and take measures to address problems of false documentation, a regular occurrence in exports originating from Malaysia. The Government should maintain cooperation with Malaysia Airlines Cargo, purchase more x-ray scanners and like equipment, and establish a government reward scheme for targeting export syndicates.
- **Tackle Internet-Based Piracy:** Internet piracy, in the form of P2P file-sharing and Internet cafés facilitating online infringements, is on the rise. The Government should take broader action to address Internet piracy, including expediting drafting/consideration of copyright law amendments to enhance and facilitate online enforcement. Piracy at Internet cafés continues to be problematic; the Government should conduct more inspections for copyright (and other license) compliance, and shut down those establishments found to be engaged in illegal activities.
- **Stop Illegal Photocopying:** The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. The MDTCA has been cooperative, but officers lack training needed to effectively handle raids, decide on seizures,

track and act against underground operations, and protect right holders (who were being asked to give copies of their national ID cards to infringers).

- **Take Stronger Steps to Deter End-User Piracy of Business Software:** Unlicensed use of software in the workplace causes the greatest revenue losses to the business software industry. The MDTCA conducted 12 end-user raids in 2005, representing only a small fraction of the number of companies using pirated or unlicensed software. Thus, there is little deterrence against this highly damaging activity in Malaysia. The Government needs to do more.
- **Prosecute More Cases, Including Factory Cases; Establish Specialized IP Courts and Special IP Unit of Prosecutors:** In general, there remains a significant divergence between the number of raids being carried out and the number of cases being processed through the courts in Malaysia (e.g., against distribution warehouses, factories, pirate photocopy shops, etc.). MDTCA appears to understand the problem, and has indicated a desire to commence a Special Intellectual Property Court in 2006, which it is hoped would greatly ease the burdens imposed on right holders due to current court delays and other difficulties. The MDTCA has already established a specialized prosecution unit (although the number of deployed officers needs to be substantially enhanced) and the Attorney-General's Chambers has dedicated officers to handle IP crimes. However, what is needed is a specialized legal academy, allowing staff in both the MDTCA and Attorney-General's Chambers to be properly trained in IP prosecution. The Government should additionally issue sentencing guidelines to ensure imposition of deterrent sentencing.
- **Address Organized Crime/Use All Available Forensic Techniques:** The Government has never adequately addressed the linkage between piracy and organized crime. In addition, despite the availability of sophisticated forensic techniques, the Government has been reluctant to use forensics except in some straightforward kinds of cases (smaller retail cases). Such forensics should be used in all cases, especially optical disc factory cases and cases involving large seizures of pirated products at retail locations, where forensics can identify the source of production. IIPA recommends the re-establishment of the Special Copyright Task Force to ensure proper resource allocation to tackle all forms of piracy, including coordinating the fight against organized crime and factory piracy.
- **Amend/Modernize Copyright Law, Optical Disc Law:** The Malaysian Government should modernize its Copyright Act, including fully implementing the WCT and WPPT (the WIPO "Internet" Treaties), and joining these treaties to provide adequate protection of copyright. Legislative changes should also facilitate enforcement in the digital environment, including, *inter alia*, by extending and/or clarifying mall owners' liability for the rampant trade of pirated products that still occurs within many commercial buildings. The Optical Media Act is also in need of modernization to address the changing situation in Malaysia, including, *inter alia*, the need to (1) prohibit the gouging of SID code from discs; (2) ensure that inspection authority is available and used at any time, day or night, and in any place where optical media production activity may be occurring; and 3) prohibit the unauthorized "burning" of content onto recordable discs. The Government must be discouraged from adopting levies against foreign films (such as those proposed by the Minister for Culture, Arts and Heritage) that would violate Malaysia's WTO obligations. Finally, the Government should pass anti-camcording legislation making the possession and/or use of recording equipment and devices in movie theaters a crime (theft of film prints is also a problem and, if not already dealt with in the law, should be prohibited).
- **Allow Right Holders to Access Criminal Files to Initiate Legal Actions Against Infringers:** The Copyright Act is interpreted in a way that impedes the ability of injured right holders to take civil actions based on evidence seized by MDTCA, even in raids run pursuant to complaints by rights holders and undertaken with the support of right holders'

representatives. It is vital that the law on this point be clarified in a way that allows right holders access to, and examination of, evidence which in many cases will be critical to support a civil claim.

For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html> for more detailed discussion of the situation in Malaysia, particularly as to what is needed legislatively.

MALAYSIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	38.8	49%	55.5	52%	40.0	45%	110.2	70%	148.9	70%
Business Software²	75.1	60%	73.0	61%	77.0	63%	79.2	68%	75.0	70%
Entertainment Software³	23.4	91%	12.9	91%	NA	90%	NA	NA	56.4	93%
Books	10.0	NA	10.0	NA	9.0	NA	8.3	NA	8.2	NA
Motion Pictures⁴	NA	NA	36.0	50%	38.0	50%	42.0	75%	40.0	80%
TOTALS⁵	147.3+		187.4		164.0		239.7		328.5	

PIRACY AND ENFORCEMENT UPDATES IN MALAYSIA

Pirate Production Continues in Licensed and Unlicensed Plants, Despite Government Efforts: Malaysian optical disc manufacturers, both underground and licensed, continue to press infringing discs for domestic and international consumption. There are 38 licensed factories and an unknown number of underground factories (at least three, for a total of 41 known plants). The licensed factories alone contain enough production lines to produce over 300 million discs per year. This disc production over-capacity presents enormous challenges to the Malaysian Government, both in terms of saturation of the domestic market by pirate product, but, more damaging, massive export piracy.

The Government of Malaysia made further strides in 2005 tackling pirate optical disc production in underground factories, resulting in decreases in the numbers of pirate music and motion picture discs produced in Malaysia for export. However, the entertainment software industry notes that pirate exports of its products have not decreased. Unfortunately,

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Malaysia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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 MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ Total losses due to piracy of records & music, business software, entertainment software, and books remained virtually the same at \$151.4 million in 2004 to \$147.3 million in 2005.

notwithstanding the closure of five licensed factories in 2005, several licensed facilities known to have engaged in pirate production continue to operate with impunity.⁶ These known entities must be a focus of attention for the Malaysian Government in 2006. The Malaysian Government has reported that in 2005, MDTCA successfully shut down seven factories, and industry is aware of five license revocations. In the factory raids, as in previous years, MDTCA has successfully seized equipment including machinery used in the pirate production.⁷ Significantly, in March 2005, the first successful raid was carried out on an unlicensed mastering factory, the culmination of a four-year investigation into Malaysia's largest pirate audio manufacturing and distribution syndicate. However, industry has since been informed that pressure from elements within the Prime Minister's office are pushing to have the facility's equipment returned and a license issued. If this is the case it would mark a low point in MDTCA's enforcement action and Government/industry efforts to promote and support the legitimate manufacturing industry. In addition, only three licensed plants have been charged for any offense since January 2004.⁸ Of particular concern are the Pioneer Solution and Universal Fitlink plants, which have seen no inspections to date despite numerous complaints. The failure to prosecute plant owners in all cases, and especially, any signs of backsliding with respect to Malaysia's largest pirate audio manufacturing and distribution syndicate, contribute to a continued lack of deterrence against this damaging form of piracy.

It is also essential in 2006 that MDTCA ensures that any plants which indicate that they are producing on "recordable" discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand recordable production, be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided for production (even recordable-only plants). Evidence has emerged regarding pirate pre-recorded production at such plants (e.g., MDTCA inspected a licensed recordable plant, H.I.Edar, in February 2004, finding 13 film stampers and 4,000 pressed titles). Reportedly, on January 17, 2006, MDTCA raided another recordable-only facility, resulting in clear evidence of content bearing pirate disc production. Standardized exemplar collection from all optical disc manufacturing facilities, irrespective of format, is needed.

Pirate Exports of Entertainment Software Still a Problem, Despite Increased Seizures for Other Industries: Pirate entertainment software products continue to be exported out of Malaysia at a furious pace, notwithstanding Government reports that MDTCA had seized double the number of discs destined for export in 2005 than in the previous year – over 700,000 discs.⁹ As MDTCA itself indicates, "[t]he bigger haul was due to the effort of a special enforcement unit set up in April last year, to focus specifically on pirated films and music destined for export to other countries." MDTCA's statement is tellingly silent on seizures of

⁶ The recording industry reports that its forensic lab in London has matched pirate product against 15 licensed Malaysian plants (including separate premises owned by the same company) with criminal complaints lodged against 12 since 2002.

⁷ For example, in seven successful raids the record industry participated in against unlicensed pirate optical disc factories (as well as one mastering factory) from January to April 2005, a total of six CD/VCD lines and three DVD lines were seized, as well as one mastering line.

⁸ Optical Disc Tech (MDTCA ref ACO1/04[NS]), H.I.Edar (ACO1/04[KAJ], and Multimedia Commerce (AHC45/04[KKB]).

⁹ Ministry of Domestic Trade and Consumer Affairs (MDTCA) enforcement officers indicated that in 2005, they had seized 702,369 CDs and VCDs destined for export (worth RM5.88 million) (US\$1.6 million), more than double the cache seized in 2004. Deborah Loh, *Crackdown on VCD Piracy Showing Results*, New Straits Times, February 4, 2006 (quoting MDTCA Director-General of Enforcement, Datuk Abdullah Nawawi Mohamed). See also *More Pirated Discs Being Exported*, The Star Online, at <http://thestar.com.my/news/story.asp?file=/2006/2/5/nation/13299803&sec=nation> (indicating that the latest major seizure took place on January 26, 2006 at KL International Airport involving 24,000 pirate DVDs destined for export to the United Arab Emirates and Jordan).

pirate entertainment software destined for export. Malaysian sourced pirated entertainment software continues to be shipped from Malaysia literally all over the world, to neighboring markets (e.g., Thailand, the Philippines and New Zealand); Europe (Belgium and Germany); the Middle East; South Africa and elsewhere in Africa; Latin America; and even the United States.¹⁰ Thus, the Government must redouble its efforts in 2006 to significantly reduce pirate entertainment software exports.

Book Piracy: The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. Dozens of shops line each campus, and most academic buildings at universities contain shops. Despite regular cooperation between book publishers and MDTCA, the problem has gone largely unchecked, especially at on-campus facilities.¹¹ Furthermore, as the off-campus shops have gone underground, the problem has become harder to detect. Shops will often set up facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities. While MDTCA is well-intentioned (taking raids against commercial photocopy centers near university campuses, especially in the Klang Valley), they need training on how to track and deal with such underground operations, including consistent instructions from superiors to MDTCA officers on how to handle raids, decide to seize, and protect right holders (who, e.g., are inappropriately being asked to provide copies of their national ID cards to the targets of raids). Other structural difficulties include that there have been no *ex officio* actions taken to combat book piracy, and MDTCA has not, to date, conducted raids at night (although we are hopeful that ongoing talks with industry on this issue will result in night raids in the near future). In addition, the universities and educational authorities (Ministry of Education) must become more engaged, especially regarding practices of on-campus facilities.

End-User Piracy: The unauthorized use of copyrighted software in businesses — end-user piracy — is an increasing global problem, including in Malaysia, and causes the greatest losses to that industry. In 2005, MDTCA conducted the most end-user raids for a single calendar year, conducting 12 end user criminal raids and 8 retail raids by the end of October 2005. In the course of the raids, 125 computers were seized (with an estimated value of RM375,000 – US\$100,540), along with the discovery of more than 41,000 copies of suspected pirated and unlicensed software worth an estimated RM98.6 million (US\$26.4 million). In addition, 2005 saw the first-ever criminal end-user conviction in a contested case that went through a full trial (detailed further below). However, the conviction is now on appeal, a process that often takes a year or more. The software piracy rate in 2005 of 60% remains well above the Asia Pacific rate of 53% and significantly higher than the world average of 35%.

Internet Piracy: Given that from October 2004 to September 2005, the number of broadband lines in Malaysia increased by 61.6%, placing it in the top ten in the world in terms of growth,¹² it is no surprise that Internet-based piracy is an increasing threat to legitimate

¹⁰ U.S. Customs, on the other hand, has noted some seizures of pirate entertainment software product sourced from Malaysia being transshipped through in Alaska. In late 2005, U.S. Customs & Border Protection apprehended a shipment of 1,400 pirated entertainment software on DVDs (with the SID codes etched out) from Malaysia at the Anchorage Federal Express Facility, destined for Paraguay. It is believed that the shipper information provided was false.

¹¹ Not only have pirate photocopy centers infiltrated campuses, but the problem is being perpetuated 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.

¹² Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. No other country in Southeast Asia grew by such a large margin.

copyright owners, including local Malay artists.¹³ In 2004, 2,176 online software infringements were traced to Malaysian ISPs; this number skyrocketed to 6,537 in the first 10 months of 2005. Internet cafés are also known to facilitate illegal activities or use unlicensed software. Piracy at Internet cafés continues to be problematic for the entertainment software industry. The MDTCA has been reluctant to run raids against such cafés and often asks that companies resolve such matters through private contracts/licensing.¹⁴

Domestic Retail Piracy (Optical Disc): Domestic retail piracy involving sales of mainly optical discs has been a longstanding problem in Malaysia, but in the past two years, MDTCA has done a better job driving retail piracy underground. Significant raiding continued in 2005.¹⁵ Nonetheless, industry continues to note the harm caused by retail piracy, e.g., many legitimate retail outlets for home video products have closed, with commensurate loss of jobs. In addition, for the first time in many years, the record industry reports significant numbers of copies of pirate CDs being imported into Malaysia from China. Enforcement against fixed retail premises will need to be stepped up and amendments to legislation extending and/or clarifying criminal liability to mall owners (who condone the flagrant open sale of pirated optical discs by their tenants) need to be introduced. Finally, prosecutions leading to deterrent sentences actually imposed are few and far between. For example, in October 2004, an entertainment software company initiated a raid at the retail premises of a suspected producer, exporter and local distributor of pirate entertainment software products. The raid resulted in the seizure of nearly 800,000 pirate entertainment software discs, but to date, there has been no progress towards initiating prosecution against this notorious pirate. Prosecutions must occur in this case and others like it to create deterrence and drive piracy from Malaysia.

Camcorder Piracy: The vast majority of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the US theatrical release and well before their international debuts. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the

¹³ Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006 (describing that top-selling musical act Mawi cannot thrive in “the piracy-infested local music scene where CD copies go as low as RM10 for three pieces and free Internet downloads are easily available at a few clicks.” The article notes record sales of 170,000 copies and 120,000 copies for two of the band’s efforts, though notes that

this is only a small percentage of the real sale. The Domestic Trade and Consumer Affairs Ministry recently reported that the raids in Sarawak revealed that 95 per cent of Mawi’s albums sold throughout the State were actually pirated copies. A simple search on the Internet reveals that the whole content of Mawi’s first solo album ... are available for download. All you need is a registration with the portal and a stable Internet connection to get free Mawi tracks saved onto the hard disk.

¹⁴ MDTCA insists that “cease and desist” letters be sent (even though they are largely ignored by the café operator) before they even considering raiding the premises.

¹⁵ The Government reported that in 2005, MDTCA officers conducted 37,296 raids, resulting in the seizure of 4.7 million discs worth RM100.8 million (US\$27 million). They also arrested 710 distributors and sellers. The motion picture industry reports that during 2005, there were 1,123 raids against sales of pirate VCDs and DVDs (473 criminal copyright cases initiated), 75 raids against pirate DVD and VCD distributors (18 criminal copyright cases initiated), 8 actions involving Internet piracy (1 criminal copyright case initiated), and 526 raids involving pirate product for export (2 criminal copyright cases initiated).

unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. Although in Malaysia, this may already amount to a violation of the copyright law, existing copyright laws have not been used and may not be adequate to combat the “act” of using a camcorder to reproduce a cinematographic film. We urge the Government of Malaysia to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

Organized Crime/Need for Complex Investigation: There can be little doubt of the involvement of organized crime in Malaysian piracy operations, whether by this term we mean large-scale illegal commercial operation or an operation that involves many individuals conspiring to engage in many different criminal ventures. It has also been clear for years that anti-piracy work, either from the industry side or the Government side, is fraught with danger.¹⁶ Malaysian authorities continue to be reluctant to thoroughly investigate links between piracy and organized crime. This must change if the Government is to begin to adequately address its piracy problem and to successfully remove these syndicate-run operations (such as those that control the large-scale production and export of pirated entertainment software products) from the country.

A related point is the continuing reluctance of Malaysian authorities to make use of the forensic capabilities available to them. While MDTCA supports the industry’s forensic programs in Malaysia where infringing product is found on site in the course of a raid or inspection, MDTCA had not until recently (September 2005) submitted samples from sizeable seizures to the Government Chemist to identify the manufacturing source. Industry has been assured by the new Director of Intellectual Property that this is now being done, which is a positive sign. Some dynamic middle managers in MDTCA appear enthusiastic to take on more sophisticated investigative operations to target major pirates. One act that might help the Government to prioritize and allocate resources to tackle piracy, including organized piracy, most effectively would be the re-establishment of the Special Copyright Task Force to take on these coordinating responsibilities.

Courts’ Response to Piracy/Need for Specialized IP Court: Malaysia’s court system, whose ruling bodies seem out of step with the more forward thinking government departments, remains incapable of processing court hearings in a timely, logical and ordered manner. Until this bottle neck is addressed, the Malaysian Government will continue to fight an uphill battle to successfully combat piracy. Notwithstanding this over-arching problem, the year 2005 saw a couple of breakthrough events in the courts. Constant pressure led to most criminal end-user software piracy cases being brought to court shortly after the raids in 2005. This is a very encouraging development. The MDTCA also achieved its first-ever criminal end-user conviction in a contested case that went through a full trial,¹⁷ resulting in a sentence of a fine of RM120,000 (US\$32,174) or six months’ jail per charge for directors in default of payment of the fine, for possession of 15 infringing copies of software, other than for private and domestic use.¹⁸ For the recording industry, court cases are proceeding well only for retail cases where arrests are made during raids. Other cases, however, languish in an essentially broken court system. There remains a significant divergence between the number of raids being carried out

¹⁶ In a raid run recently on an Internet café by a representative for an entertainment software company, the owner and the supervisor of the café became agitated and verbally and physically abusive, tossing computers on the floor in the presence of the police. They also took photos of the industry representative with their cell phones and cameras and threatened to distribute the photos to other cafés.

¹⁷ The defendant, Sarawak-based Alom Industries Sdn Bhd, is currently appealing the conviction.

¹⁸ Though many of the criminal end user cases have reached the courts, many still remain in the investigation phase, including some cases over two years old. In addition, cases in the courts can still take many years to reach resolution.

and the number of cases being processed through the courts. In addition, a number of appeal cases lodged by the prosecution against acquittals, some dating back to 2003, have never been concluded.¹⁹ The MDTCA Minister appears to understand and has announced that he hopes to have a pilot specialized IP Court in Kuala Lumpur by 2006.²⁰ IIPA supports this initiative.

Right Holders Not Permitted to Access Criminal Files to Initiating Legal Actions Against Infringers: The Copyright Act is interpreted in a way that impedes the ability of injured right holders to take civil actions based on evidence seized by MDTCA, even in raids run pursuant to complaints by rights holders and undertaken with the support of right holders' representatives. In particular, right holders have been refused access to evidence seized by local authorities on the argument that such access would violate a non-disclosure provision in the Act.²¹ Application of the non-disclosure provision to refuse access to evidence prevents right holders from being able to initiate civil actions for their injury. This creates an impossible enforcement situation in cases when the authorities fail to take criminal actions against the infringer but nevertheless refuse to allow access to evidence for use in civil actions.

Hologram Sticker Program Does Not Deter Piracy: The hologram stickering program remains an unreasonable burden on industry. This program requires that the sticker be affixed inside the shrink-wrap packaging of discs. Since entertainment software products are not domestically produced but imported into Malaysia, when imported legitimate products arrive in the country, they have to be re-packaged to accommodate the hologram stickers, adding unnecessary costs and delays. The sticker program is also subject to abuse if stickers are issued to pirates.

TRAINING AND PUBLIC AWARENESS

The Malaysian Government has generally been receptive to training opportunities and technical assistance for its enforcement authorities. As noted, a key issue in Malaysia is developing a cadre of trained prosecutors and a specialized IP court with judges sufficiently familiar with copyright law as well as the links between copyright and organized crime to be ready to mete out deterrent sentences. In addition, before a case even reaches court, it would be highly useful to provide training to MDTCA staff (and others involved in investigations) to deal with all the "post-raid" investigative procedures. The record industry is considering such a training for 2006.

The MDTCA has been very supportive of initiatives by the business software sector to publicize the need to respect software copyright. In April 2005 the Deputy Minister for the MDTCA announced the launch of the *Ops Tulen 2005 Korporat* program at a press conference, after which the campaign (and raiding discussed above) against end-user software piracy commenced. In addition, most of the criminal end-user software piracy raids discussed were publicized by the local heads of the MDTCA at press conferences irrespective of where the raid was conducted. The MDTCA also co-sponsored a number of "Software Asset Management"

¹⁹ It has also been reported that cases, once filed, do not move forward, as officers are transferred, etc.

²⁰ Izatun Shari, *Special court to hear IP cases*, The Star, September 13, 2005.

²¹ A series of raids by the recording industry and MDTCA in 2005 uncovered distribution centers, offices and replicators used by a known syndicate distributing suspected pirate products throughout Southeast Asia. Over one million discs and large quantities of documents and other evidence were seized. While industry wished to bring a civil action, MDTCA, citing Section 52 of the Copyright Act (dealing with the disclosure of information obtained pursuant to the Act) would not provide industry with access to the materials recovered from the raids. MDTCA has further opined, after consulting with the Attorney General's office, that such information would not be provided in other cases as well. This makes civil litigation with respect to these matters extremely difficult if not impossible.

(SAM) seminars with the Business Software Alliance (BSA) across Malaysia, including places such as Penang, Kota Kinabalu, Kuala Lumpur, and Johor, targeting CEOs, business owners, financial managers, IT managers and auditors. The MDTCA also sent out around 10,000 letters to businesses urging them to use licensed software programs and to join the BSA's voluntary software audit program. This support from the MDTCA resulted in a very favorable response from the business community.

The MDTCA has also been generally supportive of industry initiatives to boost the standard of IP prosecution in Malaysia. For example, from November 25 to 27, 2005, the Motion Picture Association and the MDTCA jointly organized a "Copyright Enforcement and Prosecution" seminar at Genting Highlands which was attended by 28 MDTCA prosecutors nationwide, five Senior Deputy Public Prosecutors from the Attorney-General's Chambers, the Senior Assistant Parliamentary Draftsman, the Head of the Commercial Crimes Division, and MPA's local counsel. The seminar allowed participants the opportunity to discuss and share their court experiences directly with senior prosecutors from the Attorney-General's Chambers.

MARKET ACCESS

Broadcast Quotas and Investment Restrictions Hamper Legitimate Right Holders: Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of airtime to local Malaysian programming. Broadcast stations are also being banned from broadcasting foreign programming during "prime time" hours of 8:30 to 9:30 p.m. Foreign investment in terrestrial broadcast networks is also strictly prohibited, and through licensing agreements the government also imposes a 20% limit on foreign investment in cable and satellite operations. These restrictions are extremely damaging and highly prejudicial to U.S. copyright owners in program content, and should be eased or lifted.

Proposed Levy Could Violate National Treatment: The Malaysian Government also maintains several other regulatory requirements in the audiovisual sector that effectively combine to impede the growth of the film and home video industries and has announced the possible imposition of further restrictions on foreign products. In October 2005, Malaysia's Culture, Arts and Heritage Minister, Datuk Seri Dr. Rais Yatim, was quoted in several newspapers supporting the idea of introducing a levy to be assessed against all imported films distributed in Malaysia. The Minister stated that the proposal was specifically for the purpose of assisting the development of the local film industry. While the extent of the proposal remains unclear, audiovisual distributors and exhibitors remain concerned that the imposition of such a levy would place Malaysia at a competitive disadvantage with respect to other markets in the region, may result in a reduction in the importation of films into Malaysia, and may violate Malaysia's WTO obligations to extend full national treatment to foreign rights owners.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

MEXICO

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Mexico remain on the Special 301 Watch List in 2006.

While IIPA's submission only requests that Mexico remain on the Watch List, the fact remains that notwithstanding the efforts of the Attorney General, whose office has been very responsive, the piracy situation in Mexico has not materially improved, and the sheer dimension of the piracy problem in the Mexican market reflects a situation more in line with those of countries on the Special 301 Priority Watch List than the Watch List. Simply put, the Mexican Government must focus not only on increased enforcement, but must enhance its efforts in all areas, with emphasis on increased public awareness of the nature and repercussions of rampant piracy in Mexico, based on development of a strategy to significantly decrease levels of piracy rather than to merely maintain current practices. It is urgent that the Mexican Government develop more effective methods to work with state and municipal governments to attack the blatant problem of over 50,000 street vendors openly offering pirate products. The best efforts being extended by the Attorney General and some enforcement agencies will be wasted unless the government can address the sizable offer of illicit product found in practically every corner of the country. In addition, judicial training must be intensified, and modifications to the penal code to grant *ex officio* authority are sorely needed.

Actions Which Could Be Taken by the Mexican Government in 2006: 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.

Enforcement

- Focus efforts to fight piracy in well-know street markets (like Tepito in D.F. and San Juan de Dios in Guadalajara) which sell vast quantities of pirated goods in broad daylight;
 - Significantly improve investigations and raids against pirates involved in commercial distribution and street piracy;
 - Insist that PROFECO use its *ex officio* powers to stop piracy in street markets;
 - Insist that state and municipal governments take a proactive role and be held accountable for fighting piracy at the street level.
- Have the PGR's Organized Crime Division work closely with copyright industry and carry out systematic and effective investigations and actions against chief pirates who are involved with organized crime.
- Crack down on illegal photocopying by copyshops on or near major university campuses.
- Improve police coordination between federal and state enforcement.
- Involve the tax authorities (SAT) in sustained anti-piracy actions.
- Encourage prosecutors to act swiftly on complaints, and to recommend maximum sentences to the courts in order to improve deterrence.
- Impose higher sanctions on door-closings (i.e., refusals to admit inspectors during a governmental audit or raid).

- Improve administrative enforcement by the Mexican Industrial Property Institute (IMPI), for example, IMPI agents should be accompanied by police with the authority to gain entry into the targeted premises during inspections.
- Continue to track the importation of blank optical media products.
- Improve border enforcement.
- Issue mandatory sentencing guidelines, or at a minimum, suggested guidelines, in the courts.
- Improve judicial and administrative training on copyright enforcement.
- 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

- Support passage in the House of the Anti-Piracy Bill which would amend the penal code to give *ex officio* authority for police (the bill has already been approved by the House and is in the Senate for approval).
- Make refinements to the bill proposing to amend the penal code regarding the anti-circumvention of technological protection measures.
- Make refinements to the bill proposing to amend the copyright law to authorize the use by authors, performers and record producers of technological protection measures to protect against unauthorized use.
- 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 anti-circumvention and rights management information).
- Pass amendments to the Film Law to prevent parallel imports of films.
- Pass amendments to the criminal code to sanction piracy of open TV signals.
- Pass the penal code amendment to provide protection against unauthorized camcording in theaters.

COPYRIGHT PIRACY IN MEXICO

Summary: Copyright piracy remains a serious problem in Mexico, with 2005 revealing no significant improvement in the piracy situation. Piracy involving hard goods, optical discs, Internet piracy, photocopying and street sales continued in 2005. Unfortunately, piracy affecting some industries (such as the audiovisual industry and the recording industry) worsened over the past year. 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, on piratical production and distribution. 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. Total estimated losses due to copyright piracy in Mexico, as reported by IIPA members, amounted to \$1.25 billion in 2005.

MEXICO
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	376.5	65%	326.0	60%	360.0	61%	459.0	68%	366.8	61%
Entertainment Software ³	137.7	75%	132.2	76%	136.9	66%	NA	NA	202.5	83%
Business Software ⁴	214.2	64%	222.0	65%	220.0	63%	168.9	55%	146.9	55%
Motion Pictures ⁵	483.0	62%	140.0	70%	50.0	45%	50.0	40%	50.0	40%
Books	42.0	NA	42.0	NA	40.0	NA	40.0	NA	40.0	NA
TOTALS	1,253.4		862.2		806.9		717.9		806.2	

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy in Mexico is among the worst in the world, and is getting worse. In the last 18 months the piracy rate and the losses to the audio-visual industry have increased dramatically. This dramatic increase in such a short time is due to the tremendous surge of pirate product available in the system of street markets. 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. Not only has the volume of optical disc piracy increased in this market system, the market system itself has increased in size and extension. Pirates are also using the subway stations, where there is great circulation of people, to sell pirate DVDs. Pirate points-of-sale easily outnumber legitimate DVD sell-through points of sale and total theatrical screens, while providing a convenient direct competition. For 2005, MPA's methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Mexico (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Mexico due to audiovisual piracy (including both hard goods and internet) were \$483 million, and the estimated piracy level was 62%.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B to IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

² RIAA reports that the 2000-2005 estimated losses due to recording piracy in Mexico reflect losses experienced by the overall industry, including both U.S. and Mexican record companies. The losses are calculated using a third-party survey to improve accuracy of the estimate.

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 BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Mexico, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

Music and recording piracy: For the recording industry, Mexico continues to be one of the top ten pirate markets in the world. Burned CD-Rs and DVD-Rs are the format of choice for almost all pirates. Recording and music piracy in Mexico represents \$376.5 million in losses and covers approximately 65% of all units sold in the country. The level piracy has increased slightly over the last year by 5 percentage points (from 60% to 65%) due to mostly the spread of street vendors in south and central Mexico. The key areas of anti-piracy actions such as Mexico City, Jalisco and Monterrey have either remained at the same level or decreased. In part, the efforts made to combat piracy in key markets have contributed to a small recovery of the legitimate market, which increased by 26% in units. Nevertheless, Tepito has continued to be a major problem for the recording industry for far too many years; it accounts for approximately 65% of the pirate music product manufactured and distributed in the country. Another major concern for the industry is Internet piracy. A third-party survey conducted by the local industry association revealed that approximately 600 million songs are annually downloaded illegally. This level piracy is threatening the development of an emerging legal download business now represented by two new important websites: Tarabu.com and Beon.com.

Business software piracy: The estimated level of business software piracy in Mexico has remained basically the same over the past few years, with the 2005 piracy level placed at 64%, and estimated trade losses at \$214.2 million in 2005.⁶ The Business Software Alliance (BSA) remains very concerned with continuing end user piracy. This industry also reports problems with Tepito and San Juan de Dios (in Guadalajara) which serve as manufacturing (burning labs) and selling points for pirated software. Higher fines need to be imposed on parties who close the doors during a governmental inspection or raid. Copyright certificates from abroad must be given full recognition. Electronic audit means should be fully implemented. Additional staffing in governmental agencies is necessary.

Entertainment software piracy: Videogame piracy on all platforms (from cartridges to CD-ROMs) continues to be widespread in Mexico, with pirated products most prevalent at informal markets and sales centers. Circumvention devices and services that facilitate the installation of such devices are also prevalent at these sales centers. 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. Reports indicate that counterfeit cartridge-based games are being assembled in Tepito. Seizure notices received from U.S. Customs & Border Protection identified Mexican importers as being involved in the importation of significant quantities of counterfeit Game Boy Advance components from Hong Kong and intended for assembly in country. The total number of counterfeit components was 45,974. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Mexican marketplace was \$137.7 million in 2005, with a 75% piracy rate.

Book piracy: The Association of American Publishers (AAP) reports that illegal photocopying of books remained a huge problem for the publishing industry in 2005. 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

⁶ Lowering the piracy level could accrue numerous economic benefits to the Mexican economy as well as the IT sector. BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: reducing Mexico's 65% piracy rate by 10 percentage points would help the industry grow by almost 50 percent to \$11 billion by 2009, and pump \$2.7 billion into the economy, create nearly 7,000 more new jobs, and increase local industry revenues by more than \$2 billion. The extra business activity, in turn, would generate an additional \$300 million in tax revenue to help the Mexican government pay for public benefits and services. See <http://www.bsa.org/idcstudy/pdfs/Mexico.pdf>.

permissible levels under the copyright law.⁷ For example, copy shops in and around the UNAM (the national university) in Mexico City charge as little as 2-3 US cents per page, allowing producers of illegal copies to undercut the market for legitimate texts. (Off-campus facilities of major office supply chains and other reputable businesses to restrict the content and amount of material being copied.) Universities are condoning, directly and/or indirectly, 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. By one industry estimate, the number of pages of copies of copyrighted materials made in Mexican universities per year amounts to at least 5 billion pages. Some 80% of these, mostly in Spanish, are published in Mexico by wholly-owned subsidiaries of U.S. companies. 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. 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. These payments remain voluntary, and are thus not a good source of revenue for legitimate companies, though some publishers report that payments have improved a bit. AAP estimates that book piracy losses in Mexico remained at \$42 million in 2005.

Street vendor piracy and efforts to legitimize markets: Without a doubt, 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, less permanent street markets. For example, one of the world's largest centers of pirate product and contraband sales (as well as of drugs and weapons), Tepito, is well organized and politically protected. It is imperative that any anti-piracy campaign by the government include as a top priority reducing this kind of distribution network. For example, MPA reports that in Tepito alone there are more than 600 booths of pirate movies with an average of 20,000 units each, selling counterfeit goods in daylight. Huge simultaneous raids hit more than 20 pirate DVDs laboratories in Tepito and seized 4 million units of pirate goods with virtually no impact on the offering of piracy. In addition, there are an estimated 1,500 (and growing) smaller, less permanent or rotating, street markets not surveyed by MPA that also have one to three booths each that carry pirate audio-visual product and sell at higher retail prices to local consumers. The growth of these unregulated markets is now a political, economic and public security concern to local authorities. 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.⁸

The Mexican government conducted yet another raid on Tepito on January 19, 2006. The Attorney General's (PGR) office, with support from 600 federal and local police, raided 224 small and medium-sized warehouses and 15 CD-R replication facilities, resulting in the seizures of 1.7 million recorded CD-Rs, 5 million inlay cards and 957 burners. The size and sophistication of these operations clearly reflect the existence of structured, organized enterprises at-work.

⁷ 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 provision violates TRIPS and should be revised.

⁸ 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 now believe that the street markets need local control, both on the municipal and state levels. On the municipal level, for example, the Jalapa, Veracruz mayor has worked to take administrative licensing action against markets selling audio-visual piracy. The effort has been very successful. At least two other cities, Cuernavaca and Irapuato, have taken similar action (we have found that some of these points with music product sell both pirate and legit product). On the state level, the governor of Puebla has been a great supporter of the anti-piracy fight and is working in close coordination with MPA and PGR to make the state of Puebla a piracy free market with original DVDs and CDs and licensing these outlets by legally requiring that they sell only legitimate product. The model is designed to require that street sales be limited to legal products with systematic licensing, inspections, and sanctions.

Over the past 18 months, there have been efforts by the federal, state 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 (*auto-empleo*). 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 Guadalajara. We also understand that the City of Guadalajara has started to revoke operating licenses of those vendors who refuse to convert to legitimate product or change to other different legitimate goods. This measure may have a greater effect on pirate vendors because some stand locations in key markets may be worth up to US\$200,000. The local recording industry reports that to date, the City of Guadalajara has revoked 22 licenses in the major covered market of “San Juan de Dios” and seems committed to continue with the program. The Mexican government should consider expanding this conversion program to Mexico City.

Nevertheless, we repeat again, that while the visions of these conversion programs should be applauded, it is imperative that the Mexican government 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. These actions need to be complemented with a license revocation program that will threaten the ability of those vendors to earn a living.

COPYRIGHT ENFORCEMENT IN MEXICO

Over the last two years, the Office of the Attorney General (PGR) has increased its commitment to seize pirate product from street markets, improve effective case preparation, prepare indictments and conduct prosecutions, but all this unfortunately is still far below the level needed to have any significant effect in the marketplace. Some pirate marketplaces, such as Tepito, still remain outside the reach of law enforcement. Without a government-initiated, sustained campaign against well known pirate marketplaces, the situation in Mexico is unlikely to change dramatically.

Raids, seizures and cooperation with the police and PGR: 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.

Cooperation and coordination between the PGR and the private sector remained good in 2005. 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 Attorney General 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. 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. The recording industry reports that the PGR, the Assistant Attorney General and its anti-piracy task force continues to be fully engaged in the campaign to the extent of available resources. Over 1,200 raids have been carried out over the course of 2005 against a number of targets that include pirate replication facilities, warehouses and street points. In addition, the PGR has provided support in the enforcement part of the conversion program in Guadalajara. It is important that PGR release its *Acuerdo Nacional contra la Piratería* (National Anti-Piracy Agreement) so that said instrument may become a means for ensuring a smooth transition into the next government. In this sense, PGR, the Ministry of Economy, the State Department (*Gobernación*) and the other agencies involved must work together closely to establish a coordinated and effective national anti-piracy strategy, and, more importantly, to implement it effectively.

Getting police to seize product has not been the predominant problem in Mexico; obviously, there is a lot of pirate product out there, and there is always room for more seizures. 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 2004, the PGR 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 and 2005 casts some doubt on its potential. Due to the complex investigative procedures established by the law, this division has not undertaken concrete actions against piracy. MPA recommends a strong partnership between Organized Crime Division and copyright industry to carry systematic and effective investigations and actions against main pirates who are involved with organized crime.

The Attorney General of Consumer Affairs (PROFECO) has the authority to take *ex officio* actions against black market and informal markets, including the powers to seize product, close markets, and issue sanctions. In 2004, the local recording industry has used PROFECO operations in Guadalajara and San Juan de Dios. PROFECO has been instrumental in identifying pirate product for the municipal authorities to take action on the license revocation programs in four key municipalities making up metropolitan Guadalajara. PROFECO should get much more actively involved in fighting piracy at the street markets, especially in Mexico City, Puebla, Guadalajara and Monterrey. PROFECO's *ex officio* powers could be used to address widespread street piracy; however, the lack of concrete actions leads to the conclusion that PROFECO does not have political willingness to adopt effective measures against piracy. PROFECO should work with copyright industries and use its *ex officio* powers to inhibit piracy in street markets.

The recording industry reports that anti-piracy authorities conducted a large operation in July 2005 at a well known pirate market in Guadalajara, executing 55 search warrants, seizing over 80,000 pirate discs, and closing a number of stores.

Full prosecutions remain few and sanctions are not deterrent. Again in 2005, no significant progress was made in resolving one of the most longstanding and disturbing problems in Mexican criminal copyright enforcement. 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). Cumulative year-end data for 2005 is not yet available from all industries (see chart, below). The recording industry reports a 5% sentencing-to-number of criminal raids ratio for 2005, an improvement over prior years.

COPYRIGHT ENFORCEMENT STATISTICS IN 2005 IN MEXICO (PARTIAL DATA)					
	MOTION PICTURE ASSOCIATION CASES (JAN-JULY 2005)	BUSINESS SOFTWARE ALLIANCE CASES (2005)	RECORDING INDUSTRY (LOCAL AND U.S.) CASES (2005)	2005 TOTAL	COMPARE 2004
TOTAL NUMBER OF RAIDS	928	443	1,265	2,636	2,487
CRIMINAL RAIDS	918	34	1,265	2,217	2,218
ADMINISTRATIVE RAIDS	10	409	0	419	269
NUMBER OF PERSONS HELD IN PRE-TRIAL DETENTION	N/A	N/A	208		212
NUMBER OF INDICTMENTS	N/A	N/A	64		124
NUMBER OF CASES RESULTING IN FINES OR JAIL TERMS	N/A	N/A	11		22
LEVEL OF SENTENCES IMPOSED	N/A	N/A	2 YEARS BUT SENTENCES ARE SUSPENDED	(SEE LEFT)	
RATIO OF CONVICTIONS/ FINES TO NUMBER OF CRIMINAL RAIDS CONDUCTED	N/A	N/A	5%		0.9%
PIRATE COPIES SEIZED	6,771,469	N/A	12,817,214	AT LEAST 19.6 MILLION COPIES	AT LEAST 12.1 MILLION COPIES
OTHER MATERIALS RELATED TO INFRINGING ACTIVITIES WHICH WERE SEIZED (ITEMIZED)	704,658 BLANK OPTICAL DISCS ; 1,163 DVD BURNERS	N/A	17,121,000 BLANK CDR'S AND DVDR'S	(SEE LEFT)	

MPA reports that even though seizures of optical discs by the PGR set a record in 2005, piracy has not declined. These seizure actions are effective in temporarily removing pirate product and causing limited financial losses to pirates, but are not effective to date in terms of prosecutions leading to deterrent sentences. (Only PGR can develop a case for prosecution after a raid.) Effective efforts to attack piracy will require more deterrence than just seizures. Although the PGR has notably increased its commitment to seize pirate product from street markets, effective case preparation, indictments and prosecutions are still far below the needed commitment to have any significant effect.

In 2005, BSA member companies brought 34 criminal cases, which represents a shift because for several years, BSA chose not to pursue criminal actions in Mexico.

The recording industry reports that only 11 sentences were issued in 2005 for incarceration of up to 3 years but most of them were suspended because judges felt the crimes were not serious enough to jail the pirates. The only bright spot in this issue has been that some judges are awarding damages to the companies as part of the criminal convictions. In one case in Guadalajara, the industry was compensated with approximately \$2,700, not nearly enough to repair the damage, but it represents a positive change.

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 positive traction 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.

Administrative copyright enforcement by IMPI improved in 2005. BSA reports that 2005 represented a significant improvement in cooperation with the Mexican Industrial Property Institute (IMPI). As for administrative anti-piracy actions, BSA and IMPI collaboration was better than ever: 324 *ex officio* raids and 88 *ex parte* actions were brought in 2005. IMPI implemented for the first time a fully operational electronic audit system. In addition, BSA also worked with INDAUTOR, the copyright office, to implement a system of institutional mediations (*juntas de avenencia*). It completed 28 such mediations in 2005. These actions are an alternative to litigation. Parties are given the opportunity to talk about a specific infringement situation and reach an amicable solution. The campaign entitled PIÉNSALO BIEN or “Think about it” was more robust, encompassing both software system builders and end users. It intensified its operations within the Mexico City metropolitan area, and it reached out considerably to states like Nuevo León, Guadalajara, Veracruz, Puebla and Quintana Roo.

Two historical problems with IMPI are being addressed. First, in recent years, BSA has reported that one of its major challenges in its administrative actions was that IMPI inspectors were frequently denied entry to the suspected premises (if IMPI invited the police to accompany them on their inspections, such denials would be prevented). In December, 2005, an Appeals Court belonging to the Tax Court (Novena Sala Regional Metropolitana Civil) has recently issued a decision ruling that IMPI is to presume the truth of all the allegations made by the complainant, considering that the alleged infringer denied IMPI entry into its premises. In addition, IMPI’s Executive Director made several radio appearances, stating that those who close their doors to administrative enforcement should beware of the consequences. BSA is hopeful that this case will reverse the historical trend and significantly improve administrative enforcement efforts. Second, IMPI historically denied the possibility of using electronic audits to review use of allegedly infringing software in end-user owned computers. Today, IMPI officers are using laptops, portable printers and USB units to audit targets. BSA has donated hardware, software, training and the costs for obtaining an expert opinion relating thereto.

Furthermore, ESA launched its new anti-piracy program for entertainment software in May 2005. Working with IMPI, the industry took administrative actions against eleven vendors at the Pericoapa Bazaar in Mexico City which were involved in the distribution of pirated and counterfeit computer and video games. A large quantity of pirated entertainment software for the PlayStation2®, the Xbox®, and PCs were seized from most of the vendors during the raid (nearly 1,000 pieces of infringing material including two CPUs containing pirated material). IMPI officials on the raid were also accompanied by officers from the Mexico City riot police to provide protection. In June 2005, IMPI, along with ESA local counsel, conducted a raid against vendors of pirated and counterfeit entertainment software product at the Perinorte sales mall, resulting in the seizure of approximately 800 pirated products on optical discs and one CPU from the targeted vendors. In December, another

raid was conducted at the Pericoapa Bazaar resulting in the seizure of 1,751 pirated entertainment software products (games for play on PlayStation, Xbox and GameBoy Advance®) and 1 CPU containing pirated content. A December raid at Plaza Meave also resulted in the seizure of over 1,500 counterfeit *Nintendo* products. Over 350 security police were involved in support of the action and to avoid rioting and violence.

As noted above, IMPI officials were accompanied by riot police on market raids. Although the presence of riot police at these raids can be helpful for maintaining the peace, they lack a mandate and the authority to demand entrance into the premises targeted for the raids. In the case of market raids by IMPI, the riot police typically wait outside the market while the IMPI agents, unaccompanied by any police, attempt to inspect and serve enforcement documents on various vendors operating out of separate booths inside the market. For administrative enforcement to be more effective, IMPI agents should be accompanied by police officers with authority to enter premises so that vendors cannot simply refuse entrance during inspections.

MPA uses administrative agencies to address a few cases involving optical disc piracy at the retail level through IMPI and INDAUTOR (the Copyright Office). Although these agencies do not have the immediate 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.

Border efforts to track blank optical grade media must continue. Given the growth of optical disc (OD) piracy in Mexico, it is important to track imports of blank ODs. 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). In 2005 this work with Customs netted total seizures of over 17 million units of blank optical media.

Border enforcement needs improvement and better interagency coordination. 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 recognizes Customs for their tremendous efforts in seizing raw materials destined for the production of pirated products. The action that netted over 17 million units of blank CD-Rs in 2005 is a positive sign that Mexican Customs is willing to act. ESA and its members report that while there continue to be problems with stopping and seizing pirate and counterfeit product at the border, there were two significant seizures in 2005, with a total of 115,000 counterfeit *Game Boy* cartridge components seized. The seizure operation was conducted by Mexican Customs after receiving information from Canadian authorities. 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.

Civil Infringement Actions: In 2005, BSA initiated 12 civil copyright infringement actions. While the initial instances of these actions are being resolved, it is still early to assess the results. BSA notes that the Tax Court has issued an interesting decision: AOS Solutions S.A. de C.V., ruling that door closures may result in the presumption of the authorities that complainants' assertions are true. This decision should be followed by administrative and judicial authorities.

Trainings: Copyright industry associations and companies regularly conduct training and informational seminars for Mexican enforcement authorities. For example, BSA led several training programs with IMPI and INDAUTOR during 2005, and has participated as presenting speakers in various conferences organized by the Ministry of Economy, UNAM, AMIPCI, the Computer Law Association, and other associations and chambers. BSA also conducts a regular roadshow at Universidad Iberoamericana, Tecnológico de Monterrey, ITAM and some other 360 universities (through UNIVERSIA). BSA is creating the Mexican Software Consortium to help with lobbying, street enforcement actions, and training administrative authorities and judges. MPA organizes training sessions frequently, from occasional large general sessions (discussing general issues such as the political and economic context issues, cyber crime and optical disc tendencies, etc.) to frequent small practical training sessions for identification of pirate product for seizure purposes. MPA both offers and receives requests for training. The program's priority is smaller sessions oriented toward practical identification for seizure of pirate product. All Mexican enforcement agencies have been open to receiving such training. The ESA provided training seminars for IMPI officers, for both the copyright and trademark divisions. The training addressed specific piracy and enforcement issues faced by entertainment software publishers in the country, as well as targeted sessions on how to identify pirated products for seizure. At the Mexico City Electronic Game Show, the organization also delivered and promoted an anti-piracy message. Finally, 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.

COPYRIGHT AND RELATED LAWS IN MEXICO

Copyright Law (1996, as amended) and Regulations: 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. Regulations to implement the 2003 amendments were issued in September 2005.

Mexico still needs to fully implement the WIPO Treaties.⁹ The WIPO Treaties have not been fully incorporated into Mexican Law. The Agreed Statements still need to be published in the Official Gazette. 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),¹⁰ 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

⁹ Please see prior IIPA Special 301 reports for more comprehensive details on the deficiencies in the current Mexican copyright law; see <http://www.iipa.com/countryreports.html> and scroll down to Mexico.

¹⁰ The Mexican government is undertaking efforts to correct a problem with the proper publication of the WIPO Treaties. The text of the treaties, as published in the *Diario Oficial de la Federación*, is incomplete, and the Treaties' agreed statements are missing. Fortunately, the full texts seem to have been approved by the Executive and ratified by the Senate.

revise the Mexican Federal Copyright Law. Any reform should include ISP liability and create notice and takedown procedures, a comprehensive making available right, and civil and criminal sanctions on the circumvention of technological protection measures and removal or alteration of electronic rights management information. The copyright industries request that any such initiative involve public comments and that the process be as transparent as possible.

Bill on *ex officio* copyright actions: An Anti-Piracy 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 was presented to the Mexican House in 2004. The good news is that it was recently passed by the House in December 2005, and is pending before the Senate. There is optimism that the House will pass this legislation, too, which would be a great result.

Proposed 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, approved in the Lower House in 2005, and is now pending in the Senate. 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.)

Proposed copyright law amendment regarding technological protection measures: Also pending in Congress is a bill which amends the copyright law to grant the right to authors, performers and record producers to insert technological protection measures in their works, performances and sound recordings. More work is needed on this bill to better reflect the scope of what the industries view as an effective anti-circumvention bill, including sanctions against the circumvention of TPMs, and removal and alteration of electronic rights management information.

Software legalization decree in government ministries: The Mexican federal government is among the most "legal" in all of Latin America 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. So far, INDAUTOR, the Education Ministry of Jalisco and the Municipality of Zapopan have agreed to self-audit and publicly set the example for legal software. BSA reports that the efforts in Jalisco are moving forward.

Organized crime law: 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.) This reform also gave 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). Due to the complex investigative procedures established in this law, the Organized Crime Division of the PGR has not undertaken concrete actions against piracy. An amendment to this law may be considered to simplify the procedures. To our

knowledge, none of the 2005 criminal copyright cases were based on the organized crime law.

Amendment to criminal code to provide protection against unauthorized camcording in theaters: MPA is sponsoring a bill presented by Congressman Javier Orozco, which amends the Criminal Code to punish with a prison term from 3 to 10 years and fines the unauthorized camcording of films in theaters; the respective legal action would be *ex officio*. Currently the bill is in the Lower House and MPA expects it to be voted on in 2006.

Amendment to the Film Law to prevent the parallel imports of films: In 2004, a bill was presented in the Lower House which would prevent the parallel imports of films by determining and imposing administrative sanctions on those who commercialize films without the previous authorization and rating granted by the Radio, Television and Film Secretariat. MPA supports this initiative.

Free television piracy bill and amendment to the Television and Radio Federal Law: In 2004, an amendment to the criminal code was presented in the Lower House which would sanction with a prison term from 4 to 8 years anyone who uses, exploits and operates public communication networks. This bill should also be modified to sanction the unauthorized use and retransmission of pay-TV signals. MPA supports its modification and approval. In addition, the Lower House just approved an amendment to the Television and Radio Federal Law to regulate the grant of licenses to pay TV operators, establish a must-carry obligation, limit the market share of individual broadcasters, reduce the validity period of licenses, etc. MPA understands that this initiative should be modified to include a provision to protect digital audiovisual content.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PAKISTAN

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Pakistan be moved from the Priority Watch List to the Watch List, with an out-of-cycle review to evaluate whether Pakistan continues to make progress in tackling book piracy and reducing pirate optical disc production. IIPA is particularly concerned with Pakistan's immediate action to significantly curtail book piracy. IIPA also urges USTR to evaluate whether the optical disc piracy raids and arrests have significantly reduced optical disc pirate production, and have led to criminal prosecutions with deterrent sentences imposed against those responsible for pirate optical disc production, including plant owners.

Priority Actions Requested in 2006:

- **Significantly Reduce Book Piracy:** Pakistan is one of the world's worst markets for books, as piracy of published materials is rampant. Large-scale photocopy piracy and higher quality offset print piracy have completely decimated the market for most legitimate publishers. The Federal Intelligence Agency (FIA) must devote resources and manpower to raid pirate printers and warehouses where pirated books are stored, and pirate retailers, especially those in the Karachi and Lahore Urdu Bazaars. The Ministry of Education must ensure that all books being used in educational institutions are legitimate copies, and that pirate photocopying will no longer be tolerated.
- **Fix Royalty-Free Book Compulsory License Which Violates TRIPS:** The Government of Pakistan amended its copyright ordinance in 2000 to include Section 36(3) that allows a royalty-free compulsory license of books. This amendment was passed without any opportunity for publishers to comment. This provision threatens to further diminish a market already almost completely overrun by piracy. This royalty-free compulsory license violates the Berne Convention and TRIPS and the Government of Pakistan must repeal it.
- **Prosecute Optical Disc Plant Owners:** The Pakistani Government took unprecedented actions in 2005, shutting down several factories engaged in piracy of optical discs. Now, the persons responsible for massive pirate OD production in Pakistan (including those who were arrested during the 2005 raids) should be expeditiously prosecuted and given deterrent sentences consistent with the huge scale of their infringing activity. The remaining plants must continue to operate under close Government supervision and regular inspections, and the plants previously found to be engaged in piracy, and/or recidivist plants, must remain closed and equipment dismantled and/or destroyed.
- **Take Action Against "Burning" Operations and Seize More Pirate Imports:** With the resounding success of the actions by IPO and FIA against pirate plant production of optical discs, increased vigilance will be needed in 2006 through raids, seizures, and monitoring at the border to ensure that the void is not filled by "burning" operations and/or pirate imports from Southeast Asia. FIA should take swift action against any "burning" operations, including raids, seizures, and, where warranted, arrests. A directive should be issued ordering Customs officials to be increasingly active in intercepting pirate imports at the borders.
- **Take Actions Against Business Software Piracy and Other Forms of Piracy:** The rate of unauthorized use of business software in Pakistan is extremely high. Inspections should

be run against those suspected to be engaged in this form of piracy, and prosecutions brought. In addition, while many prosecutions were brought against those engaging in hard-disk loading of pirate software onto computers, the slow pace of court processes and lack of deterrent sentences has meant those engaging in this activity will not be deterred. Steps should be taken to reverse this trend.

- **Amend Copyright Law to Enhance Enforcement, Create Deterrence:** The laws in Pakistan remain a weak link, since there are no mandatory minimum sentences; as a result, judges impose only nominal fines which have no deterrent value, and actually embolden pirates. It is essential to strengthen laws by introducing minimum sentences, including mandatory fines and jail sentences.
- **Pass Optical Disc Regulation:** As promptly as possible the Pakistani Government should pass and implement an effective optical disc law to enable control over optical disc production, including 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 mastering-LBR and mould codes) to track location of production, etc.
- **Take Action Against Cable and Satellite Piracy:** There are around 50,000 satellite dishes receiving unauthorized programming in Pakistan, and over 10% of Pakistani households have unauthorized cable TV connections. It is vital that the Pakistani Government take action to address this problem.

For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

PAKISTAN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	25.0	100%	70.0	100%	70.0	100%	60.0	83%	60.0	90%
Books	55.0	NA	52.0	NA	44.0	NA	44.0	NA	NA	NA
Business Software ²	15.7	83%	14.0	82%	9.0	83%	11.2	80%	9.2	83%
Entertainment Software ³	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Motion Pictures ⁴	NA	NA	12.0	NA	12.0	95%	12.0	95%	11.0	NA
TOTALS	95.7+		148.0		135.0		127.2		124.2	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Pakistan, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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 MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

PIRACY AND ENFORCEMENT UPDATE IN PAKISTAN

Book Piracy Remains Serious: Pakistan is perhaps the worst book piracy haven in the world. Large-scale photocopy piracy and offset print piracy make the market virtually untenable for legitimate publishers. All types of books are pirated — practically anything that is popular and can sell more than a few hundred 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. While the quality of the pirated copies is often poor across the board, some pirates are now able to produce better quality copies that are difficult to differentiate from the legitimate versions.⁵ To this end, publishers are forced to employ measures such as the use of holograms to distinguish legitimate product from counterfeits.

The academic market in Pakistan has been completely overrun by piracy. Elementary and high school courses taught in English routinely feature pirate versions of books.⁶ Piracy at the university levels is even worse, with rates soaring over 90%. Often, one student will purchase the required reading for a class and then organize the photocopying for the entire class, or lend the book to other students for them to copy any material they require. Some medical titles have been pirated, usually in one color, so they have misleading and inaccurate illustrations. Lack of government motivation to reduce book piracy levels results in an almost total lack of criminal prosecutions, even in cases where pirates are arrested. Thus, there is little 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.⁷

By contrast, publishers report a higher 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, making this market unattractive to pirates looking to turn a large profit. This may also be due to the Pakistani Government's "National Education Policy 1998-2010" which states in part, "School, college and university libraries shall be equipped with the latest reading materials/services." Contributing to this increase in business in Pakistan are the increased imports of Indian-printed "technical" and "religious" titles.⁸ The problems inherent in a system generating demand from India include: 1) reason to suspect shipments from India are mixed, containing pirate books, Indian-only reprints, and copies that are legitimate for distribution in Pakistan; and 2) general hostility among many to having India supply Pakistan with books on cultural/social/political grounds. Nonetheless, it may be that in the short term providing authorized texts from India is a way for legitimate right holders to gain a toehold in a previously impenetrable market.

A longer term solution to opening up the market in Pakistan is to deal effectively with the Urdu Bazaars. Recently, publishers have engaged in trying to clean up the Urdu Bazaar in Karachi, which features 350 booksellers and wholesalers (there are a further 700 in a second bazaar in Lahore). The bazaars are the main source of pirated books for Pakistan and have remained relatively untouched by raid action over the past few years. In September 2005, publishers began conducting a series of inspections on the Urdu Bazaar in Karachi. The initial

⁵ 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.

⁶ 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.

⁷ 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.

⁸ Included in "technical" titles are business, economics, and pure science books.

actions resulted in the seizure of around 3,000 infringing titles and four arrests by the police. The reaction by local pirate traders was strong, as they staged strikes (including hunger strikes) and demonstrations.⁹ Eventually, a truce was reached by which several key publishers agreed to set up a collective account with the traders for legal books, and the bazaar sellers undertook neither to sell nor produce pirate books. By this approach, the publishers are attempting to provide the bazaar sellers in Karachi with increased means to turn their businesses legitimate, but the jury is still out as to whether or not that attempt will be successful. IIPA will be monitoring the evolving situation in Karachi closely and expects full cooperation with authorities in ensuring that legitimate practices prevail, either through negotiation, enforcement or both.

Enforcement updates have been further compromised by an increase in violence against copyright enforcers in 2005. In one incident, a copyright agent was kidnapped and tortured (by being hung upside down for several hours) before escaping. During his absence, his family was threatened. Certainly, this is indicative of a situation that is out of control.

Royalty-Free Compulsory License for Books Is Out of Step with International Standards: The Government of Pakistan amended its copyright ordinance in 2000 to include a provision (Section 36(3)) that allows a royalty-free compulsory license of books. Specifically, it provides, “[t]he 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.” Included in “government or statutory institution” is the National Book Foundation (NBF), which is part of the Ministry of Education and has been previously accused of engaging in unauthorized reproduction. 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 the Berne Convention and TRIPS¹⁰ and Pakistan must delete it.

Successful Prosecutions Needed in Optical Disc Factory Piracy Cases: The Pakistani Government (with great leadership of the Federal Intelligence Agency) took unprecedented actions in 2005, initially shutting down six pirate factories, raiding warehouses, and overseeing the closure of four other plants,¹¹ all of which had been engaged in brazen

⁹ The inspections and the following strikes/demonstrations attracted much media attention. Eventually, with the intervention of police and government officials, the strike was called off. At this stage, policing of the Bazaar is ongoing to ensure that the sellers remain legitimate; vigilance is required to avoid the practice of mixing of legitimate and illegitimate stock.

¹⁰ The Government could limit the scope of the license by making clear that the conditions of the limiting language of Article 36(1) must be met in order for a license to be available under Article 36(3). Even then, however, the license cannot withstand scrutiny when compared with the Berne Convention’s three-part test. Pakistan has not availed itself of the Berne Appendix. Thus, Article 36(3), completely out of the bounds of Pakistan’s international obligations. It also may run afoul of private property rights enumerated in the Constitution of Pakistan and should be considered in light of this constitutional requirement as well.

¹¹ As of February 2006, it is believed that several plants remain open in Pakistan. Reportedly, the plants still in operation are considered as “locked down” as the owners have no right to shift or repair machinery without receiving permission from relevant courts. Plant raids commenced on May 5, 2005, and were conducted several times throughout 2005. In the initial raids, 150,000 pirate optical discs and over 6,000 pirate stampers were seized from six plants overall; nine individuals were arrested; and warrants were issued for the arrests of the owners of the six plants. Only one of the owners was subsequently arrested during the November raid and he is free on bail now. According to FIA and industry’s knowledge, three of the six plants initially raided – AMIN’s, Sadaf, and Worldwide Plastic – received court permission in August 2005 to produce licensed products, but one (AMIN’s) has since been shut down for subsequently being caught pirating. Incidentally, Sadaf has a second plant, which has not been raided and is still open and is producing Pakistani licensed products. On May 11, 2005, the Federal Investigation Agency (FIA) ran a follow-up raid on the offices and warehouse belonging to one of the factories previously raided and seized 5,500 pirate stampers. On August 31, 2005, FIA Karachi once again raided one of the plants and seized over 270,000 pirated CDs and DVDs from a warehouse belonging to the plant, and arrested two persons. 90% of the seized goods

production of pirate optical discs for several years. Now, the persons responsible for this massive pirate OD production, including those who were arrested during the 2005 raids, should be expeditiously prosecuted and given deterrent sentences consistent with the huge scale of their infringing activity. The plants initially and subsequently closed must also remain closed and their equipment dismantled or destroyed.

As discussed in greater detail below, the Government of Pakistan should now pass a comprehensive optical disc regulation to ensure that Pakistan is never again transformed in a pirate production haven. Regarding the ongoing investigations/cases, in May 2005, a total of nine persons were arrested during the initial raids and criminal cases were launched against the owners of the six plants initially raided. In December 2005, in a positive development for these cases, the Director General of FIA Islamabad transferred the cases to the Special Investigation Group (SIG) Islamabad, which will directly report to the Director General of FIA.

Pirate Production Shifts to “Burning” on Recordable Discs; Imports Also Noted:

As a result of the resoundingly successful enforcement actions in Pakistan in 2005, pirate optical disc factory production has virtually ceased.¹² Over the last half year of 2005, the importation of polycarbonate (used to make optical discs) declined by about 95% compared with the same period in 2004. Factory produced discs are now being replaced, but at nowhere near the same levels, by “burning” of content onto recordable discs. As a result, domestic availability of product in the open markets of Pakistan has also been reduced significantly, and the export problem noted in previous reports has virtually vanished. Small quantities of unauthorized factory DVDs are available.¹³ However, it appears these are imported from Southeast Asia, possibly Indonesia or Malaysia. Recent Customs seizures would appear to back this assertion up.¹⁴

Cable and Satellite Piracy: Piracy of cable and satellite broadcasting signals is out of control in Pakistan, with cable companies estimated to transmit without authorization 94% to 97% of the programming they provide to end users. In 2005, the Government took positive steps with the establishment of the Intellectual Property Office and the increased attention paid

from that raid were DVDs of U.S. motion pictures. A printing press (also owned by the plant) was raided, resulting in seizure of printing plates, negatives, computers and some pirate DVDs. On November 11, 2005, one of the manufacturing plants previously raided was again raided by the FIA and its owner was arrested when it was discovered that he had allowed his factory to continue manufacturing infringing optical discs. In the November raids, a total of 225,000 pirate discs were seized – from the plant (155,000) and retail outlets (70,000) – tied to this owner's plant. Over 80% of the titles in that raid were Indian movies. The owner was refused bail by the session court on this occasion.

¹² In 2004, the Pakistani Government's Central Board of Revenue (CBR) implemented new directives for customs officers at the international airports stating that commercial exports of optical discs from Pakistan – particularly the export of CDs and DVDs with international repertoire, western movies and western software, by air freight companies or as hand baggage – were prohibited. The CBR directives required Pakistani Customs officers to inspect every export shipment and verify that the shipment contained Pakistani (regional) repertoire only. Since this change has taken effect, Pakistani Customs officers have made many seizures totaling more than several hundreds of thousands of optical discs at Karachi and Islamabad airports. After implementation of the directives, several customs officers at Karachi International were suspended because they did not act accordingly. Because of the intensifying anti-piracy activities by Customs at Karachi International and Islamabad airport in 2005, the exports of pirated optical discs by air-freight companies declined by more than 90% during 2005.

¹³ As of late 2005, pirate film DVDs were sold for US\$2, while pirate film DVD-Rs were sold for US\$1.35.

¹⁴ Customs was active in 2005. During the period from January to December 2005, Customs at Karachi Airport seized 126,780 pirated optical discs; Customs at Islamabad Airport seized 4,290 pirated optical discs. However, Customs at Lahore International Airport reported no seizures of pirated optical discs. In one concentrated period, Customs Karachi made several seizures of pirated optical discs from “incoming” passengers, which apparently were imported from Southeast Asia, possibly produced in Indonesia or Malaysia. During that window, Customs Karachi seized over 40,000 pirated optical discs from 20 passengers.

to the problem by the broadcast regulator. Nevertheless, piracy remains pervasive in the absence of sustained enforcement. The illegal cable piracy operations are serviced by “lead *walas*” who obtain cable feeds from a cable operator with hardware facility (head end). Unfortunately, to date, IIPA is unaware of any actions taken against these pirate cable operations. Similar action to that taken against the optical disc plants in 2005 should be taken in the case of cable piracy in Pakistan in 2006.

Formation of IPO and FIA Involvement Bring Greater Enforcement Coordination and Results: The Intellectual Property Organization of Pakistan was formed in April 2005 under the personal directive of Prime Minister Shaukat Aziz, and was formalized through the promulgation of the “Ordinance to Provide for the Establishment of the Intellectual Property Organization of Pakistan” in August 2005 (effective December 7, 2005).¹⁵ IPO reports directly to the Prime Minister via a 15-member Policy Board, drawn from the public and private sector. On April 16 there was also an official announcement that the Federal Intelligence Agency (FIA) would be the lead agency for IPR enforcement; raids on optical disc production facilities commenced soon thereafter. IIPA commends the Pakistani Government for the establishment of the IPO and entrusting the FIA with copyright enforcement matters. The results speak for themselves in the area of eradicating optical disc piracy in 2005, and it can only be hoped that FIA’s efforts to combat book piracy and other forms of copyright piracy will be as successful in 2006. It would also be very advantageous for Intellectual Property Rights Task Forces to be established within FIA and provided at all provincial levels. Reportedly, the Government has appointed a dedicated IPR police officer in Karachi. IIPA hopes that this officer can increase his coordination with industry in the months to come, and that such dedicated units will be expanded.

Business Software End-User Piracy Is Endemic: Despite significant public awareness and enforcement drives by the business software industry, the piracy situation for that sector remained serious in 2005. Pakistan holds the dubious distinction of having one of the highest end-user piracy levels in the world. There were 28 criminal cases lodged against hard disk loaders (computer resellers that fill computers with illegal software), arising from complaints by the Business Software Alliance, but as of January 2006, all the cases were still pending.

Courts Still Do Not Effectively Deter Piracy: Pakistani courts still do not effectively mete out deterrent results in piracy cases, and cases are marred by procedural hurdles (such as excessive documentary requirements) and delays. The maximum fine a pirate has received from prosecutions for publishing piracy was Rs15,000 (US\$251) in 2004, hardly a deterrent, and most cases involving publishers resulted in far lower fines.¹⁶ IIPA members report that judges routinely view piracy as a misdemeanor, thus punishments are often token fines and hardly deterrent. The Copyright Law should be amended to provide minimum jail sentences/fines for crimes involving copyright infringement. Pakistani court processes are also marred by procedural hurdles.

¹⁵ An Ordinance to Provide for the Establishment of the Intellectual Property Organization of Pakistan, Ordinance No. XXI of 2005, Registered No. M-302 / I.-7646 (December 4, 2005). The Ordinance formally institutes the Intellectual Property Organization of Pakistan (IPO) as a federally mandated autonomous intellectual property rights organization which will report to the Federal Cabinet. The Ordinance also provides an enforcement mechanism through the FIA to investigate and take action against any IPR (copyright, trademark, patent) offense anywhere in the country. The Ordinance is intended to be a one-stop shop infrastructure to address all IPR issues in Pakistan including enforcement, litigation, awareness, and new laws. Two meetings have been held so far of the Policy Board of the IPO; so far, the meetings were focused on staff recruitment, salaries, setting up IPO offices in Karachi and Lahore, etc.

¹⁶ Cases from 2005 are still languishing in the courts, marred by delays, so IIPA does not yet have 2005 statistics for book publishers.

TRAINING, TECHNICAL ASSISTANCE, PUBLIC AWARENESS

In 2005, the copyright industries participated in various trainings, roundtables, and seminars with judges, police, government officials, private lawyers, and right holders. For example, the Business Software Alliance participated in a judicial IPR roundtable called “Piracy hurting Pakistan” on June 28, 2005 in Lahore, Pakistan which involved judges, policy makers, and attorneys. These included a motion picture industry visit to conduct follow-up training for Pakistani Customs (continuing from training provided in 2004), and a record industry “product identification” training for Islamabad Customs and Customs Intelligence took place on January 10, 2005. In 2006, the Business Software Alliance is planning a public awareness campaign in Pakistan through television spots and a media campaign, including broadcast on all major TV channels. The Business Software Alliance also plans to hold two judicial IPR roundtables in 2006 in Islamabad and Karachi. These trainings follow on significant technical assistance provided in 2004 including provision of computers, printers and scanners for Pakistani Customs at the Karachi, Lahore and Islamabad airports and the Karachi port.

COPYRIGHT AND RELATED LAWS

Penalties in Copyright Law Fail to Deter Piracy: Copyright protection in Pakistan is generally provided under the Copyright Ordinance, 1962 (as last amended in 2000), which provides generally strong administrative tools to fight piracy, including, for example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan.¹⁷ Remaining problems in the ordinance include criminal fines that remain far too low to deter piracy.¹⁸ Criminal penalties must at least be amended to include minimum fines and prison terms. In addition to the TRIPS-incompatible royalty-free compulsory license discussed above, there are other overly broad exceptions to protection, and unclear full retroactive protection for works and sound recordings as required by TRIPS.

Compulsory License Violates Berne and TRIPS: As mentioned above, Section 36(3) of the Copyright Ordinance, as amended in 2000, runs afoul of international standards by implementing an overly broad and damaging compulsory license provision.

Pakistan Should Implement the WCT and WPPT: 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. Pakistan should adopt the 1971 (Paris) text of the Berne Convention and should join the Geneva (Phonograms) Convention.

Motion Picture Ordinance Should Cover Home Video Products: 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: To ensure that Pakistan’s effective actions in 2005 against rampant optical

¹⁷ 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.

¹⁸ Some industries have suggested that the minimum fine must be increased to PKR500,000 (US\$8,565).

disc pirate production do not return, 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 unique source identifiers (SID mastering LBR and mould codes) to track location of production, in order to successfully halt the production of pirate optical discs.¹⁹ 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. In December 2005, PIPRO was once again provided with model optical disc legislation, and it is hoped that a draft will emerge and proceed to passage in 2006.

Generalized System of Preferences: On January 24, 2005, IIPA endorsed termination of the Generalized System of Preferences (GSP) piracy investigation in Pakistan, and called on the Pakistani Government to remain vigilant against book piracy. IIPA's GSP petition had been accepted in June 2004 by the United States Trade Representative to evaluate whether Pakistan remained eligible to retain its GSP trade benefits due to poor copyright protection and enforcement. IIPA recognized the progress made in reducing the impact of optical disc piracy in Pakistan, while noting that outstanding issues such as book piracy continue to merit attention. IIPA noted,

Vigilance will be needed, however, to ensure that the problem of massive optical disc piracy does not return to Pakistan. The plants must remain closed and the Government should implement mechanisms to ensure that optical disc piracy remains in check. In addition, other forms of piracy, especially book piracy, remain serious problems in Pakistan. The Pakistani Government must continue to address these outstanding issues, and the U.S. Government should continue to press to resolve these issues.

As a result of termination, Pakistan continues to enjoy duty-free status for imports of certain products into the United States. During the first 11 months of 2005, \$87.7 million of products from Pakistan were imported into the U.S. duty-free, representing 2.9% of Pakistan's total imports into the U.S.²⁰

¹⁹ 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.

²⁰ During 2004, the United States imported \$94.2 million worth of products into the United States duty-free, or 3.3% of its total imports to the U.S.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Peru remain on the Special 301 Watch List in 2006. IIPA has long advocated that 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.

IIPA supports the Free Trade Agreement process and looks forward to the prompt and effective implementation of Peru's upcoming obligations under the U.S.-Peru FTA. The U.S. began FTA negotiations with Peru in May 2004, and negotiations concluded in December 2005. On January 6, 2006, President Bush notified the U.S. Congress of his intent to enter into this FTA.¹ The FTA 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.² Peru currently is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA)³; both programs have high standards of intellectual property rights.

Actions Which the Peruvian Government Should Take in 2006:

- Conduct regular and concerted anti-piracy actions at the black markets in Lima (specifically, Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados) as well as on the streets of high-traffic areas, with particular attention given to Miraflores, San Isidro, and other middle class neighborhoods as well as other targeted cities in the rest of the country;

¹ The President's letter gives Congress at least 90 days' notice before Bush signs the agreement. See Notice of Intention to Enter into a Free Trade Agreement with Peru, 71 Fed. Reg. 1679 (Jan. 10, 2006), at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-261.htm>.

² The preliminary text of the U.S.-Peru FTA IPR Chapter is posted on USTR's website at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file509_8706.pdf.

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 8, 2005 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>. During the first 11 months of 2005, \$159.6 million worth of Peruvian goods (or 3.5% of Peru's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 66.4% over the same period in 2004. Also during this same 2005 time frame, an additional \$2 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 44.3% increase in ATPA benefits from the same period in 2004.

- Coordinate efforts between Copyright Office and local municipalities to revoke licenses granted to vendors selling pirate product;
- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses of hard-good piracy;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) 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 piracy of business software, motion pictures (DVD and cable), books, entertainment software, and music;
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- 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, supporting the special IPR unit of the Fiscal Police (*División de Investigación de Delitos contra los Derechos Intelectuales*), and making the appropriate arrangements with the responsible judicial bodies to create a judicial court specializing in IPR issues).
- Work with the U.S. government and copyright industries to properly implement the FTA IPR obligations and WIPO Treaties to include notice and takedown provisions, ISP liability, statutory damages, comprehensive making available right, and provisions against the removal or alteration of electronic rights management information (ERMI).

PERU
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005 ⁴

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁵	66.0	98%	68.0	98%	87.0	98%	70.2	98%	57.8	97%
Business Software ⁶	23.6	73%	22.0	73%	19.0	68%	14.7	60%	11.2	60%
Motion Pictures ⁷	NA	NA	4.0	75%	4.0	45%	4.0	50%	4.0	50%
Entertainment Software ⁸	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	9.0	NA	8.5	NA	8.5	NA	8.5	NA	9.0	NA
TOTALS	98.6+		102.5		118.5		97.4		82.0	

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006/spec301methodology.pdf. For more information on the history of Peru under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁵ The lower recording industry loss estimate in 2004 was due to the fact that the average sale price per legitimate CD was lower; the number of pirate units remained unchanged between 2003 and 2004.

⁶ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁷ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁸ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

COPYRIGHT PIRACY IN PERU

Overview: 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. Street markets and fairs selling pirate books, along with illegal photocopying on university campuses, continue to plague the book publishing industry.

Record and music piracy: Piracy of music and sound recordings in Peru is still a serious impediment to the legitimate market. In 2005, the estimated piracy level for music and recordings continued to be an astronomical 98%, one of the highest music piracy rates in the world, resulting in the near total collapse of the legitimate recording industry in that country. In fact, Sony Music and Warner Music essentially closed operations in Peru in 2004. In addition, recording activity for local artists is disappearing. 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. Unfortunately, during 2005, seizures decreased dramatically by almost 61% -- from 5.4 million pre-recorded CD-Rs to 1.5 million. In any case, these isolated actions are not sufficient to serve as real deterrents against piracy, or to restore the market.

Business software piracy: The business software industry continues to report that in 2005 its key challenge was the illegal duplication of business software within larger Peruvian private sector companies as well as small and medium-sized organizations. Recent market investigations concluded a significant increase of end-user piracy among these businesses. Reseller piracy remains a very significant problem, too; illegal bazaars operate openly in high-traffic areas in the center of Lima (Galerías Garcilaso de la Vega) with virtual impunity. For example, the day after a raid, the same individuals continue selling illegal software from the same stalls and stores. Preliminary estimated trade losses due to business software piracy in Peru were \$23.6 million in 2005, with a 73% piracy level. If Peru were able to lower business piracy by 10 percentage points, BSA predicts there would be significant growth in the local economy.⁹

Book piracy: Little changed in 2005 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. Book fairs (*campos feriales*), including two large ones in Lima, often permit the sale of pirated books; some estimates place 90% of the books as being piratical. Some of the street sellers are located a block away from the SUNAT; others are located near university campuses. Such widespread piracy over the last decade has devastated the local book

⁹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: decreasing Peru's piracy rate from 73% to 63% would add \$286 million to its economy, directly create nearly 1,000 more new jobs, and increase local industry revenues by \$214 million. The aggregate effect could mean an additional \$24 million in tax revenues for Peru's government. See <http://www.bsa.org/idcstudy/pdfs/Peru.pdf>.

industry, causing book stores to close and interfering with the ability for legitimate publishers to continue doing business; such embedded piracy also sends the wrong signal about the importance of cultural development. Some professional pirates have the ability to offer approximately 3,000 titles for sale. This commercial devastation contradicts the government's declaration about the importance of publishing; the Law of the Book (Law 28086 of 2003) recognizes the important public need to create and protect books and editorial products. Peruvian authorities, including INDECOPI and the police, must do much more to protect books, especially from piracy (including unauthorized photocopying as well as reprint piracy). Estimated trade losses due to book piracy in Peru rose to \$9 million in 2005.

Audiovisual piracy: The audiovisual industry reports that optical discs piracy continue to grow tremendously over the last year. Pirate optical discs are available even prior to theatrical release in Peru and are distributed in street markets, home delivery, newspaper stands and black market distribution centers. The main concerns are the large black markets such as Polvos Azules Polvos Rosados y Hueco, which are especially difficult to address because of their political protection 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 90% of the DVDs offered in video rental stores are illegal.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that pirated entertainment software products (videogame CDs and cartridges, and personal computer CDs) remain widely available in Peru.

COPYRIGHT ENFORCEMENT IN PERU

Overview: In July 2004, the High Level Multi-Sectorial Commission against Contraband and Piracy, headed by the Production Ministry, included piracy and IP infringement fight as one of its missions. This commission, a governmental entity which also has private sector participants, focuses primarily on recommending regulations to fight contraband and counterfeit goods. In addition, the *Cruzada Antipirateria* is a private association created by the audiovisual sector, including distributors, exhibitors, video rental stores, etc. (neither the recording industry nor the business software industry participates). The *Cruzada* is one of the members of the Multi-Sectorial Commission. The Copyright Office (Oficina de Derecho de Autor) has begun to have a secondary role in this campaign.

Police actions: The copyright industries continue to report in 2005 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. 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 and participates in the *Cruzada Antipirateria* which works closely with INDECOPI. In 2005, the Federal Police performed 72 raids resulting in the seizure of blank digital media worth an estimated US\$5 million which entered the Peru as contraband from Asia. SUNAT also performed raids and seized blank media from Asia.

During 2005, the local recording industry's anti-piracy unit cooperated in seizing 2.0 million pre-recorded music CD-Rs, 500 thousand blank CD-Rs, and produced 10 sentences, all with no deterrent jail time. Some of these actions have taken place with the support of INDECOPI. This level of enforcement activity does little to contain the sale of close to 20 million units of pirate CDs sold in Peru. The raids executed in the major pirate centers of Mesa Redonda, Polvos Azules and Polvos Rosados have little impact on the level of piracy because the actions are not consistent, the product is quickly replaced and the pirate distributors have no legal exposure. The recording industry does not bring administrative enforcement cases in Peru.

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. Peru has two IPR prosecutors who work with INDECOPI when requested to do so.

INDECOPI works well with some of the copyright industries: Two industry sectors, business software and audiovisual, use the administrative remedies offered by INDECOPI. Industries also report that prosecutors and customs officials have been unwilling to work with INDECOPI.

BSA reports that in 2005, INDECOPI gave constant support to special business software campaigns to fight piracy. INDECOPI drafted the government guide for software management and got it approved in 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 for pirate copyrighted products. Notwithstanding its positive results, INDECOPI still has no authority to force an inspection when the defendant denies access to INDECOPI. As an administrative entity, INDECOPI needs express authorization from a court to enter in the face of such a denial. This lack of authority has encouraged some defendants to deny access to INDECOPI, with the expectation that the amount of the fine to be imposed by INDECOPI for such denial would be smaller than the compensation and fines faced had the inspection occurred. INDECOPI should seek for a solution using its current faculties, for example imposing deterrent sanctions to avoid this conduct in the future and seizing all means used to infringe software companies rights. INDECOPI has been effective in imposing fines on end-users that first reach a settlement with BSA but later chose not to comply with the settlement terms.

MPA continues to report positive anti-piracy developments in cooperation with INDECOPI. In 2005, for example, MPA reports that INDECOPI organized 37 raids against large black markets, including Polvos Azules, Polvos Rosados, El Hueco and Mesa Redonda, resulting in the seizure of over 160,000 counterfeit goods worth an estimated US\$ 400,000. In 2005, as in 2004, the former Attorney General did not cooperate with INDECOPI. However, a new Attorney General was appointed and MPA expects that her office will expend more effort in investigations and prosecutions related to piracy.

The book publishing industry believes it is critical that, in addition to criminal efforts, the administrative agencies of INDECOPI and the Copyright Office initiate investigations and punish those individuals and businesses involved in book piracy. INDECOPI also should work jointly with local and regional governments, as well as with the National Library and the Ministry of Education.

In 2005, an entertainment software company obtained favorable results from an action with INDECOPI. A case involving a 2004 Customs seizure of 1,800 infringing materials resulted in the defendant paying damages to the company in the amount of US\$4,000. The defendant was also ordered to refrain from further infringing activity.

Non-deterrent results in the criminal courts; hopes for a specialized IPR court dashed in 2005: Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences; cases have simply resulted in suspended sentences. No copyright pirate has received deterrent sentences for criminal copyright infringements in Peru, despite the fact that the copyright law contains adequate penalties. What happens in practice is that the Peruvian Criminal Procedures Code permits sentences of four years or less to be suspended. As a result, the courts usually suspend the defendant's sentence in copyright cases. This sad practice continues even after the 2004 amendments to the criminal code, which provided an increase of minimum sentencing to four or more years for copyright infringements. During 2005, the High Level Multi-Sectorial Commission against Contraband and Piracy filed a petition before the Peruvian judiciary to request that a special criminal intellectual property court for the first instance (trial court) be created; unfortunately, that request was rejected.

Customs: Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities to seize suspect shipments are few. Some industries estimate that over 100 million units of blank optical media are coming into the country. There are several actions which Peru could take to strengthen its borders from the entry of pirated products. First, Peruvian customs, by an internal directive or some regulatory means, should impose strict controls to check the legitimacy of IP goods entering and leaving Peru (e.g., music CDs, videos, business software, videogame software on all platforms, including CD-ROMs, personal computer CD-ROMs and multimedia entertainment products). Customs can consult with industry associations and local representatives about suspect shipments. Many of the copyright industries have participated in training aimed at Peruvian customs officials. Second, customs should also pay special attention to the value of the goods that are used as raw materials for the production of copyrighted products, such as recordable CDs, blank tapes, blank videos, etc., that enter Peru with what appear to be under-declared values. By a November 2005 resolution, the Customs Authority included blank media in a special regime (withholding of VAT) by which every importer of a listed merchandise shall pay in advance the VAT of the reseller of such merchandise, in addition to its own VAT.

SUNAT (National Tax Authority): SUNAT (Superintendency of National Tax Authority, which has jurisdiction over tax and customs issues) can and should be a major player in anti-piracy efforts, in prosecuting tax evasion and contraband activity by pirates. There have been several efforts to get SUNAT involved in the fight against piracy, but SUNAT has resisted participation.

INDECOPi and SUNAT cooperation: INDECOPi and SUNAT 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. MPA reports that that customs does report to INDECOPi all import operations related to optical discs and other goods that could be used in piracy. INDECOPi has an inspector working with Customs, who is in charge of checking the importation of blank media. That inspector reports to INDECOPi's director any irregular operations, and as necessary, INDECOPi takes administrative action or denounces the irregular activity to the IPR prosecutors.

Trainings: As reported above, many of the copyright industries have participated in training aimed at Peruvian customs officials.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

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. 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 will have to make additional reforms 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).

Government software asset management deadline delayed to December 2006: On February 13, 2003, the Peruvian government published the Government Software Legalization Decree, Decreto Supremo No. 013-2003-PCM. The decree states that all public entities should use legal software and, to that end, these entities must establish effective controls to ensure legal use of software. The decree specifies that government agencies must budget sufficient funds for the procurement of legal software, and set a deadline of March 31, 2005 for government agencies to provide an inventory of their software and to erase all illegal software. The decree also delineates clear lines of responsibility and mechanisms for ensuring compliance with its provisions: The chief technology officer or other designated official must certify compliance. The decree also provides for education campaigns aimed at public employees to inform them about licensing provisions and the content of the Legalization Decree, and further requires INDECOPI to publish a guide to ensure efficient software administration in the public sector. INDECOPI has published the government guide for software management in 2004. Nevertheless, the Government issued Supreme Decree 037-2005-PCM in May 2005, postponing the enforceability of the obligations of the agencies to provide an inventory of their software and to erase all illegal software until December 2006. BSA urges the Government to implement the software guide and the decree as swiftly as possible.

Criminal code amendments and customs provisions in 2004: First, 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. Second, the criminal code also contains several provisions to address customs crimes and piracy. It 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. The law also 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, and there is some question whether the registry has been activated.

Law of the Book 2003: The Law of Democratization of the Book and the Development of Reading (Law No. 28086) was enacted in October 2003, with the goals of protecting the creation and distribution of books and similar editorial products. The law also has goals of improving access to books, promoting the national library system, and promoting the conditions necessary for the legal production of the books, among others. The law creates a new entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*), within the Ministry of Education.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

POLAND

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Poland remain on the Special 301 Watch List in 2006.

Actions Which the Government of Poland Should Take in 2006:

Enforcement

- Continue to work with rights holders regarding the enforcement of the law and regulations on optical disc production and distribution.
- Continue progress made in 2005 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.
- Continue to monitor DAMIS' performance in banning the sale and distribution of OD products at the Warsaw Stadium, and terminate the lease agreement if the terms of its obligations under the lease are not met.
- 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 improving cooperation with the customs agencies in neighboring countries.
- Police should take *ex officio* action to initiate investigations/raids on their own.
- Have prosecutors press for expeditious consideration of criminal copyright cases.
- 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.

Legal reform

- Strengthen enforcement provisions by affording *ex officio* powers to authorities in copyright infringement cases.
- Refrain from introducing a private copying exception to the technical protection measures provisions, and from deleting the multiple damages provision, as recently proposed by the Ministry of Culture in the draft amendments to implement the EU Enforcement and Copyright Directives.
- Amend the current copyright law provisions governing the legal protection of technological measures to correct existing inadequacies and reduce the scope of the overly broad private copy exception, which is currently inconsistent with the three-step test found in TRIPS Article 13.
- Introduce criminal sanctions in the optical disc regulations.

- Refrain from over-regulating collective management of copyright and neighboring rights.
- Withdraw Poland's reservation to Article 12 of the Rome Convention.

POLAND Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures²	102.0	66%	30.0	35%	30.0	30%	25.0	30%	25.0	27%
Business Software³	212.3	58%	197.0	59%	171.0	58%	107.9	54%	77.1	53%
Entertainment Software⁴	NA	60%	109.3	94%	NA	NA	337.7	91%	115.8	90%
Records & Music	25.0	31%	36.0	37%	34.0	45%	45.0	45%	37.0	30%
Books	5.0	NA	5.0	NA	5.0	NA	5.0	NA	6.5	NA
TOTALS	344.3+		377.3		240.0		520.6		261.4	

COPYRIGHT PIRACY IN POLAND

In particular, ineffective enforcement remains a problem in Poland. Hard piracy has shifted slightly from CDs and DVDs to a significant use of CD-Rs and DVD-Rs, as well as a shift of to Internet piracy, which is steadily growing. The copyright industries continue to work with Polish officials on both policy and operational enforcement matters. On September 13, 2005, the Polish Council of Ministers adopted a Report of the Committee for the Prevention of Copyright and Neighboring Rights Infringement. According to the Government's press release, six strategic goals for 2005 were outlined in that document: (1) to increase the efficiency and improve the coordination of the state authorities' activities (police, border guard, customs) in fighting piracy; (2) to increase the efficiency of the justice system's activities in fighting piracy; (3) to draft appropriate changes to the law, related to the need for improvement in conducting proceedings regarding infringements of copyright and neighbouring rights; (4) to limit piracy at bazaars and street markets; (5) to increase the efficiency of enforcement authorities' actions against Internet piracy; and (6) to monitor the activities of public administration bodies. This strategy is based on a principle of "partnership" between the public sector and private industry; in fact, industry representatives did participate in the Committee for the Prevention of Copyright and Neighboring Rights Infringement, an Inter-Ministerial

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf. For more details on Poland's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and refer as well to Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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

industry entity. The implementation of the Government's action plan is proceeding slowly (the judicial portion has not been improved) and was further slowed in 2005 pending the results of back-to-back Parliamentary and Presidential elections.

Domestic OD production in Poland: Optical disc (OD) production within Poland continued to grow in 2005. The number of lines in the nine plants (the same number of plants as in 2004) increased from 101 lines in 2004 to 122 lines in 2005. The estimated production capacity of these plants amounted to 775 million units per year in 2005, compared to 597 million units per year in 2004. The 122 production lines exclude CD-R production figures. There is one dedicated DVD plant with 41 lines (Technicolor). In addition, there are a total of 19 DVD lines in the other plants.

Imports of piratical optical media: 2005 saw a continuing problem of pirated optical media products (CDs, DVDs, and CD-ROMs), including illegal sound recordings, audiovisual products, videogames and business software applications, entering Poland. Forensic analysis shows that the vast majority of pirated music found in Poland was manufactured in Russia and smuggled into Poland. The rest came from Belarus, Lithuania and Ukraine. Although there was sizeable law enforcement action to discover and seize pirate products, seizures at the borders constituted a minor percentage of all seizures. These products are distributed via a network of plants and distribution chains run by regional organized criminal elements. Burned CD-Rs and MP3s in Poland are becoming more and more significant. Those CD-Rs that were seized contained professionally prepared artwork, indicating a greater financial involvement of criminal groups. The estimated piracy levels for international/U.S. music repertoire is 31%, and the estimated trade losses due to piracy of sound recordings was \$25.0 million in 2005. Pirated entertainment software products in optical disc formats were imported primarily from Russia and Ukraine. The Polish Police and Customs officials 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.

Piracy remains high across all sectors. The Entertainment Software Association (ESA) continues to report that in 2005, the manufacturing and distribution of pirated entertainment software remains controlled by organized criminal enterprises (and more than likely a single syndicate) operating throughout the region. Imports of pirated entertainment software on optical disc format continue to be sourced largely from Russia and Ukraine (some appear to be transshipped through Lithuania), with the video games already localized into the Polish language. In addition, the ready availability of counterfeit cartridge-based games at retail shops remains problematic. Piracy at Internet cafés is also a problem; of the estimated 1,000 cafés in the country, only about 5-10% are licensed. The estimated piracy level of entertainment software in Poland is 60%. While cooperation with both the Police and Customs has improved significantly, resulting in cases being initiated against smaller establishments, piracy at the Stadium remains problematic as distribution and piracy activity there continues to be directed by organized criminal groups with ties to Russian and/or Ukrainian groups.

The motion picture industry reports that in 2005 audiovisual piracy levels appear to have worsened. Pirate DVDs continue to be imported into Poland and distributed in almost every metropolitan area. Russian-sourced pirate DVDs are the biggest problem because they undermine the legitimate theatrical and home entertainment industries. 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. Cable network operators often use illegal decoders and pirate cards to distribute programs on their networks without license. When Canal Plus in Poland changed its smart cards it had a substantial positive impact on fighting 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. The illicit recording of movies at movie theaters ("camcorder piracy") is a major source for pirated motion pictures available over the Internet, as well as on street corners and flea markets. For 2005, MPA's methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to Internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Poland (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Poland due to audiovisual piracy (including both hard goods and the Internet) were \$102 million, and the estimated piracy level was 66%.

The Business Software Alliance (BSA) reports that piracy levels in Poland remain relatively high. 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). At the retail level, numerous flea markets selling pirate products provide a source of pirated software. Estimated 2005 losses due to business software piracy in Poland rose to \$212.3 million, with a small (1%) drop in the piracy level to 58%. Lowering the business software piracy level in Poland could contribute significantly to the Polish economy.⁵ 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 Association of American Publishers (AAP) reports steady levels (from years past) 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, which harms both English language and Polish language materials. The Government of Poland should work with university administrations and lecturers to ensure that proper measures are taken to cultivate a climate of respect for copyright on university campuses.

Internet piracy in Poland remains a concern. Internet piracy has been a steadily growing problem in Poland. Music files are still distributed through websites and FTP-servers. However, the main focus of interest of Internet users lies in peer-to-peer services. EMule, eDonkey, Bit Torrent and Direct Connect are the most popular file-sharing softwarez. The Polish police continue to scour the Internet at their discretion in search of illegal music, film files and software and conduct raids where necessary.

In 2005, 80 criminal Internet cases, where computer equipment together with pirate CD-Rs were secured, were instigated by the police, according to recording industry statistics. In these cases charges were pressed against 12 individuals offering CD-Rs on the Internet and making available unauthorized music files in P2P networks. Other cases are pending. ZPAV has good relations with all major ISPs (around 10) in Poland, who reportedly react promptly to ZPAV cease and desist letters and remove infringing content. In 2005, the ISPs removed 83 websites and FTP servers with a total of 4,725 infringing files upon ZPAV's notification.

⁵ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Poland's 59 percent piracy rate could create 4,300 jobs and pump \$2 billion into the economy. It could also increase local industry revenues by more than \$1.3 billion and generate \$238 million in additional tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Poland.pdf>.

Following structural changes at the National Police Headquarters in 2005, new police teams consisting of IT specialists and experts in the Regional Police Headquarters were established. This is a very positive sign as those teams will be dealing with criminal activity on the Internet. At present teams of Internet specialists actively operate in the following cities: Katowice, Rzeszow, Koszalin, and Gorzow Wielkopolski. As a result of reorganization, the special and coordinating IP unit was eliminated; however, the new head of the Polish police has assured right holders that it will be restored. ZPAV recently submitted a draft cooperation agreement to the National Police Headquarters. The draft covers a broad range of issues in general, including those meant to fight against Internet piracy.

MPA indicates that Internet piracy for its products appears to be somewhat contained. That is because Internet piracy of its material is primarily focused on the sale of hard goods through web pages and auction sites. ESA reports that Internet piracy of entertainment software in the country is likewise becoming an increasing concern. 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 rise. The industries report that cooperation with criminal authorities on Internet cases is good. Rights holders considering legal actions against Internet piracy face difficulties in identifying infringers because of restrictions imposed by Polish law. Rights holders using civil processes are unable to obtain the identity of a suspected infringer from the ISP; however, this information may be obtained from public criminal authorities. The various rights holder groups such as ZPAV, FOTA and BSA cooperate closely in their actions against Internet piracy through the jointly founded Anti-Piracy Coalition. In 2005, the Coalition sent a mailing to the management boards of the 500 biggest Polish companies providing information about the risks they undertake for the unauthorized and uncontrollable use of the Internet by their employees (including software security issues). The Internet investigators in these groups regularly share information about pirate sites and jointly assist in police raids.

COPYRIGHT ENFORCEMENT IN POLAND

On a positive note, industry cooperation with police agencies throughout Poland remained generally good in 2005.

Progress at the Warsaw Stadium: The Dziesieciolecie (Warsaw) Stadium (also known as Jarmark Europa) has historically served as a centralized distribution point for pirate optical media material. Starting in 2004, for some industries, the notorious piracy situation in the Stadium started to improve. In 2005, overt trade in pirated copyrighted materials across all industry sectors in the Warsaw Stadium did diminish; vast volumes of these products are no longer visible, although underground distribution (using peddlers and runners to deliver products on request) continues. For instance, entertainment software products are no longer openly displayed but remain available from individuals who approach potential buyers and offer to provide pirated games. Or, the customer may simply make inquiries as to where or from whom such pirated products may be obtained and will be readily directed to those can provide the desired pirated product. Security forces working for the Stadium administrator, DAMIS, work with local police to enforce the ban on trading in optical discs, which was a requirement in their lease contract. Polish police, customs, and border guard officers continue their activities at the Warsaw Stadium, disclosing storage places for pirated products. Concerted efforts must continue at the Warsaw Stadium and other mini-stadiums, to combat trade in pirated and counterfeit goods.

The situation at the Dziesieciolecie Stadium continues to improve slowly. The market operator "Damis" introduced new regulations including a ban on the trade of optical discs at the marketplace. As a result, sale of pirate material at the Stadium was largely limited although it does

not mean that the problem is solved. According to law enforcement agencies, the Stadium still serves as a “redistribution point” of pirate pressed carriers, which are traded in large quantities for further distribution in other regions of Poland. In November 2005, ZPAV submitted a petition to the Warsaw authorities to close down the marketplace at the Stadium. In reply, the authorities supported this motion but the final decision is in under the authority of the Ministry of Education, owner of the Stadium's area.

Bazaars and flea markets: Illegal trade has 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. There have been some positive enforcement efforts undertaken by the Warsaw Municipality. Considering the noticeable increase in pirate products available at the Wolumen electronic market, FOTA and the Warsaw Municipality agreed on a test program at the beginning of September 2005 that involved FOTA, the Security and Crisis Situation Department of the Warsaw Municipality, the Economic Delinquency Police Unit of Warsaw-Zoliborz, the Police Officers of the Crime Prevention Department and the Customs Office. The Municipality agreed to finance the cost of 100 police officers to conduct daily controls at the market focusing on IP violations only. According to FOTA, the daily presence of uniformed police officers looking exclusively for pirate products had quick and measurable impact, and almost all visible piracy disappeared. The strategy culminated, on October 22, 2005, in a joint operation by FOTA and local law enforcement authorities dismantling the pirate lab and storage area of the main supplier of pirate products to this market. The Police seized more than 48,000 pirate discs in the operation (an exact breakdown of blank discs versus burnt discs with movies, games and software is unknown at this stage), 3 computers with 4 DVD burners in each, 2 monitors, 1 scanner, 8 printers, and 32 packages of CD stickers and paper for printers. This raid was the successful result of a test program that may now be extended to other markets in Warsaw and throughout the country.

Border enforcement still needs improvement. The recording, business software, and film industries all report that the Eastern border remains a problem, despite legislative reforms to the customs law in order to accede to the European Union. In 2005, reports indicate that Polish Customs conducted 171 actions at the borders and inside the country, resulting in the seizure of over 115,900 pirate discs containing movies and interactive games. 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. Only 20 cases were instigated by customs and border guards. In 2005, FOTA reported good cooperation with Customs officials. ESA member companies report that there has been continued cooperation with the Customs authorities in 2005, resulting in more seizures at the border. ESA member companies began registering their trademarks with Customs last year, which appears to have helped with seizure activities. Entertainment software companies are pleased with the high levels of cooperation, and encourage the Customs authorities to continue to address the influx of pirated products into the country.

Enforcement of the new Optical Disc regulations: The 2004 Copyright Law amendments required the Ministry of Culture to issue regulations to implement the optical disc production provisions of the Copyright Law. The Polish OD Decree (published on June 2, 2004) appears sufficient to control the production of optical discs. If the OD plants do not adequately comply with the provisions of the decree, it may become necessary to introduce criminal sanctions which are not in the current decree. In 2004, the Ministry of Culture called for the operational optical disc plants to

register their lines and equipment. All OD plants, except Technicolor, positively responded to an appeal of the Ministry of Culture to submit data to the register. A two-person team of inspectors was established at the Ministry of Culture to control optical disc production. The first inspection (Fall 2004) indicated the need to include criminal sanctions for plants ignoring the provisions to submit information regarding equipment and production details, such as the locations of manufacturing stampers. The industry submitted a recommendation to add criminal sanctions for the Government Strategy for the year 2005, but it does not appear to have been incorporated into the final recommendations. By the end of 2005, 14 inspections were carried out in 9 OD plants; no negative reports were issued. 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.

Criminal prosecutions remain ineffective. The industries continue to report generally good cooperation with Polish enforcement agencies on investigations and raids. However, problems pressing forward with cases through prosecution continued in 2005. Eleven prosecutors were appointed at the end of 2004 but they still need IPR training. In 2005, law enforcement agencies instigated 1,221 criminal as well as fiscal proceedings in cases where music producers' rights were infringed. As a result of actions undertaken by Police, Customs and the Border Guard, 492,000 pirate carriers, worth 14,340,000 PLN (about US\$ 4,547,700) were seized and computer equipment, worth 299,000 PLN (about US\$ 94,850) was secured.

The recording industry reported significant actions carried out by the police in 2005. The full details of these actions are at: http://www.zpav.pl/dzialania/efekty_ang.asp?rok=2005 In sum, these included:

Supplier of pirate CD-Rs to the Warsaw Stadium: On April 1, 2005, as a result of actions undertaken by local police units, one of the largest suppliers of pirate CD-Rs for the Warsaw Stadium, together with his co-worker, were detained in Warsaw. The police also searched an apartment rented by the suspect. As a result about 20,000 recorded CD-Rs and CDs, a few cardboard boxes filled with inlays, 55 CD label templates for label printings, CD label films and 6 computers with 6 burners each were secured.

CD-R/DVD-R laboratory: On April 27, 2005, the police unit combating economic crime at the Regional Police Headquarters in Gorzow Wielkopolski closed down an illegal CD-R/DVD-R laboratory. The raid was conducted on the basis of intelligence provided last year by the Polish Anti-Piracy Alliance (comprising of FOTA, the BSA and ZPAV) concerning the supply of pirate products to flea markets along the Polish-German border. During the operation a few thousand pirate CD-Rs and a few burners were seized. The goods were distributed in the whole region, but especially at marketplaces located along the Polish-German border. The distributors were equipped with burners, so that one home "laboratory" could produce about 1,500 discs a day. The goods were then sent to dealers by post. Police officers searched dozens of apartments and houses. During one of the searches, when the owner tried to convince police officers that he had nothing to do with illegal CD-Rs, a postman arrived with a parcel containing a new delivery of pirate discs. As a result of the operation 10 people were charged with copyright infringement; they face penalties of up to five years imprisonment and heavy fines.

Direct Connect hub: On June 29, 2005, police officers from the economic crime department of the Regional Police Headquarters in Gorzow Wielkopolski detained two individuals who distributed illegal software, films, and music on an internal network based on Direct Connect hub. Two individuals, employees of a company providing Internet services, sold illegal software through their own computer network. The whole system was based on offering new users of the network access to the Internet together with a financially attractive access to resources

gathered on the servers of the company. Under the cover of a legitimate company, individuals distributed illegal software, music, and films among their customers and derived financial benefits from these activities. The police officers established that about 2,000 persons took advantage of the offer. Losses incurred by software, film and music producers due to this illegal activity may reach 6 million PLN (about US\$1,903,000).

Burning Lab: On October 29, 2005, police officers from Lublin secured two CD and MC (cassette) replication lines, 11,500 CD-Rs with music, 20,000 MCs, 1,200,000 CD/DVD inlays and 200,000 hologram stickers, including 3,400 original holograms with scratched out numbers. Police officers found a burning laboratory in one of rented houses in a small village near Lublin. The replication lines were also equipped with a label printing machine; CDs were packed in boxes, foiled and provided with a hologram sticker. It was found that most of the pirate goods reached the Warsaw Stadium.

CD-R seizures at the Poland-German border: On December 18, 2005, police officers from Zgorzelec seized about 10,000 CD-Rs at a near border marketplace in Sieniawka (Polish-German border). Three individuals, suspected of distributing pirate carriers with music and films, were detained. The prosecutor used preventive measures such as bail (5 to 10,000 zł) and police supervision. Also on December 22, 2005, police officers from Gorzow Wielkopolski in cooperation with IFPI/ZPAV seized around 12,000 pirate CDs at a near-border marketplace in Leknica (Polish-German border).

The recording industry reports that they continue to experience the following problems with the police and prosecutors:

- The unnecessary practice of calling independent experts (in investigations).
- Lengthy delays in bringing and completing copyright cases due to a huge backlog of cases in the courts. This does not apply only to copyright cases. The new Minister of Justice plans to introduce changes in the functioning of the judiciary by establishing 24-hour courts, where cases will have to be tried within a very short period. We still do not know what categories of offenses will be considered by such courts; however, we hope that the new system will limit delays in completing copyright cases.

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. Many of the hard goods cases are started *ex officio* by the Polish police. In software piracy, BSA reports that the Polish Criminal Code provides *ex officio* authority for software piracy crimes.

ESA member companies also noted that actions against street sellers greatly improved in 2005. However, the Polish Government should also begin to investigate the upstream sources of pirated products in the market, i.e., the syndicates and large-scale importers that facilitate and control the flow of pirated products into the Polish market. It is possible to conducting *ex officio* cases against computer piracy, including entertainment software, in accordance with the Polish Criminal Code. Music and film piracy cases require that an application be filed by the damaged party.

The motion picture industry (FOTA) reports that in 2005, it conducted 1,679 investigations, resulting in the seizure of 217,980 DVDs, 246,895 other carriers, and 488 computer and hard discs,

all reflecting an increase from 2004. MPA reports that its most significant actions carried out by the police in 2005 were:

Police seize large DC++ hub. On April 26, 2005, FOTA and Police officers from Bydgoszcz raided 9 apartments in the city and seized 11 PCs, including two that were being used for a DC++ hub, 15 hard discs (6 of which were used for the hub) and more than 1,500 CD-Rs and DVD-Rs containing films. The hard discs contained over 1.5 terabytes of movie software and music files. Nine individuals were detained for questioning, one of whom was the 18-year old operator of the hub and one of whom was a professor at the Bydgoszcz Science Academy. As is typical in emerging Internet countries, the hub was a private hub restricted to users in the Fordon district of the city connected to the local ISP. The ISP is a cable operator called Gavex that cooperated with FOTA to dismantle the hub. The Police have been able to secure the logs on the DC++ hub, which they may now use to initiate criminal actions against top users.

Police seize 54,000 pirate DVDs from Warsaw warehouse. On June 14, 2005, Police raided a warehouse in Warsaw and seized 54,000 pirate DVDs containing a total of 96 titles, including *Constantine*, *Polar Express*, *I, Robot*, *The Aviator*, and *The Flight of the Phoenix*. The raid also netted 127 masters, about 35,000 inlays and over a hundred printing blocks. The value of the seizure is estimated at over US\$1,250,000. Investigations are continuing to identify the pirates behind the operation.

FOTA and police shut down Internet auction fraud. On June 22 and 23, 2005, the Grójec Regional Police Unit, accompanied by Radom Police officers and FOTA investigators, conducted searches of nine residential addresses in Grójec. The grounds for the action were allegations of fraud in connection with Internet auctions. A group of seven people was offering pirate copies of film box sets via Internet auctions (collections included *Star Wars*, *The Godfather* and *Indiana Jones*). To establish their authenticity, the sellers arranged sham auctions in which fellow conspirators would leave positive feedback to encourage others to participate in subsequent sales. Purchasers, paying amounts between US\$60 and US\$290, found that the goods were either not sent, that parcels arrived empty, or that the discs were damaged. As a result of the search, three PCs (with four hard discs), five additional hard discs, a PC with a DVD burner and two satellite decoders were seized, along with 450 pirate DVD-Rs. Other evidence secured included counterfeit currency and bank documentation confirming payments made by people who had been defrauded. Initial estimates suggest that the fraud generated income of about US\$3,500 a month for just one of the suspects. Although seven individuals were questioned, only one was an adult; the others were found to be between 14 and 16 years old.

48,000 discs seized and pirate lab closed in Police/FOTA raid. On October 22, in a joint operation, FOTA and local law enforcement authorities dismantled a pirate lab and a storage area in Warsaw. The operation started with the interception of a car near the Wolumen electronic market in which the Police found two large bags of pirate discs. The three occupants of the car were detained for questioning but only one of the three men was involved in the pirate activity. The Police decided to search his apartment and discovered an important pirate lab. Subsequently, another apartment was searched and found to be a storage area. Overall, the Police seized more than 48,000 pirate discs (an exact breakdown of blank discs versus burned discs of movies, games and software has not been provided), 3 computers with 4 DVD burners in each, 2 monitors, 1 scanner, 8 printers, and 32 packages of CD stickers and paper for printers. According to the Police, the individual is believed to have been the main supplier of pirate discs to the Wolumen market. The Police are now proceeding with additional investigations to identify the pirate's accomplices. This operation is the result of a test program,

agreed to by FOTA and the Warsaw Municipality at the beginning of September, seeking to eradicate piracy from the Wolumen electronic market. Under this joint program (involving FOTA, the Security and the Crisis Situation Department of the Warsaw Municipality, as well as the Economic Delinquency Police Unit of Warsaw-Zoliborz, the Police Officers of the Crime Prevention Department and the Customs Office), the Municipality has agreed to finance the cost of 100 police officers to conduct daily controls at the Wolumen market focusing exclusively on IP violations. The success of this raid may encourage the extension of the program to other markets in Warsaw and throughout the country.

Police arrest administrators of pirate server. On January 4, 2006, Police in the Northern city of Koszalin arrested five administrators of a pirate server. According to FOTA, since last May, over 2,400 users of the server worldwide have shared an estimated 88,000 gigabytes of pirate movies, music, games and software. Following the arrests, Police conducted 120 raids on homes in Koszalin, and 55 additional raids across the country. These raids yielded over 30 PCs and approximately 100 hard discs. Officers from the City Police Unit in Koszalin were joined in the operation by officers from the Regional Police Unit in Szczecin, and from the Border Guards Unit in Darlowo.

Deterrent penalties lacking in the judiciary. For years, the copyright industries have identified the failure of the Polish judiciary to issue sufficiently deterrent sentences in criminal copyright infringement cases, as well as delays in any judgments. Penalties in the Copyright Law are strong in relation to local standards, providing fines of up to US\$175,000 and jail sentences of up to five years. But, the problems continued in 2005 including:

- **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.
- **Delays at the judicial level:** Polish courts are overloaded with a substantial backlog of cases (not just IP cases). This is due to the lack of resources--few judges, and the need for equipment and better technology. The lack of deterrent sentencing is also a very common problem. For the motion picture industry, FOTA reports of 4,000 cases pending in the criminal courts at the end of 2005, only about 120 cases closed all year. In the large urban centers, it takes between 3 to 4 years for a case to be concluded. ZPAV reports 5,011 criminal cases are currently pending (in 2004: 1,208 cases were instigated, and of that 1,127 are still pending). BSA reports 282 cases are still pending, as of 2004.
- **Polish courts fail to apply deterrent sanctions.** No improvement in deterrent sentencing was reported in 2005. Despite strong penalties in the Criminal Code, prison sentences for copyright infringement are almost always suspended and the fines for copyright infringement imposed are very low (from US\$50 to \$1,000). In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases.⁶ As noted, the fact that Polish courts require an expert opinion on each seized disc or cassette is problematic.

Civil copyright enforcement in Poland still not viable. BSA has not conducted any civil actions in Poland in the last four years. Instead, BSA has relied on criminal enforcement to address

⁶ There were three improvements made in this Criminal Code: 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.

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 was able to legalize its software shortly before raids were conducted. BSA and IIPA continued to recommend that 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. BSA reports that all recoveries are collected through settlements.

Trainings: The copyright industries continue to participate in seminars for law enforcement agencies. For example, ZPAV organizes and participates in training seminars for the police, prosecutors, customs and Border Guard Officers, with the main objectives of such seminars being: (a) product identification/differences between original and pirate product; (b) procedures for cooperative raids with ZPAV representatives present; (c) improved enforcement practices; and (d) cooperative Internet anti-piracy activities including the documenting of such infringements for further proceedings.

COPYRIGHT LAW IN POLAND

Copyright and Neighboring Rights Act of 1994 (as amended in 2004): Amendments to the 1994 Polish Law on Copyright and Neighboring Rights to implement certain aspects of the WIPO Internet Treaties and of the EU Copyright Directive were published on April 30, 2004. Those amendments contained several improvements, including provisions regarding the regulation of optical disc production (issued in June 2004). However, a number of issues raised by the industries were not addressed in the 2004 amendments.⁷ Although Poland is a party to the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT), its legislation is still not in compliance with the treaties. The legal protection of technological measures is inadequate and the overly broad private copy exception is inconsistent with the three step test found in TRIPS Article 13.

Implementation of the EU Enforcement Directive: The Polish Government is working on amendments to both the Copyright Act and the Civil Procedure Code in order to implement the EU Enforcement Directive. A draft was recently sent to right holders for comments. Of particular concern are two proposed provisions: (a) an exception with respect to the protection of technological measures and private copying in Article 79(5). The proposed draft amendment allows consumers in Poland to demand from right holders free analog as well as digital copying of phonograms and videograms for their personal purposes, even when protected by technological measures; (b) the continuing need to limit the currently very broad private copying exception in the Copyright Law. The EU Copyright Directive limits the personal use exception explicitly to reproduction of the works made by natural persons for their private use and not for any direct or indirect commercial purpose.

Need for anti-Camcording legislation: Anti-camcording legislation should be adopted in Poland to require jail sentences, preferably of up to a year or longer for the first offense, and a higher penalty

⁷ For example, other issues 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; (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).

for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film's ability to recoup the investment made in its production.

Withdrawal of Poland's reservation to the Rome Convention: Unfortunately the Polish Government is uninterested in withdrawing its reservation 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 broadcasting rights. Poland also 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.

Broadcast Act of 1993: The National Council for Radio and Television has granted broadcast and cable licenses, which are revocable for the failure to comply with license provisions. MPA reports that the 1993 Broadcast Act does not contain an explicit copyright compliant 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.

MARKET ACCESS ISSUES IN POLAND

Broadcast quotas: According to the 1992 Broadcasting Act, as amended in 2000 and July 2004, broadcasters must dedicate at least 50% of broadcasting time to European productions and 10% of broadcasting time to European independent productions. Furthermore, Polish broadcasters are subject to an obligation to dedicate at least 33% of their quarterly broadcasting time to programming produced originally in the Polish language. However, lower percentages to be determined by the National Council apply to broadcasters during the first year of transmission of their program service, thematic program services for which the number of available programs is insufficient; and program services transmitted solely via satellite or cable which in their entirety are available against payment of a fee.

Discriminatory tax treatment of U.S. audiovisual works: After years of successive drafts, the Polish government passed a new Film Law in June 2005 which includes new taxes on box-office and on video/DVD sales to finance subsidies for Polish and European films. These taxes, besides having a detrimental effect on the Polish audiovisual market, would unfairly burden MPA member companies with the cost of financing the government's cultural policy. Further, the wording of the text appears to introduce a double taxation burden on distributors, including our members.

Foreign ownership restrictions: Article 35 of the 1992 Radio and Television Law, restricts foreign ownership in a broadcasting company to 49%. MPA promotes the reduction and elimination of such restrictions in order to further stimulate the foreign investment necessary for the continued development of the television industry.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ROMANIA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2006.

Actions Which the Romanian Government Should Take in 2006:

- Have senior levels of Romanian government officials express a strong political will and a commitment to eradicate copyright piracy and instruct all enforcement authorities to make the fight against copyright piracy a priority and to take sustained and concrete actions to support that commitment in-practice.
- Have the police, including the anti-organized crime directorate, undertake tough and consistent anti-piracy enforcement actions. The police must engage and tackle the root source of the problem: the suppliers of pirate discs to the small-scale retail and street vendors.
- Request that the General Prosecutor's Office maintain consistent quality of IPR prosecutors by not constantly reassigning them. (Reports indicate the Central IPR Department in the General Prosecutors Office will soon have ten members, five already appointed and working on statistics and other coordination efforts, and the other five will have executive powers.)
- Instruct prosecutors to stop dismissing copyright cases. This undermines the motivation of the police to take actions. Prosecutors should expeditiously pursue criminal cases to the fullest extent of the law, including requesting that the courts issue deterrent level penalties.
- 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 right holders' organizations.
- Reform the structure and competence of the State Copyright Office (ORDA).
- Eliminate the mandatory ORDA-regulated hologram system for all copyright industries.
- 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, or in software cases by the raiding agents) and stop dismissing cases involving repeat offenders.
- Establish a system at the borders to track the importation of blank optical media products. This should involve the coordination between enforcement authorities (police, customs).

ROMANIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	17.0	80%	18.0	78%	18.0	80%	15.0	75%	14.0	70%
Business Software²	41.6	75%	32.0	74%	28.0	73%	20.7	70%	15.7	75%
Entertainment Software³	NA	NA	75%	65%	NA	NA	35.2	97%	NA	95%
Motion Pictures⁴	NA	NA	8.0	55%	8.0	35%	6.0	55%	6.0	65%
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	60.6+		60.0		56.0		78.9		37.7	

In addition to its multilateral IPR obligations under the WTO, Romania has bilateral IPR/trade obligations related to copyright and enforcement with the U.S.⁵ The European Union also has raised concerns about the adequacy of copyright enforcement in Romania in the context of its possible accession to the EU in 2007.

COPYRIGHT PIRACY IN ROMANIA

Optical media piracy: Optical disc piracy in 2005 remained widespread throughout Romania. There are several factors implicating optical media piracy. First, pirated pre-manufactured discs (contain all types of copyrighted content) continue to enter from Russia and the Far East, often via the Ukraine and Moldova borders, and are subsequently found in all major cities. For example, the Entertainment Software Association (ESA) reports that pirated entertainment software for play on personal computers appear to all originate from Ukraine; games for play on consoles continue to be shipped in from Asia or otherwise are locally burned CD-Rs. Pirated entertainment software for all

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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 MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ 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. For more details on Romania's Special 301 history, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Romania are posted at <http://www.iipa.com/countryreports.html>. During the first 11 months of 2005, \$248.9 million worth of Romanian goods (or 22.6% 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 25.2% increase over the same period in 2004.

platforms continue to be widely available on the street, flea market venues, some retail locations, through Internet websites and newspaper advertising.

Second, the major problem with the copyright industries in Romania is the substantially increased amount of CD-R and DVD-R burning, and burning operations are often controlled by organized criminal groups.

Third, local pirate optical disc production at the industrial level is not the primary OD problem the copyright industries face in Romania (see CD-burning, above). There is now a second optical disc plant in Romania, bringing the total of production lines up to three and the annual estimated capacity up to 14 million optical discs per year. There is no local blank CD-R production. Rather, blank CD-Rs and DVD-Rs are imported, which has substantially increased the volume of illegal local CD-R and DVD-R burning of copyrighted products in Romania. Given the continued – albeit increased – low levels of local production of optical media, it is premature at this time for the industries to suggest that the Romanian government adopt a comprehensive optical disc regulatory regime. In fact, the music industry acknowledges the support of ORDA in convincing the government to issue Ordinance No. 25/2006 (adopted on January 30, 2006, and will enter into force on March 1, 2006); this new ordinance obliges plants to use SID Codes. Furthermore, in light of the massive CDR/DVD-R burning, establishing a system at the borders to track the importation of blank optical media products is strongly recommendable.

Internet piracy: In Romania, the Internet provides huge opportunities to download music, video and software. Many websites have advertised their service to burn copyright content onto CVD-Rs and DVD-Rs on-demand. Many physical products (including pressed discs) are now sold using the Internet as it offers a more secure solution for the vendor. Local industries report that although the copyright law covers both uploading and downloading, there are problems regarding ISP liability and the criminal procedure law. The Criminal Procedure Law requires that a search warrant must be issued in order to search a private home, and such a warrant may be issued only by a judge and only if the criminal investigation is officially initiated. At the same time, the criminal investigation may be commenced only if sufficient evidence exists. As a result, it has been difficult to gather the evidence necessary to commence a criminal investigation before a search warrant can be issued. ROACT has faced no problems in investigations developed with the fraud investigation police. ISPs may incur criminal liability only for aiding and abetting. This means that the ISP's intention must be proven.

The industries report good cooperation with the ISPs. The local recording industry group, UPFR, reports generally a positive response from ISPs to their notices. In 2005, the recording industry identified 282 websites containing illegal files and offering illegal CD-Rs for sale. Of these, 144 are based on servers of Romanian ISPs. The recording industry 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. In 2005, the local film industry group, ROACT, initiated a collaboration program with the Ministry of Communications and Information Technology to develop law enforcement efforts aimed at e-commerce and Internet crimes. ROACT managed to increase the number of hard goods investigations done by the Police, the Fraud Investigation Department and the Organized Crime Police. With only one exception, all ISPs requested by the film industry to block URLs have responded positively. ROACT enjoys good cooperation with about half of the country's ISPs. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. The ISPs are generally responsive when it comes to software industry requests to shut down websites promoting copyright infringing content. In 2004, a few ESA companies took enforcement actions against smaller Internet cafés, some of which resulted in settlements.

Record and music piracy: The recording industry faced a continuing battle in 2005 against piracy in Romania. First, the CD-R piracy has increased considerably and now constitutes 80% of the overall piracy, compared to the 55% share in 2004. Illegal CD-Rs are burned (and converted to MP3 files) in private apartments; this 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. Second, there is 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. Third, a problem is the rapidly growing use of illegal peer-to-peer services that has had a direct impact on the increased use of blank CD-Rs and DVD-Rs. The piracy level for international repertoire alone is higher at approximately 80%, representing trade losses for the U.S. industry of around \$18 million. The estimated overall piracy level for sound recordings (both local and foreign) is 50%. 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. For example, the price of a legitimate CD at \$15 cannot compete with the price of a pirate product at \$4 or of a blank CD-R at \$0.15.

Business software piracy: The Business Software Alliance (BSA) reports that the high levels of software piracy basically remained unchanged in Romania in 2005, despite the positive legislative developments accomplished in 2004. The market is mostly affected by end-user piracy and the illegal distribution, including hard-disk loading and the distribution of home-burned CDs). Lowering the level of software piracy in Romania could contribute to the local economy.⁶ Although the police have taken some action against hard disk loaders, the police continue to focus on only small companies suspected of using unlicensed software (known as “end-user” piracy), not larger ones. Internet-based piracy continues to increase, with online advertisements and potential customers submitting orders via e-mail, or it is operated through websites promoting pirated software for downloads. There are, unfortunately, still several public prosecutors who refuse to prosecute software infringement cases because there is a “perceived lack of social harm.” BSA appreciates the work of the government toward 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.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy is a big problem, with product entering Romania from the Far East and Russia via the border with Ukraine and through Bucharest airport. In fact, Poland has become a new source of pirate DVD-Rs. Pirate optical discs (DVDs, CD-Rs and DVD-Rs) generally are sold via the Internet or press advertisements and delivered by mail or personally, on the streets. The level of videocassette piracy in Romania has dropped, and most blatant retail piracy has been eliminated. The most popular distribution methods are now Internet sites and street markets (here are over 400 regular markets in Romania and 250 other markets open at various times). MPA also notes that falling prices for Internet connections and DVD

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Romania's piracy rate (from 74% to 64%) could add nearly \$670 million to its economy, increase local industry revenues by more than \$430 million, create 3,000 new jobs, and generate over \$75 million in additional tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Romania.pdf>.

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). 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.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that pirated PC game market appears to now be sourced exclusively from Ukraine. In fact, 2005 saw a significant increase in the imports of pirated products from Ukraine. Pirated entertainment software for console platforms, primarily factory produced silvers are imported from Asia or are locally produced CD-R burns; pirated cartridge-based videogames also continue to be shipped from Asia. Pirated entertainment software products continue to be available on the streets, at flea market-type venues, and in specialized retail shops, as well as being advertised on the Internet and in newspapers. Internet café piracy remains a problem, although the situation continues to improve because police and right holder enforcement actions continue against unlicensed cafés. Of the 5,000 Internet cafés in the country, about 30% are now legitimately licensed by entertainment software publishers. This increase in the number of licensed cafés stems from ESA member companies having taken a significant number of enforcement actions against these establishments, which have resulted in settlements that have been beneficial not only to the publishers but also the cafés, whose operations now use legitimately licensed entertainment software. 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.

Book piracy: 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 2005.

COPYRIGHT ENFORCEMENT IN ROMANIA

Despite regular reminders from Romania's trading partners and the private sector, as well as ongoing training under U.S. and E.U. assistance programs, anti-piracy efforts remain an overall low priority for Romanian enforcement authorities. 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, these have been targeted at the "soft" end of pirate operations, failing to challenge the production and distribution systems involved. Prosecutors have failed to push for deterrent sentences and courts have failed to impose such sentences. In particular, the Romanian government should completely reform the capacity and responsibilities of the copyright office (ORDA). Constant staff changes within the National Police offices and customs have contributed to an overall lack of efficiency.

National IP Strategy: 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.⁷ Indeed, under this campaign, the police took action, customs simplified their procedures, and competence on IPR matters before the courts improved. Industry reports that another national strategy plan was adopted in October 2005, but to date, few

⁷ The National Strategy is available at http://www.osim.ro/strate_en.htm, or in Romanian at <http://www.orda.ro>.

concrete results have been produced (although it should be noted that some of the internal deadlines for results do extend into 2006).

The copyright industries continue to believe, as stated before, that 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, and the National Anti-Fraud Crimes Unit (the economic police), 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. In 2005, the prosecutor in charge of IPR for two consecutive years inside the General Public Prosecutor's Office was promoted and was replaced. Even though there are specialized IPR prosecutors appointed in each district, the General Prosecutor keeps changing them frequently. As a result, only very few IPR cases are ever fully prosecuted. The business software, music and film industries report good cooperation with local enforcement authorities. The problem remains that the personnel with IP training — especially with prosecutors — are constantly being shifted to other jobs. There are only specialized IPR courts in Bucharest; more are needed in the country.

Difficulties with ORDA: The state body responsible for copyright enforcement, ORDA, is an independent government agency. ORDA needs internal reform, including the establishment of a proper supervision by another state institution over its activities, in particular in the field of enforcement. ORDA's enforcement responsibilities still cover several areas, which complicate the bureaucratic layer to all parties involved (right holders in particular), rather than acting as an effective state copyright enforcer. To give a few examples of the ineffectiveness of ORDA's enforcement activities, the recording industry reports the following:

- (a) ORDA issues holograms for every optical disc (audio, video, software) that is released commercially. All copyright industries agree that this system produces more bureaucracy than help in anti-piracy activities. It has been confirmed in the practice of other countries that holograms simply do not work as effective anti-piracy tools. To the contrary, they may even end up on pirate products, as has happened several times in Romania. Holograms must not be mandatory and state-administered (the latter point was introduced by the Government Ordinance No. 25/2006), and their usage should be decided voluntarily by the copyright industries. In sum, the industries strongly oppose the unhelpful state hologram system and recommend repealing it fully.
- (b) ORDA registers every sound recording that is released to a commercial circle for the purposes of issuing holograms. This is a new requirement introduced by the Government Ordinance No. 25/2006. As expected, the procedure is extremely complicated and time-consuming. Worse yet, the registration of each recording is taxed by ORDA, which is another state fee alongside the hologram fee. This system must be repealed alongside the holograms system.
- (c) ORDA issues expert reports in copyright cases. This happens at a very slow pace, which results in major delays in criminal investigations (up to 14 months). The solution here is to follow the prevalent practice in Europe and other countries, and to transfer this task to the copyright industries, who are true experts in their respective products.
- (d) ORDA supervises collecting societies. Again, ORDA has historically been more unhelpful than productive in this field. It has extensive intervention powers and has tried to over-regulate the activities of collecting societies several times. This practice has shown that collecting societies are like any other commercial business and should not fall under an overly detailed special regulation. Examples such as royalty caps and unique collectors have clearly illustrated how

they bring the market development into a complete chaos and halt it. ORDA has shown poor results in fulfilling its duty as a coordinator in the field of collective licensing. For example, in a recent case of recording industry versus cable operators, ORDA failed to inform the industry organization that the court decision overruled ORDA's decision favoring the cable operators.

More stickering problems. In addition to the recording industry, other copyright-based industries are adversely affected by a stickering (hologram) program in Romania. 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. The initiative affecting software was later dropped, and this stickering decree currently applies only to audiovisual works. In 2002, the Ordinance was approved with modifications (by passing Law No. 213 without consulting with industry). The motion picture industry was and remains opposed to this law (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 rating certificates for every title) to purchase stickers. Each sticker cost 500 lei, or approximately two cents. This type of a state-mandated sticker system is counterproductive to anti-piracy efforts because it results in "legalizing" pirate material once the stickers are themselves forged. Additionally, there is the problem of corrupt government officials giving the pirates the legitimate stickers to place on their product. Stickers also prevent the legal distributor from getting product into the marketplace, because ORDA's bureaucracy works very slowly and inefficiently. Rather than accept a state-organized system, ROACT worked to amend the ordinance so that it or another non-governmental organization can manage it. Being out of stock of film holograms stickers, ORDA issued certificates for sound recordings to film distributors and allowed the application of the recording holograms on videograms that were put on the market. It is important to keep in mind that the business software industry and BSA remain opposed to extending any stickering regime to business software.

Police, prosecutions and few deterrent judgments: The copyright industries continue to report that in 2005, the Romanian police generally exhibit a positive attitude in cooperating with industry representatives on investigations and raids (although raids usually take place only 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. Ineffectiveness by the policy may be caused by several factors:

- Police are reluctant to take any actions against small-scale piracy cases. This became a problem with the last Copyright Law amendments, whereby the small-scale cases were "downgraded" to a level of contraventions (administrative infringements). As contraventions are not part of an internal "points system" in the police to measure their effectiveness, police officers are simply not interested in taking actions against the small-scale pirate traders. Such a system should be reviewed so as to include administrative infringements alongside criminal cases to the evaluation system of police officers. The recording industry reiterates that it is important to target both large- and small-scale pirate traders with anti-piracy actions. Very often, a small case leads to a bigger illegal networks.
- Police are unmotivated by the prosecutors who keep dismissing the copyright cases. This problem lies with the constant staff turnover among the prosecutors tutored by the General Prosecutor's Office.

However, a significant activity boost for the police was provided by the amendments to the Copyright Law which were introduced by the Emergency Ordinance No 123/2005 and adopted on

September 19, 2005. In particular, this new law repealed ORDA's supervisory role over copyright criminal cases and enabled the police to conduct more domicile searches. So far, the police have achieved successful results notably in Arad, Timisoara and Sibiu counties, where the police instigated several large-scale criminal cases against the involved persons, which are pending resolution.

For 2005, BSA reports that the law enforcement authorities were very active, taking many *ex officio* software cases. Between January and November 2005, 261 raids were run, and 34 convictions were obtained. BSA reports that there remains some reluctance by law enforcement to conduct raids in hard disk loading and big end-user cases. BSA has filed official raid referrals with the police; this forces them to give an official answer to the referral request.

MPA reports improved police enforcement efforts took place in 2005. Internet piracy cases were investigated that resulted in some large seizures. However, a large number of files still await decisions by local IP prosecutors in the country, and there was a reduction of over 40% in the number of files actually sent to the courts. In general terms, however, ROACT reports good cooperation with the Prosecutor General's Office.

The recording industry reports in 2005 that it worked with enforcement agencies to file 50 criminal cases, and requested damages in 37 of these cases. The industry group UPFR was notified that 18 of these actions were dropped (and were not notified that 31 other actions were dropped). 27 cases were before the courts (this included raids conducted in 2003 and 2004). Case results included 7 fines, 1 term of imprisonment issued (and suspended) and 1 acquittal. With respect to cases involving collective licensing issued, 63 criminal cases were brought in 2005. 27 of these cases were dropped, with 1 case resulting in an administrative fine and another case with a term of imprisonment (suspended).

Romanian prosecutors often drop copyright cases. 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. Furthermore, there continues to be a lack of general prosecutorial knowledge about copyright cases and piracy. 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).

Civil *ex parte* search authority: The copyright law amendments, effective August 1, 2004, in addition to the most recent amendments (effective September 19, 2005), expressly provided civil *ex parte* search authority. Such a provision is a requirement of TRIPS and especially important for the business software community. Unfortunately, BSA confirms that no such civil *ex parte* searches have been conducted to date.

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 improvement was reported in 2005. Furthermore, the new Criminal Procedure Code enables the right holders to file counter claims against the actions that the prosecutors have taken in court. However, the practical experience with this provision has been negative – for example, all such claims submitted by UPFR in 2005 were rejected by the courts.

Border enforcement: It remains critical that Romania's border enforcement system improve, because it remains far too easy for pirate product to be imported into and exported out of Romania. In December 2005, Romania adopted a new Law No. 344/2005 that implemented the EU Council Regulation No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and measures to be taken against goods found to have infringed such rights (the EU Customs Regulation). This law entered into force on February 3, 2006. In general, the law introduced several positive amendments to the customs procedure against copyright infringements, in particular:

- The customs measures can be taken also against illegal goods in free trade zones;
- The right holders' application fee was repealed;
- The requirement for right holders' guarantee to cover the value of detained goods was repealed;
- The goods can be destroyed through a simplified procedure without a court order.

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. The recording industry continues to report that no concrete steps have resulted from this agreement.

Establishing a system at the borders to track the importation of blank optical media products is strongly recommended.

Concerns over corruption: Corruption among enforcement officials remains a recurring and 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. In fact, concerns over corruption were prominently raised in the EU's 2005 Country Accession Report on Romania.⁸

Training Programs: The recording industry (UPFR) participated and made presentations at three trainings organized by the U.S. Embassy for the IPR-responsible prosecutors and judges and one organized by National Police Inspectorate for the police officers. BSA organized trainings for the police, the border police, the customs inspectors, the public prosecutors and judges in 2005. Romanian police have organized their own trainings and invited BSA and ROACT experts to give presentations. In addition, the copyright industries also participated in a series of six training organized by the U.S. Embassy in Bucharest. These training sessions are important because they help educate law enforcement and introduce them to industry experts who are investigating cases.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Emergency Ordinance (2005): On September 19, 2005, the Romanian Government adopted the Emergency Ordinance No. 123/2005, further amending its Copyright Law, in anticipation of

⁸ See European Commission, *Romania: 2005 Comprehensive Monitoring Report* {COM (2005) 534 final}, dated October 25, 2005), posted at http://europa.eu.int/comm/enlargement/report_2005/pdf/SEC1354_CM_MASTER_RO_COLEGE.pdf.

implementing the EU Enforcement Directive (EC/48/2004). The ordinance entered into force in September 2005. Although far from being ideal, there are some positive elements, for example, as summarized for IIPA by industry colleagues:

- ORDA no longer has direct enforcement authority in criminal cases, or a central role vis-à-vis other enforcement authorities. It does retain the ability to draft expert reports in specific cases. (Concerns do remain over whether requisite expert reports can be drafted expeditiously; note that some industries would prefer that the State get out of producing expert reports altogether).
- The penalties for copyright infringement were increased as follows:
 - The reproduction or import of pirate goods: imprisonment 2 to 5 years or a criminal fine of 2,500 RON to 25,000 RON (US\$846 to US\$8,460);
 - The distribution, possession, or storage and transportation, for the purpose of distribution, of pirate goods, as well as the possession of them for the purpose of utilization through the communication to the public at the working locations of the legal persons: imprisonment of 1 to 5 years or a criminal fine of 2,000 RON to 20,000 RON (US\$677 to US\$6,770);
 - In cases where the identified actions (above) are committed for commercial purpose, they are to be sanctioned with imprisonment of 3 to 12 years. The same offenses, if they produced extremely serious consequences, will be punishable by 5 up to 15 years of imprisonment;
 - The promotion of the pirate goods through any means and in any modality, including the utilization of public announcements or electronic means of communication or through the exhibiting or presentation to the public of the lists or catalogues of products: imprisonment of 6 months to 3 years or a criminal fine of 2,000 RON to 20,000 RON (US\$677 to US\$6,770);
 - The making available to the public without the consent of the right holders: imprisonment of 1 to 4 years or a criminal fine of 2,500 RON to 40,000 RON (US\$845 to US\$13,535).
- Jurisdiction for criminal piracy cases were moved to the higher level tribunals. It is hoped that this will assist in expediting cases, in part because these tribunals have a lighter caseload than courts of first instance. It will also allow some expertise to develop on IPR matters.
- The principle of having a unique collecting society for all right holders was eliminated.
- The statutory royalty caps for the broadcasting and cable retransmission rights of copyright and related right holders were eliminated.

However, the Emergency Ordinance also included some negative developments. First, the withdrawal of the holograms' administration from the private sector was transferred to ORDA. From the perspective of the recording industry, this is another reason to justify eliminating the hologram system altogether. Second, the text of the Ordinance is unclear in certain places and leaves much room for adverse interpretations. For example, the texts providing for criminal offenses and penalties are not very clear, as they mention also "producing of pirated goods, for *distribution purposes*" as one offense, and, as another, more serious offense, the "producing of pirated goods, for *commercial purposes*."

Because the Emergency Ordinance is due to be voted in the Parliament to become a law, it must be ensured that those changes are maintained in the law. There is a strong users' lobby (broadcasters, cable operators) to re-introduce objectionable provisions regarding collective management. Furthermore, the Ministry of Justice, along with the police and prosecutors, is lobbying

for the downgrading the classification of small-scale copyright cases, including small piracy cases and unauthorized broadcasting and public performance from crimes to contraventions. This is motivated by the lack of personnel and the need to focus on large-scale illegal operations. The recording industry considers this as an excuse to de-prioritize the criminal investigations in copyright cases. Considering the high piracy levels in Romania, the downgrading of copyright infringements sends the message that those crimes are not serious, the opposite that is required for an improvement.

Copyright Act of 1996, as amended in 2004 and 2005: In June 2004, Romania passed amendments to its 1996 copyright law which sought to bring it into compliance with European Union directives and the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonogram Treaty (WPPT), which Romania ratified in February 2001. These amendments were also aimed at harmonizing Romanian legislation with the EU Copyright Directive and the EU E-Commerce Directive. Nevertheless, further reform of the copyright law, is still needed in Romania, particularly with respect to: (1) transient copying exception in the reproduction right; (2) producers of sound recordings not having exclusive rights of broadcasting or communication to the public, but rather a limited right of remuneration; (3) the law clearly providing full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement; (4) amending two provisions regarding ownership and performance royalties which adversely affect the distribution of films; (5) the law requiring 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 even to monitor this otherwise non-deterrent system, making it completely unworkable.

Criminal Code: The Romanian Government is working on a new Criminal Code which is likely to come into force September 2006. To review, in 2004, Romania completed an overhaul of its criminal code, effective in July 2004 as Law No. 285/2004. Note that the sanctions provided in the Criminal Code are lower than those established with the new Emergency Ordinance No. 123/2005, as described above. Previously we have noted that the provisions concerning the copyright crimes were copied directly from the copyright law, including the level of penalties and prison sentences. One highlight of the revision is the added provisions establishing criminal liability of legal entities (companies and institutions). However, there were some problems. For example, 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 (such as software piracy), a private complaint is needed as a pre-condition for starting an enforcement action and subsequent prosecution.

Search Warrants: Verification of computer systems and of the computing data carriers requires a search warrant, according to Law No. 161 of 2003. The search warrant can be issued only by the court and only after the commencement of the criminal investigation. This law will have a significant impact on the market if not amended quickly. BSA expects that the consequence will be that the number of *ex officio* police raids will decrease dramatically, as will police raids upon response to right holder leads. The amendment should provide that the mere verification of the existence of software installed on the computers should not require such a search warrant.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

SAUDI ARABIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Saudi Arabia should remain on the Watch List with an out-of-cycle review to monitor implementation of new enforcement and transparency commitments made to IIPA in a recent visit and following the Kingdom's recent and welcome WTO accession.

Actions to be Taken in 2006:

Deterrent Enforcement

- Use the new Special Committee on enforcement set up by the Governor of Riyadh, Prince Salman, to establish a new regime for imposing increased penalties including imprisonment and securing the creation of a special police task force to work with the Ministry of Culture and Information (MOCI). Deterrent penalties and transparency are TRIPS requirements;
- Work closely with the new IPR Committee, headed by M. Al-Aiyash, to secure increased penalties and a more transparent process at MOCI;
- Ensure that the Breach Committee in the MOCI issues significant fines up to the maximum allowable in the copyright law;
- Ensure that right holders are able, as TRIPS requires, to appeal any Breach Committee-imposed fine which is considered inadequate to the Board of Grievances, which must impose imprisonment in appropriate cases, and significantly increase fines;
- Ensure systematic involvement of the police in copyright enforcement against both street vendors and those up the supply chain (warehouses etc.), and against corporate end-users of unauthorized software, including those initiated through a request from the Ministry of Culture and Information (MOCI), or directly by right holders;
- 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), including against corporate end-users of unauthorized software;
- Engage in a complete clean-up of street vendor piracy, and subject offenders to deterrent penalties, not just deportation, which has proven to be an ineffective deterrent;
- Secure the commitment of Prince Salman and the Special Committee to inform the management in compounds that they must pay license fees for the redistribution of TV signals and raid the compounds if they fail to comply;
- Reform the customs system to establish an IPR Task Force and provide customs officers with *ex officio* authority to suspend the import of pirate product into the Kingdom.

Transparency

- Press the Special Committee and the IPR Committee to open up the MOCI enforcement process by having the Ministry provide full reports on the details of each case they commence following a raid to the relevant right holder(s) so that the right holder(s) (or their representatives) can follow up with appeals and related actions;

- Allow right holders to participate in the MOCI enforcement process through directly appearing at the Breach Committee, including seeking compensation as required by TRIPS;
- Fully implement the processes of the Board of Grievances to allow right holders to appeal, at their discretion, sentences that are inadequate.

Ensuring Legal Use of Copyrighted Materials

- Secure and implement a mandate of the Special Committee and the IPR Committee to ensure that government ministries fully legalize their software use, in accordance with the existing software decrees, to set an example for the private sector;
- Order universities to regulate procurement practices to ensure purchase of authorized copies of books (and other copyrighted materials), following up where necessary to ensure that those universities comply with the law;
- Take enforcement actions against enterprise end-users of unauthorized software.

Copyright Law Reform

- Take action to ratify and implement in the copyright law the obligations of the WIPO “Internet” treaties;
- Increase maximum penalties in the Copyright Law to deter organized criminal activity that is rife throughout the Kingdom.

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

SAUDI ARABIA Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2001-2005³										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	20.0	50%	15.0	35%	16.0	40%	16.0	42%	12.0	42%
Business Software ⁴	80.1	52%	73.0	52%	76.0	54%	13.3	50%	16.4	52%
Motion Pictures ⁵	NA	NA	20.0	40%	20.0	40%	20.0	35%	30.0	45%
Entertainment Software ⁶	NA	95%	NA	68%	64.0	83%	NA	NA	115.7	83%
Books	10.0	NA	14.0	NA	14.0	NA	14.0	NA	14.0	NA
TOTALS	110.1+		122.0		190.0		63.3		188.1	

¹ <http://www.iipa.com/pdf/2006SPECIAL301HISTORICALSUMMARY.pdf>.

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

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁴ BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Saudi Arabia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ 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.

IIPA's JANUARY 2006 MISSION TO SAUDI ARABIA PRESAGES MAJOR CHANGES IN THE KINGDOM'S ENFORCEMENT SYSTEM FOLLOWING WTO ACCESSION

On December 11, 2005, Saudi Arabia was admitted to the WTO and undertook obligations under the TRIPS agreement and particularly its enforcement text. IIPA was invited to visit the Kingdom in January 2006 and the IIPA President, accompanied by local right holders, met with senior Saudi government officials in all relevant ministries and enforcement bodies. Detailed below is an update of the current piracy and enforcement situation. However, in meetings with IIPA, senior Saudi officials committed to making major changes in the system to achieve more transparency and deterrence, including, for the first time, using imprisonment as a remedy in accordance with their new TRIPS obligations. Those and other developments are listed at the end of this report and, as a consequence, IIPA is seeking an out-of-cycle review to assess the implementation of these commitments and removal of the deficiencies listed.

USTR's 2005 decision retained Saudi Arabia on the Watch List with an out-of-cycle review. The results of this review have not yet been announced.

COPYRIGHT PIRACY UPDATE

Piracy remains rampant despite increased raiding by the Ministry of Culture and Information (MOCI)

MOCI is to be commended for undertaking increased raiding activity and making larger seizures in 2005. Over the last year, seizures of pirated entertainment software, DVDs and business software have been as large as 2.28 million units (in Dammam), and there have been many raids involving seizures of from 600,000 units, down to 30,000 and 40,000 units.

However, this raiding activity alone has not had the desired deterrent effect. In the Damman raid, for example, the pirate raided was back in business the next day with new product. All these raids were done upon informal complaint by right holders and not *ex officio* by the Ministry. While the Ministry is to be commended for undertaking these successful raids, the complete lack of any deterrence in the market has meant that the availability of pirate product and piracy levels has not diminished.

Retail Piracy Continues Unabated

Optical discs (CDs, VCDs, DVDs, CD-ROMs, and "burned" CD-Rs, and DVD-Rs) of a cornucopia of copyrighted content (entertainment software, recorded music, movies, business software, and published materials) remain available for retail sale in Saudi Arabia, whether imported, "burned" on recordable discs domestically, or factory produced in Saudi Arabia. Pirated OD music and DVD products are reportedly still available, sourced from Pakistan, Indonesia, and other countries. Saudi Arabia ranks worst in the Gulf region in terms of piracy of console-based entertainment software of all kinds, regardless of content (over 90% of console-based and PC-based entertainment software games are pirated). Vendors openly admit that

pirated entertainment software for console games are imported from Malaysia (industry reports they are transshipped through Dubai and Bahrain). Pirate product has also reportedly been sourced in Pakistan and Lebanon.⁷

Pirated entertainment software is openly sold in souks and retail markets and pirated DVDs are sold openly or very often under the counter in massive volumes. Pirate copies of business software are either available from PC assemblers and resellers, which are then loaded on PCs and sold both to consumers and to small and medium-sized businesses, or are available from street vendors found in the regular computer store malls.

Specific Sectors

- **Pay Television Piracy:** Illegal distribution of “Pay TV” (i.e., cable television and satellite) signals on compounds continues unabated. The Kingdom’s prohibition against cinemas makes the pay TV market particularly active, and most 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. While there are occasional raids, there is a great reluctance to go into compounds, most of which are owned by powerful Saudi citizens or members of the royal family.
- **Book Piracy:** Saudi Arabia’s publishing market continues to experience some piracy, especially at certain universities in the Western Province, but piracy levels have generally improved during 2005. Recent changes in practice by the King Abdulaziz University in Jeddah have helped to reduce piracy losses. Nevertheless, publishing companies maintain that the situation is in need of significant improvement. 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). IIPA is pleased to see more universities legalizing their acquisition process by buying centrally and encourages the remaining universities to follow suit. Failing to do so invites an overrunning of the market by pirate photocopies, supplanting legal purchases.
- **Government Use of Illegal Software and Corporate End-User Piracy of Software:** Both remain huge problems in the Kingdom. While some ministries have legalized their software, it is estimated that 90% of the software used in government overall is unauthorized (it is estimated that 30% of the PCs in use in the Kingdom are in government hands). In 2005, there were no raids by the Ministry against corporate end users of unauthorized software, which has kept piracy levels very high.
- **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 telecom infrastructure remains immature and the Internet is under strict control of the government, Internet piracy has not yet become a substantial problem. It is expected to become so, since

⁷ Almost all PlayStation2® consoles on the market have been modified to allow the play of pirate entertainment software.

building an improved IT infrastructure is one of the government's prime investment objectives.

COPYRIGHT ENFORCEMENT UPDATE

Increased raids by MOCI in 2005 are commendable but there is still insufficient police involvement and deterrence is completely absent from the enforcement system

MOCI, in a development welcomed by industry, increased its raiding activity in 2005, inspecting more retail outlets, and on occasion joined by local police, arrested and deported street vendors, and raided major warehouses and storage areas, seizing a reported 27 million units of pirate product over the year. However, the lack of deterrent penalties, the failure of the Ministry to act *ex officio* without a right holder complaint, the continued inability of right holders to obtain any information from MOCI on raid follow-up, the unwillingness of MOCI to publicize individual convictions and penalties to promote deterrence, and the continued unwillingness of the authorities to engage in corporate end-user or book piracy raids has meant that there has been virtually no change in the market, with raided stores reopening with new product and that product being replaced as soon as it is seized.

According to IIPA's most current information, the maximum fine that has ever been imposed upon pirates by MOCI has been 50,000 riyals (US\$13,332) and the average fine has been only around 10,000 riyals (US\$2,667). The maximum fine that MOCI is entitled to impose under the new Copyright Law is 100,000 riyals (US\$26,665) but, upon referral to the Board of Grievances, the fine can be raised to 250,000 riyals (US\$66,663) and the Board can impose imprisonment up to six months, with these penalties doubled for recidivists. Reportedly only six copyright cases were sent to the Board of Grievances in 2005 and reportedly none involved piracy of a U.S. work. Industry has reported at least 25 raids in 2005 involving seizures of more than 10,000 units of pirate product. As noted above, one raid in Dammam involved 2.28 million units of pirate DVDs, VCDs, DVD-Rs and VHS cassettes (1,025,400 VCDs, 956,000 DVDs, 295,500 VHS cassettes and 10,000 DVD-Rs (10,000 of these copies were of business software), involving an estimated value at retail of US\$37 million. It is clear that the penalties currently being imposed have no deterrent value, which accounts for the fact that increased raiding has had no effect in the marketplace.⁸

MOCI, despite the fact that it has full authority to enforce the copyright law against all infringers, continues to refuse to deal with street vendor piracy, leaving that to the attention of the police, which are notoriously reluctant to involve themselves in copyright crimes. Pirates other than the retail shops licensed by the Ministry are not handled by MOCI although if there is a nexus to a retail shop they will ask the police to join them in a raid. While the police, upon receiving the approval of the Governor of each city, will accompany the Ministry on raids, or will raid occasionally on their own, it is imperative that the police authorities create IPR units in each

⁸ The Arabian Anti-Piracy Alliance (AAA), which represents MPA, BSA, Sony Computer Entertainment Europe, and a number of pay-TV companies in anti-piracy activities in the Kingdom commissioned a study released the week of January 22, 2006. The study was a scientific survey of approximately 800 individuals and entities engaged in the pirate trade seeking their views on whether the penalties available against piracy in the Kingdom would deter their conduct. While the study went into great detail about each type of penalty, the overall conclusion of the study was very clear: pirates believe that the penalties will not be severe and therefore are merely the cost of doing business. In short, they have no deterrent value and fines are just routinely paid, with pirate business going on as usual.

city to engage in serious raiding activity. Without the deterrence that comes from police raiding, it will be more difficult to bring deterrence to the enforcement system as TRIPS requires.

Enforcement against street vendors is done by the police, but is spotty. This is a primary means by which pirate business software “packaged” product is sold in the Saudi market. Moreover, such vendors are rarely punished, the remedy being deportation, since most vendors are Asian immigrants. This is, however, of little deterrent value; there are hundreds of other such immigrants ready and willing to take the place of the deported pirate.

The lack of transparency at MOCI contributes to the absence of deterrence against piracy

The MOCI enforcement system has been characterized for years by an almost total lack of transparency with respect to individual case outcomes following a raid. Right holders report that they are never told about the progress or outcome of cases and the only information they are privy to is a report issued annually listing the number of raids, the amounts seized and the total penalties imposed. Individual defendants are never revealed either to the right holder (unless already known to the right holder or its representative that made the original complaint) or in the press following a judgment, or in the aforesaid annual report. Under the copyright law and the new implementing regulations adopted to bring Saudi’s regime into compliance with TRIPS, right holders are entitled to damages and to appeal sentences they believe are too light to the Board of Grievances. Neither can occur without the right holder being informed and being given the right to participate in the administrative process. Failure to afford such transparency and the ability to participate places the Kingdom in violation of its new international obligations under TRIPS. IIPA made this point continually during its January 2006 meetings in the Kingdom and it appears the Ministry is now aware of this issue and will take corrective action. Moreover, the Board of Grievances evinced a willingness to entertain appeals from right holders, not now possible under the current system.

To implement these new obligations and the commitments made, the MOCI must:

- Take *ex officio* action, and if it does so, inform right holders of all those enforcement actions;
- 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;
- Provide right holders with early notice of the case, so that they may assert their right to compensation as required by TRIPS⁹, including the right to participate in making their case

⁹ Article 22(4) of the law provides,

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.

for damages. This must be done regardless of whether the initial raid was *ex officio*, or upon oral or written complaint from the right holder.

- Inform the right holder and their representatives of the outcome of all cases decided at the Ministry by the Breach Committee including the names of the convicted person, the amount and type of product involved, and the fine imposed. This will permit the right holder to exercise its right to appeal the fine, if considered too low, to the Board of Grievances.
- Publicize the results of raids, and subsequent prosecutions/cases to the public at large to provide further deterrence.

MOCI still does not extend its enforcement to corporate end-users or to book piracy

MOCI's historical unwillingness to enforce its law in these two areas must be remedied immediately and should be a specific recommendation of the Special Committee and of the IPR Committee.

COPYRIGHT ENFORCEMENT REFORM PROMISED

In the course of IIPA's meetings with Saudi government officials from January 22-25, 2006, a number of advances were made that, if fully implemented, will go far to remedying many of the deficiencies in its enforcement system that have contributed to high piracy levels in Saudi Arabia and the atmosphere of lawlessness that accompanies such piracy. The following are the advances and commitments made during this mission; their early implementation should be subject to monitoring under an out-of cycle review process:

- His Royal Highness Prince Salman bin Abdulaziz al Saud, brother of the King of Saudi Arabia and Governor of Riyadh, has instructed that a Special Committee be immediately formed under his auspices to review the reforms needed and discussed above. The Committee will consist of a representative from the Ministry of Commerce and Industry (Mr. Mohammed Al-Aiyash, Chairman of the IPR Committee, was named as the Commerce Ministry's representative within minutes after the IIPA meeting with the Prince), a representative of the Ministry of Culture and Information, a representative of the Saudi Arabian General Investment Authority (SAGIA) and right holder representatives.¹⁰ Through this Committee, it is hoped that these reforms can be effectuated immediately; that an IPR Task Force will be set up in the office of the Riyadh police (which is under the jurisdiction of the Prince); that such Task Forces will be extended to other cities; that an order will be given, followed by enforcement actions as necessary, to the compounds to legalize their redistribution of pay-TV signals; and that deterrent penalties will be imposed on all acts of piracy which the Prince called "illegal and immoral";

However, right holders 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 have no way to seek adequate compensation for the injury suffered due to infringement except under that complaint. The current system does not permit this to happen, which renders the system incompatible with TRIPS.

¹⁰ IIPA met with Governor Amr Abdullah M. A. Al Dabbagh, Chairman of SAGIA, who indicated great interest in resolving these problems as the *sine qua non* of copyright industry investment in the Kingdom, a goal strongly desired by the Governor.

- Legalization of the government's software use and the commencement of regular enforcement by MOCI against corporate end-user software and book piracy;
- Implementation of the MOCI's Acting Minister Al-Akkas' view that the Ministry is required under the TRIPS agreement to become fully transparent with respect to its enforcement actions and decisions by the Breach Committee and the Ministry's need to increase penalties to deterrent levels. This would include the right to seek compensation in these cases and the right to appeal fines considered too low to the Board of Grievances;
- Imposition of the penalty of imprisonment in appropriate cases by the Board of Grievances upon appeals by right holders, or on referral from the Breach Committee. Prison sentences in cases involving large seizures would go far to bringing real deterrence to the Saudi enforcement system;
- Implementing the commitment of the Saudi Customs to work more closely with right holders through the appointment of a high level Customs officials to act as liaison with right holder organizations.

THE COPYRIGHT LAW SHOULD BE AMENDED TO IMPLEMENT THE WIPO "INTERNET" TREATIES AND RATIFICATION SHOULD OCCUR AT THE EARLIEST POSSIBLE DATE

While virtually all the deficiencies in the Saudi Copyright law have been remedied in the new implementing regulations adopted in 2005,¹¹ IIPA impressed upon all relevant officials at its January 2006 meetings on the importance of developing the legal infrastructure for electronic commerce by ratifying and fully implementing the WCT and WPPT. The reception to this suggestion was gratifying and industry and the U.S. government should work closely with the responsible agencies (including MOCI) to assist with advice and training.

¹¹ Two deficiencies appear to remain, however. The law appears not to mandate destruction of infringing goods and does not require the award of costs and attorney's fees as required by TRIPS. Furthermore, statutory prison sentences remain very low. MOCI Acting Minister Al-Akkas indicated a willingness to propose raising these terms in the near future.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

SERBIA AND MONTENEGRO

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Serbia and Montenegro be added to the Special 301 Watch List in 2006.

Actions Which the Government of Serbia and Montenegro Should Take in 2006:

- Instruct the enforcement agencies to make combating piracy a priority and set goals to ensure active and in-depth criminal investigations, raids and prosecutions.
- Take swift actions against street piracy by investigating the production and storage operations supplying the kiosks and other retail operations selling pirated materials
- Both Serbia and Montenegro should enact strong optical media regulations to prevent illegal optical media production and distribution.
- Both should give customs and border police a clear mandate and legal competence to act *ex officio* against cross-border trade in pirated goods to stop importation and exportation of those goods, including optical media product.
- Both governments should instruct prosecutors and judges to prioritize criminal copyright prosecution.
- Both should improve judicial training on copyright matters so that courts expeditiously and effectively enforce all aspects of the copyright law.
- Direct market inspectors to enforce copyright against street vendors
- Instruct prosecutors to charge pirate street vendors as unlicensed traders under Article 243 of the Serbian Penal Code.
- Both governments should enforce, without delay, criminal copyright provisions, including by imposing deterrent prison sentences—
 - Serbia must implement its High Tech Crime Law;
 - Montenegro must pass amendments to its Criminal Code and then use the law in-practice.

SERBIA AND MONTENEGRO
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2005¹

INDUSTRY	2005		2004	
	Loss	Level	Loss	Level
Records & Music²	12.5	80%	12.0	80%
Entertainment Software³	NA	NA	NA	NA
Business Software⁴	NA	NA	NA	NA
Motion Pictures⁵	NA	NA	NA	85%
Books	NA	NA	NA	NA
TOTALS	12.5+		12.0	

Previous IIPA reports on Serbia & Montenegro can be found at <http://www.iipa.com/countryreports.html>, including prior history on the Special 301 context as well as the Generalized System of Preferences (GSP), which this country became an eligible country in 2005, see <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>.

COPYRIGHT PIRACY

Optical media piracy: Copyright piracy in Serbia and Montenegro is not limited to distribution and retail sales. The country has at least one optical disc plant involved in large-scale pirate production (see below), not only for the local market, but also for export to other countries in the region. CD-R and DVD-R piracy have become predominant problems in this market. CD-Rs are primarily replicated locally in underground “burning” facilities. Illegal CD-R and DVD-R burning operations are supported by a large-scale importation of blank optical discs from China, Bulgaria and Hungary. Much of the illegal material is still available on cassettes (music and videocassettes) and industrially produced optical discs. The recording industry reports that smuggling of pirate optical discs into Serbia from Russia via Ukraine and Hungary, as well as from Romania and Bulgaria, is commonplace. IFPI forensic results on pirate products purchased in Serbia confirm these connections. This includes pirate VCDs and DVDs imported

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

² 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.

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 BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Serbia and Montenegro, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

from the Far East. The pirate discs are frequently shipped from Serbia to Montenegro, in particular for the summer period, and to other Balkan countries. 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.

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. There are now at least four known CD plants in Serbia with a total of 10 production lines. In 2005, a minimum of 4 DVD lines were installed in Serbia. All of these plants are located in Belgrade. General Disc Technology (GDT) is still subject to civil and criminal investigations (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 two other plants, one has not applied its codes (acquired in 2000) and the other continues to use it improperly. This situation undermines any possible confidence in correct application of the SID code system and illustrates the urgent need for a strong optical disc regulation.

Retail piracy widespread: During 2005, the markets in Serbia and Montenegro continued to be full of pirated copyrighted materials. 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. Some Ministers of the current Serbian government increasingly speak out against piracy, but the heritage of the recent past is still strongly felt.

The recording industry reports that despite some success in combating piracy in 2002-2003, the situation with music piracy worsened in 2005 and regressed to problems experienced in 2002. The piracy situation in Serbia and Montenegro is worse than in its neighbors, Croatia and Slovenia (but better than in Kosovo), with much music piracy reported in Belgrade, Subotisa and Novy Sad in Serbia, and Budva in Montenegro. Even the notorious Mihailova Street in Belgrade is back in action, with pirate goods readily available. Kiosks and street traders selling illegal copyright materials can be found in large numbers in every town. The distribution 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. Internet piracy has also started to develop in Serbia, offering a multitude ways for illegal file-sharing. In 2005, 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 and Montenegro. The country could support a promising legitimate music market. The recording industry reported a piracy level of at least 80%, with losses to the U.S. music industry amounting to \$ 12.5 million in 2005.

The Motion Picture Association (MPA) reports that in 2005, audiovisual piracy remained a major problem, severely limiting the ability of legitimate companies to distribute their product. Serbia & Montenegro is attempting to create a legitimate market, but is plagued by high piracy levels. Optical disc piracy is the predominant problem. Surrounding countries suffer from the illegal export of pirate product. Overt piracy, with dozens of kiosks selling pirate CD-Rs and DVDs is decreasing, with the pirates adjusting their techniques and becoming more mobile.

Legal market players are a minority of the local audiovisual market. Many flea markets and retail stores carry pirate optical discs and videocassettes. Market and Tax inspections control only registered retail stores, letting flea markets off the hook. MPA reports there has been no improvement in administrative efforts to close down and fine kiosks and other retail operations which engage in the selling and distribution of pirated materials. With respect to internet piracy, MPA reports that the operators of one of the main Internet hard goods sites were arrested in October 2004 on a complaint of the local anti-piracy organization (APASCG). Seven suspects were arrested in Belgrade and five other suspects were arrested by local enforcement officials at the request of the Belgrade prosecutor in towns outside Belgrade. The pirates had DVD-burning facilities in their homes, and police seized computers and over 22,000 masters. One of the arrested was sentenced in 2005, receiving a suspended sentence, and sentencing is reportedly imminent on a second defendant. Television piracy continues to be an issue, and it is estimated that there are over 300 illegal stations operating throughout the country (often using DVDs (sometimes pirate) for their programming). Cable operators offer packages including the broadcasts of pirate TV stations and re-transmitted programming from neighboring countries.

The Business Software Association (BSA) reports that the primary piracy problems affecting its companies are optical disc piracy (at the retail level) and end-user piracy. Some internet piracy does exist, but it has not reached the problematic levels caused by optical disc piracy. Lowering the software piracy rate in Serbia and Montenegro could contribute positively to the local economy.⁶

According to the Entertainment Software Association (ESA), rightholders' investigations revealed, beginning in 2001, that there is also an increase in Internet piracy by illegal sites hosted in Serbia and 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.

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. The government should encourage university campuses to take an active role in promoting the use of legitimate materials by their students and lecturers.

COPYRIGHT ENFORCEMENT

Efforts to create a National Anti-Piracy Campaign: In October 2004, the Serbian Government approved an Anti Piracy Action Plan. The plan was not made public and was based on proposals made by the Anti-Piracy Commission, formed in 2002. The only result of the Plan during 2005 was a large number of criminal cases initiated *ex officio* against street vendors. The police initiated the cases, but failed to carry out more than superficial investigation into them. The burden of bringing the cases to a conclusion has fallen on the judges and the right holders. In March 2005, the enforcement agencies (police, inspectors, ministries of finance

⁶ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Serbia_Montenegro.pdf), using 2004 data, found the following: a 10-point drop in Serbia-Montenegro's percent piracy rate (from 81% to 71%) could create 1,800 jobs and pump \$420 million into the economy. It could also increase local industry revenues by an estimated \$227 million and generate \$63 million in additional tax revenues. See http://www.bsa.org/idcstudy/pdfs/Serbia_Montenegro.pdf.

and internal affairs) declaring to visibly fight piracy undertook actions against OD plants, but ended up targeting legitimate businesses. Reports suggest that Montenegro might be in the process of preparing a comparable anti-piracy plan.

Criminal Enforcement: Despite the improved Criminal Code of 2005 that covers all copyright crimes, the governmental anti-piracy efforts on-the-ground in completing raids, prosecutions, and judicial sentencing did not greatly improve. Law enforcement falls within the jurisdiction of each state, and not the State Union of Serbia and Montenegro.

BSA reports that it continues to experiencing better cooperation with the enforcement authorities in Serbia. The authorities are taking *ex officio* actions in software cases, police raids are being performed, and BSA has had positive results at judicial hearings. Judges have been receptive to information on software piracy as well as receiving printed materials with instructions how to recognize pirated software and about the software licensing types. BSA reports that in 2005, there were 76 criminal proceedings on software cases initiated in 2005. BSA reports some positive results in 2005; the number of verdicts reached by the judges in which the accused was found guilty in criminal proceedings is 12, which is significant improvement compared with the results from 2004. BSA reports that, although there were convictions, deterrent level penalties were not issued. The monetary fines (the most common penalty) were *de minimus* and imprisonment sentences (rarely issued) were suspended.

MPA also reports good cooperation with enforcement officials in 2005. In Serbia, a large number of criminal cases were initiated *ex officio* against street vendors in 2005. (In contrast, the Criminal Code of Montenegro currently does not envisage *ex officio* prosecution.) The police initiated the cases, but failed to carry out more than superficial investigation into them. The burden of bringing the cases to a conclusion has fallen on the judges and the right holders. Although the police succeeded in arresting a number of significant producers of pirate goods in 2005, no prosecution has yet been initiated. Investigative efforts seem hampered by poor organization and limited resources.

The recording industry reports that the only enforcement agency that shows some interest in IPR protection is the Ministry of Internal Affairs. The industry's relationship with the ministry is good, on a normal working level, and with regular contact and exchange of information. In 2005, the ministry was fairly active, undertaking a significant number of inspections and raids, bringing criminal charges on the basis of the Serbian Criminal Code, in particular: (a) unlawful trade (Article 147), (b) unauthorized use of a company name (Article 165), and (c) unauthorized use of copyright and related rights (Article 183). Police is often taking *ex officio* actions. The recording industry is unable to report about the activities of other enforcement agencies in this field. The main bottleneck lies at the prosecutorial level and in the courts, which treat copyright cases as unimportant ones. IFPI has not received any concrete results of prosecution of copyright cases in 2005, and is unaware of successful convictions and non-suspended sentences for IPR crime.

Serbia's Ministry of Internal Affairs has reported the following anti-piracy actions in 2005: 982 inspections, 620 businesses and video/DVD clubs inspected 664 criminal charges brought; 655 people denounced; 12 convictions issued; 783 criminal offenses (presumably meaning charges). Over 226,000 copies of pirated audio and video products (which include video, music, software, publications and books on optical media products) were seized.

Border Enforcement: The Customs authorities lack the organizational capacity and operational will to tackle the distribution of pirate material across the borders of Serbia and Montenegro. The existing limited IPR capacity is in turn beset by prohibitive bureaucracy concerning the applications from right holders, which has resulted in indifference among the on-ground Customs officers vis-à-vis copyright cases. Reports suggest that there are some actions, mostly in the trademark area. Serbian Customs is implementing its new customs law.

In an attempt to improve intellectual property rights enforcement, the government formed an organizational unit for Intellectual Property Protection within the Customs Administration of the Republic of Serbia, which, due to the scope and complexity of work, was rapidly transformed into a Department, an organizational unit of a higher level. This organizational change shows the seriousness that Customs authorities bring to protection of IPR, as is the fact that intensive personnel education and professional training is planned. As the only proper organizational unit dedicated to IPR protection, however, it is faced with unsolved problems such as the modernization of its information system, problems with the storage of temporarily detained goods and difficulties in managing the destruction of confiscated products.

Trainings: BSA and IFPI report that they participated in IP educational seminars and conferences in 2005, such as the conferences organized by AmCham SCG in cooperation with BSA in both Federal Republics. IFPI also made presentations at the EU CARDS organized seminar in March 2005. MPA and its local colleagues also provided seminars in 2005. The competent state authorities should be trained continuously in order to be able to deal with IP cases efficiently.

LEGAL REFORM AND RELATED ISSUES

Copyright Act 2004: The State Union of Serbia and Montenegro (Union) has the ability to pass substantive legislation regarding intellectual property rights. In December 2004, the Union Parliament adopted its new Copyright and Related Rights Act (CRRA), which entered into effect on January 1, 2005. The local copyright industries then reported that the CRRA appeared to be generally adequate (though some provisions, such as overbroad exceptions, remain troubling) and were hopeful that it would provide a foundation for effective prosecution of piracy cases. The CRRA is a substantial improvement of the copyright system in Serbia and Montenegro, replacing the former inadequate copyright law based on the law in the Federal Republic of Yugoslavia.

Criminal Codes and other reforms:⁷ Enforcement and substantive provisions on criminal copyright sanctions are left to the Republics of Serbia and Montenegro, respectively. The Union does not have responsibility for criminal and enforcement matters, and actual enforcement can happen at the state level.

Serbia:

- The New Serbian **Criminal Code** was passed by the Parliament and will enter into force on January 1, 2006 (published in the Official Journal of the Republic of Serbia No. 85/2005 and 88/2005). Under this code, there are three criminal offences relating to copyright and related

⁷ IIPA does not have the texts of these laws and relies on the reporting of its member associations and news reports.

rights: Infringement of an author's and interpreter's moral rights, unauthorized use of copyright or related right, and unauthorized elimination or change of electronic rights information on copyright and related rights.

- Serbia has adopted a **Law on Organization and Jurisdiction of Government Authorities in the Suppression of High Technology Crime** (published in the Official Journal of the Republic of Serbia No. 61/2005) which entered into force on July 26, 2005. This law establishes the Office of the Special Prosecutor in charge of prosecuting computer crimes, including intellectual property infringements involving computer technologies. The Law also establishes the jurisdiction of the District Court in Belgrade to do these cases for the entire Serbian territory. The law also requires that the departments specialized in IP criminal offences (provided that the number of copyright copies is more than 500 or provided that the pecuniary damage amount is higher than 850.000,00 CSD (US\$11,877) should be established within the District Public Prosecutor Office in Belgrade, within the Serbian Internal Affairs Ministry and within the District Court in Belgrade. However, the Special Prosecutor has not been appointed yet; the Special Police Service and the Panel of the Judges of the Belgrade District Court have not yet been established.
- A **draft law on the Intellectual Property Regulations Enforcement** reported has been crafted by Serbian Ministry of Foreign Economic Relations, and is pending. The industries do not have any information about this bill, other than it is still in draft form.
- The **Customs Law**, effective January 1, 2004, provides for detailed regulation of border measures, and grants power to the customs authorities to act where the goods placed in the customs procedure are found to infringe intellectual property rights.
- The Serbian **Broadcasting Law** was amended, establishing a Broadcasting Agency which is required to ensure that all broadcasters comply with the regulations on copyright and neighboring rights. Illegal conduct by a broadcaster may be the basis for the imposition of prescribed sanctions by the Agency, independently of other legal remedies at the disposal of the aggrieved right holder. The recording industry welcomes the inclusion of rights compliance condition to the broadcasting licenses due to be issued by the Broadcasting Agency. The MPA hopes that broadcasting piracy will decrease substantially when the Agency starts to work. This statute has been approved by the Serbian Parliament, and a public tender has been launched; broadcasters will, explicitly, be bound to respect copyrights in their programming.
- The Serbian **Telecommunications Law** has (finally, after 3 years) entered into force. MPA reports that the Telecom Agency was established and members of the Agency Board were appointed. This Agency will issue general licenses to cable distributors of TV programs. Cable distributors will be bound to respect copyright in their program offers.

Montenegro:

- **Amendments to the Criminal Code** for Montenegro: Information on this proposed legislation is sparse, but the current law is believed to be the Criminal Code approved two years ago. Other reports suggest that a new bill is pending which include *ex officio* prosecution and deterrent penalties. Industry does not have details on such proposals.

- The Parliament of Montenegro approved, on July 21, 2005 a **Law on Enforcement** that regulates the protection of intellectual property rights, effective as of January 1, 2006. This Law provides powers for market inspectors, other inspectors and authorities to detain, confiscate and order destruction of infringing goods. It also provides for fines for economic offences (offences by legal entities and businesses found in violation of IP rights) and misdemeanors.
- Montenegro's **Regulation on Border Measures** was approved by the Government and is effective as of July 1, 2005. The Regulation provides for the power of the customs authorities to act where the goods placed in the customs procedure are found to infringe intellectual property rights.

Need for Optical Media Law: Both governments of Serbia and Montenegro should craft and issue an optical media law. The global copyright community has agreed on key elements of an effective optical disc law (these appeared in IIPA's 2005 Special 301 submission). The relatively high number of OD 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 and Montenegro. The copyright industries look forward to working with the authorities of Serbia and Montenegro to draft, implement and enforce comprehensive optical disc regulations. Reports suggest that the Serbian government is working on drafting an optical disc law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that South Korea be placed on the Watch List, with an out-of-cycle review to determine whether book publishing and music industry issues have been adequately addressed, or whether a higher designation is warranted. On February 2, 2006, U.S. Trade Representative Rob Portman announced the U.S. Government's intention to negotiate a free trade agreement (FTA) with the Republic of Korea. The negotiations are expected to commence in the coming months (after the expiration of a 90-day consultation period). Just prior to the FTA announcement, the long-standing motion picture screen quota issue was resolved, and it is hoped that an FTA with Korea will bring resolution to many other issues, including many discussed herein.

Actions to be Taken in 2006

- **Take Effective Action Against Illegal Photocopying and Printing of Published Materials:** Despite positive steps in 2005 by the Korean Government, book piracy appears to be worsening in Korea, and going underground where it is much more difficult to detect. Publishers need cooperation from the Government's Copyright Protection Center (CPC) to help ferret out massive photocopy and print operations operating in near-secrecy. In addition, since pirate textbooks and English Language Teaching (ELT) materials are used all over Korea with impunity, publishers need follow-up by the Ministry of Education on work to ensure legalized use of published materials in all learning institutions, and to ensure that universities deliver and implement action plans to achieve greater legalized use of published materials.
- **Effectively Tackle Internet Piracy:** As has been reported for several years, Internet piracy in Korea continues to cause major damage to the legitimate marketplace for copyright material, evidenced by the closure of many licensed shops and decreased sales across the motion picture and music industries. While there were some positive case results in 2005 involving online piracy, leading some online services to take the necessary steps to go "legal," enforcement generally has been lacking. IIPA thus calls upon the Copyright Protection Center (CPC), which was tasked with tackling Internet piracy in September 2005, to take effective action against illegal Internet sites and to address such piracy as a priority in 2006. To the extent CPC cannot act, the cybercrime units within the Korean police and prosecutors must do so.
- **Ensure Passage of Laws That Strengthen Protection and Comport with International Standards:** Few of the many copyright-related amendments being considered in 2005 successfully address key needs for copyright owners, including: (1) extending copyright term for works and sound recordings to reflect global trends; (2) providing sound recording producers with control over digital dissemination of their sound recordings; (3) fully complying with WIPO Treaties standards on technological protection measures; (4) clarifying liability of Internet service providers and providing effective notice and takedown; (5) recognizing protection for temporary copies and narrowing the private copying exception in the digital realm; (6) substantially tightening library exceptions; and (7) clarifying and strengthening criminal prohibitions on "camcording" (use of a video camera to illicitly record

a movie at a movie theater). These needs should be addressed, and any attempts to scale back protection in these and other areas should be abandoned.

- **Address WTO-Inconsistent Broadcast Sub-Quota:** A WTO-incompatible broadcast sub-quota limiting the availability of foreign content in Korea must be resolved.
- **Address Increasing CD-R “Burning” Problem:** Several industries report major CD-R “burning” operations in Korea, e.g., the motion picture industry suffers losses due to sales of DVD-Rs “burned” with major motion pictures titles. The Korean Government must focus on this problem by running market sweeps on shops engaging in illegal burning or sales of illegally burned discs and investigating and acting against pirate duplication labs.
- **Maintain Enforcement Efforts Against “End-User” Piracy of Business Software:** The Korean Government has done a very good job remaining focused on end-user piracy of business software, and hopefully will continue this work throughout 2006. The Government should publicize raids to ensure that the business community does not become complacent.
- **Unauthorized Public Performances:** Unauthorized public performances of motion pictures in motels, computer game rooms, and public baths and saunas remain a problem in Korea. A Presidential Decree to amend the Enforcement Regulations of the Copyright Act of Korea was approved in early 2006 by the State Council and will go into force in March 2006. This Decree partially addresses this problem, and IIPA calls for its swift implementation.
- **Piracy of Cartridge-Based Videogames:** 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 Korean Government should not let this unacceptably high level of piracy stand in 2006.

For more details on Korea’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

SOUTH KOREA Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software²	255.8	46%	276.0	46%	275.0	48%	285.9	50%	100.4	48%
Entertainment Software³	415.1	55%	349.0	43%	248.4	36%	381.0	36%	487.7	63%
Books	43.0	NA	42.0	NA	38.0	NA	36.0	NA	35.0	NA
Records & Music	1.3	13%	2.3	16%	3.5	20%	6.9	20%	4.0	14%
Motion Pictures⁴	NA	NA	40.0	20%	40.0	20%	27.0	25%	25.0	25%
TOTALS	715.2		709.3		604.9		736.8		652.1	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in South Korea, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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 MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

PIRACY AND ENFORCEMENT UPDATES IN KOREA

Book Piracy: Despite some very positive efforts by the Korean Government in 2005, piracy involving published materials has worsened, resulting in decreased sales by legitimate right holders operating in Korea. The chief problems facing book publishers in Korea include massive illegal photocopying in and around university campuses, and more sophisticated pirate offset print operations. The problem of pirate offset printing has become particularly severe, with pirates exhibiting high levels of organization, and publishers regularly noting seizure numbers in the thousands, much higher than in other Asian markets. The problems have been exacerbated in recent years by the increasingly evasive practices of pirate offset printers and even copyshops, which have moved their operations underground. The quality of the pirate offset prints is becoming so high as to make detection increasingly difficult, hence, cooperation with right holders is key to discerning pirate (unlicensed) production from legitimate.

The problem of photocopying of educational materials in Korea is unfortunately not limited to the university market; thriving English language institutes, as well as primary and secondary schools, now use massive numbers of pirate copies of U.S. publishers' English Language Teaching (ELT) materials, as well as tertiary ELT books. While it is still generally accepted in Korea that students would prefer to go to a copyshop to get a hard copy of a book than deal with online versions, there are also some reported instances of digital piracy, such as cell phones with high-resolution cameras being used by university students inside bookstores to copy up to 100-200 pages of textbooks rather than purchase them,⁵ and copyshops using scanned versions of texts to speed up the generation of new pirate "copies on demand."

As noted, the Korean Government took some important steps in 2005 to recognize and begin to address the serious book piracy issues. These include the creation of the Copyright Protection Center (CPC) (which we understand has subsumed the enforcement functions of the Korea Reprographic Transmission and Rights Center (KRTRC)), increasing Government cooperation with foreign right holders on copyshop raids, and increasing Government cooperation on raids on pirate print warehouses. IIPA is hopeful that CPC will receive the manpower and resources necessary to reduce book piracy levels. We also hope CPC will avoid the "conflict of interest" that plagued KRTRC enforcement efforts by separating the functions of licensing and enforcement. Regarding pirate offset printing, the publishing industry, with some government cooperation, had especially notable success in 2005 in tracking down massive underground offset printing operations, leading to some of the largest seizures in the history of enforcement efforts against book piracy in Korea. However, while Korean Government cooperation is vastly improved over 2004, the burden of initiating, investigating and carrying through enforcement actions remains on right holders. In 2006, IIPA would like to see even greater activity to combat piracy, including *ex officio* actions.

One important area in need of more efforts and results in 2006 involves promoting the legal use of published materials at educational institutions. IIPA commends the Minister of Education for issuing a letter in March 2005 requesting every university to devise an action plan for reducing book piracy on campus. IIPA understands that the Ministry has received responses from nearly half the universities, regarding implementing policies, monitoring on-campus photocopy shops, and crafting educational campaigns. We look forward to the Minister's further efforts to ensure that the universities that have not yet responded do so, and to press for some highly notable universities to step up as "models" in this regard. Implementation of these plans

⁵ Kim and Lim, *Cell phone users using their cameras to copy textbooks*, Joong-Ang Ilbo, August 12, 2004.

in 2006 is crucial to measuring the ultimate effectiveness of the MOE letter. IIPA also hopes the CPC will work with industry to devise an appropriate response to raise public awareness about illegal use of published materials at primary and secondary schools, as well as ELT materials by language institutes, and to put into place educational initiatives aimed at these schools/institutes, students and parents.

Internet Piracy: With the near-saturation of the broadband market,⁶ the challenge now is to legitimize the usage of copyright materials by Korea's online population. Unfortunately, P2P sites are on the rise in Korea, with 100 to 120 sites now providing P2P file-sharing; this number is expected to rise to 150-180 sites in 2006. From only 20-30 file sharing services monitored in 2005, the Motion Picture Association identified over 9,500 Korean uploaders engaged in audio-visual piracy, a 20% increase over 2004. While cease & desist letters were sent to all the file sharing services concerned and there was a 100% compliance rate, the files in question invariably resurfaced on the same, or different, file sharing services within weeks or sometimes days. The business and entertainment software industries are also feeling the effects of unlawful downloads of their products over the Internet. The effects of Internet piracy are felt countrywide on the legitimate market.⁷

Peculiar to the entertainment software industry are so-called "offline servers." The "offline server" essentially makes a publisher's online game readily available without authority from the legitimate publisher and without adherence to terms or conditions set forth in a licensing agreement. In this form of piracy, an "offline server" operator creates a "mirror" server to the legitimate servers operated by entertainment software companies to run their online games, thereby diverting traffic and subscription revenue from the legitimate site. Pirate servers also allow the play of pirated games as there is no authentication or verification process carried out at the server level (i.e., to verify that the game software being used is not a pirated copy) as there is on a legitimate game server.

There is also unauthorized use of copyright materials, including entertainment software, by some of the more than 20,000 Internet cafés (called *PC baangs*.) In 2004 some ESA member companies succeeded in entering into licensing agreements with many of the cafes, about 40% of which have now been legitimately licensed by game publishers. Entertainment software publishers also face a new form of piracy – piracy of games for play on mobile phones. Pirated entertainment software is now capable of being downloaded directly from the Internet onto mobile devices or memory cards used in such devices. The near ubiquity of mobile devices in Korea – far exceeding even fixed broadband penetration – makes this a serious concern.

The recent Soribada decisions (criminal and civil) and the case involving Bugsmusic have raised the awareness of copyright law and rights enforcement amongst Koreans (Bugsmusic is now licensed, while Soribada, which had three significant court rulings against it, closed in November 2005, although recent press reports indicate Soribada is considering the launch of a product that permits "free" file sharing without any intermediary; industry will continue to monitor this development closely). The Copyright Protection Center (CPC) (formed

⁶ Korea boasts a household broadband penetration rate of 79.9%, and Korea remains the only country in the world to have surpassed the threshold of 25 broadband lines per 100 people. Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

⁷ For example, the motion picture industry reports that the number of video shops operating in Korea has decreased to about 7,000, resulting in lost employment to legitimate distributors and salesmen. The entertainment software sector reports that there is a strong market for legitimate product for the PC format, including through legitimate online delivery and online game play, but that there is also a significant level of illegal downloading and P2P trading of PC games and of entertainment software in other formats.

under the Copyright Deliberation and Conciliation Committee) was just designated as the responsible agency to address online piracy in September 2005. CPC had not previously seemed willing or able to take effective action against illegal Internet sites, leaving the cybercrime units within the Korean police and prosecutors' offices as the relevant enforcement agencies. The CPC should be given enforcement powers and must treat Internet piracy as a priority issue in 2006, and to the extent they will not act, the police and prosecutors' offices must do so.

IIPA understands that the Seoul Central District Prosecutors' Office in early January, 2006 issued internal guidelines relating to the criminal liability of individuals who upload or download infringing song files. Industry is monitoring the application of these guidelines.

Tackling Street Piracy/CD-R and DVD-R "Burning": Both the motion picture industry and the entertainment software industry suffer losses due to sales of "burned" optical media (DVD-Rs or CD-Rs) with their copyright product on them. The Korean Government must pay more attention to this problem by running market sweeps on shops engaging in illegal burning or sales of illegally burned discs and investigating to identify and enforce against any offsite duplication labs. A particularly encouraging investigation with the Police in January 2004 resulted in the step-by-step arrest and isolation of a street vendor selling pirated motion pictures on DVD-Rs, a truck driver delivering pirated motion pictures on DVD-Rs to the street vendor, and the DVD-R laboratory supplying the infringing motion pictures. It is also encouraging that as a result of ongoing raids by the Police in the Yongsan Electronics market in 2005, the number of pirate vendors has dropped from 28 to 18.

End-User Piracy of Business Software: Unauthorized use of software by businesses causes the greatest losses to the business software industry in Korea. The piracy level has plateaued, but the damage in absolute terms remains great. The problem would have been worse without the government's effective enforcement program and more widespread public awareness about the benefits of respecting copyrights. IIPA and the business software industry greatly appreciate the considerable efforts the Ministry of Information and Communication (MIC), the police and prosecutors' offices have made in recent years. At this rate, Korea is on track to have one of the lowest software piracy rates in the region. It is important, however, that the Government maintain the level of enforcement activity as in previous years (the Government is taking more than 50 criminal end-user actions a month on average in response to complaints from industry) and publicize raids to ensure that the business community does not become complacent in managing software assets.

Unauthorized Public Performances of Motion Pictures: 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, motels, computer game rooms, and public baths and saunas. These uses severely undercut the ability to distribute these videos through commercial channels. 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. As noted below, proposed regulations will hopefully help reduce this form of piracy in Korea.

Cartridge-Based Videogames: Piracy of cartridge-based entertainment software has increased, primarily due to imports of counterfeit and pirate Game Boy products from China.

TRAINING AND PUBLIC AWARENESS

The copyright industries undertook or supported many training and public awareness and educational activities in 2005. For example, book publishers participated in U.S. Embassy trainings, giving presentations at Embassy-sponsored events, and allowing interactions with local government officials and personnel. One publisher headed up a highly successful direct-appeal campaign in 2005, combining educational efforts with direct appeals to convince many copyshops to refrain from engaging in illegal practices. The motion picture industry conducted periodic training for both the Korean police and prosecutors' offices. The business software industry provided software asset management seminars to businesses. The recording industry conducted training sessions for the CPC on how to tackle online piracy (since CPC, as noted, was designated as the online enforcement agency at the end of September 2005).

UPDATE ON LAW REFORM

Various copyright-related pieces of legislation were under consideration in 2005.

Copyright Act of Korea Amendments: There are two known sets of proposed amendments to the CAK. The first set, introduced in June 2005 on behalf of the Government, raises several concerns, including:

- **Weakening of Rights for Sound Recording Producers:** The bill would result in denial of exclusive rights for producers of sound recordings for non-interactive transmissions, and a denial of remuneration for U.S. producers for broadcasting, resulting overall in a weakening of protection. MOCT posted on its website in January 2005 a set of "Q&A Regarding Data Transmission over the Internet," which included some encouraging interpretations of the 2005 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; this interpretation would unfortunately appear to be superseded by the new bill.
- **Educational Exception:** The bill proposes expansion of the education exception (ostensibly for distance learning purposes). The exception would extend to "transmission" (i.e., online dissemination), and could be invoked by a student as well as a teacher. On the other hand, the existing exception would apparently be narrowed in that it could be invoked only "for the purpose of classes" (while the current law says "for education"), and an entire work could be used only if such use is "inevitable" in light of the "character" or "exploitation purpose" of the work. The revised amendment would also authorize the implementing Presidential Decree to specify technical safeguards ("reproduction preventative measures") that schools would have to meet in order to qualify for the exception.
- **Proposed Mandatory Collective Management:** The bill would set out procedures for mandatory collective administration of rights of remuneration created under several other provisions, including broadcasting and "transmission of digital sounds" with respect to sound recordings; reproduction or transmission by libraries; or use of copyrighted material in school textbooks. It appears that only one collective administration organization can be recognized by the Minister of Culture and Tourism for each remuneration right. The statute should allow recognition of more than one organization for this purpose, and right holders should be free to choose which organization to use, or whether to by-pass collective administration

altogether and contract directly with users for payment of this remuneration. MOCT should also reverse its current policy – which is not, apparently, mandated by law – that gives a *de facto* monopoly over administration of the rights of music publishers, including foreign publishers, to KOMCA, the Korea Music Copyright Association. Foreign music publishers should be accorded a non-discriminatory opportunity to qualify for "trust licenses" that would give them an unchallenged legal basis for directly managing and enforcing within Korea all the rights applicable to musical compositions within their catalogs.

- The bill proposes an expansion of the mandate of the Copyright Commission to include promotion of "business designed for fair use of works."
- The bill proposes replacing the MOCT "Standing Enforcement Team" with a new organization charged with, *inter alia*, developing a "sound environment for exploitation of works," including establishing and enforcing standards for rights management information, as well as "promoting fair use."
- The bill provides that MOCT will be directed to designate an organization to receive and administer "donations of property rights" from authors. IIPA is concerned that without safeguards against third parties "donating" works they do not own, this provision could lead to undesired results.
- The bill summary contains an explanatory statement that MOCT is considering expanding the library networking exception in Article 28(3) to apply to schools as well. It is unclear what is contemplated or the timetable for such an expansion, but in any event, as noted below, Article 28 must be narrowed, not expanded, to comport with international standards.

The latest set of amendments to the CAK, issued in mid-November 2005, raises additional concerns,⁸ including the following:

- The bill would, among other things, give either the MOCT or allow by Presidential Decree the authority to issue "certifications" that "prove" someone is the legitimate right holder to license all forms of exploitation (proposed Articles 52-3 and 2(23)), which could impose a formality to protection in violation of Article 5(2) of the Berne Convention.
- Proposed Article 47 would be amended to allow second-comers to a work, for which a statutory license had already been granted, to use the work without trying to locate the right holder; this would be a troubling provision but is less of a concern if, as proposed in the pending government amendments, Article 47 was made inapplicable to foreign works.

Computer Programs Protection Act Amendments: In September 2005, the Ministry of Information and Communication (MIC) released draft amendments to the Computer Programs Protection Act (CPPA), which contain a number of positive changes,⁹ although there

⁸ There are some positive features of the latest set of amendments, including providing for: civil and criminal liability for online service providers whose service are "for the main purpose of reproduction or transmission of a work mutually between other persons" (proposed Arts. 77-3(2) and 98(4-3)); criminal liability for ISPs who, having knowledge of infringement, fail to act against it (proposed Art. 98(4-2)); and Ministry of Culture and Tourism administrative enforcement authority against online infringement, backed by fines (proposed Arts. 97-5 and 104).

⁹ Positive changes include the following:

- Registration of a computer program can now be made more than one year after its creation, and registration now creates a presumption as to authorship of the program (amended Art. 24.2);
- The Computer Program Protection Committee (see below) can ask an ISP to take down an infringing program or TPM circumvention material, and/or suspend or terminate the account of the user in question; if the service provider fails to take the needed corrective action, the Ministry can "deny, suspend or restrict the handling of such programs or information by on-line service providers" (this administrative process supplements the existing statutory notice and takedown procedure) (see new Arts. 34-2 and 34-3);
- Potential jail terms for infringers, and fines to be imposed on ISPs that disobey orders in the administrative process described above are increased (amended Arts. 46, 47, 51);

remain some questions about how the amendments would affect existing provisions on technological protection measures (TPMs).

Draft Presidential Decree to Amend Enforcement Regulations of the Copyright Act of Korea: Amendments to the Enforcement Regulations and Decree would include the following improvements:

- Free cinema screenings in public baths would become infringing, as would screenings in government buildings, community centers, libraries, museums, etc. of commercial titles within the first six months after their release.
- Regarding the ISP liability provisions of the CAK, it would be specified that e-mail can be used to deliver takedown notices to ISPs.¹⁰

Music Industry Promotion Act: This legislation could potentially be quite useful, in that it will remove the requirement on the recording industry to apply for the KMRB's approval before the release of music videos.¹¹ Another positive feature of this legislation appears to be the regulation of "[o]nline service providers for phonograms," who:

- are required to obtain copyright licenses and to "take technical measures to prevent illegal reproduction (Art. 25.1);
- can have their license to operate such a business revoked or suspended by local or regional officials (Art. 32), and can have their servers confiscated if operations continue after revocation (Art.35);
- can have pirate recordings confiscated and destroyed by MOCT or local officials if technological protection measures (TPMs) have been removed (Art. 35.3).
- can have criminal penalties imposed (probably fines only) for operating such services in defiance of a revocation order (Art. 39.1).

Nonetheless, since the Sound Recordings, Video Software, and Game Products Act (which previously dealt with such issues as to sound recording producers) was the basis for most enforcement against music piracy in Korea, it is essential that the Music Industry Promotion Act not result in weakening of enforcement against piracy of recorded music. One example of a potential concern involves the notification and registration requirements for various music industry businesses. Notably, under draft Article 20.2, those who wish to make phonograms available online have to notify the city, county, or district governments, and much of the enforcement stemming from this notification is devolved to these sub-national levels. It is not clear how practical this is or what the role of MOCT would be. Article 37 also provides that enforcement activities can be contracted out to an association or similar organization. At the same time, MOCT has the authority under Article 31 to create a "standing inspection team" to "handle illegal phonogram cases," though the details are left to a Ministerial Decree (Article 31). It must be ensured that these notification and registration requirements, and the new enforcement mechanism, do not result in undue burdens being placed on right holders to

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- The Program Deliberation and Mediation Committee is re-named the Computer Program Protection Committee (CPPC) and given a number of new functions, including operating a "Report Center for Unjust Reproduction of Programs" to take complaints that would initiate the administrative process mentioned above.

¹⁰ Unfortunately, notification requirements are lightened for "copyright trust management" services but not for copyright owners in general.

¹¹ The KMRB censorship/rating function will be taken over by a new "phonogram deliberation" entity, which will act on its own initiative or at the request of a phonogram producer/distributor to identify recordings deemed unsuitable for minors, draft Arts. 18-19, and would prohibit the importation of recordings deemed "offensive" in a number of categories, draft Art. 28.

exercise or enforce their rights, or these new provisions could run afoul of Korea's international obligations.

Movie Promotion Law Amendments: This law would eliminate the "import review" procedure presently imposed against foreign films by the KMRB (a secondary review over and above the "content review" required for all films distributed in Korea). IIPA supports passage of this amendment to eliminate this onerous review, which MPA views as a violation of Korea's WTO obligations under the General Agreement on Trade and Services.

IIPA Observations on All Copyright-Related Legislation: It is disappointing that, despite numerous interventions by the IIPA and affected right holders, the Korean Government has not addressed many of the key needs for copyright owners. Failure to do so in some instances (e.g., broad exceptions) leaves the Government open to criticism for failure to meet international obligations, and in other instances, leave Korea's laws lagging behind those of nearby trading partners, to the detriment of IIPA members' copyrights as well as those of local Korean creators' copyrights. These important issues include:

- **Extending Copyright Term:** In line with the international trend in over 80 countries to extend term past the Berne minimum terms, Korea should extend the term of copyright protection for works and sound recordings to the life of the author plus 70 years, and 95 years from date of first publication where the author is a legal entity or in the case of related rights of a sound recording producer. Korean law is becoming more isolated on this issue, and Korea now provides less protection than do most other OECD member countries.
- **Providing Exclusive Rights for Sound Recordings:** Korean authorities should ensure that means of dissemination, such as webcasting, streaming, and digital broadcasting, are clearly brought within the scope of the producer's exclusive rights. 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 producer 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 in early 2005 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. Finally, but not least of all, 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.
- **Protecting Technological Protection Measures:** Korea should fully implement the WIPO Treaties standards on technological protection measures, by, e.g., ensuring coverage of access controls, prohibiting the act of circumvention, etc. IIPA understands that an anti-hacking statute may provide broad coverage for technologies used to prevent access on a "networked" environment, but offline access controls must also be covered to provide adequate and effective protection as required by the WIPO Treaties.
- **Clarifying Liability of Internet Service Providers (ISPs):** The basis for indirect liability of ISPs for copyright infringement needs to be spelled out in Korean law, perhaps in the form

of an amendment to Article 92 of the CAK. In addition, 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. In addition, we note that while several improvements are proposed in the amendments to the CAK and the CPPA, it should in addition be expressly provided that: 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; and 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.

- **Providing Effective Notice and Takedown:** Notice and takedown in Korea still does not seem to effectively deter online infringement, although compliance rates with takedown notices are good for some industries. Article 77-2 of the CAK provides for a notice and takedown system, which is spelled out in more detail in the Enforcement Decree. It is positive that a proposed amendment to the Decree would accommodate the routine delivery of notifications by e-mail. Comparable provisions in the CPPA provide for a similar approach, and amendments to the CPPA would apparently further strengthen the regime. In order to facilitate enforcement further, 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 laws in Korea.
- **Protecting Temporary Reproductions:** 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 stands nearly alone in the world in its rejection of protection for temporary copies. In order to meet its international obligations 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.
- **Narrowing Certain Exceptions in Light of Digital Copying:** The market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. As such, the private copy exceptions in Articles 27 and 71 of the CAK should be re-examined in light of the growth of digital technologies. We are encouraged by recent Korean court decisions in the Soribada litigation that appear to deny the shelter of the exceptions to copying in the context of illicit peer-to-peer file-swapping services. The personal copy exception should be made inapplicable to digital copying to the extent that it exceeds the three-step test for permissible exceptions as enshrined in the TRIPS Agreement and Berne Convention. In this regard, IIPA supports the bipartisan legislation that was introduced in early 2005 in the National Assembly to narrow the scope of the Article 27 exception.
- **Eliminating or Narrowing 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. This exception as codified is incompatible with the

three-step test in Article 13 of TRIPS. 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 longer than five years after first publication. The only sure way to achieve compatibility with international standards is to repeal the exception altogether. At a minimum, the Article 28 exception must be substantially narrowed, e.g.: for on-site access (Article 28(2)) or networking with other libraries (Article 28(3)) only; subject to the pre-condition that there be implementation of technological safeguards; increase the period from five to ten years, and start the ten-year clock running when the material is first published in Korea; provide a notice to publishers of the library's intent to avail itself of the exception if the publishers chooses not to make the work available on commercially reasonable terms; and provide a more robust compensation mechanism.

- **Outlawing “Camcording”:** A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to bootleg “dealers” throughout the world and over the Internet. Korea should take whatever legislative steps are necessary to criminalize camcording (use of a video camera to illicitly record a movie at a movie theater) of motion pictures.

MARKET ACCESS ISSUES

A WTO-incompatible broadcast sub-quota in Korea should be resolved. The Broadcasting Act of 2000 provides that total foreign programming may not exceed 20% of total airtime allowed on terrestrial stations, with additional restrictions set by genre. Foreign movies may fill up to 75% of the time devoted to broadcasting movies, but a sub-quota instituted in 2002 limits total foreign content by any one country to 60%. This sub-quota effectively limits U.S. programming to 45% of all airtime allocated to movie broadcast on terrestrial stations. IIPA believes that this sub-quota violates Korea's WTO obligations. Both the intent and effect of this new sub-quota are to discriminate against U.S. programming, and this issue should be addressed now.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY

Special 301 Recommendation: Taiwan should remain on the Watch List.

Priority Actions Requested in 2006

- **Concentrate Efforts on Rapidly Growing Internet Piracy Threat:** Taiwan is now beset by rapidly increasing instances of Internet piracy, especially through unauthorized peer-to-peer (P2P) file sharing services. As the problem grows, so must the response. Enforcement is coordinated by the Joint Internet Infringement Inspection Special Taskforce (JIST), and executed mainly by the IPR Police (IPRP). JIST and IPRP must expand their enforcement activities if they are to make headway against the Internet piracy wave in Taiwan.
- **Eradicate Online Infringements from TANet:** The Taiwanese Government-owned TANet network is being used widely throughout Taiwan for Internet piracy, including unauthorized P2P file sharing. The Ministry of Education (MOE) oversees TANet but due to the lack of explicit ISP liability provisions in Taiwan's copyright law, TANET insists it has no lawful obligation to impose controls over the illegal transmission of files over its network. TIPO/MOEA should coordinate efforts to enact legislation clarifying ISP liability and move to exert control over enforcement on the network.
- **Provide Needed Training, Equipment, and Manpower to JIST and IPRP:** Unfortunately, only a few IPRP personnel are well trained to handle Internet piracy cases. In addition, there is not sufficient equipment, both in quality and quantity, provided for the use in combating Internet piracy. Finally, recent manpower cuts to IPRP seriously curtail their ability to effectively function. IIPA calls upon the Taiwan Government to provide JIST and IPRP with the training, equipment, and manpower they need to carry out their functions effectively.
- **Enact Controls Outlawing P2P File-Sharing and Create an Effective Notice and Takedown System:** The cases of *ezPeer* and *Kuro* demonstrate that guidance is needed to clarify secondary liability for copyright infringement in Taiwan. In addition, copyright owners will not be able to compete in the digital marketplace without the cooperation of ISPs, whose profits include payments by those engaged in Internet piracy. It is fair to ask ISPs to cooperate; they should do so voluntarily, but the law should also be amended to clarify the scope of secondary liability of ISPs. The amendment should also include an effective statutory notice and takedown regime which provides incentives for ISPs to cooperate with right holders, both with respect to pirate content residing online (stored on websites) as well as in the P2P environment.
- **Effectively Tackle Book Piracy:** The Government of Taiwan must do more to significantly reduce illegal photocopying of academic textbooks and journals, English language teaching (ELT) materials and professional reference books. In addition to continued enforcement by the Justice and Interior Ministries, IIPA requests that the Ministry of Education adopt policies prohibiting illegal photocopying and use of unauthorized materials on campus, backed with 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. Any fair use guidelines considered by the government must comply with international norms and not run afoul of the Berne three-part test.

- **More Effectively Monitor Exports of Counterfeit Cartridge-Based Videogames and Components:** There is incontrovertible proof that key components of infringing Nintendo products continue to be manufactured in Taiwan and exported to China for assembly. Taiwan Customs and the Aerial Police Bureau must take effective measures to monitor the exports of component parts of counterfeit cartridge-based games.
- **Enhance Foreign Coordination on Enforcement:** Despite their dedicated efforts within Taiwan, the paucity of diplomatic relations with other jurisdictions hinders the full effectiveness of Taiwan agency's investigations. Creative solutions to ensure greater international coordination are required.
- **Devote Sufficient Resources to Enable the New IP Court to Hear Copyright Cases on First Instance:** The Judicial Yuan has proposed establishing an intellectual property court to handle all copyright infringement cases, both civil and criminal, for which it should be congratulated. However, because the IPR court will initially operate in a single geographic location the Judicial Yuan has expressed concern regarding the practicality of absorbing the entirety of IPR-related litigation and prosecution in Taiwan without additional training, manpower, and district offices.
- **Prohibition on "Tiering" of Cable Channels and Other Onerous Restrictions on Pay TV Right Holders Should be Lifted**
- **Lengthy Copyright Royalty Rate Reviews Should Cease:** The Copyright Examination and Mediation Committee (CEMC) is no longer responsible for review of royalty rates proposed by collecting societies. However, the Taiwan Intellectual Property Office (TIPO) still insists that all collecting societies submit their proposed royalty rates for review and approval by CEMC in advance. Delays in these reviews, and the unfair outcomes, are causing serious harm to right holders; TIPO should no longer require them.
- **Pass Copyright Term Extension Legislation:** The Government of Taiwan should follow the international trend and extend term of copyright protection to life plus 70 years, and 95 years from publication for sound recordings and other works of juridical entities.

For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

TAIWAN
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	98.0	51%	40.0	40%	42.0	44%	42.0	44%	35.0	30%
Records & Music	21.5	26%	49.4	36%	58.0	42%	98.6	47%	51.7	48%
Business Software ³	77.5	42%	88.0	43%	83.0	43%	91.2	43%	106.8	53%
Entertainment Software ⁴	161.9	42%	123.0	63%	261.8	42%	596.1	56%	119.4	70%
Books	18.0	NA	20.0	NA	20.0	NA	20.0	NA	20.0	NA
TOTALS	376.9		320.4		464.8		847.9		332.9	

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Internet Piracy: With over 60% of Taiwan's population (13.8 million) using the Internet,⁵ and with roughly 61% of households in Taiwan having broadband connections,⁶ it is not surprising that Internet piracy has become the predominant form of piracy for most industries in Taiwan.⁷

As an example of the scope of the problem and how it has grown, in 2004, the number of online infringements involving business software (mainly P2P) traced to Taiwanese ISPs was 49,539. This number had risen to 344,157 in the first 10 months of 2005. By year's end it was expected that the number of infringements would increase by 700% year on year.⁸ For the music

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Taiwan, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. The piracy level in 2005 does not reflect handheld piracy rates, which were not available for 2005. In 2004, handheld piracy rates were upward of 95%.

⁵ Internet Usage and Population in Asia, at <http://www.internetworldstats.com/stats3.htm> (updated November 21, 2005, with demographic numbers based on data contained in [world gazetteer](http://www.worldgazetteer.com), and usage numbers from various sources, mainly from data published by [Nielsen/NetRatings](http://www.nielsen.com), [ITU](http://www.itu.int), and other sources).

⁶ Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

⁷ The problem of Internet piracy is accompanied by the opportunity of the growth of new powerful business models for legitimate distribution. Similar to Japan and South Korea, the digital music market in Taiwan has developed quickly since 2004. Online music operators including iMusic, HiMusic, KKBox, and Qband separately concluded licensing agreements with recording and music companies and started to provide legal online music downloads and/or streaming services. All of these operators either charge their customers a fee of approximately US\$1 per download or require a monthly flat rate of around US\$36. In 2005, the online music market in Taiwan experienced some consolidation, with iMusic terminating its service but HiNet (the major telecommunication company and largest ISP in Taiwan) reaching agreement with KKBox to provide online music.

⁸ The number of infringements found in Taiwan alone in 2005 was more than double the number in 12 other Asian countries for which the business software industry has data. Surprisingly but of great concern, in the course of

industry,⁹ over 500 pirate websites offering illegal downloads are available to Taiwanese consumers, located either in Taiwan or greater China. Academic journal publishers report a high level of unauthorized access, and P2P file sharing of scanned academic texts is on the rise in Taiwan. The Taiwanese Government-owned TANet (a network designed for “educational” uses at college campuses throughout Taiwan) is being used widely for Internet piracy including unauthorized P2P file sharing. The Ministry of Education (MOE) oversees TANet but, because of the lack of explicit ISP liability provisions in Taiwan’s copyright law, TANet insists it has no lawful obligation to impose control over the illegal transmission of files through its network and MOE’s oversight is necessarily compromised.¹⁰

Other forms of Internet piracy are quite damaging. Entertainment software publishers now face the problem of so-called “offline server” piracy in Taiwan. The offline server essentially makes a publisher’s online game readily available without authority from the legitimate publisher and without adherence to terms or conditions set forth in a licensing agreement. In this form of piracy, an “offline server” operator creates a “mirror” server to the legitimate servers operated by entertainment software companies to run their online games, not only diverting traffic and subscription revenue from the legitimate site but also allowing the play of pirated games, as there is no authentication or verification process carried out at the server level (i.e., to verify that the game software being used is not a pirated copy) as would be done with a legitimate online gaming site. Another problem faced by the videogame industry is piracy at Internet cafés, especially involving unlicensed use of entertainment software. Of the approximately 1,000 Internet cafés in the country, only about 25% are licensed by entertainment software publishers.

Publishers also experience some problems with piracy over the Internet. Academic journals publishers report a high level of unauthorized access, and that peer-to-peer file sharing of scanned academic texts is on the rise. Another form of Internet-based piracy that remains prevalent is the selling of pirated copyright content through Internet auction sites, and other forms of advertising the sale of pirate product. Unfortunately, many of these websites are registered in foreign countries, which makes tracing these sites and enforcement against them quite a challenge (though access to these sites can be blocked). Anecdotally, it has been noted that the predominant number of illegal products sold on websites, as well as sold at retail, are sent directly from mainland China. Because Taiwan does not maintain diplomatic relations with the majority of the world’s governments, the IPRP’s ability to coordinate cross-border investigations on websites registered outside of Taiwan requires creative solutions outside the sphere of normalized inter-government relations.

Kuro and ezPeer Decisions: The major developments in 2005 with respect to the liability of Internet P2P services in Taiwan occurred in the courts in two long-awaited criminal decisions. In the first, *In re Chuan Cho Shu Ma Technology Co., Ltd.* (the “ezPeer” decision),¹¹ decided in June 2005, the Taiwan Shilin District Court found the defendants, Wu Yih-Dar and Global Digital

investigating infringing websites in Taiwan, the recording industry became aware that the majority of the infringing websites in Taiwan are located in the People’s Republic of China (PRC).

⁹ Infringing music files in various formats such as MP3, midi, WAV and RAM are available from a variety of channels in Taiwan including FTP sites, websites, streaming sites and file-sharing services.

¹⁰ For example, even after Kuro was convicted, TANet continued to facilitate unauthorized music file-sharing and swapping. The MOE leaves each school to control students’ usage of TANet on their own and takes no further action to prevent unauthorized copyrighted materials from being transmitted through TANet. MOE has not done its part to ensure proper implementation of the “Implementation Plan for Strengthening Internet Infringement Preventive Measures,” which was formulated by TIPO TIPO, in force May 1, 2005 to December 31, 2006. According to the Plan, MOE is to report to JIST on its efforts to rid TANet of online infringements, but MOE barely participates.

¹¹ *In re Chuan Cho Shu Ma (“Global Digital”) Technology Co., Ltd.*, 2002 Zhen Zi No. 10786 and No. 4559 (Taiwan Shilin District Court, June 30, 2005).

Technology Co., Ltd. (“ezPeer”), not guilty of copyright infringement.¹² This case threatened to have a devastating effect on the rights of copyright owners in the digital environment, but on September 9, 2005, in the *Kuro* case,¹³ the defendants, an individual subscriber of the P2P service and the managers of Kuro, were found guilty of copyright infringement. Specifically, the court sentenced the subscriber to four months imprisonment for downloading 900 unlicensed songs. Kuro’s managers were found guilty as joint infringers, since they were fully aware of the illegal downloads, earned subscription fees from their advertisements of 100,000 available songs for (unauthorized) download, and could “foresee” that infringements would occur. The court also found the Kuro managers to be “vocational” offenders, since they had hired others to more rapidly expand their pirate catalog. They were sentenced to imprisonments ranging from two to three years. Industry is heartened by the *Kuro* decision, which it hopes establishes that P2P services providing pirate content are liable for their acts.

Provide Needed Training, Equipment, and Manpower to JIST and IPRP: Without significant enforcement efforts in 2006, Internet piracy in Taiwan threatens to wipe out legitimate markets for copyright owners. Acknowledging the severity of the problem and the need to do something about it, TIPO and MOEA came up with an Implementation Plan for Strengthening Internet Infringement Preventive Measures (effective from May 1, 2005 to December 31, 2006), under which a Joint Internet Infringement Inspection Special Taskforce (JIST) is exclusively responsible for tackling Internet piracy. JIST comprises selected personnel with expert knowledge in computers, IT, and technology from the IPR Police (IPRP) (who are chiefly tasked with executing the Plan) and the Joint Optical Disk Enforcement Taskforce (JODE). While IPRP has run raids with some successful results,¹⁴ their efforts would be better enhanced through the provision of: 1) more IPRP personnel who are sufficiently well trained to handle Internet piracy cases; 2) more and better equipment to successfully combat Internet piracy; and 3) reversing recent manpower “reassignments” from IPRP that seriously curtail their ability to function effectively.¹⁵ Such a reassignment of manpower was clearly made without sufficient care or foresight, and IIPA believes the officers should once again be assigned back to IPRP.

Optical Disc Production in Taiwan Shifts From Factory Production to “Burning”: Illegal burning of copyright content onto recordable discs has taken over as the predominant form of optical disc piracy in Taiwan. In 2004 and 2005, more than 2,500 optical disc burners were seized in Foundation for the Protection of Film and Video Works/Motion Picture Association (MPA) raids.¹⁶ Regarding OD production facilities, the Joint Optical Disk Enforcement Task Force (JODE)

¹² Essentially, the court held that there was nothing in the Taiwan statute prohibiting the establishment of file sharing operations, nor is there any law in Taiwan requiring “P2P operators” such as ezPeer to monitor or filter their operations to ensure the content being shared on their networks is legal. The court also found that not only had ezPeer not directly infringed, but ezPeer could not be held criminally liable as an “accomplice” to any illegal acts of its end-users on the network (notwithstanding that such liability might be found in a civil case). The judge in the case looked to the legislature to clear up any ambiguity regarding the legality of file-sharing services.

¹³ *In re S.T. Chen, K.H. Chen. K.X. Chen*, Case No. 2003 Su-Tzu No. 2146 (Taipei District Court, September 9, 2005).

¹⁴ Between January 2004 and June 2005, the recording industry was involved with 13 raids were conducted against websites offering either pirate MP3 downloads or unauthorized streaming files. As a result of these raids, a total of 18 people were arrested and 95,785 infringing music files were found. The business software industry was involved in 92 Internet piracy investigations through October 2005, up from only 40 in 2004, leading to three raids against websites selling software over the Internet. The Motion Picture Association coordinated with the IPRP and the Ministry of Justice’s Investigative Bureau (MJIB) on 113 raids against Internet-based pirates throughout 2005, including 88 against Internet auction sites

¹⁵ The IPRP originally consisted of 220 officers, but has been reduced twice, most recently under the instruction of the Ministry of Interior (MOI); 35 officers were permanently reassigned (under the belief that Taiwan would be removed from the 301 list this year). In all, IPRP has seen a 20% reduction in force.

¹⁶ From January 1 through November 30, 2005, the motion picture industry program in Taiwan participated in raids resulting in seizure of 545 CD-R burners and 288 DVD-R burners. According to industry calculations, had these

of the Ministry of Economic Affairs (MOEA) remained active in 2005, running 628 inspections on the plants through November 2005. There are an estimated 89 optical disc factories, containing 58 mastering machines, 237 VCD/CD lines and 104 DVD lines in Taiwan.¹⁷ The estimated capacity of all the optical discs plants in Taiwan amounted to approximately 10.7 billion units annually. While pirate factory production was less of a problem in 2005, it is crucial that Taiwan continue to monitor the plants vigilantly to avoid backsliding. It is particularly worrisome that, of the cases brought against plants engaged in pirate production, several of the key cases, including the “DigiGold” case, remain pending after all these years (in part because of a loophole in the Optical Media Management Statute).¹⁸

Book Piracy: The most damaging activity to U.S. publishers in Taiwan in 2005 remained the illegal photocopying of academic textbooks and journals, English language teaching (ELT) materials and professional reference books. 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.¹⁹ While the authorities have been extremely helpful in running raids against these commercial photocopy shops at copyright owners’ requests, self-initiated action by the Taiwan Government remains rare. Because photocopy shops do not generally keep stockpiles of copies, but copy to order, and since the print runs are often at night or after hours, and delivery is offsite to avoid detection, the government must adopt investigative techniques that will permit them to detect this form of piracy.²⁰ Furthermore, the Ministries of Justice and the Interior should revisit incentive schemes for officers conducting raids on photocopy shops. Putting a scheme into place that adequately rewards officers for successful book piracy raids is imperative for the continued success of Taiwan’s book piracy enforcement program.

The industry also suffers from procedural inconsistencies in raiding and prosecution. First, cooperation varies with geography, with good cooperation in Taipei and relatively poor cooperation in Tainan, for instance.²¹ Search warrants have been occasionally denied arbitrarily, or refused on bogus arguments.²² Issues relating to Powers of Attorney continue to plague the attempts at convictions, especially in Tainan.

operations remained in business for one year they would have generated in excess of US\$55,000,000 in revenues for the pirates. In a raid that just occurred on January 19, 2006, Taiwan’s National Highway Patrol Police, in collaboration with IPR Police, raided five pirate optical disc manufacturing and distribution facilities in Taoyuan County, seizing a total of 147 DVD-R and CD-R burners, 118,961 pirate optical discs, and arresting five people on suspicion of infringing Taiwan’s Copyright Law. The seized burners were capable of producing as many as 7,416,000 burned CD-Rs and 950,400 burned DVD-Rs in one year, yielding pirates revenues of US\$9,557,664, all without an optical disc plant ever becoming involved. See Motion Picture Association, Police Seize 147 DVD-R, CD-R Burners in Raids on Street Vendor Suppliers in Taiwan, January 19, 2006 (press release on file with IIPA).

¹⁷ This is an industry estimate. JODE reports the existence of 57 optical disc manufacturers operating in Taiwan as of December 2005, operating the 89 plants.

¹⁸ The judicial interpretation of “criminal intent” has apparently become a loophole that optical disc manufacturing plants have exploited to avoid criminal liability. The defense that a plant was “unaware” of the infringing activity is being employed by registered plants with overseas customers.

¹⁹ 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.

²⁰ Some shops, in areas of dense student population, have display racks and catalogs featuring covers of foreign textbooks, arranged by course number and available for copying. Students can choose the course, the text, and the color for the custom cover, and the book is then copied while the student waits.

²¹ To add insult to injury, the copyshop owners in Tainan have banded together to form their own “trade association” specifically aimed at frustrating enforcement efforts. They have been at least somewhat successful to date, and the government must take action to ensure that justice is conducted despite delay and harassment tactics employed by the infringers.

²² One argument defendants often make in challenging warrants is that the “test buys” required of the rights holder in order to satisfy the very requirements for the warrant are somehow entrapment or somehow indicate “consent” by the copyright owner for the copy, invalidating the enforcement action. It should be clarified that such test buys are not only

Given that the overwhelming percentage of copying takes place on or near university and school campuses, it is imperative that the Ministry of Education adopt and implement policies prohibiting this kind of illegal conduct, backed with internal sanctions for violations (including, for instance, making IPR protection on campus a criterion for universities' annual assessments by MOE). University officials should also build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those facilities caught engaging in illegal activity. The local publishing association, the Taiwan Book Publishers Association, and the Association of American Publishers (AAP) had productive meetings with MOE in September 2005, in which the Ministry promised action on the organizations' request. As publishers approach the March high copying season, IIPA looks forward to the Ministry's implementation of the programs discussed at that September meeting.

Enforcing Against Pirate Imports: Following the enactment of copyright amendments in 2004, an Executive Order was issued, "The Customs Operation Guideline Concerning the Protection of Copyright Law and Patent and Trademark Law" that sets out procedures to be followed by Customs to curtail pirate exports. In furtherance of this objective, Customs even made space available in its offices at CKS Airport to industry representatives. While these measures have proven effective to control the outward flow of some infringing goods,²³ the importation of infringing product into Taiwan, particularly due to Internet auction sites located and operating in neighboring jurisdictions, merits the further allocation of resources in order to adequately coordinate cross-border enforcement.

Piracy of Cartridge-Based Videogames: There is incontrovertible proof that key components of infringing Nintendo products continue to be manufactured in Taiwan and exported to China for assembly.²⁴ The investigative efforts of Nintendo's anti-piracy program have identified several Taiwan semiconductor design houses involved in the design and development of infringing chips, as well as in ordering the manufacture of such chips from semiconductor plants in Taiwan. These companies have been involved in the design, fabrication and distribution of over 40 million semiconductor chips over several years, and cases against some of these companies remain pending.²⁵ Now that the Export Monitoring System (EMS) has been abolished, Taiwan Customs and/or the Aerial Police Bureau (APB) must step up and take effective measures to monitor the exports of component parts of counterfeit cartridge-based games, such as those manufactured for Nintendo handheld devices.²⁶ Though concerns remain about the ability of Customs to effectively

permitted but required, and they should not be problematic as long as the buyer makes no representation that he/she is the copyright representative. Another argument defendants make is that commercial copyshops are only providing a "service" to students (presuming, incorrectly, that students themselves are perhaps permitted to make entire copies under the fair use provisions of the law), and thus they are not liable for the students' actions. This argument should be dismissed. Copyshops are operating for-profit businesses based on illegal activity.

²³ The motion picture industry reports some success, being called upon for assistance in inspections at the Taipei airport. The following is a record of inspections the MPA has been involved in:

Year	# of investigations	# of parcels checked	Cases of OD piracy	# of units seized
2004	53	22	18	2,418
2005	453	133	57	5,899

²⁴ 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 embedded in the products and containing illegal copies of Nintendo copyright games 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.

²⁵ A detailed account of Nintendo of America's enforcement activity against these factories is provided in that company's 2006 Special 301 Submission dated February 1, 2006.

²⁶ The Taiwan government also promised that it would provide its Customs authorities with the requisite training so that they may adequately assume export-monitoring functions, but recent experience indicates that the training provided thus

police and halt the export of infringing Nintendo videogame components and products,²⁷ the Taiwan government appears to be trying to strengthen and improve its border measures, as well as provide its Customs authorities with the requisite training to adequately perform its functions. Taiwan Customs and APB efforts at apprehending imports of counterfeit products into the country increased in 2005.²⁸

End-User Piracy of Business Software: The use of unlicensed or pirate software in the workplace causes the greatest revenue losses for the business software industry. The Business Software Alliance (BSA) reports good enforcement cooperation from the police and prosecutors' offices. In 2005, the police ran one end-user piracy raid, and BSA filed five successful criminal complaints against end-user targets. Problems include unclear guidance on the information needed to secure a search warrant for police raids, as almost all cases have required informants to testify before the prosecutors and judges. Further, the processing time for considering search warrant applications has been unreasonably long pending consideration of informants' written testimonies by the prosecutors and judges.

Government Tenders: Reportedly, a business software company's request to a Taiwan Government department during a government building tender for bidders to use only authorized software was turned down. The Government of Taiwan should establish or tighten up requirements in public tenders (including government procurement).

Night Markets Improved: All the industries note some improvement in the level of pirate activity in the night markets. The number of night market stalls reached its peak in 2001 when an estimated 300 stalls sold pirate optical discs all over Taiwan each day. After vigorous enforcement actions and legislative amendments to Copyright Law in 2003 and 2004, the average number of stalls operating each day in Taiwan has declined to not more than 50.²⁹ We believe this improvement is directly attributable to the 2003 and 2004 amendments to Taiwan's copyright law elevating copyright offenses to the status of "public crimes," which allows the police to act without a formal complaint, and which empowers the authorities to confiscate pirated goods. Another factor has been the formation and activity of the IPRP.³⁰ A recent phenomenon is home delivery, whereby pirate product catalogues are provided to pirate consumers or available via the Internet.³¹

far has been insufficient. In December 2004, 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. 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.

²⁷ Jurisdictional issues exist between Customs and the Aerial Police Bureau that have yet to be fully resolved. IIPA encourages the Taiwan government to ensure that both agencies cooperate fully so as to effectively address the ongoing export problems.

²⁸ A total of 12 inspections by both agencies resulted in the seizure of 500 counterfeit Game Boy cartridges and 6,600 infringing components being shipped from China.

²⁹ Motion picture industry investigators reported 428 cases of pirate activity in the night markets in 2004, as opposed to only 355 instances through December 31, 2005.

³⁰ Night market stall piracy appears to be under control except at the Xinmin Night Market in Taoyuan, Taipei. Various teams of IPR Police including Taoyuan, Taipei, Taichung and Kaohsiung teams have been dispatched to conduct raids against the pirates in Xinmin Night Market. There are six to ten pirate stall vendors on average every night; most stalls are manned by minors or are equipped with a "Conscience Box" (unmanned stalls with pirate product where buyers choose on their own to place money in a box in exchange for the pirate discs). Due to the fact that the police started to confiscate pirate products on display even when no stall operator was arrested, the number of pirate products on display has decreased country-wide.

³¹ In 2004, the Anti-Counterfeiting Committee (ACC) under the Ministry of Economic Affairs circulated a warning to newspapers, dispatch agencies and express delivery services to be careful in handling product catalogue and

Since 2003, almost 100% of pirate discs in these markets are burned CD-Rs and DVD-Rs.³² One point of concern in enforcement in general, including the night markets, is the Ministry of Interior's promulgated rules to evaluate police performance based on the market value of seized goods.³³ While this was undoubtedly issued with good intentions, this may lead to discrimination as to whose products receive proper enforcement (i.e., the market value of optical discs may be less than the market value of many other goods, e.g., counterfeits). IIPA will continue to monitor whether these new rules have any detrimental effect on enforcement by the police.

Specialized IPR Court to be Established in 2006: The Judicial Yuan has proposed establishing an intellectual property Court to handle all copyright infringement cases, both civil and criminal (as well as patent and trademark cases). However, IIPA understands that the JY proposal is that this new court would hear copyright cases only on appeal. IIPA contends that if the purpose of setting up the IP Court is to allow expert judges to handle IP cases, careful consideration should be given to extending coverage to initial trials as well as appeals. The court system continues to handle copyright cases with varying degrees of success,³⁴ although the industries continue to note delays in adjudicating even straightforward piracy cases against night market operators.³⁵

TRAINING AND PUBLIC AWARENESS

The copyright industries were actively involved in training and raising public awareness about copyright in 2005. The industries participated in a number of government seminars and trainings, including:

- Five seminars held by IPO for the interns of judges and prosecutors, discussing IPR enforcement activities and policy (each seminar involved around 20 interns), were held in Taipei: (1) January 17 to February 6, 2005; (2) May 16 to June 12, 2005; (3) June 13 to July

merchandise. Ministry of Economic Affairs, *Quarterly Report on Taiwan's Intellectual Property Rights Protection*, April - June 2004.

³² In 2005, the average price of most physical pirate products was NT50 per disc (US\$1.55).

³³ The point system was re-evaluated in March 2005. At present, a successful raid against copyright infringement not resulting in the capture of any suspected criminals is worth 2 points, whereas a successful raid leading to the capture of a suspect is worth 10 points. If the market value of the pirated goods seized is more than NT\$10 million (US\$310,318), the police can be awarded 10 additional points for every NT\$10 million (US\$310,318) worth of value (if no market value can be determined, each VCD is valued at NT\$300 (US\$9.31) and each DVD at NT\$600 (US\$18.62). In each instance, the points are split equally between all the police participating in the raid. By way of comparison, the police get 30 points for the seizure of each handgun, 40 points for each shotgun or machine gun, and 3 points for each illegal immigrant.

³⁴ For example, in 2005, the Motion Picture Association initiated 458 judicial cases involving 541 suspected defendants, obtaining 268 favorable decisions resulting in the conviction of 301 defendants (there were no acquittals). Of these 301 convictions, 81 defendants were adults and 220 were juveniles. Of the adults, 25 defendants were sentenced to imprisonment not exceeding 6 months, 46 defendants were sentenced to imprisonment of between 6 months to 1 year, and 10 defendants received prison sentences in excess of 1 year. Of the juveniles, 206 were given probation, 3 were placed into reformatory education, and 11 received a suspended sentence. For the recording industry, the following indicates the criminal case record. The record reflects that there are still too many cases in which the sentence included a jail term but the sentence was commuted to fines or was suspended (excluding juvenile offenders).

Summary of Case Statistics of the Recording Industry, 2002-2005

Year	New Cases	Judgments (Juveniles)	Judgment (Sentences Commuted to Fines)	Judgments (Suspended Sentence)	Judgment (Jail Terms)	Not Guilty
2002	1,524	1524 (815)	352	148	191	18
2003	503	482 (159)	153	70	84	16
2004	262	260 (122)	72	36	24	6
2005	322	200 (154)	17	18	9	2

³⁵ For the recording industry, 58% of cases brought in 2002 had yet to be decided, year on year. In 2005 to date, approximately 41% of new cases brought have been concluded, with either fines or jail terms imposed.

10, 2005; (4) October 24 to November 20, 2005; and (5) December 19, 2005 to January 15, 2006.

- Three anti-piracy investigation training events were held by IPO in Taipei for the police (each training involved around 40-100 police officers) at the Taipei Public Service Institute (TPSI): (1) September 5-9, 2005; (2) September 12-15, 2005; and (3) October 17-20, 2005.
- An IPR Training event was held by American Institute in Taiwan for law enforcement authorities (including 4 judges, 25 prosecutors, 41 police officers, and 19 IP officials) at the Judges and Prosecutors Training Institute in Taipei on September 28-29, 2005 (the Motion Picture Association also participated in this training).

BSA also held a press conference and seminar in February 2005 in Taipei to increase awareness and to educate online users on the threats and damage posed by Internet piracy.³⁶ In 2005, the Motion Picture Association sponsored or participated in 11 training programs aimed at IPR police and judicial personnel.³⁷

MARKET ACCESS

“Tiering” of Cable Channels Prohibited and Subscription Rate Capped: Under the Cable Audio and Television Law, the “tiering” of pay television services (providing differential channels and levels of service for differential pricing) is prohibited. Cable operators are required to bundle all 80 channels under a single basic tier and the law caps the subscription rate payable by consumers at NT\$600 (about US\$18.62) per month. Advertising on pay channels is restricted. Foreign investment in pay television services is limited to a maximum 20% equity share and no cable service provider’s potential market share can exceed one-third of the total market. These onerous restrictions on the ability to market content in Taiwan should be lifted.

COPYRIGHT LAW AND RELATED ISSUES

Previous years’ reports have gone through in detail the legislative landscape in Taiwan, including the 2004 copyright amendments. The following is intended to provide a summary of latest developments only. Please see previous years’ reports for more information about past developments at <http://www.iipa.com/countryreports.html>.

ISP Liability: Given the rapid growth of Internet piracy in Taiwan, especially P2P infringements, it is essential that a workable approach to online enforcement be forged between right holders and service providers, who are aware in general and may be able to foresee that

³⁶ The event was supported in person by Jack LU, Deputy Director, IPO Office, C.J. Cherng, Chairman, Taiwan Internet Association and General Manager of SeedNet (an ISP in Taiwan) and Y.S. Lee, Vice President, Chunghwa Telecom (an ISP in Taiwan).

³⁷ The MPA trainings for 2005 were as follows:

Date in 2005	Location	Sponsor	Topic	Audience
January 17	Taipei	TIPO	OD Factory inspections	50 IPRP officers
January 24	Taipei	TIPO	OD Factory inspections	50 IPRP officers
January 31	Taipei	MPA	Prosecution of IPR offenses	20 prosecutors and judges
June 10	Taipei	MPA	Prosecution of IPR offenses	20 prosecutors and judges
July 5	Taipei	MPA	Prosecution of IPR offenses	20 prosecutors and judges
September 7	Taipei	CIB	Investigation of online piracy	111 police officers
September 13	Taipei	TIPO	Investigation of online piracy	40 police officers
October 18	Taipei	TIPO	Investigation of online piracy	40 police officers
November 15-16	Hualien	TAPC	Technological developments in IPR	2 copyright officials, 2 LY members, 2 prosecutors
November 17	Taipei	TIPO	Prosecution of IPR offenses	20 prosecutors and judges

infringing activity is occurring over their services,³⁸ but may not be aware of the specifics of each act of Internet piracy. A voluntary Code of Conduct was considered by copyright industry groups in Taiwan and discussed with the Taiwan ISP association, TWIA, starting in late 2004. These negotiations initially failed, but after negotiations, TWIA has at least agreed to transfer the notices from copyright industry groups to users relating to P2P infringement issues. Notwithstanding the beginnings of some cooperation, and despite TIPO's fine efforts to issue "administrative guidelines" for the prevention of Internet infringement, a workable approach to P2P and other fee-based download piracy has been elusive. MOEA's proposed draft "Statute for the Development of the Digital Content Industry" would have mirrored largely the approaches in the DMCA and the EU E-Commerce Directive. However, the most up-to-date version of the draft only addresses a very general principle for ISP's liability but no specific article prescribing the scope of the ISP's liability, and certainly nothing dealing with the most dangerous threat to the copyright industries in the online environment – P2P technologies. IIPA believes the only workable approach is to amend the Copyright Law to clarify the secondary liability of ISPs, and include a statutory notice and takedown regime and other remedies which are effective and provide incentives for ISPs to comply, with respect both to pirate content residing online (stored on websites) and in the P2P environment as well.

Criminal Code: The Legislative Yuan passed several revisions to the Criminal Code which bear on the "vocational" offender provision in the Copyright Law (Article 94). As we understand it, the changes (to Articles 55 and 56, and 12 "vocational" offender Articles of the Criminal Code) will close a loophole whereby a "vocational" offender was able to reduce his sentence as a "successive offender" to that involving only one of the crimes. In addition, the maximum sentence for "combined sentences" was raised from 20 years to 30 years (Article 51(5)). In November 2005, TIPO proposed a conforming amendment of deleting Art. 94 (and other minor conforming changes). As we understand it, and according to TIPO, since the former "vocational" offenders may receive heavier penalties after the new amendment of the Criminal Code is put into force in July 2006, the result is a strengthening of the law. Therefore, IIPA supports the amendment. This would leave optical disc-related offenses (Arts. 91.3 and 91*bis*3) as the only public crime proscribed in the copyright law.

Taiwan Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to bootleg "dealers" throughout the world and over the Internet. Taiwan should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

Anti-Smuggling Act: The Customs Anti-Smuggling Act was amended in January 2005, adding a new Article 39*bis* which provides,

Where import or export cargoes [sic], other than genuine goods parallel imported, that have been declared to Customs[,] infringes the patent right, trademark right or copyright, the importer or exporter in question shall be, except otherwise specified in other acts and regulations, imposed with a fine equivalent to one to three times the value of the cargoes [sic], and the cargoes [sic] shall be confiscated.

³⁸ As a result of the *Kuro* decision and past decisions on accomplice liability, awareness and foreseeability of infringing activities occurring over their services could subject service providers to claims for copyright infringement.

While this new administrative fine is welcome as to piratical imports, it leaves aside parallel imports, notwithstanding that the Copyright Law retains criminal penalties against the sale or rental of parallel imports in Taiwan. In addition, the question of the “value” of the cargo is crucial in this case, otherwise fines under this statute will be meaningless. Article 5 of the Customs Anti-Smuggling Act provides, “[w]here a fine, pursuant to this Act, is imposed on the basis of the value of cargoes, the duty-paid value or the FOB value shall be referred for import and export cargoes respectively.” Since the value of the physical media for copyright goods should be the “duty-paid value” in accord with international practice, not the value of the intellectual property contained on the media, the fines would appear to be meaningless under this statute. Thus, it must be ensured (by amendment, if necessary) that the “value” with respect to copyright goods for determining the fine (not the duty) is the legitimate retail price of the good.

Copyright Examination and Mediation Committee Review Process Should be Abandoned: According to Article 82 of Copyright Act, the Copyright Examination and Mediation Committee (CEMC) is no longer responsible for review of royalty rates proposed by collecting societies. However, TIPO still insists that all collecting societies submit their proposed royalty rates for review and approval by CEMC in advance. This review is causing serious harm to right holders and TIPO should no longer require it. For example, ARCO (a collecting society consisting of sound recordings copyright owners, mainly record companies) submitted proposed royalty rates for public performances on September 14 and December 14, 2004, respectively, and while TIPO indicated that CEMC would complete its review process in four months, the process took almost one year, during which ARCO could neither collect remuneration nor bring litigation to collect fees for the use of sound recordings throughout Taiwan.³⁹

Guidelines on Fair Use: TIPO has been instructed to draft guidelines on educational fair use. 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.

Term of Protection: The Government of Taiwan should follow the international trend and extend term of copyright protection to life plus 70 years, and 95 years from publication for sound recordings and other works of juridical entities.

³⁹ Another example of how this procedure interferes unreasonably with current business practices, in 2004, ARCO proposed a rate of remuneration for hotel public performances of sound recordings of NT\$250 (US\$7.75) per guest room. CEMC cut the rate to NT\$40 (US\$1.24) per guest room without reason. Three major collecting societies (ARCO, AMCO and MUST) have reviewed CEMC’s approved rate for 2005 as being too low.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

TAJIKISTAN

IIPA recommends that Tajikistan remain on the Watch List in 2006 for failing to enact the necessary legal reforms it obligated itself to adopt over ten years ago.

In 2005, the U.S. Trade Representative, in retaining Tajikistan on the Watch List noted that Tajikistan was not complying with “its IPR obligations under the 1993 bilateral agreement.” In fact, the Tajik IPR legal regime falls far short of Tajikistan’s obligations under the 1993 U.S.-Tajikistan Trade Agreement (in force November 24, 1993). Specifically, Tajikistan has not joined the Geneva Phonograms Convention and does not provide any protection for foreign sound recordings, nor does it explicitly protect foreign pre-existing works (before 2000) or sound recordings. Thus, over ten years after pledging to do so, Tajikistan does not even provide the basic rights or protection for U.S. or other foreign works or sound recordings.

Legal Reform Deficiencies

In 2000, Tajikistan adhered to the Berne Convention. However, the Tajik Copyright Law last amended in 1998 (in force, December 17, 1998) falls short of full compliance with the Berne Convention and other international norms. There are many deficiencies in the Copyright Law including: (1) the over-regulation of the terms and conditions of author’s contracts; and (2) provisions that provide only for a right of remuneration for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable. In lieu, the law should be amended to: (1) delete the onerous contract regulations; and (2) add protection for the use of copyrighted materials on the Internet by adopting an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with the WCT, Article 8), and for phonogram producers (i.e., consistent with the WPPT, Article 14). In short, the Copyright Law needs to be revised to be consistent with all international obligations, including compliance with the WIPO digital treaties.

There are many legal reforms that Tajikistan must undertake including:

- 1) Adherence to the Geneva Phonograms Convention.
- 2) Amending the Copyright Law to provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 3) Amending the Criminal Code to cover all IPR violations of “works” and “neighboring rights.” The current code does not provide this essential remedy for IPR protection.
- 4) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 5) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes; and set that threshold at a low actual level. The current Criminal Code (Article 156) provides

for copyright and neighboring rights sanctions, but only where there is “significant harm” to the rightholder.

- 6) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 7) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 8) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.
- 9) Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 10) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 11) Adherence to the WIPO digital treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), plus enacting all of the appropriate implementing legislation in the Copyright Law.

The Customs Code (last revised in 1995) does provide liability 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.

There has not been a single criminal IPR case reported under existing law. 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. In short, the copyright industries have no reports concerning enforcement activity in Tajikistan.

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 well above 80%; trade losses for 2005 continue to be estimated at about \$5 million annually.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

TURKMENISTAN

IIPA recommends that Turkmenistan remain on the Watch List in 2006 for failing to enact the necessary legal reforms it obligated itself to adopt over ten years ago.

In 2005, the U.S. Trade Representative, in retaining Turkmenistan on the Watch List, noted that Turkmenistan was not complying with “its IPR obligations under the 1993 U.S.-Turkmenistan Trade Agreement.” In fact, the Turkmen IPR legal regime falls far short of Turkmenistan’s obligations under that 1993 Trade Agreement (in force, October 25, 1993). For over ten years since signing the agreement, Turkmenistan has done little to modernize its copyright regime or to join any of the relevant treaties it obligated itself to join in the bilateral agreement. Turkmenistan is neither a member of the Berne Convention nor the Geneva Phonograms Convention. Thus, it denies any protection for foreign works and sound recordings denying even the most basic rights or remedies, much less any protection consistent with international norms.

Legal Reform Deficiencies

Turkmenistan never adopted a comprehensive separate copyright and neighboring rights law. Instead, 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 has been under consideration for years, but has never been adopted by the Parliament.

The basic legal reforms that Turkmenistan must undertake include:

- 1) Adherence to the Berne Convention.
- 2) Adherence to Geneva Phonograms Convention.
- 3) Adoption of a Berne, WTO TRIPs, and WIPO “digital” treaty (WCT/ WPPT) compliant Copyright Law to protect works and sound recordings. Also, the Civil Code should be repealed or scaled back upon adoption of a Copyright Law to avoid confusion and misinterpretation of rights and remedies as between two “competing” laws.
- 4) Provisions in the Copyright Law to protect for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 5) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 6) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes; and, set that threshold at a low actual level. Article 153 of the current Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of “significant harm” — a threshold that is too vague, and likely, too high.

- 7) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 8) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 9) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.
- 10) Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 11) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 12) Adherence to the WIPO “digital” treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), plus enacting all of the appropriate implementing legislation in the Copyright Law.

IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate. Turkmenistan, by failing to provide a proper legal regime, and lacking any police, prosecutorial, judicial, or border activity, is clearly not providing “adequate and effective” enforcement as required by the 1993 bilateral Trade Agreement.

After adopting the necessary legal reforms (noted above), 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 copyright industries have no reports and no information about any enforcement activity undertaken in Turkmenistan in 2005.

The music industry reports that illegal musical cassettes produced in neighboring countries, in particular from Uzbekistan, enter Turkmenistan as the result of the very poor border enforcement regime (on both sides of the border). The IFPI reports that there are still no known optical media plants in Turkmenistan.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), the level of music piracy is estimated at about 85%; trade losses for 2005 continue to be estimated at about \$7 million annually.

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.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

UZBEKISTAN

IIPA recommends that Uzbekistan remain on the Watch List in 2006 for failing to adopt the necessary legal reforms it obligated itself to adopt over ten years ago. IIPA further recommends that Uzbekistan lose its eligibility to participate in the General System of Preferences (GSP) program because Uzbekistan is not providing the statutorily mandated “adequate and effective” copyright protection and enforcement under its present IPR regime.

In May 2005, the U.S. Trade Representative, in his announcement placing Uzbekistan on the Watch List noted that Uzbekistan was providing neither the necessary legal reforms nor enforcement mandated by the 1994 U.S.-Uzbekistan Trade Agreement. In fact, Uzbekistan is still not a member of the Geneva Phonograms Convention and thus does not provide any protection or rights for U.S. or other foreign sound recordings; further, it does not protect pre-existing foreign works (pre-2005). The USTR noted that “IPR enforcement in Uzbekistan remains very weak.” IIPA agrees with this assessment.

Legal Reform Deficiencies

In November 1993, Uzbekistan and the United States signed a bilateral Trade Agreement which detailed 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, and in GSP hearings before the U.S. Government in 2000 (pledging at that time to complete all of its obligations by the end of 2003).

The December 2000 Copyright Law 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 pre-existing works and sound recordings. In any case, the January 2004 amendments were never adopted.

In 2005, Uzbekistan finally adhered to the Berne Convention (effective April 19, 2005). Unfortunately, Uzbekistan made a reservation to its accession regarding Article 18 that denies protection for pre-existing works from the United States and all other Berne countries. This reservation, as noted by WIPO and other copyright experts to the Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne. Uzbekistan must withdraw its reservation immediately and provide clear protection for pre-existing works (and separately, for sound recordings as well).

There are many legal reforms that Uzbekistan must undertake including:

- 1) Adherence to the Geneva Phonograms Convention.
- 2) Amending the Copyright Law to provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 3) Amending the Criminal Code to include “neighboring rights” violations (the current code only applies to infringements of “works”).
- 4) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 5) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes; and, set that threshold at a low actual level.
- 6) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 7) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 8) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.
- 9) Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 10) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 11) Adherence to the WIPO digital treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), plus enacting all of the appropriate implementing legislation in the Copyright Law.

There are deficiencies in the Copyright Law that need to be corrected as well. The corrections include: (1) adding protection for the use of copyrighted materials on the Internet by adopting an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with the WCT, Article 8), and for phonogram producers (i.e., consistent with the WPPT, Article 14); 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) deleting the onerous provisions that over-regulate the terms and conditions of author’s contracts.

The December 2000 Copyright Law 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.

Uzbekistan did not amend its Criminal Code following passage of the 1996 Copyright Act to adopt deterrent penalties for intellectual property violations. Drafts to amend the Criminal Code were circulated in 2004, but never adopted. In fact, 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.

In January 2004, an Uzbek government proposal to amend the Customs Code was circulated to IIPA; it would have established 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. IIPA recommends that this plan be repealed.

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 FY 2005, according to U.S. Government statistics, Uzbekistan enjoyed \$91.9 million (up from \$50.6 million in FY 2004) for other economic/social reform, law enforcement, and democracy program monies from the U.S. government. In addition, Uzbekistan benefited from \$11.4 million worth of GSP benefits in the first 11 months of 2005 (up almost 300% from the same period in 2004). Yet, even as the U.S. Government is promising to enhance trade and investment with Uzbekistan and providing GSP benefits and 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 its bilateral and multilateral obligations, 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 well above 80%; trade losses for 2005 continue to exceed \$30 million.

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.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

VIETNAM

EXECUTIVE SUMMARY

Special 301 Recommendation: Vietnam should remain on the Watch List.

Priority Actions Requested in 2006:

- **Issue Implementing Regulations to Fix Deficiencies in Newly Passed Copyright Law:** The new Intellectual Property Law was enacted on November 29, 2005, and will go into effect July 1, 2006. While the law strengthens protection in some respects, key issues were dealt with in ways incompatible with Vietnam's current or anticipated treaty obligations. The Vietnamese Government is reportedly working on implementing regulations for the new IP Law. Many of the noted deficiencies in the new Law (see below) could be remedied in the implementing regulations.
- **Commence Public Awareness Campaign About New IP Law and Announce July 1 Crackdown:** The Vietnamese Government should take the opportunity of the new Law to launch a public awareness campaign about copyright protection. The Government should bring in local creators to discuss why copyright protection is important to Vietnam's future development. The Government should announce an anti-piracy campaign to begin July 1.
- **Commence Piracy Crackdown on July 1:** The Vietnamese Government should gear up its enforcement organs for the anti-piracy campaign referred to above and devote sufficient resources and manpower to make it a success. Beginning July 1, 2006, the Government's authorities, including police, should target sources of pirate production, pirate distribution warehouses, pirate retail shops selling CDs, DVDs, books, engaging in hard-disk loading of computers. As per the Law, pirate product and tools and materials should be seized, and shops dealt with administratively, including fines, license revocations and shop closures.
- **Apply Criminal Remedies to Address Copyright Piracy (and If Necessary, Amend Criminal Law and Thresholds):** The new IP Law states that criminal remedies are available for copyright infringement in appropriate cases. Unfortunately, the Criminal Code provision has not been used effectively to deter piracy. Vietnam cannot reduce piracy levels and meet international norms until it provides an effective criminal remedy. Police involvement in raids, followed by prosecutions, must occur; if this requires amendments to the Criminal Code and a Supreme Court re-interpretation of the criminal threshold, then those steps should be taken.
- **Broader Market Access Should be Afforded:** Various market access barriers exist in Vietnam today, the most serious being the prohibition on foreign companies' setting up subsidiaries to produce or distribute "cultural products." Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry. Market access restrictions in Vietnam should be lifted to let foreign right holders avail themselves of the Vietnamese market.

- **Pass Optical Disc License Regulation:** Vietnam now has between five and seven optical disc plants with capacity that far outstrips any rational legitimate domestic demand. As such, the Vietnamese Government should swiftly adopt a comprehensive regulation on the licensing of optical disc manufacture, including the use of SID Codes for identification purposes, and imposition of inspections by the Government on optical disc production facilities.

For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

VIETNAM Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software²	26.8	91%	30.0	92%	24.0	92%	29.1	95%	26.3	94%
Books	16.0	NA	16.0	NA	12.0	NA	NA	NA	NA	NA
Motion Pictures³	NA	NA	10.0	NA	7.0	100%	7.0	100%	7.0	NA
Records & Music	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	42.8		56.0		43.0		36.1		33.3	

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Piracy levels in Vietnam rank among the highest in the world; the music and recording, as well as business software industries report over 90% piracy rates. Such high rates indicate a total lack of effectiveness of the current copyright laws on the books, a total failure to enforce, and lack of effective market access, which in itself could drive piracy levels down.

Optical Disc Plants Vietnam: The Vietnamese Government indicates there are between five and seven optical disc plants in the country. The plants include at least 12 production lines, capable of producing at least 42 million discs per year. This production capacity is far greater than any rational domestic legitimate demand. In addition to nearly 100% piracy rates domestically, Vietnamese-sourced pirate products (notably entertainment software) have been found in several Asian countries, Canada, the Czech Republic, and Poland. CD-burning operations also exist in the country, with pirated PC games being sourced from cracked versions made available through the Internet. Piracy of entertainment software is also widespread in Internet cafés.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Vietnam, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

Despite modest efforts from some local publishers and government officials, book publishers continue to suffer from overwhelming book piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copyshops all sell illegal copies of bestselling trade books, travel books and academic textbooks. The English language teaching market continues to be hard hit, with approximately 90% of this market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. State-sector publishers' licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are still being misused, resulting in distribution of unauthorized books through the mainstream state bookshops. Copies of such books also flow to Cambodia. 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).

Signal Piracy: Piracy of cable and satellite broadcasting signals remains a significant problem, made more egregious by the fact that a state owned company, controlled by the Ministry of Posts and Telematics, is openly pirating content in serving hundreds of thousands of end users throughout the country.

Business Software End-User Piracy: Business software piracy is rampant in Vietnam. The most damaging form of piracy for this sector is corporate end user piracy. Vietnam has done little to use what administrative authority it does have to fight against software piracy.

TRAINING AND PUBLIC AWARENESS

The Business Software Alliance provided some enforcement training to authorities in 2004 and 2005. The motion picture industry participated in an IPR Workshop on "Counterfeiting and Border Measures" jointly organized by the World Customs Organization and Vietnam Customs in Ho Chi Minh City in January 2005.

COPYRIGHT LAW AND RELATED ISSUES

New Intellectual Property Law Enacted: On November 29, 2005, the Vietnamese National Assembly passed the "Intellectual Property Law,"⁴ which will go into effect on July 1, 2006. The law results in a number of advances in Vietnam's copyright system. For example, it provides protection for temporary reproductions (Article 4(10)), and provides for the first time in Vietnam protection against circumvention of technological protection measures used by right holders to protect their works/subject matter in the digital environment (Articles 28(12) and 35(7)), as well as prohibitions against trafficking in circumvention devices (Articles 28(14) and 35(9)).⁵ The Law also attempts, less successfully however, to deal with exclusive rights in the digital environment, namely, the right to control the communication to the public of works, sound

⁴ Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Session of the 10th National Assembly dated 25 December, 2001.

⁵ The term "technical methods" is undefined, so it is unclear whether it includes access controls as well as controls against the unlawful exercise of exclusive rights (the term used throughout is a technical measure "applied by a copyright owner to protect copyrights of his or her work." The implementing regulations being drafted should include a definition of "technical methods" to ensure that access controls are included in coverage, a very important aspect of TPM protection and necessitated by the WCT and WPPT language. It is also unclear what, if any, exceptions apply to the anti-circumvention provisions. The implementing regulations must spell out that violation of the TPM-related articles constitutes a separate violation, or questions about the efficacy of these provisions will remain.

recordings, etc. including an interactive right (making available) (see discussion of this issue below). Unfortunately, the new Law still contains a number of deficiencies when evaluated on the basis of full TRIPS compliance and compliance with the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).⁶ The drive toward WTO accession no doubt has infused energy into the copyright drafting and legislative process, and in Vietnam's overall willingness to try to align itself with the international community on issues related to the protection of copyright.⁷ As such, it is truly a major disappointment that the Vietnamese did not take this legislative opportunity to ensure that its law complies with the BTA or is TRIPS-compatible. The Vietnamese Government should work to correct as many deficiencies as possible when issuing the implementing regulations. The following is a non-exhaustive list of concerns in the new IP Law (with respect to copyright).

Substantive Issues

- **Restrictions on IP Rights:** Article 7(2) gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection, e.g., in Article 25. Leaving Article 7(2) intact would create inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties, and should pose a major obstacle to Vietnam's accession to the WTO. The second half of Article 7(3) violates Vietnam's current and future obligations by permitting the State to restrict the ability of a right holder to exercise lawful rights, and worse yet, could result in an open-ended compulsory licensing to use copyright materials seemingly without limitation or reason. The provision should be deleted. The first clause of Article 8 would also run afoul of Vietnam's bilateral commitments and would be Berne and TRIPS-incompatible since it establishes impermissible content-based restrictions of protection under copyright. That clause must be deleted.⁸
- **Civil Code Supremacy:** Article 5 retains a clause making the Civil Code supreme to the IP Code where inconsistent. Supremacy of the Civil Code, and the legal uncertainties and inconsistencies resulting from such parallel and inconsistent legislation, seriously endangers Vietnam's ability to fulfill its present (Berne, BTA) and future (TRIPS, WCT/WPPT) obligations.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.
- **Importation Right Not Provided (BTA Requirement):** Articles 20 and 30 fail to provide an "importation" right as required by BTA Articles 4.2(a) and 4.6(b).
- **Exceptions Overly Broad:** Certain exceptions, including Article 25(a) (personal use copy exception), (d)*bis* (library archive copies "for the purpose of research"), (g) ("[d]irectly recording and reporting performances for public information and educational purposes"),

⁶ Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA). The BTA required Vietnam to bring its copyright regime, including enforcement provisions, into compliance with the TRIPS Agreement by December 2003. This has still not occurred.

⁷ Vietnam acceded to the Geneva Convention (the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms) on July 6, 2005 and the Brussels Convention in late 2005. Vietnam was also planning to accede to the Rome Convention at the end of 2005. There are no plans to accede to WCT and WPPT although Vietnam acknowledges that its law will comply with these and Vietnam will eventually accede.

⁸ We note that a new Article 24 was added just prior to passage of the Law, and it is unclear what its scope may be. It provides, "[t]he protection of the copyright to literary, artistic and scientific works referred to in Article 14.1 of this Law shall be specified by the Government." Article 14.1 enumerates the various subject matter of copyright (not including related rights). This provision could be innocuous; however, to the extent it coincides with Articles 7 and 8 to deny rights to authors or right holders or cede rights, it could be problematic.

and (j) do not accord with the Berne Convention, TRIPS, and the BTA. For example, Article 25(j) regarding personal use imports needs to be specifically narrowed in order to comply with TRIPS Article 60. Article 25(e) is Berne and TRIPS-inconsistent, as it provides that it is permissible to put on stage “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” as long as there is no admission charge; however, the provision that performers may not be paid was struck in the bill that was passed into law. It was already believed that “cultural gatherings” and especially “promotional campaigns” could be read in an overly broad way, but with payments being made, this provision runs afoul of the Berne three part test.⁹

- **Impermissible Compulsory Licenses:** Article 26 enacts into law in Vietnam a broad broadcasters’ compulsory license as to all works except cinematographic works (excluded by the terms of Article 26(3)).¹⁰ Notwithstanding the attempt in Article 26(2) to limit the scope of the compulsory license to the three step test, it is hard to see how the compulsory license in clause 1 would not collide with the three step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which is a last minute addition to this legislation) for use of sound recordings and video recording for commercial “broadcasting” is in violation of international standards; 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne three part test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.
- **Duration Provisions Are BTA-Incompatible:** Articles 27(2)(a) (with respect to cinematographic works) and 34(2) (with respect to phonograms) violate BTA Article 4.4 since they do not provide the term promised under that Agreement.¹¹
- **Scope of “Communication to the Public” Right Unclear:** While it appears some legislators intended that this law fully implement the WCT and WPPT, in the end, the term “communication to the public” was left undefined, and while the exclusive right in Article 20(d)*bis* provides a potentially broad right “[t]o communicate the work to the public by wire or

⁹ By contrast, Title 17, Section 110(4) of the U.S. Copyright Act permits “performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers” if there is “no direct or indirect admission charge” or if “proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.” Section 110(4) also provides right holders with an opportunity to object to such performances. The Vietnamese provision is much broader in the subject matter (“dramatic works and other forms of performing arts”), the setting (“cultural gatherings or in promotional campaigns”) and the payment scheme (payments not prohibited).

¹⁰ The Article reads as follows:

Use of published works without obtaining permission but paying royalties, remuneration

1. Broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form shall not be liable for obtaining permission from, but shall be liable to pay royalties or remunerations to, the copyright owner in accordance with the Government regulations,
2. Organizations and individuals when using the works stipulated in paragraph 1 of this Article must not influence the normal exploitation of works and must not prejudice rights of authors or copyright owners, and must provide information about the name of the author and origin of the works.
3. The use of works referred to in clause 1 of this Article shall not apply to cinematographic works.

¹¹ “Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.”

wireless means, through electronic information network or by any other technical means,” the right as enacted does not expressly include the interactive “making available” right of the WIPO treaties. As noted below, the fact that the “making available” language does appear in the definition of “broadcasting” at least suggests that omission of the concept in Article 20 was not an inadvertent oversight.

- **Scope of Rights for Producers of Phonograms Unclear:** The scope of rights for producers of sound recordings is similarly left unclear, since sound recording producers receive in Article 30 a broad right to “[d]istribute to the public the original or copies of the phonogram by sale, rental or distribution or any other technical means accessible to the public,” but again, the “making available” language is missing. Article 30(2) similarly leaves more questions than it answers, providing, “[t]he producer of a phonogram shall have the right to get material benefits when his or her phonogram is distributed to the public.” To the extent it clarifies the exclusivity of the right (i.e., the ability to enjoy the economic right), it can be dropped as duplicative. To the extent it sets out the possibility of a right of remuneration, it is quite problematic since “distribution” is arguably so broad (and, e.g., to the extent it creates remuneration for “rental” this would be TRIPS-incompatible). Article 35(3) does make it an infringement to “communicat[e] to the public” a phonogram without permission, and while this appears helpful, it also adds to the uncertainty given the failure to enumerate this right in Article 30.
- **Broad “Broadcasting” Right Afforded, Including “Making Available” Right, But Apparently Only Afforded to Performers and Broadcasters:** A new definition of “broadcasting” was added at the last minute (Article 4(11)). This definition is very broad, defined as “transmission by wire or wireless means” and including transmission “to the public for its reception at a place or at a time select[ed] by them.” This sets forth the WCT/WPPT “making available” right, but the scope of the right in the Vietnamese law is to “sounds or sounds and images.” Further, the “broadcast” right is only apparently afforded to performers (Article 29(3)(c)) and broadcasters (Article 31(1)(a)). It is illogical to provide an interactive “making available” right for performers and broadcasters and not for authors of works (see discussion above) and producers of sound recordings, especially given the stated wish of many legislators in Vietnam to take the opportunity afforded by this legislation to fully implement the WIPO treaties.

Enforcement Issues

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Imposition of a Prohibited Formality:** Article 203 fails to provide a Berne and TRIPS-compatible presumption of copyright ownership, and apparently imposes a Berne-prohibited formality by requiring a registration certificate in order to enforce copyright. Article 3.2 of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, *enforce* and exercise rights or benefits in respect of copyright and related rights.” Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures), since they apply the same standard of proof, also violate international standards.
- **Level of Administrative Remedies Left to Implementing Regulations:** Article 211(2) provides, “[t]he Government shall make specific provisions for acts of IPR infringements to be liable for administrative remedies, form and level of remedies and procedures for imposing such administrative remedies.” Article 214 similarly provides, “[t]he Government shall make detailed provisions for the method of determination of the value of infringing goods” (after noting the administrative fine is “at least equal to the value of the discovered infringing goods but must not exceed five times of that value”). The great danger is that the Vietnamese Government will set administrative fines and remedies in implementing

regulations at a “value” lower than a legitimate retail price. IIPA hopes the outcome of implementing regulations will be on-their-face deterrent administrative remedies, including deterrent fines, seizure, forfeiture and destruction of infringing goods, as well as materials and implements used in the infringement, and other necessary remedies, such as business license revocation and shop closure where necessary.

- **Criminal Penalties: IP Code/Criminal Code Remain TRIPS-Incompatible:** Article 212 dealing with criminal penalties does nothing to resolve doubts about whether Vietnam’s criminal remedy is TRIPS-compatible.¹² TRIPS (and the BTA) require that Vietnam provide criminal penalties at least in cases involving copyright piracy on a commercial scale, and that remedies be sufficiently severe to provide a *de facto* deterrent to further infringement. Article 14 of the BTA requires Vietnam to “provide criminal procedures and penalties to be applied at least in cases of ... infringement of copyrights or neighboring rights on a commercial scale,” and to provide that “penalties *available* include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity” (restating the TRIPS Article 61 test). Article 14.2 of the BTA also requires Vietnam to “provide that, in appropriate cases, its judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense.” The current draft IP Code does not expressly provide for BTA or TRIPS-compatible criminal penalties. As noted below, the Criminal Code is not helpful in resolving the ambiguities and potential weaknesses in the criminal statutes, regulations and interpretations.
- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Article 12.4 of the BTA provides that infringing goods, materials, equipment, implements, etc. be seized and disposed of outside the normal channels of commerce, and (in the case of goods) destroyed (if permissible constitutionally). Article 202(5) of Vietnam’s IP Law provides that one application of civil remedies could include “Compelling distribution or use for non-commercial purpose of goods, materials and equipment used for the production and business of IPR infringing goods.” This provision falls short of what the BTA (and TRIPS) would allow, notwithstanding that the drafters added “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” There remains no possibility of seizure or destruction of the infringing goods, materials or equipment used in the infringing activity. With regard to administrative remedies, Article 214(3)(a) is similarly too broad, providing for the possibility of “distribution and use of the [goods/implements] for non-commercial purpose provided that such distribution and use does not affect the IPR owner’s capacity to exploit his/her IPRs.”
- **Possibility of “Re-Export” of Illegal Goods:** Article 214(3)(b) provides for “Compelling delivery out of the territory of Vietnam or re-export of the IP counterfeit goods, materials and equipment that are imported mainly for manufacturing such intellectual property counterfeit goods.” It must be confirmed that this applies only to “counterfeit trademark goods.”
- **Secondary Liability and Limitations of Liability for Internet Service Providers** We note at the outset our disappointment that Article 442(2) of the 3rd Draft IP Code was stricken from subsequent drafts. That Article provided that “[t]he person who does not directly conduct the act of infringement of intellectual property right but assigns, hires or orders other

¹² A proposed change in a previous draft would have come closer to compliance. Specifically Article 249(2) of the 4th Draft of the IP Code provided that the following would be subject to criminal penalties:

- “Any of the acts of infringement provided for in Article 218 conducted after the infringer has been handled by administrative procedures, or after the infringer has been sentenced for this crime and the criminal records have not yet been deleted.”
- Any act of intellectual property right infringement resulting in serious consequences to the society.”

person to conduct that act shall be considered as the infringer of intellectual property rights.” Establishing secondary liability for copyright infringement in the IP Law would have provided the context for what the Government is now contemplating: treatment of “service providers” when infringing materials or activities occur on their services. IIPA understands that a draft E-Transactions Bill which would have giving ISPs blanket immunity for copyright infringement occurring over their services was scrapped, in favor of the approach taken in the IT Bill.¹³ IIPA’s view is that the draft IT Bill should not be considered seriously for passage until it is reworked to do more to foster incentives for “suppliers” (as defined therein) to cooperate with right holders in combating online piracy,¹⁴ and to adopt a robust “notice and takedown” mechanism.¹⁵

Criminal Code of Vietnam: There are several problems with Article 131 of the Criminal Code which criminalizes certain acts of copyright infringement.

- It is unclear what the thresholds are (e.g., terms like “serious consequences,” “very serious consequences,” and “particularly serious consequences” are defined in only vague ways in court interpretations).
- It is unclear whether “appropriating” in Article 131 covers all commercial scale piracy (e.g., potentially all acts of infringement, end-user piracy of software, etc.).¹⁶
- The penalties for “serious consequences” may be too low to deter further infringements, i.e., they may result only in “non-custodial reform” (we note that two years non-custodial reform is the maximum penalty for the lower “serious consequences” violations, so it would depend on the threshold for such violations and the in-practice application of such penalties as to whether this is TRIPS-incompatible).¹⁷
- Neither the IP Code nor the Criminal Code provide that “judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense” as required by the BTA and TRIPS.
- Finally, we are told that the police in Vietnam will not investigate or enforce copyright infringement cases because Article 131 violations are considered “human rights” violations rather than economic crimes. This is a serious problem that must be addressed for Vietnam to achieve TRIPS compatibility.

¹³Bill entitled “Information Technology Law, Based on the Constitution of the Socialist Republic of Vietnam dated 1992, amended and supplemented in accordance with Resolution No. 51/2001/QH10 dated 25/12/2001 of Legislature X, Session 10.”

¹⁴In general, Articles 20-23 seem intended to describe instances in which a “supplier” is not liable (with notions roughly parallel to those adopted in the United States and the EU). Unfortunately, the current formulation creates blanket immunities from liability rather than remedial limitations, i.e., it does not preserve incentives for service providers to cooperate with right holders to fight infringements online.

¹⁵The IT Bill creates no notice and takedown mechanism whereby right holders can make “suppliers” aware of infringing activity, upon which the supplier is obliged to expeditiously take down or block access to the infringing material or the user engaging in the infringement.

¹⁶Specifically, it should be confirmed that illegally “appropriating” includes illegally reproducing, distributing, publicly performing, broadcasting, renting, communicating to the public (including “making available” to the public so that they may access the work/sound recording at a time and a place of their choosing), adapting, translating, compiling, etc. Alternatively, it may be that some of these acts are covered under the term “disseminating” in Article 131(1)(d), but it would be important to confirm whether “disseminating” extends to digital dissemination. It should also be confirmed that unauthorized use of software in a business setting would be criminalized under this “appropriating” language.

¹⁷The penalty for the crime committed with “serious consequences” is \$1,263 to \$12,630 or “non-custodial reform” of up to two years; thus, a crime of copyright piracy may result merely in a “non-custodial reform” which might be non-deterrent (we note that two years non-custodial reform is the maximum penalty for the lower “serious consequences” violations, so it would depend on the threshold for such violations and the in-practice application of such penalties as to whether this is TRIPS-incompatible).

Civil Code Amendments

The Vietnam Civil Code was amended and passed by the National Assembly. Unfortunately, our analysis reveals that the Civil Code contains provisions that are inconsistent with the draft IP Code in several crucial areas. Because of these and other inconsistencies and the confusion that will arise in interpreting the laws in Vietnam, IIPA advocates that the Civil Code provisions be trimmed to a few basic paragraphs that do not contradict with the provisions of the draft IP Code.

The Need for Optical Disc Regulations: The Copyright Office in Vietnam estimates that there are 5 to 7 optical disc plants in Vietnam, and they plan to issue a decree on optical disc production. If this is true, it is welcome news. Effective prevention of optical disc piracy can only be achieved through targeted legislation and by the establishment of specific enforcement mechanisms. APEC Member Economies' Ministers endorsed a paper, "Effective Practices for Regulation of Optical Disc Production," which contains the key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join the other APEC Member Economies that have already enacted such legislation, and modernize its legislative framework to meet the challenge of optical disc piracy. Essential provisions for an effective optical disc regulatory scheme include:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary.
- The requirement to use SID Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed).
- The ability to inspect plants (in addition to traditional search and seizure), including nighttime inspections, to ensure that plants are engaging in legal activities.
- Government record-keeping of all plants and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license including criminal penalties and possibility of plant closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials (an automatic license is one common approach).

MARKET ACCESS

As noted, various market access barriers exist in Vietnam today, the most serious being the prohibition on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves right holders no choice but to license Vietnamese companies (which often refuse to license due to the prevalence of piracy). Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market in Vietnam, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry as our right holders invariably do. Market access restrictions in Vietnam should be lifted to let foreign right holders avail themselves of this developing market.

Quantitative Restriction on Foreign Film and Other Restrictions Relating to Audiovisual Content: Under current regulations, there are no screen quotas or restrictions on the number of imported films. However, under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed two-thirds of those domestically produced. Also, the number of foreign films projected by each cinema would only be allowed to reach two-thirds of the total projected films in any given year. Since the domestic films industry is underdeveloped and the number of domestic films produced has generally ranged between 10 and 15 films or less per year, these proposed restrictions would pose a significant barrier to the import and distribution of foreign films in Vietnam. In the television sector, foreign content is reportedly limited to 50% of broadcast time, although it is unclear whether this is enforced. In addition, foreign programming is not allowed during prime time viewing hours of 7:00 p.m. to 9:30 p.m. Foreign investors may invest in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. Only cinema exhibitors are allowed to import foreign films into Vietnam.

Sound Recordings and Musical Compositions: Under present rules in Vietnam, foreign sound recording companies cannot set up subsidiaries to produce or distribute "cultural products"; they must license a Vietnamese company. In the first instance, this has prevented U.S. sound recording companies from establishing businesses in Vietnam. Making matters worse, Vietnamese companies are not interested in licensing legitimate product from American companies given that pirated versions of these products are already available in the Vietnamese market. Thus, right holders in sound recording (and musical compositions) are totally excluded from the market. It is critically important that all U.S. right holders obtain the right, if Vietnam joins the World Trade Organization, to establish wholly owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. U.S. right holders do not challenge the authority of the state to review cultural materials (e.g., through censorship) provided that they do so in a transparent and timely manner that does not operate as a disguised barrier to entry.

306 MONITORING

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PARAGUAY

EXECUTIVE SUMMARY

Special 301 Recommendation: Currently Paraguay is not on any USTR list; it is being monitored under Section 306 of the U.S. Trade Act of 1974. IIPA proposes that Paraguay remain under Special 306 monitoring, and calls upon the Government of Paraguay to deliver on some of the progress initiated this past year and to take actions that will effectively reduce piracy levels.

Despite their best efforts, the Paraguayan Administration has failed to create the legal environment to fight piracy due to the lack of deterrent level penalties. IIPA members report continued high levels of cooperation with the Paraguayan authorities, and commend the actions of the UTE in trying to address piracy. Unfortunately, these actions have thus far not had a meaningful impact on the amount of pirate product available in Paraguay, and especially in the city of Ciudad del Este, or on Paraguay's role as a transshipment point for the raw materials intended for pirate production. It is imperative that Paraguay adopt changes to its penal code so that deterrent sentencing is possible, and that it undertake judicial training and/or the adoption of sentencing guidelines so that judges impose deterrent sentences when cases come before them. We express our gratitude to the brave men and women involved in the fight against piracy, and hope that enhanced inter-agency cooperation and the provision of better tools (i.e., deterrent sentencing) will permit the UTE and other law enforcement agencies to succeed in reducing Paraguay's role as a major player in global pirate trade—a role that significantly impairs Paraguay's standing in the world community and which limits direct foreign investment.

Priority Issues in 2006: IIPA commends Paraguay for having adopted a new and meaningful approach to the protection of intellectual property over the last two years. Much, however, remains to be done. We continue to hope that the following initiatives will create positive results:

- Enact legislation to amend the criminal code to increase penalties for copyright infringement (designating IPR violations as major crimes), establish *ex officio* actions, and criminalize of the circumvention of technological protection measures;
- Improve border enforcement, including the interception and seizure of piratical goods and contraband PC hardware, as well as the inspection of blank optical disc media;
- Attack the large-scale distribution points operating in Ciudad del Este, including by addressing the role of landlords with respect to the open and notorious illegal activities taking place on their premises;
- Impose deterrent remedies against pirates, including criminal penalties;
- Audit large-scale importers of blank CD-Rs who are suspected suppliers of pirate organizations for possible tax evasion. Pursue audits of customers of those importers. Tax authorities may want to consider creating a specialized unit familiar with the business of optical media and other exportable products;
- Improve training for prosecutors and judges, with the objective result being that the Paraguayan system provides deterrence to copyright piracy;

- Improve training for officials in the UTE, the special IP task force;
- Request that the Supreme Court suspend and/or remove expert witnesses and judges reported to be involved in corruption cases from current dockets.

PARAGUAY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	128.0	99%	127.8	99%	154.6	99%	204.4	99%	253.6	99%
Motion Pictures ³	NA	NA	2.0	95%	2.0	80%	2.0	80%	2.0	80%
Business Software ⁴	7.3	83%	6.0	83%	5.0	83%	2.2	71%	3.5	72%
Entertainment Software ⁵	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.0	NA	2.0	NA	2.0	NA	3.0	NA
TOTALS	137.3+		137.8		163.6		210.6		262.1	

Overview of Key Achievements/Problems: Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. Officials in the new Paraguayan administration have shown a great interest in tackling copyright piracy in-country and at its borders. IPR issues are discussed regularly under the context of the 2003 Memorandum of Understanding on Intellectual Property Rights and at the 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, is in charge of conducting raids and seizures, and, with the assistance package of \$320,000 contributed by the U.S. government, has established a Statistics Center to collect data on IPR cases.

There have been significant positive developments in Paraguay during 2005, including:

- Seizure of over 12.7 million blank CD-Rs/DVD-R's and 3,819 burners;
- Convictions of 15 pirates (without prison sentences, however);
- Indictment of 14 people for organized crime violations;
- Indictment of 37 people for tax evasion in connection with piracy;

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay and estimated losses caused by transshipment. The decrease in 2003 and 2004 estimates are due to lower average prices of recorded music and currency devaluation.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Paraguay, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

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.

- Indictment of 21 people for forging import documents related to the importation of raw materials for piracy;
- Cancellation of 82 import licenses from companies found to have engaged in forgery and/or in predicate offenses related to piracy;
- Implementation of 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;
- Completed staffing of the special IP task force known as the UTE;
- In the first case involving Internet piracy, the defendant spammers were arrested, convicted and imprisoned for copyright infringement when they burned business software programs on CD-Rs and sold them.
- As noted in the number of seizures above, some actions have been taken against the illegal importation of blank optical media. However, Customs has done little to deter the exportation of “burned” CD-Rs and DVD-Rs.

The Government of Paraguay has shown resolve to address a problem that has for too long hindered the country's economic development, and IIPA and its member associations recognize that effort. Nevertheless, despite the renewed energy by the Paraguayan government to combat piracy, the piracy situation remains relatively dire. Enforcement efforts taken by Paraguayan authorities, while well intended, continue to be largely ineffective in deterring widespread piracy there. Unchanged in recent years is the lack of deterrence — weak criminal penalties for IPR that deter judicial authorities from issuing sentences that require effective jail time. 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 and prosecutions against copyright pirates. 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.

Need to extend the 2003 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 2004,⁶ and contains 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. 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. The MOU also requires regular review of Paraguay's progress throughout the term of the agreement, which terminated on December 31, 2005. Ongoing bilateral discussions are underway to extend the MOU, possibly for a two-year period.

⁶ 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/doiit.cgi?204:64:1:185>.

COPYRIGHT PIRACY IN PARAGUAY

Optical Media Piracy — Transshipment and CD-Rs: Again in 2005, 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 remains a significant player as a transshipper of pirate product to its neighbors.

Pirates in Paraguay have continued to shift their products from pre-recorded optical disc product to importing blank recordable CDs (CD-Rs) into Paraguay. According to official Paraguayan statistics, there were 290 million blank CD-Rs and DVD-Rs imported into Paraguay in 2005. In comparison, there were 27.4 million units imported in 2000. Simply said, 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. Hundreds of labs using CD burners have replaced the previous underground illegal CD plants. Many of these 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. During 2005, some industries report that organized crime elements are working more with smaller labs, making it harder to identify their operations. The influence of organized crime is pervasive. Even INTERPOL has recently engaged the Triborder Area in law enforcement actions against criminal organizations involved in IP infringements. In November 2004, INTERPOL launched “Operation Jupiter,” aimed at disrupting the activities of organized criminals involved in transnational piracy and counterfeiting.

Domestic piracy remains widespread across all sectors. Copyright piracy remains pervasive in Paraguay, with little to no improvement in 2005. Industries also report that Internet-based piracy rose in 2005.

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 video game products continue to be imported largely from Asia, then to be exported to other countries in the region. In April 2005, a raid was conducted against three (3) locations in Ciudad del Este, resulting in the seizure of 47,557 pirated CDs of games for play on PlayStation consoles. About 60,000 inlay cards bearing a variety of video game titles for PlayStation consoles were also seized.

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. BSA reports that in 2005, Internet-based piracy increased, and they have

found more suppliers of pirated products distributed their wares by Internet. BSA completed a successful case in 2005 against a spammer who offered counterfeit software which they burned for sale. 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. Estimated trade losses in 2005 due to business software piracy amounted to \$7.3 million, with an 83% piracy level.

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. Not surprisingly, this product continues to be primarily exported to Brazil, Chile and Argentina. The recording industry reports 2005 losses of \$128 million based almost exclusively on the sale of pirate product with a nexus to Paraguay but intended for consumption outside the country. Despite many efforts by both industries to work with local authorities to control the volume of blank optical media coming into the country that surely is used for domestic piracy or exported to Brazil for the same purpose, the 290 million units imported in 2005 indicate that these efforts have been ineffective.

AAP continues to report that photocopied materials are being used in place of legitimate books in institutions of higher learning. Suspicions regarding the presence of pirated versions of trade books and English language teaching materials remain. Estimated trade losses due to book piracy remained at \$2 million for 2005.

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

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 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. In addition, tax authorities should conduct strict audits of businesses catering to the "sacoleiro" traffic in Ciudad del Este since tax evasion is rampant.

Customs operations and industry coordination with the Ministry of Industry and Commerce (MIC) have greatly improved during 2005. 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

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>.

until these groups verify that the submitted invoices and documents are valid and accurate. As a result of this new system, over 12 million blank CD-Rs and DVD-Rs with false or questionable invoices have been seized during 2005. In addition, 82 import licenses were cancelled, 37 individuals were indicted for tax evasion and another 21 for providing false documentation on imports of blank media. In July 2005, two cargo containers allegedly carrying general merchandise were intercepted after false documentation was filed. These containers held over 2.2 million blank CD-Rs. This operation was conducted by the Special IPR Unit (UTE) – not customs -- along with industry representatives. Another matter of concern is that a specialized technical unit in Customs has not been set up as required by the MOU on IPR Annex.

Criminal enforcement by the government is still ineffective. 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 2005, the recording industry conducted 163 raids, which resulted in the seizure of over 671,000 units of infringing products (mostly music CDs) and the closure of 33 manufacturing facilities, most of them small to mid-sized CD-R replication facilities, and 20 storage facilities of different sizes. Another two major organized crime cases with international nexuses are currently under investigation. Shipments of contraband blank CD-Rs amounting to 12.7 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by APDIF Paraguay.

BSA reports that the authorities remain cooperative with industry officials on both criminal and civil cases. Last year BSA conducted one civil end-user action (fewer than in prior years) and three reseller actions. About two dozen cases are currently under investigation. In Asuncion, BSA is working with the Ministry of Industry and Commerce on Project CITI, which has the object of prohibiting street sales of pirated product, a difficult objective. UTE has also been working with BSA members on ex parte actions regarding investigations into suspected pirated and counterfeit product.

ESA reports that government enforcement activities increased in 2005, compared to 2004. In 2004, Customs authorities and police conducted 12 raids which resulted in the seizure of approximately 240,000 Nintendo video game items. In 2005, there were 27 raids that resulted in the seizure of about 395,000 products; 22 of these raids were conducted by the police, while in each of the five raids conducted by Customs authorities, an average of 30,000 infringing materials, both finished products and components, were found.

Despite the efforts of the current government, corruption remains a major obstacle to effectively fighting piracy in the country. For example, in June 2005, a shipment of counterfeit video game products was identified and targeted for seizure. However, despite information provided regarding the shipment, authorities still failed to detain the shipment and the counterfeit goods were released to the importer without explanation or notice to the copyright owner. In other instances, counterfeit goods that had already been seized would be released to the infringer or the counterfeit merchandise would simply disappear from the storage facilities. The current government's efforts to improve the manner in which it addresses copyright piracy should also address the issue of corruption that pervades the system. Otherwise, despite their best intentions, the piracy situation will remain dire.

MPA's anti-piracy enforcement actions in Paraguay, as of the second semester of 2005 began to be coordinated by the local recording industry anti-piracy association. In more than 20 raids in the last half of the year, more than 200,000 pirate movies were seized, 8 laboratories closed and millions of blank optical disks.

Effective prosecution and deterrent sentencing needed. 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 the ability to pursue copyright infringement cases as "public" actions (thanks to Law No. 1.444, which entered into effect in July 1999). One news report indicated that Ciudad del Este now has six prosecutors (although it is unclear whether they are all IPR prosecutors or have general assignments).

The recording industry reports that in 2005, Paraguayan courts issued 15 criminal judgments against pirates of sound recordings, but none resulted in effective incarceration. BSA reports that in 2005, two defendants in a spam case were arrested and imprisoned in the first case of Internet piracy in Paraguay; this case involved the seizure of 6,000 copies of pirated software. However, severe problems remain with the Paraguayan judiciary, especially related to corruption. In addition, experts appointed by the courts, especially in the trademark area, are not qualified and have not been removed from the list of experts. As a result, unfounded opinions by both experts and judges have been issued and seized merchandise returned.

Civil End-User Actions and Civil *Ex Parte* Searches: 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 AND RELATED ISSUES 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.⁸ Paraguay already has deposited its instruments of ratification to both the WIPO Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In order to achieve the kind of comprehensive implementation desired by the copyright industries, further refinements to Paraguayan laws will be necessary.

Pending Legislation 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;
- Specifically make these criminal provisions "public" offenses;

⁸ For example, refer to IIPA's 2005 301 report on Paraguay at <http://www.iipa.com/rbc/2005/2005SPEC301PARAGUAY.pdf>.

- 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.

Unfortunately, legislative consideration of this bill stalled in 2005, and it remained pending in the Commission for the Reform of the Criminal System, which was created in 2004 by President Duarte Frutos for the purpose of drafting comprehensive amendments to the inadequate Criminal Code. We encourage the Paraguayan government to support these amendments to create the necessary legal framework to fight piracy effectively as rapidly as possible.

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 mid-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. In a positive move, this bill deleted language in the Criminal Procedures Act of 1998, which required that private parties 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, the good news is that 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.

COUNTRIES DESERVING SPECIAL MENTION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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SPECIAL MENTION

AZERBAIJAN

As the U.S. Trade Representative noted when Azerbaijan was retained on the Watch List in 2005, Azerbaijan “has not addressed deficiencies in its IPR laws or fulfilled its IPR commitments under the 1995 U.S.-Azerbaijan Trade Agreement.” The USTR listed those deficiencies which unfortunately, remain unchanged in 2006, even though Azerbaijan obligated itself to address these issues in the Trade Agreement that 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 (which it joined in 1999) and the Geneva Phonograms Convention (which it joined in 2001). Effective April 11, 2006, Azerbaijan will become a member of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA continues to oppose the eligibility of Azerbaijan to enjoy General System of Preferences (GSP) trade benefits until the Government of Azerbaijan addresses the legal reform deficiencies noted below (see letter of IIPA to U.S. Government, December 3, 2004).

Legal reform deficiencies: The legal reforms that Azerbaijan must address are:

- 1) Adoption of clear and explicit provisions into the Copyright Act of 1996 (or by adoption of a government decree) to provide protection for pre-existing works (pre-1999) or sound recordings (pre-2001) – required for compliance with the bilateral Trade Agreement, Berne, and/or the WTO TRIPs Agreement.
- 2) Adoption of provisions to provide civil *ex parte* search provisions – required by Article 50 of the WTO TRIPs Agreement.
- 3) Adoption of the following changes to strengthen criminal enforcement:
 - a. A “significant amount of use criteria” that is calculated on the basis of the price of legitimate product, instead of the existing “significant harm” criteria found in Article 158 of the Azerbaijan Criminal Code (2000) for copyright and neighboring rights criminal violations;
 - b. Lowering the respective amount for the threshold to commence liability under Article 158 of the Azerbaijan Criminal Code (2000) for copyright and neighboring rights criminal violations;
 - c. Similarly changing the “significant amount criteria” (as in (a), above) in the Code of Administrative Misdemeanors (Article 186-1) and eliminating any threshold for administrative violations which is currently ten times the minimum monthly wages; and
 - d. Providing for the confiscation and destruction of equipment used for pirate production of copyright and neighboring rights materials.
- 4) Adoption into the Criminal Code and/or the Criminal Procedures Code of the proper *ex officio* authority for the police to commence criminal IPR investigations and cases.

- 5) Adoption (or the clarification, in Article 19, if it already exists) into the Customs Code of the proper *ex officio* authority for customs officials to seize material at the border and to commence criminal IPR investigations and cases.
- 6) Adoption of all the necessary provisions for Azerbaijan to fully implement the WCT and WPPT now that it will become a member of these treaties in 2006.
- 7) Creation of an Inter-Ministerial committee consisting of police, prosecutors, and customs officials charged with IPR enforcement, to coordinate enforcement activities.

Enforcement deficiencies: Azerbaijan is, at present, not providing “adequate and effective” enforcement as required under its bilateral and multilateral obligations. There is no meaningful police, customs, or prosecutorial activity, as required by the bilateral Trade Agreement and the WTO TRIPs Agreement. As noted, the administrative sanctions (Article 186-1) provide for fines of 20 times the minimum monthly wages for copyright infringements, but 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 in Azerbaijan imposing either an administrative sanction or a criminal penalty for an IPR violation, including a neighboring rights violation. Piracy rates for the recording industry are an estimated 80% overall, and over 90% for international repertoire. Trade losses continue to be estimated at over US\$15 million annually.

Cases regarding copyright violations brought on behalf of Azerbaijani rightholders are usually considered in civil courts. There were no reports of any IPR materials, including audio products, being seized during the past year. There are no reports of any optical disc plants operating in Azerbaijan. In March 2005, the U.S. Government and U.S. and European copyright rightholders’ organizations held a large training program for Azerbaijani law enforcement officials in an effort to improve enforcement.

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SPECIAL MENTION

BANGLADESH

IIPA specially mentions Bangladesh in the 2006 report to highlight that due to a total lack of enforcement, the overall piracy situation in Bangladesh has worsened over the last year. IIPA expresses grave concern over book piracy (photocopy and offset print piracy), the migration of two optical disc plants to Bangladesh from Pakistan, increasing CD-R “burning” piracy and audiocassette piracy, and theft of theatrical prints. The harm is not only to U.S. and other foreign right holders but is felt keenly by Bangladeshi nationals.¹ In 2006, IIPA urges the Government of Bangladesh to undertake the following:

- Implement an effective optical disc law including mandatory adoption of SID mastering (LBR) and mould codes for all optical disc production plants.
- Carry out inspections on the two known plants, seizing pirate discs, stampers, masters, and equipment, tools and materials (raw materials) used in unlicensed or infringing activity.
- Close down plants found to be engaged in piracy.
- Permit official plant visits by industry.
- Establish an anti-piracy force and take actions against CD-R “burning,” audiocassette piracy, book piracy (photocopy shops and offset print piracy), theft of theatrical prints, etc.

Book Piracy: The book publishing industry continues to face unchecked piracy in the form of offset print piracy and illegal commercial photocopying. Any book having the potential to sell more than 100 copies is subject to piracy levels nearing 100%. This is especially affecting the university textbook and English language teaching book markets. Also affected are medical books and other professional titles, computer books, trade fiction, dictionaries, etc. 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, Rajshahic and Khulna. Local pirate producers call their versions “local editions” and operate with impunity, destroying the market for legitimate producers.

Optical Disc Production in Bangladesh: Two pirate optical disc plants, with three lines each, are operational in Dhaka, Bangladesh, both of which are owned by Pakistanis who had operated optical disc plants there until the recent crackdown in Pakistan. It has been confirmed by different sources that one of the plants in Bangladesh has a mastering facility and intelligence indicates that they have the best technology available in the industry, meaning they can deliver orders in seven days and can produce about 40,000 discs per day (all formats); that plant can also run “burned” recordable discs (CD-R or DVD-R). The second plant has three production lines, can produce 40,000 discs per day, and is in the process of installing a DVD line imported from Germany. The second plant also has mastering capability. Industry knows where these plants are located and have informed the Bangladesh Government, but they have

¹ The local music companies are regularly complaining about growing piracy problems, especially the fact that music albums of the leading Bangladeshi music labels are being pirated in the outskirts of key urban areas.

done nothing. The massive pirate production has destroyed any domestic market (even local music, for example, is 85% pirate while international repertoire is virtually 100% pirate). It is estimated that both plants together are responsible for more than 80% of the available pirated 'pressed' discs in Bangladesh. As the local production of pirated discs by both plants in Bangladesh has increased during last six months, the import of large quantities of pirated discs from Pakistan, Malaysia and Singapore has decreased. In addition to factory produced discs, there is a growing number of master/slave (recordable) duplicators as well as PC-based duplication units available at many retail outlets (there are as many as 60 CD-R duplicating facilities operational in Bangladesh). It is confirmed by different sources that Bangladesh is importing about one million blank recordable discs from China and Taiwan per month. The price of a blank CD-R is 10 cents (US\$).

Theatrical Print Piracy: The motion picture industry has experienced repeated instances of stolen prints fraudulently cleared through Customs and the Board of Film Censors and then contracted for exhibition in Bangladesh. Right holders are unaware of the presence of these pirated theatrical prints unless they are reported by legitimate distributors in the affected territories.

Cable Piracy: Several cable television distributors in Bangladesh are showing international and Hindi movies on their channels without authorization. The Ministry of Information is including provisions in a new anti-piracy law to take action against such theft.

Copyright and Related Laws: Copyright protection is afforded under the Copyright Act, 2000.² The law is adequate for basic anti-piracy purposes, although it does not implement the WIPO "Internet" Treaties. The Ministry of Information has drafted a new anti-piracy law which currently sits with the Law Ministry and after internal approvals it will go to the Parliament for final approval. It is also believed, unfortunately, that pirate producers are lobbying the Government for exceptions that would have the effect of permitting pirate exports to neighboring markets such as India.

² Act No. 28 of 2000, Act for the Amendment and Assimilation of Copy Right Act, Bangladesh National Parliament Dhaka, 18 July, 2000/3 Shrabon, 1407.

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SPECIAL MENTION

BOSNIA AND HERZEGOVINA

Piracy: High levels of copyright piracy exist in Bosnia and Herzegovina. The motion picture industry reports that piracy in 2005 worsened. All forms of audiovisual piracy exist in the country, much of it involving “burned” discs. Pirated films – increasingly optical discs – are easily found in retail businesses and street markets. Similarly, most of music compact 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. 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) in the country. Specialized CD shops are invariably located in what are almost exclusively pirate music/games enclaves. The business software industry reports that no significant change in the nature and scope of piracy in 2005; the market continues to experience both commercial and personal use piracy. Unlicensed business software is often pre-installed on new PCs (also known as “hard disk loading”). Lowering business software piracy levels could significantly improve the local economy.¹ Pirated copies of media is easily transported to neighboring countries, including Croatia, Slovenia, and Serbia and Montenegro, and is also believed to be entering the wider European market. There is also concern about unauthorized retransmissions by cable of broadcast signals from neighboring Croatia and Serbia and Montenegro. In sum, the ready availability of cheap, illegal products has created a hostile environment that makes establishment of a legitimate market very difficult. Companies distributing in this territory find it almost impossible to remain competitive.

Enforcement problems: 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. The copyright law is adequate, but there are serious problems and deficiencies in enforcement. In spite of the successes of—and experience gained in—IP operations in December 2004 (referred to below), the recording industry is not aware of continued momentum. There is a lack of sufficient law enforcement expertise and training necessary to conduct raids, perform investigations, and commence cases against copyright infringers by the relevant agencies, including police, customs officials, prosecutors and courts.

¹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Bosnia's piracy rate (from 70% to 60%) would add \$53 million to its economy, create 235 more jobs, and increase local industry revenues by more than \$30 million. That, in turn, would generate an additional \$3 million in tax revenue to help the Bosnian government pay for public benefits and services. See <http://www.bsa.org/idcstudy/pdfs/Bosnia.pdf>.

The motion picture industry reports that there continued to be little enforcement in 2005. In 2005, following investigations by the local anti-piracy program, APAW, the police initiated criminal cases against 15 copyright infringers in Bosnia and Herzegovina, and administrative cases against an additional 25 infringers in Republika Srpska. These and prior displays of cooperation by the government, such as the destruction of over 100,000 pirate videocassettes in July 2002, have done little to reduce the massive levels of piracy throughout the country. At the end of 2004, the motion picture anti-piracy operation, APAW, succeeded in securing raids on over 100 locations (mostly flea markets) across Bosnia and Herzegovina by police, customs officers and trade inspectors. Over 100,000 pirate discs and cassettes were seized in the raids which also netted pirate duplication labs in the towns of Bosanski Samac and Bihac. In the town of Mostar alone, raids on four addresses resulted in the seizure of over 20,000 items, mostly movies. APAW's office in Bosnia and Herzegovina provided target information to the State Attorney's Office, and cooperated closely with it in the conduct of this major operation. The government needs to address this issue on a consistent basis if its plans to stabilize the economy and encourage foreign investment.

The Business Software Alliance (BSA) plans to commence an enforcement program in 2006, focusing on ensuring that computer resellers and businesses are in compliance with the copyright law. However, as always, the primary aim of the BSA program in a developing market such as Bosnia will be IPR education, awareness and training for local law enforcement.

Copyright Law: Although the basic copyright law (Law on Copyright and Related Rights, 2002) is generally adequate, there are a few deficiencies which require additional amendment.² Reports indicated that there is a team within the government working on a draft amendment to the existing law. The industries have no additional information on the scope of this process or its legislative timetable. Reports indicate that the European Union has granted funds for a new copyright law project and, within the next year or so, it is anticipated that a new law will be prepared and adopted. It is unclear whether the law will go through the regular parliamentary procedure or be imposed by the Office of the High Representative.

Trainings: The motion picture industry, through APAW, has conducted training seminars for judges and prosecutors. BSA believes that the main enforcement problem for software enforcement is the lack of knowledge and experience on the part of law enforcement. In the past, various seminars on intellectual property protection have been initiated, but they were often very general. BSA plans to organize trainings and seminars in 2006 to tackle this problem. The recording industry (IFPI) made presentations to an assembly of judges and prosecutors from around the country at a UNESCO/CISAC-sponsored IP seminar and training session in 2005. The seminar included a brief presentation by the prosecutors who had launched successful country-wide actions in December 2004.

² For example, deficiencies in the 2002 law include: the absence of clear protection for temporary copies; an overly 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.

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SPECIAL MENTION

BRUNEI

Piracy and Enforcement: While having one of the highest per capita incomes of any country in the developing world (purchasing power parity \$23,600 as of 2003), the small country is still dominated by piracy, as approximately 90-95% of the home video and music markets appear to be pirate. It is estimated there are between 75 and 200 retail shops selling pirated optical disc media in fixed locations throughout Brunei, though the largest are clustered primarily in the Bandar Seri Begawan metropolitan area. Forty-six of these outlets have been identified selling pirated audio products. DVDs appear to have been imported from Malaysia and Pakistan, while invariably all of the VCDs are locally burned CD-Rs. Certain titles are offered in the same shop in three different formats: cellophane sleeved CD-Rs for B\$3 (approximately US\$1.80), boxed DVD-5s offered for B\$8 (approximately US\$4.90) and high-quality deluxe packaged DVD-9s for B\$20 (approximately US\$12). New compression technologies have resulted in two-title (2-on-1), three-title (3-on-1), or even four-title (4-on-1) DVD compilations becoming more common.

While Brunei has an adequate copyright law for enforcement purposes (see below), the government's resources are limited, as there are presently only seven officers in the Commercial Crime Unit for all of Brunei. There is virtually no enforcement, and little political willingness in Brunei to conduct enforcement actions, despite the fact that the Police can technically take actions *ex officio* as well as *ex parte* under the law.¹ However, despite assurances of support, the Bruneian authorities have shown reluctance to undertake criminal enforcement actions even when complaints have been made. After extensive liaison with the Police and Attorney-General's Office throughout 2005, coordinated efforts by the motion picture and recorded music industries to undertake joint raids against identified targets were effectively compromised by unduly excessive delays and the suspected leakage of information to the targets, all of whom were either closed or cleared of pirate product by the time the warrants were effected.

Copyright Law and Related Issues: The Emergency Copyright Ordinance (2000). Copyright Ordinance, modeled on the 1988 UK Act, took effect May 2000, and addresses key WCT/ WPPT issues (e.g., it provides protection for temporary copies, a WIPO treaties-compatible definition of "communication to the public" including the "making available" right, and prohibitions against trafficking in circumvention devices which partially, but not fully, implements the WCT and WPPT requirements). The enforcement provisions, while not perfect, are adequate to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. Brunei has a censorship law

¹ There have been instances in which industry has tried but been thwarted in achieving positive enforcement action from the Bruneian authorities. Industry representatives have repeatedly been assured that raids could be taken *ex officio* and on an *ex parte* basis (without notice to the defendant), however, on certain occasions, it turned out the Police would not act without the laying of a complaint, and uncertainty expressed by authorities about whether raids can be taken on an *ex parte* basis, and delays and mistakes in warrants have led to unsuccessful actions (i.e., leaks occurred, and product had been cleared from the shelves before investigators arrived). These examples demonstrate a general lack of understanding about the laws and will on the part of Police to run successful enforcement in Brunei.

administered by the Board of Review which empowers the Board with *ex officio* authority to impose severe penalties against guilty offenders; however, the law is presently limited to films (and other works/performances) that are intended for public exhibition and does not presently extend to home video products.

Unfortunately, the Electronic Transactions Order, 2000 provides a near-total exemption from civil or criminal liability for a service provider that provides infringing materials over its services. Under § 10 of the Order, “A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on ... the infringement of any rights subsisting in or in relation to such material.” Section 10 leaves open the possibility of a contractual arrangement to take down infringing materials, or a “written law or by a court to remove, block or deny access to any material.” While the Internet is still in its relative infancy in Brunei, the Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to provide notice-and-takedown.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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SPECIAL MENTION

BURMA (MYANMAR)

Burma is mentioned in this report because, like its Southeast Asian neighbors, the potential for migration into its territory of sources of production of piracy, including optical disc plants (it has been reported that there may be one plant there with two production lines), gives rise to our collective concern. Burma has a 91-year-old, colonial-era copyright law that is largely ignored, so is essentially a “pirate’s haven.” Burma has been a WTO member since 1995, and a WIPO Member since 2001. It is not, however, a member of the Berne Convention, nor has it ratified or implemented the WIPO “Internet” Treaties. Burma’s WIPO membership makes it eligible for WIPO programs and support. UNESCO has gotten involved, holding a seminar on copyright protection in Burma in September 2005.¹ IIPA is interested to know the outcome of the UNESCO seminar and any other engagement on copyright by other countries/organizations.

¹ UNESCO (Asia/Pacific Cultural Centre for UNESCO) sponsored a workshop on copyright law from September 7 to 9, 2005, along with the Japan Copyright Office. In attendance were representatives of the Myanmar Writers and Journalists Association, the Australian Copyright Office, and others.

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SPECIAL MENTION

CAMBODIA

Cambodia is specially mentioned this year since it is still believed there is one optical disc plant in the capital, and due to its location, the potential for migration of more optical disc plants remains a possibility. Since Cambodia has virtually no legitimate demand, the existence of a plant that could produce millions of pirate optical discs is of great concern. The motion picture industry reports virtually 100% piracy in the home video market, and book publishers continue to report pirate product imports from Vietnam. Industry also believes that pirated optical discs, originating in China, are being transshipped via Cambodia, along with other contraband, into Thailand. The Government of Cambodia should be encouraged to devote resources at the border to stop pirate shipments, and should inspect any plants producing optical discs or other kinds of copyright content, and should shut down any found to be producing illegally.

Cambodia and the United States entered into the “U.S.-Cambodia Trade Relations & Intellectual Property Rights Agreement” in 1996. This Agreement obligated Cambodia “[t]o provide adequate and effective protection and enforcement of intellectual property rights,” and provided a point of attachment for U.S. works (sound recordings are defined as works, and includes strong substantive as well as enforcement obligations, as well as requiring Cambodia to join or at least give effect to major copyright treaties (the Berne Convention and Geneva “Phonograms” Convention) (and to make “best efforts to join by December 31, 1998).¹ Cambodia has not joined these treaties, but apparently in 2005, was making preparations to join the WIPO “Internet” Treaties, the WCT and WPPT, as well as the Berne Convention. Cambodia joined the WTO on October 13, 2004.

In order to join the WTO, and implementing many key obligations of the 1996 Agreement, Cambodia passed the Law on Copyrights and Related Rights (adopted by the National Assembly on January 21, 2003 and ratified by the Senate on February 13, 2003). The 2003 Law went far in implementing the requirements of the WCT and WPPT (e.g., it provides protection for temporary copies, a WIPO treaties-compatible definition of “communication to the public” including the “making available” right, and prohibitions against trafficking in circumvention devices which partially, but not fully, implements the WCT and WPPT requirements). The enforcement provisions, while not perfect, are adequate to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. The gap in the legal structure might be the absence of a regulation regarding optical disc plants, but the Law on Copyrights should be used to address illegal activities occurring in the one known plant, if any. Nonetheless, 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.

¹ At that time, Cambodia was also already a member of the Universal Copyright Convention (U.C.C.).

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SPECIAL MENTION

CYPRUS

Copyright Piracy: The motion picture industry reports that in Cyprus in 2005 it continued to suffer from a high level of pre-theatrical release piracy, with many pirate optical discs (VCDs, DVDs, and DVD-Rs) widely available at kiosks, video clubs, and souvenir shops. Optical piracy is devastating the Cypriot market, with pirate discs being “burned” (copied) from parallel imported DVDs (also openly sold in video shops) or from pirate VCDs and DVDs imported from the Far East. As has been the case over the last two years, there are about 150 souvenir shops where tourists in particular, 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” Law (which protects a limited number of titles in theatrical release against piracy by parallel video imports). The retail shops supply the various markets, with a destructive effect on legitimate optical disc/cassette sales, and are creating resulting in a decline in box office admissions. Pirate discs sold to tourists, who number around three million annually, are exported to their home countries (e.g., the UK, Scandinavian countries, Germany and Russia). The recording industry adds that CD-R piracy is the prevalent problem for the recording industry in Cyprus, and it has taken over from the imported pressed pirate discs. The tourist-targeted market is full of burned CD-Rs with illegal music content.

In addition to retail piracy, public performance piracy is a persistent problem, especially in bars, discotheques, and restaurants located in tourist areas. About 80 pubs and discos in the main tourist areas offer free showings of the latest titles as a bonus for customers. This affects not only the Cypriot market but also the home markets of the tourists who no longer need to view the films exhibited. The negative impact is exacerbated if the titles at issue are Zone 1 (programmed for playback and distribution in North America only) and have not yet opened theatrically in Cyprus. MPA also reports that 2005 saw a resurgence in broadcast television piracy on some parts of the island. One local TV station in Limassol is reportedly transmitting unauthorized films. Finally, due to its geographic location, Cyprus has the potential to become an important transshipment point for pirate product despite increased vigilance by Customs. Pirated entertainment software products are also widely available at kiosks, with the majority of the available pirated video games for play on consoles. Enforcement is improving somewhat but much more needs to be done.

Enforcement: MPA reports that its most significant enforcement problem in Cyprus over the last few years has been the low level of police activity to enforce audiovisual piracy under the Copyright Law or the Windows Law. The creation in June 2004 of an Intellectual Property Task Force at Police Headquarters has contributed to efforts to tackle piracy, but it is understaffed and its effectiveness leaves much room for improvement. CYFACT supported the creation of the Police Task Force, and continues to report targets to the Police and provides technical expertise to examine all products seized (this is required by the police). In addition, the

consistent understaffing of the Consumer Protection Unit of the Ministry of Commerce, Industry and Tourism continues to contribute to the absence of enforcement of the Trading Standards legislation. This could be a very effective tool in the war against piracy if used and staffed properly. The absence of specialized prosecutors also adds to the ineffectiveness of the judicial system, which continues to impose low penalties with little or no deterrent effect. Although the recent strengthening of criminal penalties should make copyright offenses a more serious matter, and should act as a significant deterrent, the results remain to be seen.

The local motion picture anti-piracy organization, CYFACT, reported 276 targets to the Police in 2005, and the Police conducted 56 raids resulting in the seizure of 109,249 pirate items (an exact breakdown is unknown as the Police refuse to give the information to CYFACT, arguing that they cannot give information to private bodies). In 2005, Customs seized 2,147 pirate DVDs. As far as court actions are concerned, although CYFACT believes that a number of cases have been filed in court under the new amended Copyright Law, the Police have not given them any information on these cases. CYFACT is aware of only four court decisions in 2005 (all under the old Law).

The business software industry reports that in 2005, the police conducted four software raids. The recording industry reports that it has a good working relationship with the local enforcement authorities.

Legislation: Cyprus remains a focus of attention especially with the advent of unification with the North, currently occupied by Turkey. There is a possibility of an amalgamized law, although no dates or official notification and reference have been made; this could spell major problems for IPR bodies. There is no recognition of copyright legislation in the Northern zones of Cyprus, and much will be needed to bring this part of the country in line with Europe, if unification occurs.

There were several legislative developments in 2005, as well as remaining concerns.

- WPPT: Cyprus acceded to the WIPO Performance and Phonograms Treaty (WPPT), effective December 2, 2005 (Cyprus joined the WIPO Copyright Treaty in 2003).
- EU Copyright Directive: In April 2004, amendments to the 1993 Copyright Law were integrated into the implementation of the EU Copyright Directive (Cyprus joined the EU on May 1, 2004). Prison terms were increased from up to 2 years to up to 3 years for a first offense, and from up to 3 years to up to 4 years for a second offense. Fines were increased from C£1,500 to C£30,000 (approximately US\$3,130-\$62,655) for a first offense and from C£2,000 to C£35,000 (approximately US\$4,170-\$72,990) for a second offense. In addition to the Copyright Law amendments, the Evidence Law was also amended to allow for hearsay evidence. However, as it is difficult to prove ownership of copyrights, the Copyright Law should be further amended to reverse the burden of proof, to improve and clarify aspects of the legal protection for technological measures, reproduction rights, and to provide for notice and takedown procedures. The act of circumvention of technological protection measures needs to be clearly prohibited.

In addition, the recording industry remains concerned that the Cypriot Copyright Law is applied by the judiciary in a way which raises difficult barriers to the enforcement of phonogram producers' rights. Cumbersome burden-of-proof rules as to copyright ownership makes the initiation of legal proceedings against infringers very difficult. The Cyprus Copyright Law is being interpreted in a way that requires rights owners to prove their

ownership of 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. 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. Cyprus should effectively implement the EU Enforcement Directive by April 29, 2006.

Trainings: During 2005, CYFACT gave or participated in six training seminars for police officers at the Police Academy on the Copyright Law, Windows Legislation and pirate product identification (in January, March, May, June, and December). On November 10, 2005, the Cyprus American Business Association (CyABA) and the U.S. Embassy in Nicosia organized a workshop and roundtable discussion on the enforcement of IP rights in Cyprus which brought together customs officers for EU member nations and several North African countries. The workshop provided a forum for the discussion of IPR issues between the various official agencies dealing with IPR (such as the Police, the Department of Customs, the Consumer Protection Division, the Office of the Attorney General and the Office of the Official Receiver and Registrar) and private sector representatives, both local and international. Representatives of the film, software, music and merchandise industries voiced their concerns on IP enforcement in a constructive and informal way. The discussion focused on practical matters such as ways of making enforcement more effective, and resulted in viable suggestions to enhance these efforts. The event emphasized the importance of better communication between the government and private sector in combating piracy. The workshop featured speakers from CYFACT, WIPO, the BSA, and the IFPI. CyABA operates under the auspices of the Cyprus Chamber of Commerce and Industry (CCI) and continues to emphasize local business support and benefits for stronger IPR protection. BSA, IFPI and MPA provided training to the IPR Office personnel. BSA also coordinated its System Builder raids with the IPR office. BSA is working with the IPR Office to give improve its visibility as well.

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SPECIAL MENTION

CZECH REPUBLIC

Piracy: Music and record piracy in the Czech Republic remains at unacceptably high levels—one in two sound recordings sold is illegal. The main problems frustrating the legitimate market are CD-R piracy and illegal file-sharing, poor border enforcement, delays in criminal enforcement proceedings and lingering deficiencies in the copyright law. The once strong market has been shattered due to massive CD-R piracy that now accounts for 93% of the overall physical music piracy problem in the Czech Republic. According to the recording industry's enforcement statistics, nearly 1 million burned CD-Rs (950,000 copies) with illegal content were seized. The Czech legitimate music market in 2005 continued to decline an estimated 17% in terms of value. The recording industry was further shattered by the so-called hotel exception in the Copyright Law, in force in February 2005, which will bring an estimated 20% decrease also in royalty income. The results of investigations and police raids in Western Bohemia, in particular the Cheb district, confirm that the large-scale CD-R burning is organized by Asian-based and other organized crime syndicates. As this area borders with Austria and Germany, this illegal activity has a direct impact on the music markets there as well. Most of the content on burned CD-Rs is targeted to German speaking nationals. The most serious problem remains in the district of Cheb, where police and Ministry of Interior officials are promising continuous investigations of illegal activities. However, while meaningful enforcement is being pledged, the recording industry calls for more effective intervention. The other major and growing problem is illegal file-sharing in unauthorized peer-to-peer (P2P) services. In January 2006, the Police Department for Internet and Computer Crime in co-operation with the local recording industry disclosed the first ever case against a large scale illegal uploader.

The entertainment software industry reports that the level of piracy for its products continues to be problematic, with little change from the previous year. Pirated console-based entertainment software products continue to be shipped from Russia. Local CD-R burning of pirated materials is also prevalent in the country. The level of piracy for counterfeit and pirated cartridge-based games increased remained high, 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. Internet piracy in the country remains a growing concern. Entertainment software companies have enjoyed good cooperation with the authorities, and have had some cases successfully resolved. ESA member companies also provided Customs trainings in 2005 which appeared to be well received. However, an ESA member company also reports that problems exist with respect to ES Council Regulation No. 1383/2003. Under the regulation, a right holder must, within three (3) business days, send a statement to the Customs authorities confirming that the goods seized are indeed pirate. In addition, the right holder must, within 10 days, obtain written consent for the destruction of the goods from the importer, or choose to file a legal action. If these deadlines are not met, the shipment must be released into the market. This regulation and the deadlines it imposes causes a significant burden to right holders as a lawsuit must be filed to prevent the counterfeit goods

from entering the market. The importers are not fazed by the prospect of a case and simply continue to engage in their illegal activity. The regulation does more harm to the interests of right holders and it is necessary that it be reformed so more adequately protect right holder interest in keeping counterfeit products from entering the market.

MPA reports that optical disc piracy is the main problem facing the film industry in the Czech Republic. Increasing numbers of pirate optical discs are distributed via the Internet, street markets or newspaper advertisements. Large city street markets are popular for distribution of pirate DVD-Rs. Despite increasing numbers of raids and seizures in these markets, this form of piracy is remaining stable. Along with Czech-language pirate product available throughout the Czech Republic, pirate optical discs aimed at German language foreigners are openly seen in the street markets along the German and Austrian borders. Internet hard goods piracy is growing, mainly through auction and advertisement sites. The popularity of Czech titles in P2P swapping and DVD-R distribution has led to the growth of camcorder piracy. The cooperation of enforcement authorities (police, the Czech Trade Inspection Bureau and Customs) with the local audiovisual anti-piracy organization (CPU) is reasonably satisfactory in most cases. The cooperation of enforcement authorities with each other is gradually developing, but is not satisfactory. In addition, in the judicial arena, the very low sanctions, such as the minimum sentences given to street vendors, continue to be a significant obstacle in dealing effectively with piracy, despite the availability of deterrent sentencing possibilities (up to five years' imprisonment).

Optical disc production: A continuing problem in the Czech Republic is the overproduction of optical media (CDs, CD-Rs, and DVDs). In 2005, there were four known operating CD plants in the Czech Republic, with an unknown number of lines.

Enforcement: The recording industry reports that 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) in music cases that there is no deterrent effect. MPAA reports that it has conducted numerous raids on final vendors and several raids on producers and distributors and has seized a large number of infringing goods, and yet this has not diminished the audiovisual piracy problem. In the first three quarters of 2005, the audiovisual industry anti-piracy organization has already seized almost 320,000 CD-Rs.

Entertainment software companies report that the number of counterfeit products seized in the Czech Republic increased significantly in 2005. In 2004, there were 13 seizure actions and approximately 44,000 counterfeit goods seized. In 2005, 26 actions resulted in the seizure of an estimated 78,000 counterfeit products. These goods were primarily components for cartridge-based goods intended for assembly in country, imported from Asia with many of the importers Vietnamese.

On a positive note, the business software industry reports continuing good cooperation with Czech authorities in 2005, especially with developing systems to monitor governmental compliance with its commitment to use only legal copies of software. The courts continue to issue fairly strong court decisions in criminal software piracy cases. Lowering business software piracy rates in the Czech Republic could improve the local economy.¹

¹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing](#)

The Czech government should take the following steps to improve the efficacy of criminal enforcement: (1) demonstrate political will, including by issuing public announcements and internal government orders, to make effective enforcement of IPR laws a priority; (2) have the Interior Ministry take swift action against the omnipresent pirate activities, especially in the Cheb district; (3) adopt optical media regulations to control optical media production and distribution; (4) strengthen border enforcement to stop importation and transshipment of pirated goods, including optical media product; (5) improve the speed of criminal enforcement (at the police investigation, prosecutorial and judicial levels); and (6) 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.

Copyright law: The Czech Copyright Act of 2000 is currently being discussed in the Parliament in order to complete the implementation of the EU Copyright Directive and the EU Enforcement Directive. The music and film industries raised joint concerns over the drafting process and the quality and final text of the amendments yet remain unclear. In particular, the two industries raised the following concerns:

- The so-called hotel rooms exception to the communication to the public right that exempts hotel rooms and health institutions from the obligation to pay royalties for the use of music (Article 23)
- Private copying exception and intervention to technical protection measures (Articles 30 and 43)
- Over-regulation of the collecting societies' activities.

The draft amendments were expected to pass its third (formal) reading on February 8, 2006, and the amendments are expected to be in force on April 1, 2006.

Criminal code and other laws: Under the Czech Criminal Code, copyright infringement can be penalized with up to five years imprisonment and a fine of five million koruna (US\$125,000). Amendments to the Consumer Protection Act and the Trade Inspection Act that took effect on September 1, 2000 also give wide authority to the Czech Trade Inspection Bureau to fight copyright and trademark infringement. The Trade Inspection Bureau's team of "examiners" is empowered to seize suspect goods and to destroy them if they are determined to be unauthorized copies or counterfeits. Fines of up to two million koruna (US\$50,000) can also be imposed. In addition, the new draft amendment to the Copyright Act (above) reportedly includes higher penalties for copyright infringement handled out of criminal prosecution (from 15,000 koruna to 150,000 koruna). Despite this good legal framework, there has been no effective use of it to impose deterrence in the marketplace.

Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in the Czech Republic's piracy rate (from 41% to 31%) could add \$950 million to its economy, increase local industry revenues by more than \$700 million, and pump an additional \$96 million into Czech Republic's tax coffers. The 10-point reduction could also create 2,900 new IT jobs. See http://www.bsa.org/idcstudy/pdfs/Czech_Republic.pdf.

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SPECIAL MENTION

ESTONIA

Internet Piracy: During 2005, the growth of Internet piracy, especially via File Transfer Protocol (FTP) servers and peer-to-peer (P2P) systems, quickly became a predominant piracy concern in Estonia. A 2004 Memorandum of Understanding between the local anti-piracy organization (EOCP) and Estonian Internet Service Providers (ISPs) has been used to enable the removal of infringing materials. In 2004, this memorandum was updated to allow removal of illegal copyright material from the public FTP servers of major ISPs. The MOU does not cover numerous local ISPs offering the FTP server service to swap music, film and software files. EOCP are the Business Software Alliance (BSA) will be addressing this issue with local Estonian ISPs. Despite some occasional cooperation, ISP cooperation remains generally problematic, with little or no response to take-down requests and no cooperation for information. For example, on March 23, 2005, EOCP and the Economic Police raided a private apartment in Narva and confiscated an FTP server belonging to and administered by a local ISP; the server contained hundreds of music and film files.

Optical disc piracy: Optical disc piracy throughout Estonia remains a serious problem. The Estonian market remains under threat from pirate optical disc product manufactured in other countries, notably Russia. As a general trend, however, the import of pirate goods is decreasing due to the growth of locally produced pirate CD-Rs and DVD-Rs. Retail piracy exists, but most pirates distribute their product at street markets, through mail order, and over the Internet. The main piracy centers are located in Tallinn and in towns in the northeast. The pirate goods in Tallinn harbor tourists' shopping centers continue to contribute to a significant suitcase piracy problem from Estonia to Finland. On June 30, 2005, after several months of work and weeks of surveillance, the Economic Crime Division of the Northern Police Prefecture discovered a major pirate warehouse containing over 10,000 discs (mainly DVDs and PlayStation® games). They also found evidence indicating that the warehouse had once housed a CD-R lab. One person was arrested. The distribution system operated by the pirates was well organized, with people placing orders by e-mail for delivery by courier. In addition, MPA reports that parallel imports also remain a problem in Eastern Estonia due to the border trade with Russia. The implementation of parallel import provisions into the Customs Act is urgently needed.

In 2005, Estonia received two optical disc plants. One factory is located in Taru city (one CD/DVD line) and the other plant, a subsidiary to the Lithuanian BOD plant, is in Tallinn (one CD/DVD line). This development strongly calls for the regulation of the optical disc production, as the government control in this field is almost impossible. 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.

Other forms of piracy: The Business Software Alliance (BSA) continues to report that although end-user piracy continues to cause most damage to the legitimate software sales

market, Internet piracy, in particular file transfer protocol/FTP and P2P piracy, grew the most last year. According to BSA, reducing the business software piracy levels in Estonia could generate significant contributions to the Estonian economy.¹ MPA reports that cable and satellite television piracy are also present in Estonia. Significant anecdotal evidence suggests that a considerable number of Swedish and Finnish visitors to Estonia acquire illegally copied music, films and software for their own use. Entertainment software companies report that the piracy situation is improving, particularly with respect to piracy at Internet cafés, with many becoming legitimately licensed by publishers.

Criminal Enforcement: Unchanged from prior years, the Estonian government attention to intellectual property crime failed in 2005 to be sufficient to deal effectively with piracy. IP matters simply are not a top priority for the local police or customs. The main problem involves a lack of customs' investigation and surveillance work, which is essential to stop smuggling of pirate products over the border by a routine border control. This unfortunate situation continues despite regular meetings between EOCP and the Customs IP contacts: (a) to exchange information, (b) to introduce to the Customs the information obtained from the police investigations, (c) to discuss any obstacles occurred in IPR issues is Customs work, and (d) to provide IPR training to the customs officers as often as required. The copyright industries continue to urge Estonian Customs to exercise their existing *ex officio* powers in order to stem the flow of counterfeit and pirate product into Estonia from Russia and Latvia.

The police lack the will and resources to investigate piracy, especially duplication labs and warehouses, although an April 2003 agreement between rightsholders and police was aimed at securing improved assistance from police. Despite the fact that specialized IP units have been formed in different parts of Estonia, and different trainings and seminars have been provided to those units, the progress of copyright cases still remains slow, primarily due to unfamiliarity on the part of police and prosecutors with the subject matter. Evidentiary burdens, lack of police resources and, most particularly, significant staff turnover among police officers block effective enforcement because they present significant hurdles to cases moving forward. Prosecutors' offices have been informed about these delays, and have sought to pressure police to accelerate the progress of investigations. Finally, Estonian courts generally only impose minimum sentences for intellectual property crime, despite the new Penal Law and Misdemeanor Act of 2002, which increased maximum penalties. The fines in misdemeanor cases remain low at around \$400. For example, on November 23, 2005, one individual was sentenced in a misdemeanor case to a fine of 6,000 kroons (US\$460) for trading over 700 pirate copies of music.

BSA reports that although its relationships with prosecutors have increased and been improved (primarily as a result of trainings conducted and sponsored by BSA), contacts with judges have significantly decreased. BSA reports that in 2005, 20 criminal raids involving unauthorized software took place, although BSA is not aware of any customs seizures taking place in relation to transshipment matters.

¹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Estonia.pdf), using 2004 data, found the following: by cutting the country's software piracy rate from 55% to 45%, Estonia could add nearly \$70 million to its economy, create roughly 330 technology jobs, increase local industry revenues by \$44 million, and generate an additional \$12 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Estonia.pdf>.

Rightholders contemplating legal action against Internet pirates in Estonia faced difficulties in 2005 in identifying infringers due to restrictions imposed by the Telecommunications Law. Rightholders cannot obtain from ISPs, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. ISPs may, however, be required to provide such information in both civil and criminal proceedings.

WIPO Treaties: The Ministry of Culture has prepared and sent for the Government approval the draft law ratifying the two 1996 WIPO Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The proceedings in the Parliament should commence in the first quarter of 2006.

Civil Code: A new Code of Civil Procedure passed Parliament in April 2005 and entered into force in January 2006. Amendments to this code included implementation of the civil search and seizure remedy, a problem that Estonia had been almost a decade late in resolving. These amendments also implemented several provisions of the EU Enforcement Directive. However, concerns remain as to the availability of interlocutory injunctions against Internet service providers, and whether the proposals are compatible with Articles 9 and 11 of the Enforcement Directive.

Criminal Code: Reports also indicate the Justice Ministry is preparing amendments to the Criminal Code (we do not have further details on this development).

Trainings: BSA and EOCP offer trainings each year to Estonian enforcement agencies and prosecutors, although it appears that the appetite for such trainings is diminishing. Unfortunately, Estonian judges have been disinclined to participate in BSA training events.

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SPECIAL MENTION

HONG KONG

IIPA recommends that USTR monitor developments in Hong Kong during 2006, with respect to the issues discussed in this Special Mention report. Though not recommending that Hong Kong be included on any of the Special 301 lists at this time, IIPA urges the U.S. government to conduct an out-of-cycle review at an appropriate point to determine whether industry's concerns with current deficiencies and proposed changes in copyright legislation are being adequately addressed.

PIRACY AND ENFORCEMENT ISSUES

Internet Piracy: Internet piracy in Hong Kong causes increasing harm to right holders, primarily due to the explosion in use of the Internet for illegal peer-to-peer (P2P) file sharing on services located both in Hong Kong and abroad.¹ Two cases are bright spots in otherwise murky legal waters. In one, decided in 2005, a man who uploaded three motion pictures using BitTorrent was convicted of copyright infringement;² in the second, in January 2006, the court ordered four Internet service providers to identify 22 people who uploaded music illegally.³ The law should be amended to clarify the scope of secondary liability as to Internet service providers (ISPs), and should include a statutory notice and takedown regime which is effective and provides incentives for ISPs to comply, both with respect to pirate content residing on servers (e.g., stored on websites) as well as in the P2P environment.

The problem of so-called "offline server" piracy of entertainment software is also of increasing concern in the territory. An offline server essentially makes a publisher's online game readily available without authority from the legitimate publisher, and without adherence to terms or conditions set forth in a licensing agreement. The offline server "mirrors" the legitimate servers operated by entertainment software companies to run their online games. This not only diverts traffic and subscription revenue from the legitimate site, but also allows the play of pirated games, since the off-line server lacks an authentication or verification process at the server level (i.e., to verify that the game software being used is not a pirated copy).

Optical Disc Piracy and Proposal to Alleviate SID Code Requirement: There are currently 106 optical disc production plants with 817 production lines in the Hong Kong Special Administrative Region (HKSAR) (with a production capacity of over 2.8 billion discs per year). It

¹ The Hong Kong market for recorded music declined once again due to Internet piracy. Estimated losses due to P2P piracy in Hong Kong are HK\$1 billion (US\$ 129 million) (based on estimated retail value).

² Agence France Presse, Hong Kong man jailed three months in landmark Web piracy case, November 7, 2005 (reporting that a Hong Kong court sentenced a man to three months in prison on November 7, 2005 in what is believed to be the first jail sentence for distributing movie files over the BitTorrent network). The Magistrate, Colin Mackintosh, noted, "[t]he message has to be sent out by courts that the distribution of infringing copies, particularly by seeding films onto the Internet, will not be treated leniently." The defendant has since appealed both the conviction and the sentence and the appeal is pending.

³ Min Lee, *Hong Kong Court Orders Internet Providers to Reveal 22 People Who Uploaded Music*, Associated Press Newswires, January 26, 2006.

is suspected that some Hong Kong plants are once again involved in pirate manufacturing for export. IIPA is concerned by the very slow and bureaucratic response by the Customs authority to individual complaints. Further, the recent proposal by the Customs and Excise Department (C&E) to remove the requirement to place SID Code on recordable optical discs gives rise to concerns that registered factories may set aside a separate line for burning pirated discs (with no SID codes) under the guise that the line is used for making blank discs.

Other Piracy and Enforcement Concerns: 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\$59 million in losses incurred by the software industry in 2005, with a software piracy rate of 51%.⁴ Since the enactment of 2001 amendments to the Copyright ordinance, C&E has carried out a number of end-user raids against those suspected of using software illegally. However, 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.

As reported in past years, entertainment software publishers continue to 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 proposal to designate foreign copyright registries (including the U.S. Copyright Office registry) under Section 121 remains pending. 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. IIPA hopes that the Hong Kong government will soon adopt the measures necessary to recognize foreign copyright registries for this purpose.

The book publishing industry reports that C&E has been quite responsive to its complaints about illegal photocopying during 2005. Cooperation has been at an all-time high and the authorities are to be commended for their efforts. The industry remains concerned that the enforcement successes of recent years have resulted in a change in mode of operation for the pirate entities. More and more photocopy shops are moving underground or copying at night, making their activities difficult to detect. The industry needs the continued cooperation of C&E in changing enforcement tactics to tackle these new iterations of the problem.

LEGISLATIVE ISSUES

Proposed Copyright Legislation—A Step Backward: Two legislative reform processes are currently underway in Hong Kong. The Commerce, Industry and Technology Bureau (CITB) published a document on November 15, 2005 containing proposals that would

⁴ During the same time period, and while Hong Kong's piracy rate saw no improvement, other markets in the region reduced their software piracy rates, including Mainland China, Singapore, South Korea, Malaysia and Philippines. This is a serious and ongoing problem and puts Hong Kong well behind other advanced economies in the Asia Pacific. A study released by BSA and IDC on December 8, 2005 found that a 10-point reduction in Hong Kong's current piracy rate would yield \$650 million to its economy and create 4,600 high-wage technology jobs.

set Hong Kong's copyright law and right holders back for years to come.⁵ IIPA notes the incongruity between these proposals, virtually all of which weaken copyright, and the CITB's prior recommendations, as well as Hong Kong's government policy of promoting creative industry. Further, IIPA is perplexed that in almost every case, recommendations made by right holders have gone unheeded in this process. We strongly recommend that the HKSAR government reconsider the various right holder comments submitted throughout 2005, and re-evaluate the proposed changes in light of international standards of the TRIPS Agreement and the Berne Convention, agreements to which Hong Kong is a party.

The following explains many of the chief CITB proposals in the November 2005 "Refined Proposals" document that IIPA finds problematic.

- **Failure to criminalize possession of pirated copies of published works for use in a business in Hong Kong:** The paper confirms that possession of pirated copies of published works for use in a business in Hong Kong will never attract criminal liability. The Government categorically states that such conduct is never "willful copyright piracy on a commercial scale." We believe the discrimination between subject matter in this instance is unwarranted, and that "commercial scale" ought to apply to a commercial enterprise that builds its business upon using infringing copies of publications as with other subject matter; to the extent our belief is correct, the CITB proposal will codify a TRIPS Article 61 violation.⁶
- **New criminal liability for copying/distribution of copyright infringing printed works:** CITB proposes creation of a "new business end-user criminal offence for significant infringements involving copying with a view to distributing or distributing infringing copies of copyright works published in four types of printed works, i.e. newspapers, magazines, periodicals and books, in the course of and for the purpose of business." However, this new proposed liability is fraught with weaknesses:
 - The proposed prohibition is currently limited to "printed versions" (though there has been some discussion of including "intranet" activities as well). This clearly violates the Hong Kong Government's own stated principal of technological neutrality;⁷ it makes no sense to exclude from criminal liability massive copying of online and digitized formats (e.g., CD-ROMs).
 - A "safe harbor" would exempt from criminal liability far too broad a range of activities.⁸ Since even a person engaging in commercial activities can qualify for the Hong Kong safe harbor,⁹ the retail value threshold should be set much lower than the proposed

⁵ This document was a follow-up to a consultation document released in December 2004, and an announcement of proposed amendments in June 2005. Many of IIPA's members, affiliates, or related organizations in Hong Kong submitted comments in all three processes. The November 2005 document can be found at <http://www.info.gov.hk/gia/general/200511/10/P200511100123.htm>.

⁶ Wholly apart from the Article 61 question, the reason for according journals, reference materials, original databases, and other literary works second class treatment under the copyright law (compared to the treatment of the four "favored classes" of works) has never been satisfactorily explained.

⁷ As CITB Secretary Tsang stated at the APEC Ministerial in Korea, "[w]e would like to reiterate that the Copyright Ordinance is technology-neutral in that protection conferred on copyright works as well as the copyright exemption provisions should apply to works stored in both physical and electronic media."

⁸ The safe harbor as to books (including academic journals) provides, among other things, that there is no criminal liability if "the total retail value of the infringing copies made for distribution or distributed within a 180-day period does not exceed \$8,000, assuming that one infringing copy of more than 15% of the number of pages of the book concerned (a qualifying infringing copy) only will count for the purpose of calculating the retail value parameter."

⁹ It appears the Government may have been looking to the U.S. threshold in 17 USC § 506(a)(1)(B) (US\$1,000) but may have overlooked the fact that that section applies only when the case involves an infringement that is carried out for a purpose other than commercial advantage or private financial gain. If either of these motivations is present (as is the case with the activities covered by the Hong Kong safe harbor proposed) the US\$1,000 retail value threshold

HK\$8000 (US\$1031) per 180-day period, and all such copying that is more than *de minimis* should count against that threshold.

- There is no legitimate reason to exclude all non-profit and state-subsidized schools from the new prohibition, granting blanket immunity from criminal liability to any school that decides to reduce its book acquisition budget to zero and simply copies all the books it needs for all purposes, instructional and otherwise.
- **CITB proposes to update the protection for technological measures under existing law, but its proposal is flawed.**
 - The proposal would exclude civil liability for persons dealing with circumvention devices or committing the act of circumvention unless they have knowledge that they are enabling or facilitating copyright infringement. This would significantly undermine the effectiveness of the prohibition. Additionally, inclusion of the phrase “with a view to inducing, enabling, facilitating or concealing an infringement of copyright” could jeopardize the CITB’s stated goal of prohibiting the circumvention of both access and copy controls. To ensure proper coverage, the requirements for knowledge of infringement for both the act of circumvention and the dealing with circumvention devices should be deleted.
 - The proposed exclusion from criminal liability for commercial dealing in “circumvention devices controlling market segmentation through area code restriction” (regional coding) would make the criminal provision being proposed virtually meaningless for the motion picture industry (including Hong Kong’s own vibrant industry) and the entertainment software industry. Because of the integration of region coding with other access controls, and because circumvention devices for the former generally defeat the latter as well, this carve-out of certain “disfavored” access controls from criminal liability would have a devastating practical impact on enforcement. The exclusion could also suffer from potential overbreadth (since any defendant could challenge any technological protection measures as capable of segmenting markets), and would significantly undermine Hong Kong’s attempt to fully implement the WIPO Treaties.
 - The prohibition against dealing or trafficking in circumvention devices should also extend to dealing in “software codes” designed to bypass online authentication keys that a publisher of an online game may implement to ensure that the game can only be played using legitimate or original entertainment software.
 - Finally, IIPA is concerned that Hong Kong is considering proposals to introduce broad exemptions to the prohibitions on circumvention of technological protection measures and dealing with circumvention devices. The Government must ensure that any exceptions to technological measures protection are narrow enough to preserve the adequacy and effectiveness of the prohibitions.
- **Reduction of period during which one can be criminally liable for parallel importing:** The proposal would reduce the period during which parallel imports would attract criminal liability to 9 months after public release (from 18 months). This starkly contrasts with the Government’s prior recommendation that the Legislature maintain the status quo with respect to the existing 18 month restriction.¹⁰ IIPA strongly objects to

does not apply, and a willful infringement involving even a single copy with a value of less than US\$1,000 can attract criminal liability (17 USC § 506(a)(1)(A)).

¹⁰ In a letter sent to industry representatives on June 17, 2005 and in its Preliminary Proposals on Various Copyright-Related Issues offered to the Legislative Council’s Panel on Commerce and Industry for deliberation on June 21, 2005 the CITB stated definitively “On balance, we propose to retain all the existing restrictions on parallel imports of

this weakening of protection by shortening the period in which legitimate right holders may enjoy their exclusive rights in Hong Kong.

- **Introduction of broad exceptions for use in educational establishments and governmental bodies.** CITB decided to reject proposals for a general fair use regime along the lines of U.S. law, but proposed a similar non-exhaustive exception for use of works for education and for “urgent business” of governmental bodies. In general, IIPA is concerned that any broadening of existing exemptions could result in encouraging unauthorized uses which are not relevant to the course of study in educational establishments. Hong Kong authorities should carefully consider any expansion of educational exceptions and ensure that any such exception introduced may be invoked only in certain limited cases which comply with the TRIPS agreement three-step test. Specifically, IIPA is especially concerned about the proposed repeal of Section 45(2), which limits the scope of exceptions when a licensing scheme is in place. Repealing this provision undercuts the voluntary licensing scheme for academic materials that Hong Kong has worked so hard to build in recent years. With regard to the governmental bodies exemption, IIPA is concerned that what constitutes “urgent business” for purposes of this provision is dangerously unclear. Hong Kong must ensure that any such exception does not have a prejudicial impact on existing markets for copyrighted materials among governmental bodies.

“Digital Environment” Consultation: CITB is also undertaking a separate, second consultation exercise concerning “Copyright Protection in the Digital Environment.” The new consultation takes a broader approach and CITB has asked about the following: 1) whether a technologically neutral right of communication should be introduced for copyright owners; 2) how to facilitate copyright owners to take civil actions against infringing activities on the Internet; 3) whether statutory damages for civil infringements should be introduced; and 4) the role of Internet service providers in the fight against Internet piracy. IIPA commends the Government for looking at these crucial issues for the future of copyright protection in Hong Kong but is concerned that these issues are being considered on a separate, slower track from the problematic proposed amendments summarized above.

Failure to Criminalize Pay TV Theft: Local television industry representatives have complained about the lack of sufficient criminal penalties under the Copyright and Broadcast Ordinances against pay television signal piracy. Present remedies provide no liability against so-called overspill signals accessed through unauthorized decoders. Although trafficking in such decoders is subject to criminal penalties, a criminal prohibition is needed against the possession and use of such devices in homes or businesses.

Copyright Term Extension: Hong Kong should bring its Copyright Ordinance into line with the growing regional and global trend by enacting a 20-year extension of the term of copyright protection.

copyright works.” This recommendation was supported by interested parties that testified before the Legislative Council on July 19, 2005. The subsequent reversal in the government’s position was unexpected and difficult to justify.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

JAPAN

IIPA accords Special Mention to Japan in this report to call attention to several areas in which Japan is lagging in its efforts to keep its Copyright Law up to date with 21st century realities. We urge USTR to escalate its bilateral engagement with Japan in order to encourage positive action in the following areas, among others:

- Statutory damages: Japan's own IP strategy plan gave high priority to reform of damages provisions for its intellectual property laws, but key changes are yet to be made. We urge Japan to move more quickly to implement a system of pre-set statutory damages for copyright infringement, at levels sufficient to achieve deterrence.
- Copyright term extension: Japan recently increased the term of copyright protection, but only for cinematographic works. It should now follow through and get in step with most other OECD members by extending the term for all copyrighted works, as well as for producers of phonograms and performers.
- Technical protection measures: Current laws (the Copyright Act and the Anti-Unfair Competition Law) do not fully meet Japan's obligations under the WIPO Internet treaties. For instance, there are no criminal remedies for trafficking in tools to circumvent access controls, and no civil remedies for dealing in copy control devices or services.
- Private use exception: The broad provision of Japanese copyright law on this topic (Article 30(i)) must be narrowed to take into account the ability of home users to make digital copies that can be easily re-disseminated, such as over peer-to-peer networks. The status quo threatens to undermine the prohibition on unauthorized uploads (the "making transmittable" right).
- End-user infringement: Article 113 of the copyright law should be re-examined to ensure that it covers all knowing unauthorized use of software programs, and possession of infringing copies with intent to violate any exclusive right of copyright owners.
- Exceptions to protection: Japan should do more to clarify the applicability of its expanded education exceptions (Article 35) to textbooks and course packs, and should build in technological safeguards to reduce the risk of infringement in the distance learning environment. It should also further assess the impact of proposed new exceptions that could allow widespread unauthorized copying of scientific, technical and medical publications by pharmaceutical companies,

patent applicants, and others. In both these areas, Japan should ensure that current and proposed exceptions do not undermine or discourage licensing arrangements and that they meet international standards.

- Rental right: The existing exclusive rental right for sound recordings is limited to one year, and thereafter becomes a remuneration right. Japan should finally modify its law to be consistent with that of other nations by providing an exclusive rental right for the full term of protection.
- Compulsory licensing: Press reports indicate that Japan is considering introducing a form of compulsory licensing provisions for retransmission of television broadcasts onto mobile telephones and other technology. This proposal must be closely monitored to ensure compatibility with applicable provisions of the Berne Convention and WIPO Internet Treaties.
- Anti-camcording legislation: Master copies for the vast majority of pirate audio-visual materials are stolen right off the screen by professional camcorder pirates who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged, and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and in night markets around the world well before their international debuts. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. We urge the Government of Japan to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

KENYA

Kenya is specially mentioned in the 2006 report because of rampant piracy for all sectors, and a Kenyan Government system that is unwilling to address the problem.

Priority Actions for 2006:

- **Activate the Kenyan Copyright Board and Provide Dedicated Staff for Board:** The Copyright Act calls for staff, including inspectors, to be assigned to copyright under the Copyright Board. Despite having been established in 2003, there are still no offices and no staff.
- **Shut Down Street Vendors and “Exhibition Stalls” Selling Pirate Goods:** Street vendors and exhibition stalls sell nothing but pirate product in Kenya. The people who run these pirate sales points are not registered and do not pay value-added-tax (VAT) and should be shut down. No licenses should ever be issued to them to sell pre-recorded music and films. They may sell other goods – just not pirate copyright goods.
- **Ban Importation of Copyright Goods Except from Right Holders:** Pirate imports have been flooding the Kenyan market from Pakistan (although this may decrease due to enforcement there in 2005), Uganda, and Tanzania (including Zanzibar). Legitimate right holders have very few legal representatives.¹ Customs should not allow product in that is not legitimate and can easily ascertain in most instances whether the imports are coming from a legitimate source or are authorized.
- **Seize and Destroy All Pirate Product Within the Country:** Market sweeps should be run and pirate product seized and destroyed. If the products found do not show country of origin, or manufacturer, as required under the Trade Descriptions Act, or are not properly labeled, as required under the Standards Act, they should be presumed pirate pending a showing of proof to the contrary. There are no licensed VCDs in Kenya of U.S. content, nor are there licensed compressed formats (e.g., five films on one disc), thus any and all such discs should be seized and destroyed.
- **Enforce Against Duplicating Facilities and Internet Cafés Using Unlicensed Product or Providing Piracy Services:** There are numerous back street duplicating facilities, not to mention the proliferating number of Internet cafés, offering to reproduce pre-recorded music (and films) as a commercial business. This is illegal under the Copyright Act but in addition, the majority of these locations do not pay VAT or the Standards Levy.
- **Introduce, Pass and Aggressively Implement a New Counterfeit Goods Act.**
- **Combine Offenses in Criminal Charges:** Persons dealing in piracy should be charged with all offenses (Copyright Act, Trade Descriptions Act, Standards Act, the Trademarks Act, non-payment of VAT and other taxes, and the aforementioned Counterfeit Goods Act in the

¹ For example, there are four global record companies: Sony-BMG, EMI, Universal and Warner, which are represented by three companies in Kenya, while smaller international or foreign record companies are either (i) represented by one of these same three Kenyan companies (ii) represented by another Kenyan company, of which there are only one or two, or (iii) not represented in Kenya. In the case where a foreign record company has no representative, an invoice from the manufacturer to the owner should be sufficient evidence to allow importation. There is only one Kenyan company with rights to import major motion pictures in video or disc formats, while there are only two or three Kenyan companies licensed for theatrical.

near future²). This would indicate to the judge the seriousness of the offense and, hopefully, result in larger fines, which would in turn make this illegal business less attractive to those engaged in it. The Government should also direct the Kenyan judiciary about the seriousness of piracy as a crime to ensure it is not treated as a petty crime and so that maximum penalties are applied.

Piracy Update: As noted in previous years, piracy ranges from 83% for business software to well over 90% for music cassettes and CDs, and virtually 100% for video and DVD. Cable piracy remains a significant problem in Kenya. Local Kenyan music is pirated in Uganda and Tanzania and imported into Kenya (the Tanzanian product being the higher quality of the two), while it is believed that pirate international repertoire has come in from Uganda, Tanzania, and Pakistan.³ Kenya has been noted by the Business Software Alliance as the country in Africa with the highest piracy level, for hard disk loading and unauthorized use of software in businesses.

Enforcement Update: Enforcement is a major challenge in Kenya. The Kenya Copyright Board was established in 2003, but has to date not been able to fulfill its mandate for various reasons, including an endemic lack of funding.⁴ The Board's current term ends in April or May 2006 and a new board will have to be appointed and gazetted. However, there are still no offices and no staff. The Trade Descriptions Act is the only Act that has been used with any effectiveness in Kenya, but the penalties under the act in the past do not provide a deterrent. However, recent amendments have increased the level of fines to KShs. 2 million (US\$28,070) and/or a term of up to 3 years. Raids in Kenya are marred by loss of evidence/seized goods. Court cases drag on and in some infamous instances, are then decided in favor of pirate defendants under bizarre circumstances.⁵ There are also legal issues such as presumption of ownership, which are misapplied by courts (e.g., a defendant has been able to put ownership into question with demands to see agreements between the performing artist and the Kenyan company in various court cases). The courts also fail to use sampling to prove pirate volume, instead, in some cases demanding a list of each title seized (in some cases requiring a list from right holders of 17,000 titles!). We understand that the Kenyan Government is reviewing the Copyright Act, possibly to provide for presumptions of copyright ownership. The Copyright Act currently provides for the Copyright Board to verify contracts for the purchase of banderole.⁶

² A Counterfeit Goods bill is apparently being given positive consideration by the Kenyan Government's Cabinet.

³ It is believed that two companies in Uganda and one in Zanzibar, Tanzania reproduce millions of pirated cassettes of both Kenyan and international artists and smuggle them into Kenya, flooding the market.

⁴ The new board, once it is operative, is to oversee the administration and enforcement of copyright and related rights in Kenya, implement international laws, raise public awareness of copyright issues and prosecute copyright cases. It will also cooperate with other law enforcement agencies and carry out raids of suspected premises. Importers will obtain the board's approval before bringing new products into Kenya.

⁵ In one incomprehensible decision, a convicted defendant appealed his case, and the judge ruled that his conviction be set aside and pirate cassettes returned to him, on the grounds that, because the complainant right holders were business rivals, the defendant lacked awareness he was infringing anybody's copyright.

⁶ IIPA members do not generally support adoption of banderole systems out of concern that the banderoles themselves can be counterfeited. In this case, the existence of the requirement in the law, coupled with the failure of the government to implement it has resulted in an inability to enforce against pirate product and the courts' failure to apply a presumption of illegality due to the absence of a sticker.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

LAOS (LAO PEOPLE'S DEMOCRATIC REPUBLIC)

Actions to be Taken in 2006: IIPA urges the Government of Laos to 1) implement the Agreement on Trade Relations by passage of a modern copyright statute; and 2) enact or issue regulations to impose licensing requirements upon optical disc manufacturing facilities and to provide a level of transparency and oversight into these groups that are producing pirate and other illegal materials in Laos.

Laos has long appeared in the Special Mention section of the IIPA report because 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. In 2004, press reported that there may be plants in Thailand near the borders of Laos and Burma, and in 2005, product sourced from Laos was seized by Thai authorities.¹ Thus, unfortunately, in 2005, the fear of copyright owners has apparently become a reality. The motion picture industry reasonably estimates that the home video market is at or near a 100% piracy level.

Given the changing reality, it is time for Laos to take steps to strengthen protection for intellectual property to avoid becoming the next piracy haven. There is currently no copyright law in the country. The United States and Laos signed an Agreement on Trade Relations in 2003 which includes a chapter on intellectual property rights, and that agreement went into force in late 2004 when the U.S. Senate approved extending normal trade relations to Laos.² As it considers the appropriate legislation to implement its obligations under this trade agreement, the Laotian government should also consider adopting measures designed to improve its border enforcement authority as well as consider measures that would regulate the optical disc plants that appear to be moving to the territory. Also under the trade agreement, the Government of Laos is obligated to protect U.S. works/sound recordings and should take steps to implement its obligations as soon as possible. Laos is also a member of the Universal Copyright Convention (from September 16, 1955), providing another point of attachment for U.S. copyright subject matter, and while Laos is a member of the World Intellectual Property Organization (WIPO),³ Laos is not a member of any of the major copyright conventions of the WIPO (Berne Convention or Geneva [Phonograms] Convention). Laos is a WTO Observer Government, but the likelihood of accession to the WTO in 2006 is slim (the first meeting of the Working Party did not take place until October 2004).

¹ 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. On September 29, 2005, Royal Thai Police intercepted a private van which had just entered Thailand across the Nong Kai Laotian border control point. On being searched the vehicle was found to contain approximately 33,000 infringing discs, including pirate sound recordings. The driver was arrested and charged.

² The grant to Laos of PNTR was part of the Miscellaneous Trade & Technical Corrections Act of 2004 signed by the President in December 2004.

³ By virtue of its membership in WIPO, Laos is eligible to request assistance from WIPO in the form of a mission or "study days" to work on copyright legislation. Also, IIPA understands the Government of Laos is in the process of preparing legislation for Laotian accession to the Berne Convention.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

MOROCCO

IIPA is specially mentioning Morocco in the 2006 report to highlight the great successes achieved through the negotiation of the U.S.-Morocco Free Trade Agreement in the IPR Chapter of that Agreement and to invite the Moroccan Government to immediately begin to make good on the enforcement promises made in the Agreement. The Moroccan Government just passed one of the most modern copyright laws in the world, including key protections for the digital age, and enforcement mechanisms to account for the changing nature of commercial copyright piracy. Now, the Government should commence forthwith enforcement actions against piracy, including market sweeps to clean the market of blatant and open piracy in the streets, warehouses, and locations where duplication is occurring.

Piracy: The recording industry noted that Morocco has the dubious distinction of being in first place in the Middle East and North Africa region in terms of music piracy. The recording industry estimated the music piracy rate in Morocco at virtually 100% in 2004. After a number of highly publicized market enforcement actions that followed a high-level IPR Conference in March 2005, the music piracy level gradually dropped to around 95%. Legitimate sales of recorded music are still absolutely minimal, especially for a country that prides itself for its rich cultural sector, and due to the excessively high level of piracy the majority of local music performers are incapable of surviving from the income of their artistic work. Foreign companies are, as a result, still very reluctant to invest in the creative sector in Morocco. The Government must take actions to address this blemish on its record of copyright protection.

In addition, Morocco has emerged as one of the fastest growing broadband Internet markets in the world, growing at a rate of 200% by adding a total of 135,000 DSL lines in the first three quarters of 2005, for a total installed base of 179,000 lines.¹ Given such a development, it is appropriate that the Government has added needed protections for copyright in the Internet environment, but now the Government must be vigilant to the possibility of increasing numbers of illegal downloads of copyright materials over the Internet, and act swiftly against any illegal P2P services that emerge.

¹ Point-Topic, *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

NEW ZEALAND

In 2006, New Zealand enters the sixth year of its effort to reform and modernize its Copyright Act. USTR should encourage the government in New Zealand to move forward, but only after making changes to the recommendations in the 2003 Cabinet Paper that has provided the blueprint for reform efforts so far. In particular, new legislation in New Zealand should:

- refrain from enacting an exception for format shifting, and expanding the existing exception for time shifting, both of which could undermine innovative channels for delivering music and other copyrighted materials online;
- avoid distorting the licensing market by creating a blanket exception to protection for libraries that make digital materials available to remote users;
- include provisions that give Internet Service Providers strong legal incentives to cooperate with copyright owners in combating online piracy;
- provide broad coverage for technological protection measures, and carefully limit exceptions to the prohibitions on trafficking in circumvention devices or services; and
- extend the term of copyright protection for all categories of copyrighted works to reflect emerging international trends.

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 (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). The government should also take whatever steps are necessary to ensure that adequate protection is provided against camcorder piracy – the unauthorized operation of audiovisual recording equipment in a theater while a film is being screened – since, on a worldwide basis, pirate audio-visual products are sourced to professional camcorder pirates over 90% of the time.

Piracy and Enforcement Issues: Pirated entertainment software products continue to be imported into the country from China, Malaysia, and Thailand, though the Customs authority has done a relatively good job at seizing pirated products at the borders. Internet piracy of these products is growing, while piracy at flea market venues and at Internet cafés continues to be problematic. The government is reportedly working on creating standards to govern Internet café establishments in the country, and should be encouraged to include provisions requiring that cafés utilize only legitimate or licensed products.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

NIGERIA

IIPA specially mentions Nigeria in the 2006 report to highlight the alarming growth in optical disc production capacity, continuing rampant piracy concerns in several sectors, and an enforcement system which is ineffective in tackling these problems. In 2006, IIPA would like to see the following:

- Enactment of draft optical disc regulations to require the 15 known optical disc plants and two mastering facilities to come forward and be licensed, and to require the plants' use of SID codes (mastering LBR code and mould code) on all discs produced and sold in Nigeria.
- A campaign by the Nigerian Copyright Commission (NCC), including *ex officio* actions (traditionally complaints have been required), to sweep the markets clear of piracy, as well as duplicators, photocopy equipment, other equipment and tools used to pirate, and to inspect businesses to ensure they are not engaged in unauthorized use of business software.
- An enforcement campaign by Nigeria Customs Service (NCS) to interdict pirate imports coming in at the ports as well as those coming to Nigeria to pick up pirate exports.
- Reinstate funding to universities and libraries to purchase books.
- More prosecutorial attention to copyright cases, ensuring that cases go to trial and result in judgment with deterrent penalties actually imposed.
- Enactment of an amendment to prohibit unauthorized (parallel) and pirate imports, and to limit any exception to import of "a legal copy of a work by a physical person for his own personal purposes."

Piracy and Enforcement: There are 15 optical disc plants in Nigeria, some of which have migrated to Nigeria from Asia and operate to supply Central and West Africa. Many of the plants are not licensed to produce any kind of copyright content. Two of these plants (Akina and Nasinma) were raided in June and July 2004. However, to date there has been no outcome with respect to actions against these plants. This massive over-capacity, plus pirate imports, results in pirate production not only for domestic consumption but also for export (or "take out" as it is called, as people come from all over West Africa to buy pirated discs from the Alaba International Market in Lagos). Pirated product from Nigeria has been found in Algeria, Senegal, Ghana, Zambia and South Africa. In addition, Nigeria is itself a very large potential market, but the country is domestically overrun with pirated materials. Pirated CD-Rs are being sold for less than the equivalent of US\$1 in the local market containing compilations of up to 300 tracks of songs by local and international artists. There has also been a recent influx of imported pirated CDs from unknown locations in Asia. Book piracy continues to be a serious problem, due in part to the Government's decision in 2003 to cut all funding for university and library purchases and illegal photocopying that plagues the academic market. Some U.S. publishers indicate that the presence of legitimate publishers in the market is increasing, accounting for modest increases in sales during 2005, but the market is essentially still a piracy haven. For the business software industry, hard-disk loading of pirate software and unauthorized use of software in businesses remain significant problems. Piracy levels are nearly 85% or above for all industry sectors with

estimates (and is a staggering 98% for international music repertoire), among the highest in the world.¹

Though a copyright law was enacted in 1990,² there is little enforcement activity,³ and cooperation between government agencies to implement and enforce the law, including law enforcement, is sparse and erratic. The NCC has responsibility in Nigeria for anti-piracy activities, and the NCS, as the nation's gateway police, has a significant role to play in anti-piracy enforcement, although Customs has never, to our knowledge, seized any product on their own initiative. There needs to be better coordination between these two enforcement entities. The NCC's Director General was suspended in November 2005 over the de-certification of one of Nigeria's music collecting societies, the Musical Copyright Society of Nigeria.⁴ In addition to these problems, NCC's effectiveness is hampered by a lack of funding. We understand that consideration is being given to transferring the NCC functions to the Ministry of Justice. Lastly, civil claims in court continue to be an expensive and risky remedy.

¹ The record industry reports 98% piracy rates (for international repertoire), while the Business Software Alliance reports an 84% piracy rate and losses due to piracy of between US\$47 million and \$54 million.

² Copyright Act (Cap 68 Laws of the Federation of Nigeria, 1990) as amended.

³ The port of Lagos is inadequately policed against piracy and has become a major transshipment site for pirated product to enter Nigeria and nearby countries.

⁴ Nigeria suffers from over-zealous collecting societies, and must ensure that these voluntary organizations do not abuse their positions by claiming rights in artists/catalogs which they do not have. The other collecting society, which remains certified by the government, is the Performing and Mechanical Rights Society of Nigeria (PMRS), which was approved by the first NCC Chair, Moses Ekpo, back in the 1980s. See Ozolua Uhakheme and Richard Eghaghe, *NCC Declares MCSN Illegal, Nullifies Adewopo's Approval*, Daily Independent, November 25, 2005, at <http://www.independentng.com/life/lsnov250501.htm>.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

PANAMA

IIPA supports the Free Trade Agreement process with Panama, which began in April 2004 and continues in early 2006. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO “Internet” 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. Panama currently receives preferential trade benefits under two U.S. trade programs, the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (CBI) programs.¹

Copyright Piracy: Copyright piracy in Panama, combined with inadequate enforcement, has significantly limited legitimate revenues to right holders and has become a major market access barrier for the copyright industries. The challenges faced by these and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard goods and toward digital media and unauthorized electronic transmissions. Over the last few years, unauthorized “burning” of CDs has grown rapidly in Latin America, including Panama. The piracy of sound recordings and music in Panama remains high. While audiocassette piracy had been the preferred business of pirates for years, music CD piracy is clearly now the preferred format of choice. As a result, very few companies remain operating in the country. Hit albums that a few years ago sold in the thousands today sell a few hundred copies. Although no official figures exist for the level of music piracy, the industry safely estimates that it exceeds 50 percent of the total market.

Business software piracy takes various forms, including counterfeiting, illegal reproduction and/or distribution by resellers, mail order houses, bulletin boards, other Internet-based distribution and corporate end-user piracy.² Panama’s Ministry of Education has been leading the initiative among various Panamanian agencies to implement Decree 273 of 2000

¹ During the first 11 months of 2005, Panama imported the following under these three trade programs: \$15.9 million worth of Panamanian goods (or 5.3% of Panama’s total exports to the U.S. for this period) entered the U.S. under the duty-free GSP code, representing a 164.5% increase from the same period in the previous year; \$35 million worth of Panamanian goods (or 11.8% of Panama’s total exports for this period) entered under the CBI, representing a 33% increase over the same period in the previous year; and \$287,000 worth of Panamanian goods (or 0.1% of Panama’s total exports to the U.S. for this period) entered the U.S. under the CBTPA.

² BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: A 10-point drop in Panama’s piracy rate (from 70% to 60%) could create new jobs and pump \$31 million into the economy. It could also increase local industry revenues by more than \$21 million and generate \$2 million in additional tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Panama.pdf>.

which regulates the use of computer programs by public agencies. The U.S. entertainment software industry reports that piracy and counterfeiting affects videogames on all platforms, including cartridges, personal computer CD-ROMs, and game consoles, especially those entering Panama from Southeast Asia. This transnational form of piracy points to the enhanced need for continued cooperation among governments in tracking infringing materials across borders. As optical disc piracy grows in the region, the motion picture industry is concerned about the possibility that Panama will become a transshipment point for optical disc piracy or pirate circumvention or other technology as the market for such pirate product grows. The major forms of piracy afflicting the U.S. book publishing industry involves commercial photocopying piracy, especially as photocopying shops near universities fill requests for illegal reproductions of entire textbooks.

Border Enforcement: Cooperation with Panamanian customs has been improving over the years, but more work is needed. To that end, in March 2005, Panama's General Directorate of Customs signed a cooperation agreement with the recording industry, IFPI-Latin America, to help stop the movement of piratical goods into Latin America. Panama serves as a transshipment point for blank CD-Rs into the region; estimates place this at 40 million units/year. This agreement provides for the exchange of statistical data and information, training by IFPI experts and the creation by Customs of a specialized IP unit. The Industrial Property Law (Law No. 35 of May 10, 1996), which entered into effect on November 19, 1996, allows Customs and CFZ officials to impose administrative sanctions and seize pirated and counterfeited products. Public prosecutors can act *ex officio* against infringements of copyright as well as industrial property. Unfortunately, the recording industry is not aware of any actions taken by Customs in 2005,

U.S. Criminal Enforcement: Panama has established a variety of specialized IPR entities over the years, including: IP departments in the Colon Free Zone and at the Customhouse General Offices; specialized IPR groups at the local police level; and most recently (starting in December 2003), the Judicial Technical Police. The Specialized Superior Office on IP Infringements began its operations in January 2003. The Third Superior Court handles all IPR cases. The Interinstitutional Commission on Intellectual Property continues its coordination and policy oversight efforts. A National Intellectual Property Prosecutor was named years ago, and this office has a permanent budget and staff and with national jurisdiction. Cooperation between the copyright industries and Panamanian police and prosecutors has generally remained good. Since the implementation of the new Industrial Property Law in November 10, 1996, copyright actions may now be taken *ex officio*, which has greatly aided anti-piracy enforcement efforts in Panama. The Office of the Tenth District Public Prosecutor has been particularly vigilant in pursuing cases over the years, and we acknowledge its assistance. With some exceptions, however, much of the investigatory burden continues to be shouldered by private industry.

The recording industry has been informed that about 50 raids occurred in 2005, with seizures amounting to approximately 41,000 copies. Despite the best efforts of the National Intellectual Property Prosecutor, his team and the technical judicial police, this level of enforcement is not sufficient to curb music piracy. To improve the level of street enforcement and conduct in-depth investigations will require allocation of additional resources to the teams in charge of conducting the anti-piracy campaign.

An entertainment company reports that situation concerning outstanding criminal cases is extremely frustrating. Some of these cases date back to 2001, but have yet to be resolved. Oftentimes, the hearings are postponed, rescheduled or suspended – in many instances, the defendant simply does not appear. Meanwhile, the company continues to pay storage fees and

legal costs related to the case. The courts should be encouraged to expedite the resolution of IPR cases, as perennially pending cases do not serve as a deterrent to infringers.

Copyright Law and Related Laws: Panama's Law on Copyright and Related Rights entered into effect on January 1, 1995 (Law No. 15 of August 8, 1994). This law represented a significant improvement over the prior law and enabled Panama to adhere to the Berne Convention (effective June 8, 1996). In general, this 1994 copyright law was a relatively progressive one in the region a decade ago, even though there were some immediate challenges launched against this law. The 1994 Copyright Law required the filing of a complaint by rightholders in order to initiate actions; however, this problem was alleviated by the passage of the Industrial Property Law in 1996, and copyright actions may now be taken *ex officio*. Panama was one of the first countries in the hemisphere to join the two WIPO Internet treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Given the higher standards contemplated in an FTA IPR chapter with the U.S., Panama's copyright law will require some modification.

Various amendments to the copyright law have been proposed over the years (e.g., 1996, 1998 and 2002), but many have not been adopted (the 2002 exercise was aimed primarily at implementing the provisions of the WIPO treaties into Panamanian law, extending the term of protection, improving enforcement mechanisms and strengthening penalties). This project is still lingering in the Ministry of Education and has not been presented to the Panama's legislative body for evaluation and processing. Passage of these reforms is a crucial matter to protect intellectual property in a digital environment and give enforcement and prosecution teams the necessary tools to carry out an effective anti-piracy campaign. Legal reform to the penal codes and Industrial Property Codes (Law No. 1 of January 5, 2004) appears to have been accomplished to minimize prior confusion and clarify that criminal sanctions, including aggravated penalties, is available for both copyright and industrial property infringements. Under the Copyright Law, the level of administrative fines (from \$1,000 to \$20,000) and as imposed have been inadequate to deter pirates from engaging in commercial piracy. The level of penalties for piracy should track the higher levels available for trademark counterfeiting.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

SINGAPORE

COPYRIGHT LAW AND RELATED ISSUES

On August 15, 2005, the Copyright (Amendment) Act 2005 went into force in Singapore, for the most part culminating that country's efforts to bring its law into compliance with the copyright-related provisions of the U.S.–Singapore Free Trade Agreement. Unfortunately, two issues of major concern to copyright owners were not addressed in the final legislative package: 1) the treatment of non-interactive digital audio transmissions; and 2) the treatment of parallel imports.

Digital Audio Transmissions: Section 107B of the Singapore Copyright Act exempts digital audio transmissions that are not part of an interactive service, are not themselves subscription services, or are simultaneous transmissions thereof, from the exclusive rights granted to sound recording producers. The Singapore law, like that of the U.S., does not provide sound recording producers with an exclusive broadcast right. As such, record producers and performers do not enjoy in Singapore any rights with respect to the simulcasting of broadcasts via the Internet. Broadcasting organizations in Singapore may therefore stream sound recordings for global reception without paying any remuneration to the right holders in sound recordings. This is unfair.¹

Article 16.4(2)(a) of the FTA provides in pertinent part:

[e]ach Party shall provide to authors, performers, producers of phonograms and their successors in interest the exclusive right to authorize or prohibit the communication to the public of their works, performances, or phonograms, by wire or wireless means, including the making available to the public of their works, performances, and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Notwithstanding paragraph 10, a Party may provide limitations or exceptions to this right in the case of performers and producers of phonograms for analog or digital free over-the-air terrestrial broadcasting and, further, a Party may provide limitations with respect to other non-interactive transmissions, in certain special cases provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders.

¹ Industry has asked broadcasters to engage in license negotiations at least with respect to simulcasting and the use of sound recording rights outside of Singapore (the local recording industry collecting society is party to the recording industry's reciprocal Simulcasting Agreement enabling the Singaporean society to grant multi-territory licenses for simulcasting). Local simulcasters have however refused to enter in to negotiations, claiming effectively that Singapore is a "streaming piracy haven."

Insofar as the Section 107B exemption covers other than "free over the air terrestrial broadcasting" in Singapore, and that it conflicts with a normal exploitation of performances and phonograms and unreasonably prejudices the interests of right holders, it is in breach of Singapore's FTA obligations. Singapore should modify its legislation as quickly as possible, and in the interim, at least ensure that broadcasters (such as MediaCorp) acquire the necessary licenses for multi-territory simulcasting.

Exclusivity Restrictions in Pay TV: In July 2005, Singapore's Media Development Authority ("MDA") ruled that exclusive contractual agreements between content providers and pay television operators would require prior written approval of the MDA. This amounts to an unreasonable restriction on the ability of right holders to freely contract and should be challenged and overturned. When Singapore's sole pay television operator's (StarHub) license was up for renewal in July 2005, MDA inserted a clause, without industry consultation and transparency, requiring StarHub to obtain MDA's prior written approval for all new exclusive content agreements. Though MDA claims that the new requirement was inserted to facilitate the potential entry of more pay TV operators, IIPA views this as outrageous intrusion into the commercial decisions of contractual parties. Furthermore, MDA's sudden decision without transparency or prior industry consultation would appear to contradict the spirit of the U.S.-Singapore Free Trade Agreement. We understand that StarHub has appealed against the new requirement to the Ministry of Information, Communications and the Arts (MICA). Though the appeal remains pending, the new requirement is already being enforced. IIPA urges MICA to suspend the ruling and remand the matter back to the MDA for industry consultation resulting in market driven resolutions.

Parallel Imports: The influx of parallel imports (including motion pictures) from China is becoming a major concern in Singapore. Singapore laws have permitted parallel imports for over 10 years, and local industry has always had to deal with parallel imports, especially from Malaysia and Indonesia. In 2005, aggressively priced imports from China (e.g., where motion pictures are frequently released in home video formats at the same time as their theatrical release in other regional markets) had a tremendously detrimental impact on the continued development of copyright businesses, including the home video and theatrical distribution sectors in Singapore. More importantly, the relaxation of parallel imports has resulted in an influx into Singapore of pirated product masquerading as legitimate imports. Because of police reluctance to accord priority to such infringement, industry must resort to expensive and lengthy civil litigation in order to keep such pirate products out of the market. The Government of Singapore should reconsider its position on this issue given these changing developments, and should either add an exclusive right to authorize imports, or in the alternative, should, as neighboring countries and territories have done, provide a window of time from the release of a copyright title before allowing parallel imports into the market.

PIRACY AND ENFORCEMENT UPDATE IN SINGAPORE

A chief piracy concern in Singapore is increasing evidence of pirate production in Singapore for export. There are 20 known optical disc plants in Singapore (with at least 106 production lines). Most of the plants (18 of 20) have been allocated SID Code and are regulated, but the concern remains that there is some pirate product being produced in Singapore for export. In 2005, the police raided three optical disc plants, all involved in the export of pirated music seized in South Africa, among other countries, in 2003 and 2004; investigations are ongoing. We are also aware of investigations (which remain under consideration by the Attorney General's Chambers) into an additional two plants also

forensically linked to pirate product seized in South Africa in 2003. There were also an additional two complaints filed in respect of unauthorized production of pirate copies of motion pictures in 2005 which remain with the police for further investigation. The delay in the resolution of these inquiries is of concern. Cases of this magnitude and importance should be prosecuted and the Singapore Police and Attorney General's Chambers should provide better cooperation with right holders to provide access to evidence essential to support potential civil claims. In practice, civil proceedings cannot be taken until there is a decision to initiate criminal proceedings, and a decision not to initiate criminal proceedings leads to the return, and hence the potential destruction, of key evidence. A further case involves the seizure of over 400,000 pirate VCDs believed to have been manufactured in Singapore and destined for Africa. The plants involved in this latter case should be dealt with expeditiously under the new Manufacture of Optical Disc Act.

U.S. book publishing companies continue to suffer from illegal commercial photocopying. Just a few stores, well-known to the industry and to authorities, have become blatant repeat offenders, and a pervasive attitude of disrespect for copyright in books permeates Singapore's university campuses. The industry needs the continued support of police authorities, the Intellectual Property Office of Singapore (IPOS) and the Ministry of Education in addressing this problem.

By contrast, IIPA is pleased with the Government response in other areas, such as Internet piracy and end-user piracy of business software. Singapore continues to boast one of the lowest physical piracy rates in all of Asia (for example, the piracy level for recorded music stands at 5%). Entertainment software companies are also very satisfied with the record of the Singapore Government on enforcement for their products, particularly with the efforts of the local police.² Criminal cases involving industry product have resulted in the imposition of penalties and sentences that have acted as significant deterrents. The Government also has an excellent record of cooperation and partnership with the entertainment software industry on educational initiatives aimed at increasing the public's awareness of the importance of protection of copyright in interactive games.

² There is a thriving legitimate market for this industry's products, with retail and mall piracy having been effectively addressed by the local authorities.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

SOUTH AFRICA

PIRACY AND ENFORCEMENT UPDATE IN SOUTH AFRICA

Book Piracy: The U.S. publishing industry suffers harm from illegal commercial photocopying 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 also experience widespread copying of their books by businesses/commercial end-users.

End-User Piracy of Business Software: The business software industry reports high levels of piracy – particularly commercial end-user piracy.

Customs Issues: There are some reports linking five plants in Singapore that have been forensically linked to pirate product seized in South Africa in 2003. Unfortunately, South African Customs was not (and generally has not been) willing to seize this in-transit pirate product.¹ One shipment (1.7 million optical discs) was released by South African Customs and subsequently stopped in Benin. It was destined for Nigeria. While we understand that the Singapore Attorney General's Chambers is currently still investigating this link, it is incumbent upon South Africa's Customs authorities to be vigilant in interdicting pirate shipments into, or being transshipped through, South Africa. The entertainment software industry reports that imports of pirated optical disc products from Asia (particularly Malaysia) continue to be highly problematic. While Customs has improved in terms of its ability at stopping pirated products destined for the country, the forfeiture and destruction procedures have been less than adequate. Pirate syndicates are involved in the importation and distribution of pirated entertainment software products into the country as well as the export of such products into neighboring countries.

Internet Piracy (Advertising Sites): Internet piracy is a concern, though it is largely used to advertise burn-to-order services. There is a lack of cooperation from ISPs in taking action against such sites even where the right holder provides proof of infringement.

Difficulties in Court Proceedings: The court system remains slow and cumbersome, and imposes undue costs and burdens upon the right holder pursuing an infringement case. A presumption of copyright subsistence is lacking, and in some cases, defendants have been able to reverse the presumption of ownership by simply placing it in issue during the proceedings. The entertainment software industry also reports that problems exist with respect to enforcement of judgments. Even after winning a case and being awarded costs, the chances of collecting from a defendant is almost nil. Defendants all too often have already disposed of or

¹ A recent judgment ruled in-transit pirate goods to another country as not having entered South Africa, and as such not subject to damages in South Africa under the Trade Marks Act.

transferred their assets, and left the country, thus leaving the right holder without recourse as to collecting the damages awarded in a judgment.²

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in South Africa is provided under the South African Copyright Act (No. 98 of 1978) as amended. Unfortunately, the law retains several provisions that either run afoul of South Africa's international obligations, or seriously undermine right holders' abilities to properly protect their rights. These include:

- **End-User Piracy of Business Software Is Not a Crime:** End-user piracy is not a criminal offense in South Africa. South African law currently provides that the sale of infringing software is a criminal offence, but there is no criminal penalty in the end-user context, violating South Africa's TRIPS obligations under Article 61 (to criminalize at least all copyright piracy on a commercial scale).
- **Civil Damages Are Non-Deterrent:** IIPA understands that infringing end-users have been ordered to pay civil damages that are less than the infringer would have paid for licensed software. If this is what is meant by "reasonable royalty" in the Copyright Act, it certainly does not constitute a deterrent to further infringements as required by TRIPS, and given recovery prospects like this, it is hardly surprising that plaintiffs often choose to settle rather than await judgments like this.
- **Presumptions Not Provided in Practice:** IIPA has long advocated the adoption of a Berne-compatible presumption of ownership and a presumption that copyright subsists, such that subsistence is presumed and ownership by the claimant is presumed unless the person seeking to challenge the presumptions asserts facts which serve to place doubt on the correctness of the relevant averments made by the Plaintiff or the State. Too often, defendants in South Africa have been able to reverse the burden of proving ownership by simply placing it in issue with the court. This is not how the Berne presumption was intended to operate. Thus, expressing in the law a presumption of ownership is needed satisfy South Africa's international obligations and a presumption of subsistence of copyright will greatly reduce the procedural burden on rights holders in proving their cases.
- **Re-Evaluation of Exceptions/Fair Use:** Finally, IIPA understands that the Government of South Africa is considering legislative provisions liberalizing aspects of fair use. IIPA requests that the government allow sufficient time for review and comment by affected parties and industries before finalizing any copyright proposals related to this (or other matter), and notes that in the digital environment, exceptions which may have passed muster before must be re-examined so that they do not run afoul of the time-tested Berne three part test and TRIPS Article 13.

Finally, the Government of South Africa should amend its law to comply with the provisions of the WIPO "Internet" Treaties,³ the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and should accede to these treaties as soon as possible.

² In some instances, a defendant will transfer the "business" assets to a family member and continue the business. The right holder has no alternative but to continue incurring litigation expenses to pursue the defendant. The law needs to be amended to provide for measures by which a right holder may obtain and enforce judgments expeditiously as well as measures by which a defendant may be barred from disposing of assets related to the infringing activity.

³ IIPA notes that a recent survey of broadband penetration found that South Africa had among the highest percentage growth in the third quarter of 2005, at 30% growth (along with Turkey and Morocco). See Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

SPECIAL MENTION

SPAIN

Despite continued high piracy rates in Spain, IIPA's submission requests only that Spain receive "special mention" attention in our Special 301 filing this year. Nevertheless, the piracy situation in Spain has not materially improved for several industries, and the dimension of the problem in Spain reflects a situation more in line with those of countries on the Watch List or even higher.

Overview of Copyright Piracy and Enforcement Problems in Spain

Continuing high levels of piracy in Spain are seriously harming the music, entertainment software and filmed entertainment sectors there. Factory-produced pirate music CD products as well as locally burned CD-Rs and DVD-Rs dominate the street markets. 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 improvement in enforcement, particularly from the courts, which are generally slow, and suffer from the uneven application and lack of understanding of the relevant laws. In 2005, the Spanish government continued to take impressive measures to address ubiquitous street piracy, but these measures have not yet proven to be fully effective and need to be further strengthened. In addition, the Spanish court system – particularly the new commercial courts – are proving to be a bottleneck in civil enforcement efforts. IIPA urges the U.S. government to monitor closely the legal and enforcement situation in Spain.

Internet piracy grew exponentially in 2005, and enforcement remains a big challenge: Internet downloading in Spain is growing rapidly, especially via peer-to-peer (P2P) systems and Internet Relay Chat (IRC) channels. P2P uploading and downloading piracy appears to be growing exponentially. During 2005, the number of home users of broadband Internet services in Spain doubled; today there are more than 4.5 million broadband subscribers. Moreover, the Internet is also used for hard goods distribution; pirates have an additional layer of protection because judges have to authorize special warrants allowing police to search their homes. The lack of a specific enforcement agency tasked with addressing Internet piracy is itself a problem. Specifically identifying an agency to undertake Internet piracy investigations would be useful in more aggressively tackling the country's growing Internet piracy. An example already exists when the Spanish Data Protection Commissioner undertook enforcement responsibility to tackle spam. This appears to have been rather successful and may be a model for how enforcement against Internet piracy could be made more effective.

In August 2005, Spanish police shut down a website that allowed users to download pirated movies, and arrested four men who created the site, www.cvddgo.com. Industry estimates suggest that nearly 11.2 million visitors visited this website from its launch in February

2004 through May 2005. Prosecutions have continued but no verdict has yet been issued. Another Internet case involved the so-called Weblisten case. Weblisten's webpage, which offered downloads prior to payment, was shut down in mid-2005. This was quite an old case, since prosecutions started in 1998. This website's shutdown had an important impact in the press. Three civil actions against websites that allowed users to download pirated music were started in 2005. So far, only one has ended with the shutdown of the site and the obligation to pay compensation for damages to the right holders. The two others are still pending.

Spanish Internet service and hosting providers, far from showing willingness to collaborate in the fight against piracy on the Internet, instead make use of their file sharing and downloading service capabilities to promote their businesses.

Piracy on the streets and the influence of organized crime: Piracy in Spain during 2005 continued to exhibit some characteristics that arise frequently in connection with OD piracy — namely the connection with illegal immigration and tobacco smuggling and other organized criminal activity. These businesses are in the process of evolving. Chinese syndicates are increasingly dominating the pirate trade in Spain; they are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€ per CD), with aggressive distribution through the use of itinerant sellers in streets and entertainment premises. These Chinese networks are not only involved in using CD-R and DVD-R formats, but also directly import pirate CDs manufactured in Taiwanese and Chinese plants (but not DVDs). Product consists primarily of international releases, although albums of some important national artists have also been detected.

The Spanish government should consider extending the application of anti-organized crime laws (such as against money laundering) to intellectual property crimes so as to more effectively target the international syndicates involved in large-scale piracy operations.

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 2005, the number of street vendors selling optical disc products fell, with estimates that the number of “manteros” decreased around 40% and “mochileros” around 30%. There are an estimated 8,000 to 10,000 street vendors, including at least 5,000 mochileros, but a steadily decreasing number of manteros. As police action improves against manteros, the preferred distribution system becomes the mochilero. 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). 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 right holders to file numerous legal procedures with no decisions. (A decision cannot be made if the defendant cannot be located.) This problem highlights the need to address the organized production sources of pirate product, not only its distribution. Organized gangs maintain labs and distribution centers in Madrid, Barcelona, Grenada, and reportedly in Girona, Tarragona, and Alicante.

The following steps would be useful to address the street vendor piracy problem:

- (1) stronger criminal penalties;
- (2) increased *ex officio* police actions against street sales;
- (3) more actions against labs supplying street vendors;
- (4) increased police coordination, and
- (5) the inclusion of IP violations in the list of cases that qualify for “fast hearings.”

In fact, Spain's largest cities, Madrid and Barcelona, recently started new enforcement efforts against street piracy. Starting in January 2006, not only sellers but also buyers of illegal CDs can be fined by the Local Police in Barcelona (minimum 125 € – maximum 500 €) and the illegal CDs can be seized. Starting in December 2005, Madrid Local Police will request the personal details of the buyers of illegal CDs on the streets and transmit them to the Courts in order to call them eventually as witnesses in criminal hearings. The illegal CDs already bought by the client can be seized with the rest of illegal material.

Music and record piracy: The international recording industry reports that Spain has the worst CD-R problem in Western Europe, and piracy of DVD music videos is also very high. Spain and Italy are the only two European countries that are featured in IFPI's world's top ten legitimate markets that have piracy levels above 20%.¹ The situation for the recording industry in Spain is dire. Pirate recordings are openly on the streets. In 2005, there was a slight but progressive decrease in recordable formats, that is, CD-R and DVD-R, although the impact of this type of piracy is still alarming. This slight decrease is due mainly to the efficiency of police enforcement agencies which intensified their efforts and, therefore, results. This improvement was due in part to the positive changes in the Criminal Code and Criminal Procedure Code that took effect in October 2004, such that piracy rates for physical copies of sound recordings decreased slightly in 2005. The recording industry's fight against "mochileros," and other illegal street sellers, is now easier because the police can now proceed *ex officio* (without a previous complaint of right holders).

Importantly, the rapid growth of Internet piracy has made it the primary problem in Spain (as mentioned above) for the music publishing and recording industries. For example, NMPA indicates that its Spanish colleagues, SGAE (the collecting society, la Sociedad General de Autores y Editores, the General Society of Authors and Publishers of Spain), also report that widespread Internet-based piracy in Spain is undercutting the legitimate market for music publishers and their royalty collections. Like other industry groups, SGAE has been involved in anti-piracy activities involving unauthorized music on the Internet and in the streets and work under the Plan Integral.

With respect to enforcement, the recording industry reports that, between January and December 2005, some 13,224 police actions were conducted, 2,922 people arrested and an accumulated figure of 4.4 million optical discs have been seized, as well as 3,015 CD-R and DVD-R burners, thousands of inlay cards and jewel boxes. One raid example demonstrated the seriousness of the problem: in late October 2005, in what has been the largest operation against music and film piracy ever undertaken in Spain, police arrested 69 individuals in Madrid allegedly involved in the illegal production, storage and retail distribution of music and film discs. The police broke up a syndicate believed to be responsible for releasing over one million pirate music and film discs every month into the Spanish market. In follow-up actions, Spanish police raided more premises in the suburbs of Madrid, resulting in six more arrests, the seizure of another 50 CD drives and 150,000 discs. During the first raid, 69 people, all Chinese nationals, were arrested. Large amounts of illegal material were seized by the authorities, including over 60,000 recorded CD-Rs, almost 50,000 DVD-Rs and over 130,000 inlay cards, as well as over 200 CD drives and four industrial color copying machines, along with stolen passports. The music included both local Spanish artists and well-known international titles. Some of the films seized had not yet been legally distributed. Over 200 police officers from Madrid, Alicante, Burgos, Salamanca, Malaga, Orense, Valencia and the cities of Getafe and Puertollano took

¹ IFPI, Commercial Piracy Fact Sheet on Spain 2005, at <http://www.ifpi.org/site-content/press/20050623b.html>.

part in the raids, with support from right holders associations including local recording industry group Pro-Musicae, and enforcement officials from the industry (IFPI).²

Furthermore, Operation Madrid Plus 2005 was a campaign initiated last October which aimed at strengthening the fight against music piracy in the region of Madrid during the Christmas season, when this criminal activity intensifies. After the publication of IFPI's annual report on music piracy, where Spain appeared as being one of the countries with higher piracy growth rates in Europe, people in charge of different enforcement agencies and the Customs Department of the Tax Agency decided to intensify their anti-piracy activities and improve coordination by designing and implementing this operation in the Region of Madrid. During the last quarter of 2005, the agencies involved in the operation took actions which resulted in the dismantling of 20 organized crime networks devoted to piracy. Operation Madrid Plus 2005 has placed the region of Madrid at the forefront of the fight against music piracy in Spain.

It is essential that the Spanish 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.

Entertainment software piracy: The entertainment software industry reports that there were more police actions against retail outlets selling counterfeit and pirated goods in 2005. However, notwithstanding the increase in police activity, pirated video game products remain readily available in the market, whether on the street or at flea market-type venues. Internet café piracy continues to be a problem; of the 2,500 cafés, only 10% are licensed. Both local CD-R burning, as well as imports of pirated video games on optical disc from Asia, remain problematic for the industry. For the imported counterfeits and pirated discs, some of the "finishing work" (i.e., printing of covers or packaging) does occur in country. Internet piracy is also of great concern to the entertainment software industry, including the new form of piracy of mobile games. Pirated copies of mobile games can now be downloaded from the Internet onto handsets or stored on memory cards for use with mobile devices. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Spanish marketplace was \$135.3 million in 2005, with a 43% piracy rate.

Entertainment software companies also noted good cooperation from the Customs authorities in 2005, with Customs participating in a training seminar provided by the companies. However, Customs authorities must continue to step up enforcement activity so as to stem the flood of pirated products being imported into the country. Investigations should also be carried out against the intended consignees of the infringing products, in addition to interdicting pirated products at the border. More training for Customs officers is necessary to build on their success at stopping infringing product at the borders. Nintendo of America (NOA) noted that, in 2005, they had better success than 2004, though piracy remains prevalent, with the number of product seizures increasing by 30%. In 2004, the company had 50 police seizures and 7 customs seizures, while in 2005, these numbers increased significantly, with 87 police seizures and 20 customs seizures. Several cases also resulted in successful court outcomes, with the imposition of jail time and significant penalties. While NOA is pleased with the increased enforcement efforts, there remains much room for improvement,

² IFPI Press Release, October 28, 2005 at <http://www.ifpi.org/site-content/press/20051028.html>.

Audiovisual piracy: For the audiovisual industry, 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. Often, sound recordings made in local theaters are combined with “camcordered” 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 very useful to help address this problem. For 2005, MPA’s methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to Internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Spain (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Spain due to audiovisual piracy (including both hard goods and Internet) were \$253 million, and the estimated piracy level was 32%.

Business software piracy: The business software community reports excellent cooperation with Spanish authorities, which has contributed to a slow but steady decline in the software piracy rate over the past several years. Continuing to lower business software piracy rates in Spain could improve the local economy.³

³ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: a 10-point drop in Spain’s piracy rate (from 43% to 33%) could add \$3.2 billion to its economy, create 4,000 new jobs, and increase local industry sales by more than \$2.4 billion. For the Spanish government, the cumulative effect of all this growth could mean an additional \$531 million in tax revenues. See <http://www.bsa.org/idcstudy/pdfs/Spain.pdf>.

SPAIN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2005 ⁴				
INDUSTRY	2005		2004	
	Loss	Level	Loss	Level
Records & Music ⁵	27.0	22%	90.0	24%
Business Software ⁶	388.0	44%	346.0	43%
Motion Pictures ⁷	253.0	32%	40.0	25%
Entertainment Software ⁸	135.3	43%	103.6	46%
Books	NA	NA	NA	NA
TOTALS	803.3+		579.6	

The “Integral Plan” of the Spanish Government

Several ministries continued to be directly involved in anti-piracy efforts in 2005. The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Copyright and Enforcement Directives, while the Ministry of Culture was responsible for the implementation of the Copyright Directive, which is now in Congress. The Ministry of Interior coordinates actions of the Guardia Civil and Police, crucial for action against street sales. The Ministry of Culture seeks to establish overall coordination between the different ministries to protect intellectual property.

In late December 2004, the Ministry of Culture released its “Integral Plan” to protect intellectual property for public comment. At that time, the industries felt that the “Integral Plan” needed a much stronger enforcement component to accompany its primary analysis and awareness focus. In April 2005, the Spanish Government unveiled its integrated anti-piracy plan, which aimed to coordinate 11 ministries with police, local and regional governments, and the judiciary. It included measures in the areas of prevention, cooperation, training and public awareness. The Plan also included an analysis of the Spanish intellectual property enforcement legislation, seeking any loopholes in order to close them and help the Police and Courts to fight against these illegal activities.

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/2006spec301methodology.pdf.

⁵ The recording industry clarifies that the 2004 data reflects estimated losses to the entire recording industry in Spain. The 2005 data reflects estimated for U.S. repertoire only. The industry's overall 2005 loss estimates in Spain, for both U.S. and international repertoire approach \$75 million, reflecting both a contracting market and a drop in value, which entails a drop in estimated losses from the prior year of 2004.

⁶ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

⁷ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, www.iipa.com.

⁸ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

The Plan's implementation has been extremely slow and has been more focused on public relations than on enforcement. Although the plan offers a wide general structure regarding the different aspects of preventing and fighting piracy, its implementation during 2005 has been almost inexistent in practice, except for the awareness campaign already mentioned and two meetings also hosted and coordinated by the Ministry of Culture between the cultural industries and the Internet Service Providers (ISP) aimed at trying to reach a self-regulation complementary to the national legislation in matter of intellectual property. As an example of the slowness and lack of efficacy of the Plan, the Permanent Commission, the plan's basic body of coordination and impulse, has not yet been created, and therefore no measures have been possibly implemented.

However, the extraordinary work of Enforcement Agencies and Customs (Tax Agency) has to be highlighted, although it does not derive from the implementation of the Government's plan but more likely to the sensitivity and professionalism of enforcement agencies. On December 19, 2005, Spain launched its first national anti-piracy campaign (eight months after the initiative was announced). The Ministry of Culture is spending €1 million (US\$1.2 million) on the "Defend your culture from piracy" media campaign, covering the holiday gift-buying season.

Though the Spanish government is increasing its efforts to combat piracy, these efforts have not been entirely effective, in part due to a lack of coordination among the various law enforcement agencies tasked with IP enforcement functions. Anti-piracy actions are undertaken by the Customs inspectors, the National Police, the Civil Guard, and regional police units, as well as local police in cities, towns and villages. Coordination and information sharing among these various enforcement agencies would make anti-piracy enforcement more effective, and would be helpful in addressing the involvement of international criminal syndicates involved in piracy operations.

In 2006, the main objective should be a common strategy in the field of Internet piracy. To that end, the copyright industries expect to count on the support of the Spanish Government.

Copyright and Related Legislation

Local rights holders are working very hard to seek improvements in two pending bills which seek to implement Spain's EU obligations. 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." 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.

Late Implementation of the EU Copyright Directive: Despite positive changes made 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. One reason for the difficulties with Internet enforcement lies with the Spanish government's failure to implement the

EU Copyright Directive by the December 22, 2002 deadline.⁹ The EU Commission instituted an infringement proceeding against Spain in July 2005 for its non-implementation of the EU Copyright Directive.¹⁰

Spain developed draft legislation in December 2004. In July 2005, the Council of Ministers approved the bill and submitted it to Parliament, where it was published on August 26, 2005 (as Bill No. 121/000044). The deadline for amendments to the Culture Committee was mid-October 2005. Parliament is not expected to take any action until the first quarter of 2006. In addition to the problems resulting from the delay, the music industry is concerned about the proposed legislation, and in particular that the exclusive right of public communication that the phonogram producers have traditionally enjoyed in Spain might be excluded in the new law. This deletion would greatly prejudice the ability for record producers to negotiate their rights in broadcasting and receive fair commercial value. The industries are particularly upset over the proposal to allow private copying and are lobbying very strongly against its inclusion.

Improper Implementation of the EU E-Commerce Directive: The Spanish "Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI")) that entered into force on October 12, 2002 has improperly implemented the E-Commerce Directive.¹¹ Spanish Law creates a limitation of liability for Internet Service Providers (ISPs) in that it fails to correctively implement the constructive knowledge standard and imputes liability only on the basis of "effective knowledge." Parliament is not expected to take any action until the first quarter of 2006. The current bill is the *Ley de Servicios de la Sociedad de la Información (LSSI)*. The key problem is that it does not require ISPs to respond to any take-down request that is not accompanied by a Court Order.

EU Enforcement Directive: The EU Enforcement Directive¹² is currently being discussed in Spanish Parliament. The implementing law is likely to be passed in the first quarter of 2006. The music industry has proposed a number of amendments to the draft legislation, including improved rules on evidence such as allowing samples of a shipment as a means of proof, a meaningful right to information, deterrent damages, legal standing of anti-piracy associations and presumption of holders of related rights. Effective implementation of the Enforcement Directive is especially important, as it should facilitate enforcement efforts, particularly in the digital environment. However, concerns exist that this law might not have a great impact on Spanish enforcement legislation, because Spain already has reasonably good enforcement legislation (both civil and criminal). The problem, as outlined above, is that the anti-piracy campaigns have not had positive results leading to lower levels of piracy. The draft does not correctly implement the right to information.

⁹ The 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.

¹⁰ See EU Press Release, July 13, 2005 at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/921&type=HTML&aged=0&language=EN&guiLanguage=en>.

¹¹ The 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.

¹² The Directive 2004/48/CE on the Enforcement of Intellectual Property Rights (the "EU Enforcement Directive").

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

SWEDEN

Internet Piracy: Significant Internet source piracy infrastructure and group membership have flourished in Sweden due to this country's notoriety as a piracy safe haven (pirates have even established a Political Party (the "Piratpartiet"), which plans to participate in the general election later this year on a platform demanding the removal of national copyright laws). Topsites, highly specialized types of pirate servers with massive storage and extremely high bandwidth, are used by Encoding/Release Groups for the first release of pirated content on the Internet. This source content is then passed down using a series of couriers from Topsites to IRC (Internet Relay Chat), Newsgroups and P2P (peer-to-peer) networks. Although the total number of Topsites in the world is difficult to determine due to their highly compartmentalized and secretive nature, MPA estimates there are approximately 200 of them in the world and that some 52, more than 40% of the European sites of this type, are hosted in Sweden. The country has the largest number of Direct Connect hubs (P2P facilitators) and the most DirectConnect users in the world. Finally, Sweden is home to Rizon, one of the largest IRC networks in the world.

Sweden is also the host country to ThePirateBay.org, the world's largest BitTorrent tracker and one of Sweden's largest web sites. The site has over 785,000 registered users, between 1.7 and 1.9 million peers, with 120,000 indexed torrents. Operators of the site proudly flaunt their role in facilitating infringements, often taking pot shots at rights holders from whom they receive notices of infringing activity. Some copyright holders have had success with ISPs with respect to taking down sites that advertise pirated hard goods for sale, but other forms of Internet piracy remain the primary concern in Sweden.

Other Forms of Piracy: MPA reports that Illegal decoders and smart cards used to descramble encrypted satellite signals are sold in shops and via the Internet. Pursuant to the European Commission's Conditional Access Directive, commercial possession or import of decoding devices is illegal. However, the private possession of illegal descrambling devices and the unauthorized reception of encrypted signals are not covered by the legislation. According to the Business Software Alliance (BSA), reducing the business software piracy levels in Sweden could generate significant contributions to the Swedish economy.¹

¹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, [Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits](http://www.bsa.org/idcstudy/pdfs/Sweden.pdf), using 2004 data, found the following: cutting Sweden's piracy rate from 26% to 16% could add nearly \$3 billion to its economy, increase local industry revenues by roughly \$2.5 billion, and generate an additional \$1.5 billion in tax revenues. Piracy cuts would also create nearly 6,000 new jobs in Sweden, which, combined with an already growing IT sector, means 21,000 more IT jobs in the next four years. See <http://www.bsa.org/idcstudy/pdfs/Sweden.pdf>.

Enforcement: The industries report that the legislative and enforcement framework in Sweden is generally effective against conventional hard goods piracy, but requires vast improvement related to Internet and smart card piracy.

Rights holders contemplating legal action against Internet pirates in Sweden face difficulties in identifying infringers due to restrictions imposed by the Electronic Communication Act. Rights holders cannot obtain from Internet Service Providers (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 by a public prosecutor or the police in the course of a criminal investigation, although it appears that this is only the case with regard to infringements on a particularly large scale.

Police and prosecutors have generally failed to act on complaints of Internet piracy made on behalf of the film and games industries by the Swedish Anti-Piracy Bureau (SAB), putting in question the government's willingness to comply with its WTO TRIPS Agreement enforcement obligations. SAB (Swedish Anti-piracy Bureau) and APB (AntiPiratByran) are the same entity, that is, the umbrella organization for anti-piracy operations carried out on behalf of the film and games industries. SAB had to find alternative enforcement solutions on the civil side. For example, in March 2005 a successful raid was executed on Bahnhof AB, the country's oldest and largest private ISP located in Stockholm, which had been a source for top-level piracy for several years, hosting some of the biggest and fastest servers in Europe. This was the first time the Swedish courts gave permission for a raid of this kind, directed at the offices of a major ISP with no prior notice. The raid was undertaken by the Special Enforcement Unit of the Stockholm Enforcement Authority, assisted by local law enforcement authorities and conducted in close cooperation with rightsholders. The police were called to assist in the raid when the full extent of the material available on the servers was realized. The raid resulted in the seizure of four servers containing a total of 1,800 movie files, 5,000 software application files, and 450,000 MP3 files, which is enough for up to three and a half years of uninterrupted play. A total of 23 terabytes of data were seized. The servers seized by the police were staging grounds for a large portion of the pirate content on the Internet and one server in particular ("ECD") was reputed to be the biggest pirate server in Europe. After the raid, industry sources noted that other ISPs hosting suspected illegal file-sharing sites did remove them after being contacted by SAB.

During 2005, the Ministry of Justice tasked the Swedish Prosecution Authority, the Swedish Economic Crime Bureau and the National Police Board to review official enforcement of the law on intellectual property. Its report, published in September 2005, recommended the establishment of specialized units of prosecutors and police officers with information technology knowledge and the right for rights holders to gain information, such as Internet protocol (IP) addresses, from the ISP in "small" cases. A slight cause for optimism was the conviction on October 25, 2005, on a complaint by the SAB, of a 28 year-old man from Västerås for the offense of distributing a single Swedish film using the DC++ file-sharing hub, Walhall. The defendant was ordered to pay a substantial fine (16,000 kronor, US\$2,055) and costs. This first conviction suggests that if the authorities acquire the will to prosecute Internet piracy cases, the courts may be prepared to apply the law appropriately.

Legislation: Various law reform efforts took place in the last year and are underway in Sweden.

EU Conditional Access Directive: Although it is illegal to sell or repair pirate smart cards, it is nevertheless legally permissible to possess them, insofar as the police believe that the

quantity indicates no intent to sell. Despite industry complaints, the Swedish government has failed to close this loophole for piracy.

EU Copyright Directive: The new law implementing Sweden's obligations under the EU Copyright Directive entered into force on July 1, 2005 (Law 2005:360 amending the Act on Copyright in Literary and Artistic Works, Law 1960:729). Particularly disappointing are the inadequate provisions regarding the protection of technological measures and the lack of a specific injunctive remedy against ISPs. At least, however, unauthorized downloading of protected works is now clearly illegal, even if the lack of a right to obtain user information from Internet service providers deprives rights holders of any civil remedy for such infringement.

EU Enforcement Directive: The EU adopted the Directive for the Enforcement of Intellectual Property Rights in April 2004, and member states have two years to implement the text into national law. The Directive provides a number of benefits for civil action against piracy, in particular with regard to the obtaining of information about infringers and the grant of injunctions against intermediaries. So far the government has not published any proposals for implementing this much-needed Directive and there must be concern that it will not comply with the deadline for implementation of April 29, 2006.

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INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

SWITZERLAND

The copyright industries are very concerned that Swiss-proposed legislation to implement the WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) would create a severely problematic legal environment for copyrighted materials. The vast majority of European countries have amended their laws to meet their international obligations and to implement the EC Copyright Directive adopted in 2001. Switzerland also committed to implement these Treaties on June 21, 2001, when it signed an agreement, which extends the coverage of the EFTA Convention to the protection of intellectual property (Chapter VII, Article 19 and Annex J to the Convention).¹

To review, in October 2004, the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for Intellectual Property published preliminary draft amendments to the Swiss Copyright Act and started a consultation process, which included receiving input from the copyright industries and interested right holders. For a long time, right holder groups have been pressing the Swiss Government, which played an active role in the adoption of the 1996 WIPO Treaties, to implement them as part of its adaptation of Swiss law into the digital environment. In May 2005, the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for Intellectual Property issued a press release and published a Report on the 176 submissions it received during the consultation process.

Consistency of approach towards copyright protection in the digital age is vital. The Swiss copyright amendment proposal is problematic for copyright right holders and inconsistent with the international and European in three key respects.

First, **legal protection for technological measures** seems insufficient to satisfy treaty standards and represents a dramatic departure from the standard in the EU Copyright Directive (Articles 6.1 and 6.2) and the U.S. Digital Millennium Copyright Act (Section 1201). The draft would allow circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)); this provision weakens the legal protection of technological measures and diminishes right holders’ ability to enforce “effective legal remedies” (as required by WCT Article 11) in the event of such circumvention. This provision renders certain instances of

¹ The EC Copyright Directive (now implemented in 23 of 25 Member States, of course also being implemented by EEA Member States as well as a number of other European countries, notably those seeking to accede to the EU) provides a standard level of copyright protection across Europe. While Switzerland is by no means obliged to implement every facet of the Copyright Directive, it is important that the Swiss WIPO Treaties’ implementation achieve adequate copyright protection which helps to create a level playing field and ensures consistency of the rules across Europe. This is vital in a networked environment. Article 19(4) of the EFTA Convention states that Member States should avoid or remedy trade distortions caused by actual levels of protection of intellectual property rights. The EFTA Convention (Article 2) also promotes the enactment and respect of equivalent rules as well as the need to provide appropriate protection of intellectual property rights, in accordance with the highest international standards.

circumvention permissible even while the tools to circumvent would be illegal. While the industries understand that there concerns relating to copyright exceptions and privacy, this proposed approach is unworkable. Adequate standards for protection of technological measures are set out in both the EU Copyright Directive and the DMCA, neither of which goes so far as to permit or sanction circumvention. It should be noted that beyond the public rhetoric against Digital Rights Management (DRM), both the Copyright Directive and the DMCA have gone a long way to promote new modes of delivery of copyright works for consumers.

Second, **a fair balancing of protection of technological measures with copyright exceptions is lacking**, with the Swiss draft skewed too heavily in favour of such exceptions. The weakness of protection for technological measures is further apparent in the draft's favoring of exceptions to exclusive rights at the expense of such measures, and in the undue burdens placed on copyright owners who apply such measures to protect their works. For example, Articles 39(a) and (b) as well as Article 62(3) would cumulatively result in a process skewed heavily in favor of users at the expense of copyright owners, who will likely find themselves before courts enmeshed in litigation because the law would give users a judicially enforceable claim to obtain access to works protected by technological measures. As evidenced in both the EU Copyright Directive and the U.S. DMCA, there are other mechanisms that can be used to address possible failures to accommodate exceptions. A fairer approach is required to ensure the development of new business models, such as on-demand and interactive services.

Lastly, **the private copy exception in current Swiss copyright law is so broad as to open a wide door to piracy**, particularly in the digital realm, and therefore needs to be modified to meet international and European norms. The scope of the private copy exception is so broad that it calls into question whether Swiss law currently meets TRIPS standards (TRIPS Article 13). Article 19 of the Swiss law seems to permit transmission of copies to third parties and to permit copying from illegal or unauthorized sources. Moreover, the concept of what is a "private" copy is overly broad, in that the law refers to the "private circle" rather than to copies made "by the individual for his or her own private use and for no direct or indirect economic or commercial gain" (see Article 5.2b of the EU Copyright Directive). This is not meant to exclude users within the same household but is intended to circumscribe the exception to a narrow group of users.

In sum, these provisions are highly dubious in view of the dangers of Internet-based piracy, where users exchange unauthorized copies by peer-to-peer networks. This danger is clear based on certain comments included in the May 2005 Report of the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for Intellectual Property; that Report states that "downloading for private purposes is assimilated to private copying and is therefore authorized." Such a position encourages copyright infringement on a massive scale and is inconsistent with international norms.

We therefore urge the Swiss government to reconsider and revise the proposed amendments to the Swiss Copyright act to address the concerns expressed in this letter and would welcome the opportunity to discuss our views further as appropriate. Finally, we ask that this copyright legislation and the importance of effective copyright enforcement in both the offline and online environment be included in the work program of the new Swiss-U.S. Trade and Investment Cooperation Forum.

APPENDIX D

CHART OF COUNTRIES'
SPECIAL 301 PLACEMENT (1989 – 2005)
&
IIPA's 2006 SPECIAL 301 RECOMMENDATIONS

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2005) AND IIPA 2006 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2006	USTR 301 PLACEMENT (as of April/May of each year)																
		2005	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	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
Armenia					WL	WL	WL											
Australia								WL	WL	WL	WL		WL	PWL	PWL	PWL		
Austria									OO	OO								
Azerbaijan	SM	WL	WL	WL	WL	WL	WL											
Bahamas	WL	WL	PWL	PWL	WL + OCR	OCR	OCR											
Bahrain									WL	WL	WL	WL						
Bangladesh	SM																	
Belarus	WL	WL	WL	WL	WL	WL	WL	WL	OO									
Belize		WL	WL															
Bolivia	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO							
Bosnia and Herzegovina	SM																	
Brazil	WL + OCR	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei	SM																	
Bulgaria	WL	WL	WL						PWL	WL	OO	OO						
Burma (Myanmar)	SM																	
Cambodia	SM																	
Canada	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia	PWL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia		WL	WL	WL														
Cyprus	SM									OO	OO	OO	WL	WL	WL	WL		
Czech Republic	SM						WL	WL	WL	OO								
Denmark							WL	WL	WL	WL								
Dominican Republic	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt	PWL	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								OO									
European Union		WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
Georgia						OCR												
Germany									OO	OO	OO	OO	OO		WL	WL		
Greece	WL				WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala		WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Honduras									WL	WL	OO	OO	OO					
Hong Kong	SM + OCR							OCR	WL	WL	OO							
Hungary	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
Iceland																		

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2005) AND IIPA 2006 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2006	USTR 301 PLACEMENT (as of April/May of each year)																
		2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	PWL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL
Ireland							WL	WL	WL	WL	OO							
Israel	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL	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	WL									
Japan	SM					OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan								WL	WL	WL	OO	OO						
Kazakhstan (GSP)	WL	WL	WL	WL	WL	WL	WL		OO									
Kenya	SM																	
Kuwait	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic						OCR												
Laos	SM																	
Latvia	WL	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO									
Lithuania	WL	WL	WL	WL	WL	WL	WL											
Luxembourg										WL								
Macau						WL	WL	PWL	PWL									
Macedonia																		
Malaysia	WL + OCR	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova							WL											
Morocco	SM																	
Netherlands									OO									
New Zealand	SM				WL	WL		WL							WL	WL		
Nicaragua									OO	OO								
Nigeria	SM																	
Oman							WL	WL	WL	WL	WL	OO						
Pakistan	WL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority							OCR											
Panama	SM								OO	WL	OO		OO					
Paraguay	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL			
People's Republic of China	PWL	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
Peru	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	PWL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
Portugal											OO							WL
Qatar					WL		WL	WL	WL	OO	OO	OO						
Romania	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						

2006 Special 301: History of Special 301 Rankings
Issued February 13, 2006

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2005) AND IIPA 2006 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2006	USTR 301 PLACEMENT (as of April/May of each year)																
		2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Russian Federation (GSP)	PFC	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
San Marino										WL								
Saudi Arabia	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL
Serbia and Montenegro	WL															WL	WL	WL
Singapore	SM						WL	WL	WL	WL	WL	WL	OO					
Slovak Republic		WL	WL	WL	WL	WL												
Slovenia							OCR											
South Africa	SM							WL	WL		OO	WL						
South Korea	WL + OCR	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain	SM						WL	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																		
Sweden	SM							WL	WL	WL								
Switzerland	SM																	
Taiwan	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL	PWL
Tajikistan	WL	WL	WL	WL	WL	WL	WL											
Thailand	PWL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Tunisia									OO									
Turkey	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
Turkmenistan	WL	WL	WL	WL	WL	WL	WL											
UAE						WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PWL	PWL	WL									
Uruguay		WL	WL	WL	PWL	PWL	WL	WL	OO	OO								
Uzbekistan (GSP)	WL	WL	WL	WL	WL	WL	WL											
Venezuela	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO						
Yemen									OO									

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)

APPENDIX E

IIPA HISTORICAL SUMMARY
OF
COUNTRIES' SPECIAL 301 PLACEMENT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

APPENDIX E: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

FEBRUARY 2006

ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List. See IIPA's 2006 report on Argentina at <http://www.iipa.com/rbc/2006/2006SPEC301ARGENTINA.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." USTR retained Argentina on the Priority Watch List in 2005 citing inadequate progress with Argentina's protection of IPR. Of special concern was Argentina's lack of an effective enforcement system despite significant levels of copyright piracy. According to USTR's 2005 Special 301 announcement, problems with Argentina's enforcement regime include "lack of deterrent criminal penalties in commercial piracy cases, delays in bringing and completing criminal and civil infringement cases, ineffective border controls, and lack of deterrent civil damages."

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 2004, \$563.4 million worth of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 15% of its total

imports. During the first 11 months of 2005, \$555.0 million worth of Argentine goods (or 13.1% 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 10.3% increase over the same period in 2004.

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 Watch List because almost none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan. In 2001, IIPA recommended that USTR place Armenia on the Watch List, and USTR agreed. In the 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, the failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 Announcement, USTR noted that "Armenia has several remaining steps to take in order to fulfill its intellectual property commitments under the 1992 U.S.-Armenia Trade Agreement and to become TRIPS-consistent in preparation for accession to the WTO." In its April 30, 2002 announcement, USTR kept Armenia on the Watch List, noting, as in the past, that the country has many steps to go to comply with the intellectual property requirements of the 1992 U.S.-Armenia Trade Agreement. In particular, USTR pointed out Armenia's lack of protection for U.S. and other sound recordings, lack of retroactive protection for works or sound recordings under its copyright law, and weak enforcement of intellectual property rights. Despite continued deficiencies in its protection and enforcement of intellectual property, Armenia became a member of the WTO, effective February 5, 2003.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. In February 2000, the administration accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan, and on May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. The U.S. government has not yet decided 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 2004, \$27 million worth of Armenian goods entered the U.S. under the GSP duty-free code, accounting for 58.5% of its total exports to the U.S. During the first 11 months of 2005, \$26 million worth of Armenian goods (or 60.1% 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 3.3% increase over the same period in 2004.

AUSTRALIA

The Free Trade Agreement (FTA) between Australia and the U.S. Australia does not currently appear on any of the USTR lists. In 1994, Australia was named to the Watch List. Between 1991 and 1994, IIPA filings cited a number of issues that harmed U.S. copyright industry sales and exports in Australia, notably the threat to remove parallel import protections for sound recordings and computer programs; the failure to provide exclusive rental rights to sound recordings; the denial of national treatment to the U.S. recording and music publishing industries in the administration of Australia's audio levy; concerns about the strength of copyright protection for computer programs; and a severe problem of bootleg recordings of U.S. performers. In 1991, Australia was placed on USTR's Priority Watch List, where it remained until 1993.

Australia was briefly dropped from the Watch List after some legal reforms were undertaken but was reinstated to the Watch List because of deficiencies in the protection of pharmaceutical test data in 1996. In 1997, noting the renewed threat to weaken or eliminate the importation right, IIPA recommended placement of Australia on the Watch List. USTR agreed, and Australia remained on the Watch List through 1999, in part because of what was described as "serious concern" over 1998 legislation abolishing the importation right for sound recordings and pending legislation abolishing the importation right for other copyrighted works including software, electronic games, and gaming equipment. Although Australia was removed from any Special 301 List in 2000, USTR noted in its May 1, 2000 Special 301 Announcement the possible initiation of future WTO dispute settlement cases against several countries, including Australia, for apparent noncompliance with TRIPS obligations.

AZERBAIJAN

In 2006, IIPA highlights copyright concerns about Azerbaijan in its Special Mention section. See IIPA's 2006 Azerbaijan report at <http://www.iipa.com/rbc/2006/2006SPEC301AZERBAIJAN.pdf>. In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In its May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

In 2001, IIPA recommended and USTR agreed to place Azerbaijan on the Watch List. In the 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 Announcement, USTR noted that "Azerbaijan has yet to fulfill its intellectual property commitments under the 1995 U.S.-Azerbaijan Trade Agreement," citing failure to adhere to the Geneva Phonograms Convention as well as weak criminal provisions for IP violations. In 2002, IIPA recommended that Azerbaijan remain on the Watch List. In its April 30, 2002 announcement, USTR kept Azerbaijan on the Watch List. The announcement notes that the country "has several remaining steps to take before fulfilling its intellectual property rights commitments under the 1995 U.S.-Azerbaijan Trade Agreement." In particular, USTR pointed to Azerbaijan's lack of protection for U.S. and other foreign sound recordings and lack of a clear provision of retroactive protection for works or sound recordings. USTR's 2003 Announcement, which kept Azerbaijan on the Watch List, cited similar problems, noting "provisions under the Azerbaijani Criminal Code are minimal and contain a high threshold for the

imposition of criminal penalties.” Moreover, they are limited to copyright and patent violations, completely excluding neighboring rights violations, and do not provide *ex officio* authority.

In 2004, IIPA recommended that Azerbaijan remain on the Watch List. 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.” USTR kept Azerbaijan on the Watch List in 2005 for many of the aforementioned reasons. These include the failure to adhere to the 1995 U.S.-Azerbaijan Trade Agreement and inadequate laws which fail to provide protection for existing works or *ex officio* authority.

BAHAMAS

IIPA recommends that The Bahamas remain on the Watch List in 2006. See IIPA’s 2006 report on the Bahamas at <http://www.iipa.com/rbc/2006/2006SPEC301BAHAMAS.pdf>. 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. 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 its 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.” (IIPA believes that OCR did not occur.) In its 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. USTR 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.” USTR moved The Bahamas from the Priority Watch List to the Watch List in its 2005 Special 301 Announcement. The Bahamas was praised for passing an amendment to its copyright act regarding compulsory licensing but USTR expressed concern that the amendment had not been enacted or implemented. In addition, USTR stated that, “the amendment and proposed implementing regulations contain certain deficiencies that we urge the Bahamas to address in the near term. Until this copyright amendment is properly put into effect, problems continue to persist in the area of copyright protection for U.S. cable programs and motion pictures.”

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 2004, \$92.7 million worth of Bahamian goods entered the U.S. under the CBI, representing 14.5% of the Bahamas’ total exports to the U.S. During the first 11 months of 2005, \$99.7 million worth of Bahamian goods (or 15.2% of the Bahamas’ total exports to the U.S. from January to November) entered under the CBI, representing an increase of 20.9% from the same period in 2004.

BAHRAIN

Bahrain does not currently appear on any of the USTR lists. IIPA first recommended placing Bahrain on the Watch List in 1993, and renewed its recommendation over the next two years, citing severe video and audio piracy problems, including exports. In April 1995, USTR placed Bahrain on the Watch List. From 1996 through 1999, IIPA recommended that Bahrain remain on the Watch List because its law was out of sync with its international obligations under TRIPS, and because high piracy levels continued while enforcement was weak. USTR kept Bahrain on the Watch List through the 1998 cycle. However, due to concerted enforcement actions throughout 1998 and into 1999, USTR removed Bahrain from the Watch List in April 1999. Since it was removed from the 301 lists, Bahrain has not reappeared on any list. 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. In January 2006, the U.S. implementing legislation for the U.S.-Bahrain FTA was signed into law by the President. Bahrain was still in process of passing implementing legislation both in terms of a copyright law and an optical disc regulation.

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 2004, \$57.4 million worth of goods from Bahrain entered the United States under the GSP duty-free code, accounting for 14.2% of its total exports to the U.S. During the first 11 months of 2005, \$63.8 million worth of goods from Bahrain (or 16.1% of Bahrain’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 18.6% from the same period in 2004.

BANGLADESH

Bangladesh currently does not appear on any USTR list. In 2005 and again in 2006, IIPA highlights concerns in Bangladesh in its Special Mention section, noting that “due to the total lack of enforcement, the overall piracy situation in Bangladesh has worsened over the last year.” See IIPA’s 2006 report on Bangladesh at <http://www.iipa.com/rbc/2006/2006SPEC301BANGLADESH.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 2004, \$17.1 million worth of goods from Bangladesh entered the United States under the GSP duty-free code, accounting for 0.7% of its total exports to the U.S. During the first 11 months of 2005, \$19.6 million worth of goods from Bangladesh (or 0.8% of Bangladesh’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 21.1% from the same period in 2004.

BELARUS

IIPA recommends that Belarus remain on the Watch List, where it has remained since 1999. See IIPA’s 2006 CIS country report at <http://www.iipa.com/rbc/2006/2006SPEC301BELARUS.pdf>. In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, Belarus was placed on the Other Observations list. The next year, Belarus was elevated to the Watch List. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List.

(Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR kept Belarus on the Watch List. In 2001, USTR again kept Belarus on the Watch List, noting its lack of protection for U.S. and other foreign sound recordings and its lack of clear, retroactive protection for pre-existing works or sound recordings. USTR also noted weak IPR enforcement and high piracy levels. Further, though Belarus had amended its criminal code, relevant government agencies did not have the authority “to initiate criminal cases concerning copyright infringement on their own initiative.” In its April 30, 2002 Special 301 Announcement, USTR again placed Belarus on the Watch List. Not only did USTR cite the continued problems noted in the 2001 announcement, but further noted that “Belarus has also become a transshipment point for pirate materials throughout the region. The United States is very concerned about recent reports that optical disk production capacity has migrated from Ukraine into Belarus due to lax border enforcement.” 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. USTR’s 2005 Special 301 announcement echoed similar concerns raised in past reviews of Belarus’ IPR protection and enforcement. Citing a lack of any notable improvements, USTR retained Belarus on the 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. GSP benefits for Ukraine were withdrawn in 2001. GSP benefits were withdrawn from Belarus for reasons unrelated to intellectual property matters.

BELIZE

USTR placed Belize on the Watch List in its 2004 Special 301 Announcement citing inadequate enforcement efforts. In its 2005 Special 301 Announcement, USTR retained Belize on the Watch List stating that, “Although IPR legislation in Belize generally is consistent with international standards, the Government of Belize continued to make only minimal IPR enforcement efforts, which has led to the widespread availability of counterfeit and pirated goods.”

Belize 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 2004, \$1.2 million worth of Belizean imports to the United States benefited from the GSP program, accounting for 1.1% of its total exports to the U.S. During the first 11 months of 2005, \$1.5 million worth of Belizean goods (or 1.6% of Belize’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 23.7% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$29.9 million worth of Belizean goods entered the U.S. in 2004, accounting for 28% of total exports to the U.S. in 2004. During the first 11 months of 2005, \$39 million worth of Belizean goods (or 42.2% of Belize’s total exports to the U.S. from January to November) entered under the CBI, representing a 53% 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, \$14.5 million worth of

Belizean goods entered the U.S. in 2004. During the first 11 months of 2005, \$14 million worth of Belizean goods (or 15.2% of Belize's total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

BOLIVIA

IIPA recommends that Bolivia remain on the Watch List, where it has been since 1999. See IIPA's 2006 Bolivia country report at <http://www.iipa.com/rbc/2006/2006SPEC301BOLIVIA.pdf>. In February 1995, IIPA recommended that Bolivia be added to the Special 301 Watch List because of widespread piracy of all kinds of copyrighted works unchallenged by any meaningful government enforcement efforts. In 1996, IIPA again advocated that Bolivia be placed on the Watch List; USTR placed it on the Special Mention list and added an out-of-cycle review (OCR). In December 1996, upon conclusion of the OCR, USTR announced that Bolivia was being elevated to the Watch List because it had not yet taken adequate steps to combat copyright piracy, particularly in the area of illegal computer software production; to adequately implement the Andean Pact Decision 351 on copyright requirements; or to revise its copyright law to conform with international standards. Bolivia stayed on the Watch List in 1997. In April 1998, Bolivia signed a bilateral investment treaty with the U.S. and in so doing, committed to becoming TRIPS-compatible within 12 months. As a result, USTR placed Bolivia on the Other Observations list for 1998. However, USTR has kept Bolivia on the Special 301 Watch List since 1999. In 2002, IIPA recommended that Bolivia remain on the Watch List, pointing to that country's continued high piracy rates and failure to meet basic TRIPS standards. USTR's April 30, 2002 Special 301 Announcement again placed Bolivia on the Watch List but noted that "[t]he United States is heartened by the appointment of a new director to head the intellectual property rights service (SENAPI), and encourages Bolivia to support the director's efforts to improve the IPR situation in Bolivia." The USTR 2003 Special 301 Announcement also kept Bolivia on the Watch List, noting "efforts to amend its copyright law have languished," and adding 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 its 2005 Special 301 Announcement, USTR retained Bolivia on the Watch List, stating that, "Bolivia's IPR system continues to be deficient with respect to inadequate copyright laws, significant copyright piracy and trademark counterfeiting, and weak IPR enforcement efforts overall. The United States looks to Bolivia to strengthen its copyright law, improve its IPR enforcement mechanisms, and ratify and implement the WIPO Internet Treaties."

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, thus concluding they were denied. In 2004, \$16.6 million worth of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 6.4% of its total exports to the U.S. Another \$118.8 million worth of Bolivia's exports to the U.S. received benefits under the ATPA program, accounting for 45.6% of its total exports to the U.S. that year. During the first 11 months of 2005, \$25.1 million worth of Bolivian goods (or 9.1% 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 64.8% increase over the same period in the previous year. Another \$149.2 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2005, representing an increase of 33.8% from the same period in 2004.

BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina have never appeared on a USTR Special 301 list. In 2006, as was the case in 2005, IIPA notes Bosnia and Herzegovina in its Special Mention section, See http://www.iipa.com/rbc/2006/2006SPEC301BOS_HERZ.pdf.

In 2004, \$3.2 million worth of goods from Bosnia and Herzegovina entered the United States under the duty-free GSP code, accounting for 28.3% of its total exports to the U.S. During the first 11 months of 2005, \$3.6 million worth of Bosnia and Herzegovina's goods (or 5.3% 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 35.3% increase over the same period in 2004.

BRAZIL

This year, IIPA recommends that Brazil be moved from the Priority Watch List to the Watch List, and that an out-of-cycle review be conducted in 2006. See IIPA's 2006 Brazil country report at <http://www.iipa.com/rbc/2006/2006SPEC301BRAZIL.pdf>. Over the years, Brazil has 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 Priority Watch List because of the continuing failure of that government to address the rising piracy problems and deteriorating enforcement actions by the government authorities despite very active participation in anti-piracy efforts by the affected copyright industries. USTR put Brazil back on the Watch List in April 1999, noting that "the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove policy authority to engage in ex officio searches and seizures on their own initiative ... We also look to the Brazilian government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000." The 2000 deadline came and went. Despite IIPA's recommendation that Brazil be elevated to the Priority Watch List, USTR kept Brazil on the Watch List, and noted in the May 1, 2000 Special 301 Announcement: "... Progress has not been sufficient on Brazil's commitment to increase effective enforcement actions, from raids through judicial decisions, against intellectual property infringement; the rate of CD piracy in Brazil continues to worsen. Failure to address this problem could lead to the collapse of the market for legitimate CDs in Brazil."

In 2001, USTR kept Brazil on the Watch List, noting that "[t]he serious copyright piracy problem shows little sign of abatement." Despite this, USTR was "pleased to see the establishment of an Inter-Ministerial Committee to Fight Piracy pursuant to the Presidential Decree of March 2001." In its 2002 Special 301 submission, IIPA recommended that Brazil be elevated to the Priority Watch List. In its April 30, 2002 Special 301 Announcement, USTR did in fact elevate Brazil to the Priority Watch List. The announcement noted that despite enacting modern, largely TRIPS-consistent legislation, the country has taken "no serious enforcement actions against increasing rates of piracy." Despite encouragement from some positive moves by the Brazilian government, including the income tax authority's destruction of a large amount of seized pirated goods, and São Paulo's creation of a piracy and related crimes division in the

civil police force, USTR notes that there are still enforcement problems. For example, the Inter-Ministerial Committee has “taken very little action on the anti-piracy front.” The USTR’s 2003 Special 301 Announcement commented on the continued lack of enforcement actions, noting “very few prosecutions and deterrent convictions result from raids.” Brazil therefore remained on the Priority Watch List.

In 2004, IIPA recommended that Brazil remain on the Priority Watch List 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.” Despite various efforts and initiatives during 2004, such as the adoption of a National Action Plan by Brazil’s National Council to Combat Piracy and Intellectual Property Crimes, USTR retained Brazil on the Priority Watch List again in 2005. Problems warranting the continued status included increased levels of optical disc on online piracy, failure to follow through with prosecutions after raids and ineffective boarder enforcement measures.

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 efforts to enforce copyrights. In December 2004, USTR announced that it would again extend review of Brazil’s GSP eligibility for an additional 180 days, until March 2005. In its 2005 Special 301 announcement, USTR revealed that Brazil’s GSP review would be extended, for a third time, until September 2005. During 2005, there was a significant positive shift by Brazilian government officials in addressing the rampant piracy problem, with increased seizures and public awareness efforts. USTR ended Brazil’s GSP review in January 2006. While IIPA supported this decision, sustained and concrete results are still needed for reduce the high levels of copyright piracy and obtain deterrent criminal sentences. In 2004, \$3.2 billion worth of goods from Brazil entered the United States under the duty-free GSP code, accounting for 14.9% of its total exports to the U.S. During the first 11 months of 2005, \$3.3 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 16.5% increase over the same period in 2004.

BULGARIA

IIPA recommends that Bulgaria remain on the Watch List in 2006. See IIPA’s 2006 Bulgaria country report at <http://www.iipa.com/rbc/2006/2006SPEC301BULGARIA.pdf>. To recap, by 1995, it was clear that not only had Bulgaria failed to carry out its intellectual property protection obligations under the 1991 bilateral agreement with the United States, but also that the Bulgarian government had begun to play a direct role in massive piracy. One of the compact disc plants was operated by the government in partnership with a leading pirate company; another was operating on land leased by the government; and both were churning out pirated sound recordings for export into Russia, Europe, and other markets. Accordingly, in February 1995, IIPA asked USTR to designate Bulgaria as a Priority Foreign Country and to withdraw Bulgaria’s preferential trade benefits under the Generalized System of Preferences (GSP) program.

Faced with the prospect of sanctions under Special 301, and aided by a change in government in Sofia, Bulgaria moved quickly to address the issues highlighted in IIPA’s filing. On the eve of USTR’s Special 301 decision, the U.S. and Bulgaria exchanged letters in which Bulgaria promised to accede to the Geneva Phonograms Convention “on a priority basis” and to protect U.S. sound recordings published in

the last 50 years; to establish a title-verification system to prevent piracy of compact discs, laser discs, CD-ROMs and videos; and to enact deterrent criminal penalties applicable to a broad range of infringements, including inflation-adjusted fines and mandatory destruction of pirate product. In response to these commitments, USTR listed the country on its Special Mention list without otherwise ranking it for Special 301 purposes for 1995.

In 1996, the IIPA filing commended Bulgaria's enactment of criminal sanctions and its accession to the Phonograms Convention, but noted that other critical commitments, such as title verification, had not been met, and that real enforcement against piracy was virtually nonexistent, while high-volume pirate CD production continued unchecked. IIPA recommended that Bulgaria be placed on the Special 301 Watch List. In its April 30 report, USTR listed Bulgaria on the Special Mention list, noting that a title verification decree had just been issued, but criticizing lax enforcement and increased exports of pirated product. It scheduled an out-of-cycle review (OCR), which concluded on October 2, 1996. At that time, USTR placed Bulgaria on the Watch List, citing the lack of progress in suppressing the production and export of pirate CDs and CD-ROM products. In its 1997 filing, IIPA called for elevating Bulgaria to the Priority Watch List because of its continued failure to enforce its laws aggressively against the unauthorized production and world-wide export of CD-based products, and the overall lack of criminal prosecution. IIPA noted that deterrent penalties remained absent from the Bulgarian law, although the primary problem was the lack of effective enforcement, not the legal framework. As the piracy problem escalated in 1997 with a production capacity level of over 40 million units, USTR announced an OCR. Upon completion of the OCR in January 1998, Bulgaria was elevated from the Watch List to the Priority Watch List because of its persistent failure to take any meaningful action to eliminate the massive volume of exported pirate music CDs and CD-ROMs. In that January out-of-cycle review, and again in its February 1998 301 submission, IIPA recommended designation of Bulgaria as a Priority Foreign Country (PFC) because of the longevity of the problem, and the lack of political will to shut down the production and export of illegal goods.

With the possibility looming of a PFC designation in April 1998, the Bulgarian authorities finally took action in February and March 1998, to control the production and distribution of pirate CDs by Bulgarian plants by closing all of the plants and re-opening them only upon compliance with the newly introduced Plant Licensing Decree. The United States government decided to keep Bulgaria on the Priority Watch List in April, and to conduct a six-month out-of-cycle review in 1998 to monitor the progress and success of these production controls. Satisfied that progress was being made, USTR announced in November 1998 that it was moving Bulgaria to the Watch List, a placement supported, albeit cautiously, by IIPA. At the time of the announcement in November 1998, both USTR and IIPA agreed that title verification had to be significantly improved, and that additional controls on optical media production were required. In USTR's April 1999 Special 301 Announcement, progress in Bulgaria was noted, and in recognition of its "firm commitment to effective enforcement" of its IPR laws and its roles as serving as "a model for other economies which are at risk of developing unwanted production capacity of pirated optical media," Bulgaria was removed from all Special 301 lists. In 2002, IIPA recommended that Bulgaria be placed on the Watch List, noting resurging problems with the production, distribution, and importation of optical disc media. Though Bulgaria was not placed on any 301 list in 2001 or 2002, USTR's April 30, 2002 announcement stated that "based on recent reports of increased piracy in Bulgaria, the United States will be closely monitoring the situation and will look to the Government of Bulgaria to ensure the maintenance of the Optical Disk (OD) regulations." USTR noted that despite Bulgaria's reputation for tackling optical media piracy, "we are concerned by reports that it may weaken its optical media control regime." Despite IIPA's request to add Bulgaria to the Watch List in 2003, USTR choose to keep Bulgaria off the lists, noting again that increased piracy and revisions to CD planting licensing laws may be being revised to undermine their effectiveness. IIPA recommended Bulgaria be added to the Priority Watch List in its Special 301 Report for 2004. USTR, in its 2004 Special 301 Announcement, placed Bulgaria on the Watch List 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 USTR's 2005 Special 301 announcement, Bulgaria remained on the Watch List for many of the previously raised issues including rampant optical disc piracy, lack of an effective criminal code and problems with enforcement measures. In terms of GSP, in 2004, \$41 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 8.1% of its total exports to the U.S. During the first 11 months of 2005, \$45.5 million worth of Bulgarian goods (or 11% 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 24.1% increase over the same period in 2004.

BURMA (MYANMAR)

Burma has never appeared on any USTR list. In 2005 and again in 2006, IIPA notes copyright concerns in its Special Mention section. Specifically in 2006, IIPA noted that "because, like its Southeast Asian neighbors, the potential for migration into its territory of sources of production of piracy, including optical disc plants, gives rise to our collective concern." See IIPA's 2006 report on Burma at <http://www.iipa.com/rbc/2006/2006SPEC301BURMA.pdf>.

CAMBODIA

Cambodia has never appeared on a USTR Special 301 list. IIPA includes Cambodia in its Special Mention section since it is still believed there may be one optical disc plant in the capital, and due to its location, the potential for migration of more optical disc plants remains a possibility. See IIPA's 2006 report on Cambodia at <http://www.iipa.com/rbc/2006/2006SPEC301CAMBODIA.pdf>. In its 2003 submission, IIPA also highlighted concerns in IIPA's Special Mention section, citing concerns over migration of optical disc plants. In its 2004 Special Mention section, 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. In the 2005 Special Mention section, IIPA noted that "Given the country's location, the potential for migration of more optical disc plants engaged in piracy remains a concern."

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 2004, \$4.3 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 2005, \$4 million worth of Cambodian goods (or 0.25% of its total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 0.3% over the same period in 2004.

CANADA

In 2006, IIPA cites Canada's continued failure to implement the two WIPO treaties (the WCT and WPPT) and recommends that Canada remain on the Special 301 Watch List and that an out-of-cycle review be performed later this year. See <http://www.iipa.com/rbc/2006/2006SPEC301CANADA.pdf>. 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 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." In 2005, USTR noted that Canada continued to exhibit deficiencies in the areas of border protection and IPR enforcement and had not yet ratified and implemented the WIPO Internet Treaties. Accordingly, Canada was retained on the Watch List by the USTR in its Special 301 2005 announcement.

CHILE

IIPA recommends that in 2006, Chile be elevated to the Priority Watch List, up from the Watch List where it has been since 1991. See IIPA's 2006 Chile country report at <http://www.iipa.com/rbc/2006/2006SPEC301CHILE.pdf>. In 2001, IIPA recommended that Chile be placed on the Watch List due to continued high piracy levels. USTR placed Chile on the Watch List in 2001, noting in its April 30, 2001 Special 301 Announcement that "Chile's intellectual property laws are not fully consistent with its international obligations." The announcement pointed specifically to Chile's failure to enact TRIPS-compliant legislation. USTR also noted that "[i]nadequate enforcement against piracy and counterfeiting also remains a serious problem." In 2002, IIPA recommended that Chile remain on the Watch List, pointing to the country's significant piracy problems and enforcement failures. In its April 30, 2002 Special 301 Announcement, USTR again placed Chile on the Watch List, noting deficiencies in both legislation and enforcement. USTR's 2003 Special 301 Announcement retained Chile on the Watch List, even after the Chile FTA negotiations were announced. In 2004, IIPA recommended that Chile be placed on the Watch List. In its Special 301 Announcement, USTR agreed, keeping Chile on the Watch List. However, USTR noted that the U.S.-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, pointed toward better protection of IPR in Chile. Additional legislative efforts continued in 2004, and the industries remain concerned about these new efforts. With its decision to keep Chile on the Watch List in its 2005 Special 301 Announcement, USTR noted that despite Chile's attempts to bring its protection of IPR into compliance with FTA and TRIPS, "Copyright piracy is still a serious problem in Chile, and the U.S. copyright industry indicates that digital piracy has contributed to a dramatic rise in piracy in Chile. Concerns remain over pending additional copyright legislation introduced in 2004 which, while making some improvements in enforcement mechanisms, appears to fall short of providing deterrent penalties."

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 criterion for eligibility. Chile's participation in the GSP program basically ended when the FTA entered into force. In 2004, \$6.97 million worth of Chilean imports to the United States benefited from the GSP program, accounting for 0.15% of Chile's total exports to the U.S. During the first 11 months of 2005, a mere \$20,000 worth of Chilean imports to the United States benefited from the GSP program.

COLOMBIA

IIPA recommends that Colombia be elevated to the Priority Watch List in 2006. See IIPA's 2006 Colombia country report at <http://www.iipa.com/rbc/2006/2006SPEC301COLOMBIA.pdf>. Between 1989 and 2001, Colombia was on the Special 301 Watch List for problems involving copyright enforcement and inadequate patent and trademark legislation. In 1997, USTR noted that "[p]iracy continues to be a significant problem and that the Television Broadcast Law discriminated against foreign content." Because of the need for the Colombian government to license pay-TV operators and improve enforcement efforts, IIPA recommended that Colombia be elevated to the Priority Watch List in 1998. In 1998, USTR kept Colombia on the Watch List, and added an out-of-cycle review in December 1998. In October 1998, President Clinton met with President Pastrana and they initiated consultations on a bilateral investment treaty. One of the key elements of the 1998 out-of-cycle review was whether or not the Colombian government would issue licenses to cable TV operators. In 1999, USTR kept Colombia on the Watch List, noting that although the Colombian Attorney General had initiated legal action against 108 television operators, "Colombia has still to resolve the major issue USTR highlighted in its December [1998] out-of-cycle review — failure to license legitimate pay television operators and pursue pirate operators." USTR also added a September 1999 out-of-cycle review to measure Colombia's progress. Progress was made on issuing these licenses, and on December 17, 1999, USTR announced its decision to keep Colombia on the Watch List as a result of the September 1999 out-of-cycle review. Colombia

remained on the Watch List in 2000 in large part because of insufficient enforcement of copyright laws and high piracy levels. USTR's April 30, 2001 Special 301 Announcement noted that "current enforcement efforts and penalties have not proven to be a significant deterrent." In 2002, IIPA recommended that Colombia remain on the Watch List and that an out-of-cycle review be conducted to monitor legislative and enforcement improvements. In the April 30, 2002 Special 301 Announcement, USTR elevated Colombia to the Priority Watch List. USTR pointed to a need for stronger IPR enforcement, noting that despite occasional seizures of pirated and counterfeit goods, "prosecutions rarely follow." Despite continued high levels of piracy (especially in the home video market), USTR noted Colombia's exemplary progress in the area of data protection, and the 2003 USTR Special 301 Announcement downgraded Colombia from the Priority Watch List to the Watch List.

In its 2004 Special 301 Report, IIPA recommended that Colombia be placed back on the Priority Watch List, noting that piracy, especially in the music sector, continued to dominate the Colombian market. USTR kept Colombia on the Watch List 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. Many of the same problems with Columbia's IPR regime were cited when USTR decided to retain Columbia on the Watch List in its 2005 Special 301 announcement. USTR stated that, "...high piracy levels plus a lack of successful prosecutions for IPR infringement remain problematic. Efforts to combat piracy through raids and other enforcement measures are hindered by a judicial system that fails to actively prosecute cases or issue deterrent criminal sentences."

Negotiations between Colombia and the U.S. for a Free Trade Agreement (FTA) continued in early 2006. 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 2004, \$186.6 million worth of Colombian goods entered the United States under the GSP program, accounting for 2.6% of its total exports to the U.S. \$3.8 billion worth of Colombian goods entered the U.S. under the ATPA program, accounting for 52.1% of its total exports to the U.S. During the first 11 months of 2005, \$174.5 million worth of Colombian goods (or 2.2% 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 0.1% decrease over the same period in the previous year. \$4.1 billion worth of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for an 18.9% 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. For more details, 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 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 were withdrawn from Belarus, but for reasons unrelated to intellectual property matters. GSP benefits were withdrawn from Ukraine in 2001, but the GSP case was terminated in January 2006, and GSP benefits were restored to Ukraine. The GSP reviews against Kazakhstan and Uzbekistan remain ongoing. See Russia, below, for more details on bilateral engagement there.

COSTA RICA

IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2006. See IIPA’s 2006 Costa Rica country report at <http://www.iipa.com/rbc/2006/2006SPEC301COSTARICA.pdf>. Costa Rica was placed on the Special 301 Watch List in 1995, for problems associated with inadequate patent protection and inadequate copyright enforcement. In the April 30, 2001 Special 301 Announcement, Costa Rica was placed on the Priority Watch List. USTR noted that “there is growing concern regarding the lack of effective enforcement activity by the Government of Costa Rica.” The United States “urge[d] Costa Rica to improve coordination of enforcement activities between public prosecutors and investigators; appoint special prosecutors to take on intellectual property cases; create a coordinated nationwide plan for defending and enforcing IP rights; and improve enforcement-related training at all levels of government.” In addition, the announcement noted that “[t]he United States will conduct an out-of-cycle review in the fall to assess Costa Rica’s legislative enforcement.” On October 31, 2001, USTR announced its decision regarding the out-of-cycle review. Because “little progress has been made on the four-point list of enforcement-related actions in USTR’s April 30 announcement,” Costa Rica remains on the Priority Watch List. In 2002, IIPA recommended that Costa Rica remain on the Priority Watch List, until concrete results were obtained in the improvement of its enforcement regime. In its April 30, 2002 Special 301 Announcement, USTR downgraded Costa Rica, placing it on the Watch List. USTR noted Costa Rica’s “concerted government strategy for improving the enforcement of intellectual property rights [including] ... appoint[ing] specialized prosecutors, intensif[y]ing 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 on 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. Citing continued problems with Costa Rica’s data protection measures and IPR enforcement, USTR retained Costa Rica on the Watch List in 2005.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner will take place on a rolling basis in 2006. Once the FTA enters into force in Costa Rica, it will cease to benefit from a variety of U.S. trade programs. In 2004, \$100.4 million worth of Costa Rican goods entered the U.S. under the GSP, accounting for 3% of its total exports to the U.S. Under the CBI, Costa Rica had \$579 million worth of goods enter the U.S. in 2004, accounting for 17.4% of its total exports to the U.S. In 2004, \$376 million worth of Costa Rican goods entered the U.S. under the CBTPA accounting for 11.3% of its total exports to the U.S. During the first 11 months of 2005, \$328 million worth of Costa Rican goods entered the U.S. under the CBTPA. During the first 11 months of 2005, \$83 million worth of Costa Rican goods (or 2.7% 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 12.5% decrease from the same period in 2004. During the first 11 months of 2005, \$598.1 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 12.2% from the same period in 2004.

CROATIA

Croatia is currently on the Special 301 Watch List. In 2005, IIPA highlighted copyright concerns in Croatia in IIPA’s Special Mention section. See <http://www.iipa.com/rbc/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 Watch List 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 Watch List. Croatia remained on the Watch List 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 was retained on the Watch List in USTR’s 2005 Special 301 Announcement.

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 2004, \$125.5 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 43.2% of its total exports to the U.S.). During the first 11 months of 2005, \$138.4 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 41.6% of its total imports from January to November), representing a 27.1% 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 2006 Special 301 Report. See <http://www.iipa.com/rbc/2006/2006SPEC301CYPRUS.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 Kantor warned that “[s]uspending criminal copyright penalties is unprecedented, and we view it with utmost seriousness.” Three months later, on December 22, 1993, Ambassador Kantor announced his decision to suspend GSP benefits to Cyprus, but he deferred the suspension because Cyprus intended to implement amendments to its copyright law on January 1, 1994. On June 30, 1994, USTR terminated the GSP review because there was a significant improvement in enforcement efforts which resulted in increases in sales of legitimate product and a decrease in piracy after the criminal penalties entered into effect. In April 1995, Cyprus was placed on USTR’s Special Mention list, primarily due to improvements in copyright enforcement. In the April 1996 Special 301 Announcements, USTR acknowledged that while Cyprus had made progress in its copyright enforcement efforts, the administration would be monitoring efforts by the Cypriot government to continue to act aggressively against piracy of software and of video and audio recordings. In keeping Cyprus on the Special Mention list in 1997, USTR notified Cyprus that USTR expected that the Government of Cyprus would act expeditiously to implement fully its TRIPS obligations. In 1998, IIPA recommended the placement of Cyprus on the Other Observations list (formerly known as the “Special Mention list”). Cyprus has not been on a USTR list since 1997.

CZECH REPUBLIC

The Czech Republic currently does not currently appear on any of the USTR lists. In 2006, IIPA highlights copyright concerns in the Czech Republic in the Special Mention section of its 2006 Special 301 Report. See http://www.iipa.com/rbc/2006/2006SPEC301CZECH_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. When Czech Republic joined the European Union on May 1, 2004, the Czech Republic was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

DOMINICAN REPUBLIC

IIPA recommends that the Dominican Republic be elevated to the Priority Watch List. See IIPA's 2006 Dominican Republic country report at http://www.iipa.com/rbc/2006/2006SPEC301DOMINICAN_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 initiated action against a third station." Furthermore, GODR appointed an intellectual property rights committee to review the patent law and bring it into compliance with TRIPS. The changes made by the committee were then announced in an executive decree. These steps were sufficiently progressive for USTR to move the Dominican Republic from the Priority Watch List to the Watch List. 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 protection." 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." The USTR retained the Dominican Republic on the Watch List in its Special 301 2005 Announcement.

stating that, “Concerns still remain regarding the protection and enforcement of intellectual property, particularly with respect to ongoing broadcast piracy and ineffective prosecution of copyright and trademark infringement cases.”

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner will take place on a rolling basis in 2006. Once the FTA enters into force in the Dominican Republic, it will cease to benefit from a variety of U.S. trade programs. Regarding preferential trade benefits, in 2004, \$96 million worth of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 2.1% of its total exports to the U.S. During the first 11 months of 2005, \$136.8 million worth of Dominican goods (or 3.3% 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 60% increase from the same period in the prior year. In 2004, \$832 million entered under the CBI, accounting for 18.4% of its total exports to the U.S. During the first 11 months of 2005, \$774 million worth of Dominican goods entered under the CBI, representing a 0.6% increase over the same period in the prior year. In 2004, \$1.7 billion worth of Dominican goods entered under the CBTPA. During the first 11 months of 2005, \$1.5 billion worth of Dominican goods entered under the CBTPA, representing a 6.4% decrease over the same period in the prior year.

ECUADOR

IIPA recommends that Ecuador remain on the Special 301 Watch List, where it was placed in 2003. See IIPA’s 2006 Special 301 Ecuador country report at <http://www.iipa.com/rbc/2006/2006SPEC301ECUADOR.pdf>. Ecuador appeared on the Special 301 Watch Lists in 1992 and 1993, before being removed from the list in 1993, when it signed a bilateral intellectual property rights agreement with the U.S., which was negotiated in conjunction with a bilateral investment treaty. Ecuador reappeared on the Watch List in 1996. In February 1997, IIPA recommended that USTR commence a World Trade Organization dispute settlement case against Ecuador for its failure to fully implement the terms of its WTO accession protocol by July 31, 1996. In April 1997, USTR stated that it would initiate a WTO case against Ecuador, and it elevated Ecuador to the Priority Watch List with an out-of-cycle review later in 1997. By the time of that out-of-cycle review, Ecuador had reversed its previous position regarding its accession, which was encouraging to the U.S. In February 1998, IIPA recommended that USTR keep Ecuador on the Priority Watch List to monitor its implementation and enforcement of then-pending copyright legislation in fulfillment of its multilateral and bilateral obligations. USTR agreed, scheduled an out-of-cycle review, and kept Ecuador on the same list in February 1999. Ecuador was placed on the Watch List in 1999 and 2000. In the May 1, 2000 Special 301 Announcement, USTR noted that “serious enforcement problems remain, with piracy levels still high, difficulty getting court orders enforced by the national police and the customs service . . .” In 2002, IIPA recommended that Ecuador be returned to the Watch List, to monitor the implementation and enforcement of the country’s copyright legislation in fulfillment of its multilateral obligations and bilateral commitments. The 2003 USTR Special 301 Announcement noted the “lessening of intellectual property protection in Ecuador, with a decrease in enforcement efforts.” Most of USTR’s concerns were directed at patent issues, but one major copyright problem highlighted involved a poorly drafted provision in the Education Law 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. Echoing previous concerns with regard to Ecuador’s failure to enforce its IP laws and continued high piracy rates, USTR retained Ecuador on the Watch List in its 2005 Special 301 Announcement.

In early 2006, Ecuador continued negotiations with the U.S. for a Free Trade Agreement (FTA). 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 2004, \$49.6 million worth of goods from Ecuador entered the U.S. under the duty-free GSP code, accounting for 1.2% of its total exports to the U.S. During the first 11 months of 2005, \$51.3 million worth of Ecuadorian goods (or 1.0% 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 20.6% increase over the same period in the previous year. In 2004, \$2.7 billion worth of goods entered under ATPA, accounting for 62% of its total exports to the U.S. In the first 11 months of 2005, \$3.5 billion entered under the ATPA, representing a 44.8% increase from the same period in 2004.

EGYPT

IIPA recommends that Egypt remain on the Priority Watch List, to which it was elevated in 2004. See IIPA’s 2006 Egypt country report at <http://www.iipa.com/rbc/2006/2006SPEC301EGYPT.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 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 Priority Watch List, noting inadequate protection for pharmaceutical patents, lax enforcement on unchecked copyright piracy, and unclear protection for pre-existing sound recordings. In the April 30, 2001 Special 301 Announcement, USTR noted deficiencies in Egypt’s copyright law which appeared inconsistent with the country’s TRIPS obligations. In addition, USTR voiced concern regarding “Egypt’s approval of fraudulent licenses to distributors of pirated copyright works, which facilitated pirate operations while hampering legitimate producers.” In 2002 and 2003, IIPA recommended that Egypt remain on the Priority Watch List, citing deficiencies in the draft copyright and patent laws, as well as lax enforcement and unchecked copyright piracy. In 2002, Egypt remained on the Priority Watch List, but in the 2003 USTR Special 301 Announcement, 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 particular, 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 was retained on the Priority Watch List in USTR’s 2005 Special 301 announcement in part for “deficiencies in Egypt’s

IPR enforcement regimes for copyrights and trademarks, and problems with its judicial system,” with USTR noting:

The U.S. copyright industry continues to note its concern over deficiencies in implementing regulations for Egypt’s copyright law. Egypt improved its copyright enforcement efforts slightly for some industries, although the U.S. copyright industry estimates its losses to be \$72.5 million in Egypt for 2004. Copyright piracy remains high for book publishing, as well as for entertainment and business software. Although piracy rates decreased slightly in 2004 in the music industry due to increased police activity, there are insufficient improvements in overall copyright enforcement. Copyright enforcement is further impaired by a court system in which copyright and trademark cases continue to move slowly, collection of judgments is difficult, and transparency appears to be 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 2004, \$38 million worth of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 2.9% of its total exports to the U.S. During the first 11 months of 2005, \$59.6 million worth of Egyptian goods (or 3.2% 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 79.5% increase over the same period in 2004.

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.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner will take place on a rolling basis in 2006. Once the FTA enters into force in El Salvador, it will cease to benefit from a variety of U.S. trade programs. In terms of preferential trade benefits, in 2004, \$31.2 million worth of Salvadoran goods entered the U.S. under the duty-free GSP code, accounting for 1.5% of its total exports to the U.S. During the first 11 months of 2005, \$56.7 million worth of Salvadoran goods (or 3.1% 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 an 86% increase over the same period in the previous year. In 2004, \$39.5 million worth of Salvadoran goods entered the U.S. under the CBI. During the first 11

months of 2005, \$64.1 million worth of Salvadoran goods entered the U.S. under the CBI, representing a 70.6% increase over the same period in the previous year. In 2004, \$1.1 billion worth of Salvadoran goods entered the U.S. under the CBTPA. During the first 11 months of 2005, \$1.1 billion worth of Salvadoran goods (or 58% of El Salvador's total exports to the U.S. from January to November) entered the U.S. under the CBTPA, representing a 7.3% increase from the same period in the previous year.

ESTONIA

IIPA notes Estonia in its Special Mention section in 2006. See <http://www.iipa.com/rbc/2006/2006SPEC301ESTONIA.pdf>. Estonia does not currently appear on any of the USTR lists. In 1998, Estonia appeared on the USTR Special 301 list for the first time when USTR placed it on the Other Observations list. In both 1999 and 2000, IIPA recommended placement of Estonia on the Watch List because of significant deficiencies in the Estonian legal regime, the significant enforcement problems (particularly at street markets and the border), and the growing piracy problem across many industries (and the disruption it has caused in other countries). In 2002 through 2004, IIPA recommended that Estonia be placed on the Watch List, pointing to the country's piracy problem and the absence of deterrent penalties. Estonia has not been placed on any USTR 301 list since 1998. When Estonia joined the European Union on May 1, 2004, Estonia was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

GEORGIA

Georgia does not currently appear on any of the USTR lists. In 2005, IIPA highlighted copyright concerns in Georgia in its Special Mention section. See IIPA's 2005 Georgia country report at <http://www.iipa.com/rbc/2005/2005SPEC301GEORGIA.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 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 2004, \$38 million worth of Georgian goods entered the U.S. (or 48.9% of Georgia's total exports to the U.S.). During the first 11 months of 2005, \$8 million worth of Georgian goods (or 4.3% 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 75.5% decrease over the same period a year before.

GERMANY

Germany does not currently appear on any of the USTR lists. Germany was placed on the Special 301 Watch List from 1991 to 1992. Though it was removed from any list in 1993, Germany was placed on the Other Observations list from 1994 to 1998, primarily due to heavy U.S. trade losses attributable to business software and audiovisual piracy. In those years, IIPA's Special 301 submissions focused on the problems with Germany's enforcement against end-user software piracy and its inadequate legal framework, especially the discriminatory failure to prohibit the unauthorized fixation, and subsequent reproduction and distribution, of live performances of U.S. artists (the "bootlegging" issue). The latter set of issues was resolved by the enactment of copyright law amendments in 1995.

In 1998, IIPA recommended the placement of Germany on the Watch List because of serious problems in the audiovisual industry (namely, the manufacturing and distribution throughout Europe of "smart cards" and "descrambling" devices) and in the software industries, where some jurisdictions were still denying *ex parte* search orders. In keeping Germany on the Other Observations list in 1998, Ambassador Barshefsky noted progress made in 1997 with respect to the availability of civil *ex parte* search orders, but shared the Alliance's concerns "regarding a major audiovisual piracy problem and the role of German firms in the manufacturing and/or exporting throughout Europe of pirated 'smart cards' and other 'de-scrambling' devices used to steal encrypted satellite, cable and broadcast transmissions, particularly of U.S. motion pictures." The IIPA recommended in our 1999 Special 301 Report that Germany be kept on the Other Observations list. Germany has not appeared on any USTR list since 1998.

GREECE

In this year's Special 301 Report, IIPA notes copyright concerns with Greece and recommends that Greece be placed on the Watch List. See <http://www.iipa.com/rbc/2006/2006SPEC301GREECE.pdf>. Greece does not currently appear on any of the USTR lists. Greece was on the Watch List from 1989 to 1994 and was elevated to the Priority Watch List in 1995, where it remained until 2000. The United States filed a TRIPS case against Greece in 1997. In May 1998, Greece passed an amendment to the Broadcast Law that finally began to improve the longstanding problem of TV piracy. The same month, USTR announced the commencement of WTO dispute settlement consultations. In the April 30, 2001 Special 301 Announcement, USTR noted, "Greece has passed new legislation providing for the immediate closure of television stations that infringe upon intellectual property rights, and estimated levels of television piracy in Greece have fallen significantly as a result." However, the announcement points out that "[p]iracy rates for audio-visual works, video games and business software . . . remain high." Greece was removed from the Priority Watch List and placed on the Watch List in 2001. In 2002, USTR kept Greece on the Watch List, noting persistent problems with "optical disk piracy and unauthorized book photocopying." USTR also noted Greece's "lack of deterrent penalties imposed on pirates and inefficient judicial action," as well as the continued problem of unauthorized use of software in government offices.

GUATEMALA

Guatemala has been on the Watch List since 2001. After seven years on the Special 301 Watch List (1992-1998), USTR elevated Guatemala to the Priority Watch List in 1999 and 2000. In its April 30, 2001 Special 301 Announcement, USTR noted that despite amendments to the 1998 Copyright Act, "criminal penalties in cases of infringement of intellectual property, and the provision providing for statutory damages was removed." Guatemala was placed on the Watch List in 2001. In 2002, IIPA recommended that Guatemala remain on the Watch List, noting that much is needed before the country will meet its multilateral and bilateral intellectual property rights obligations. In its April 30, 2002 Special 301 Announcement, placing Guatemala on the Watch List, USTR noted with approval the June 2001 appointment of a special prosecutor for intellectual property rights. Despite this, USTR pointed to continued high piracy levels, most notably with regard to business software, that have not been met by

adequate enforcement. The 2003 USTR Special 301 Announcement retained Guatemala on the Watch List, noting that decreased criminal penalties and ineffective legal remedies in civil actions remain serious problems. 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 its 2005 Special 301 announcement, USTR retained Guatemala on the Watch List primarily due to the existence of high piracy and counterfeiting rates.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner will take place on a rolling basis in 2006. Once the FTA enters into force in Guatemala, it will cease to benefit from a variety of U.S. trade programs. In 2004, \$68.3 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code, accounting for 2.2% of its total exports to the U.S. During the first 11 months of 2005, \$54 million worth of Guatemalan goods (or 1.9% 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 7.2% increase from the same period in the previous year. In 2004, \$282.9 million worth of Guatemalan goods entered the U.S. under the CBI, accounting for 9% of its total exports to the U.S. During the first 11 months of 2005, \$309.3 million worth of Guatemalan goods (or 10.6% of Guatemala's total exports to the U.S. from January to November) entered under the CBI, representing a 20.8% increase from the same period in the previous year. In 2004, \$894.4 million worth of Guatemalan goods entered under the CBTPA, accounting for 28.4% of its total exports to the U.S. During the first 11 months of 2005, \$835.7 million entered under the CBTPA, representing a 3% increase for the same period in 2004.

HONG KONG

IIPA highlights copyright concerns in Hong Kong in its Special Mention section this year, and requests that an out-of-cycle review be conducted at an appropriate point to determine whether industry's concerns with current deficiencies in copyright legislation are being adequately addressed in Hong Kong's consultative and legislative processes on copyright laws. See IIPA's 2006 Hong Kong report at http://www.iipa.com/rbc/2006/2006SPEC301HONG_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 Watch List on April 30, 1997, and maintained it there in a January 16, 1998 out-of-cycle review announcement, concluding that "the piracy situation in Hong Kong has not improved." In 1998, IIPA noted that despite Hong Kong's efforts, the digital piracy problem was out of control; the territory had changed from being an importer of pirate optical media product to being a major producer and exporter, trends that justified keeping Hong Kong on the Watch List. USTR, calling for full implementation of new anti-piracy legislation, effective enforcement, and a significant reduction in piracy rates, kept Hong Kong on the Watch List. Hong Kong was removed from the Watch List after a February 1999 out-of-cycle review, but Ambassador Barshefsky added a September 1999 out-of-cycle review to assess Hong Kong's intellectual property progress.

On December 17, 1999, USTR announced that as a result of the September out-of-cycle review, Hong Kong would remain off the Special 301 Watch List because “Hong Kong has undertaken significant enforcement actions since April [1999] to address the problem of piracy, but significant follow-up efforts are needed as piracy problems continue. USTR will monitor action by Hong Kong authorities to reclassify piracy as an organized and serious crime, to extend the mandate of the special anti-piracy task force beyond December 1999, and to prosecute corporate policy and the illegal loading of software by dealers onto computer hard drives.” Hong Kong has not appeared on any Special 301 lists since 1998. 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. In 2005, IIPA once again included Hong Kong in the Special Mention section of the Special 301 report to “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,” and asked for an out-of-cycle review “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.”

HUNGARY

IIPA recommends that Hungary remain on the Special 301 Watch List, where it was placed in 2003 by USTR. See IIPA’s 2006 Hungary country report at <http://www.iipa.com/rbc/2006/2006SPEC301HUNGARY.pdf>. On September 24, 1993, the U.S. and Hungary entered into a comprehensive bilateral Intellectual Property Rights Agreement, which obligated Hungary to make significant improvements in its copyright laws. In 1994 and again in 1997, Hungary adopted amendments to update its copyright law and to make it compatible with the TRIPS Agreement. In 1994, 1995 and 1996, Hungary did not appear on any Special 301 lists. In 1997, IIPA recommended that Hungary be placed on the Special Mention list because of its enforcement and legal framework deficiencies. USTR did place Hungary on the Special Mention list in 1997 and 1998 at the urging of copyright owners because of the lack of effective enforcement. Hungary implemented extensive changes to its copyright law in June 1999; these changes became effective on September 1, 1999. The amendments were intended to bring the Hungarian law into compliance with the TRIPS Agreement as well as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and to comply with several of the European Union Directives, such as the Term Directive.

In 2001, USTR elevated Hungary to the Priority Watch List, from its Watch List designation in 1999 and 2000, largely as a result of its failure to provide adequate protection of “confidential test data submitted by pharmaceutical companies seeking marketing approval.” In 2002, IIPA recommended that Hungary be placed on the Watch List, noting the country’s need to comply with TRIPS by remedying its criminal enforcement problems. USTR kept Hungary on the Priority Watch List in 2002, noting in its April 30 Announcement that despite progress bringing its legislation into compliance with TRIPS and the U.S.-Hungary bilateral IPR agreement, enforcement and piracy remain problems. USTR’s 2003 Special 301 Announcement noted Hungary’s positive steps, primarily in the area of patent protection, but also that the country “has made important strides in modernizing its legal regime for copyright over the last several years, including extensive revisions to its criminal code.” This progress allowed Hungary to move from the Priority Watch List to the Watch List in 2003. IIPA recommended that Hungary remain on the Watch List 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 Watch List in 2004, noting poor enforcement of its copyright law, which has led to high piracy rates. Although the USTR praised Hungary for making improvements with its IPR protection in the 2005 Special 301 Announcement, Hungary was retained on the Watch List to monitor issues concerning, “... prosecutorial delays, low fines or weak sentences, and weak border enforcement.” When Hungary joined the European Union on May 1, 2004, Hungary was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

ICELAND

Iceland has never appeared on a USTR list. In 2005, IIPA highlighted Iceland in its Special Mention section, see <http://www.iipa.com/rbc/2005/2005SPEC301ICELAND.pdf>, noting concerns over Internet piracy, particularly through peer-to-peer (P2P) networks.

INDIA

In 2006, IIPA recommends that India remain on the Priority Watch List. See IIPA's 2006 India country report at <http://www.iipa.com/rbc/2006/2006SPEC301INDIA.pdf>. India has been on the Priority Watch List since 1989 and was named a Priority Foreign Country in 1991. Its practices in the patent, trademark and copyright area, as well as market access for motion pictures, were declared by USTR as "unfair" on March 4, 1992, and a Section 301 investigation was launched against India at that time. The motion picture market access problems were substantially resolved by the end of 1992, but patent and copyright enforcement problems persisted. These kept India a Priority Foreign Country until June 30, 1994, when it was moved to the Priority Watch List after it adopted significant amendments to its copyright law. USTR subjected India to a special out-of-cycle review (OCR) in January 1995 and its position on the Priority Watch List was retained. In 1996, IIPA recommended that India remain on the Priority Watch List as its enforcement program began to take shape; USTR agreed.

In 1997, IIPA recommended that India be moved to the Watch List as a result of continued encouraging raiding activity. However, USTR disagreed and in April 1997 kept India on the Priority Watch List, in part because of copyright issues, but also because of serious patent protection shortcomings. In 1997, USTR initiated a WTO dispute settlement case against India on patent protection matters. In September 1997, the WTO panel agreed with the U.S. claim that India failed to implement its obligation under TRIPS to establish a "mailbox" system to receive patent applications, and on related matters. This case was the first intellectual property rights dispute to go through the WTO panel process. India appealed the case, lost, and in April 1999 enacted legislation to address the WTO settlement. In our 1999 and 2000 Special 301 filing, IIPA again recommended that India be placed on the Watch List in light of the progress on copyright issues. In both years USTR maintained India on the Priority Watch List. In the April 30, 2001 Special 301 Announcement, USTR kept India on the Priority Watch List, largely for failures in its patent system. The announcement noted that India's copyright law was "generally strong," though "poor enforcement allows rampant piracy." In 2002, IIPA recommended that India remain on the Priority Watch List, noting the country's high piracy rate and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal cases.

In its April 30, 2002 Special 301 Announcement, USTR kept India on the Priority Watch List, citing patent protection problems as well as copyright legislation and enforcement deficiencies. USTR's 2003 Special 301 Announcement noted little change, commenting, "piracy of copyrighted works remains a problem . . . and protection of foreign trademarks remains difficult." Export of counterfeit goods to other countries was also cited as a major problem. These deficiencies necessitated India's continued placement on the Priority Watch List. 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." In 2005, IIPA once again recommended that India remain on the Priority Watch List, and USTR agreed, noting, "protection of intellectual property in many areas remains weak due in part to inadequate laws and to ineffective enforcement. Consequently, India will remain on this year's Priority Watch List," and noting:

[C]opyright piracy is rampant, and the U.S. copyright industry estimates that lost sales resulting from piracy in India of U.S. motion pictures, sound recordings, musical compositions, computer programs, and books totaled approximately \$500 million in 2004.

India is not a party to the WIPO Internet Treaties. We understand, however, that India is in the process of discussing amendments to the Indian Copyright Act which would enable India to implement these treaties. India has not adopted an optical disc law to address optical media piracy, and cable television piracy continues to be a significant problem...

and

India's criminal IPR enforcement regime remains weak in multiple areas, including border protection against counterfeit and pirated goods, police action against pirates, following up raids by obtaining convictions for copyright and trademark infringement, courts reaching dispositions and imposing deterrent sentences, and delays in court dispositions.

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 2004, \$3.3 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 21% of its total exports to the U.S. During the first 11 months of 2005, \$3.8 billion worth of Indian goods (or 22% 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 29% increase over the same period in 2004.

INDONESIA

IIPA recommends that Indonesia stay on the Priority Watch List, where it has remained since 2001. See IIPA's 2006 Indonesia country report at <http://www.iipa.com/rbc/2006/2006SPEC301INDONESIA.pdf>. IIPA has closely monitored developments in Indonesia since 1985, when, in its first submission to USTR on piracy, IIPA named Indonesia as Asia's second worst pirate country. In 1987, following a petition by IIPA to revoke Indonesia's GSP benefits, Indonesia adopted an improved copyright law and, in 1989, entered into a bilateral copyright agreement whereby U.S. works and sound recordings acquired protection under Indonesian law. Although government initiatives virtually wiped out audio piracy in 1988 and made great progress against videocassette piracy in 1991 and 1992, Indonesia remained on the Watch List continuously from 1989 through 1995, because piracy of U.S. books and computer software soared over the years, and extensive market access barriers hampered the entry of U.S. companies into the Indonesian market. These continuing problems led USTR, on IIPA's recommendation, to elevate Indonesia to the Priority Watch List in 1996, where it remained through 1999.

In 2000, IIPA recommended that Indonesia be lowered to the Watch List "[i]n recognition of the adverse conditions under which market liberalization, anti-piracy, and copyright law reform efforts must proceed in Indonesia." USTR agreed, and Indonesia appeared on the Watch List in 2000. In 2001, IIPA recommended that Indonesia be elevated back up to the Priority Watch List, due to the continuing domination of piracy in the market, and the emergence of optical disc piracy in Indonesia. USTR agreed, noting in its April 30, 2001 Special 301 Announcement that "[p]iracy levels in Indonesia's enormous market for copyright and trademark goods are among the highest in the world." The announcement pointed out that "[i]t is becoming increasingly apparent that, as other countries in the region intensify their fight against copyright infringement, audio and video pirates are finding refuge in Indonesia." In 2002, IIPA once again recommended that Indonesia remain on the Priority Watch List, noting its concern over rising optical disc pirate production in the country, and its defunct court system. USTR kept Indonesia on the Priority Watch List, noting "a troubling increase in illegal production lines for optical media and pirated books far beyond Indonesia's domestic consumption capacity," and a "judicial system [that] continues to frustrate right holders with years of delay and a pronounced lack of deterrent penalties." In 2003, IIPA once again recommended, and USTR agreed, that Indonesia should remain on the Priority Watch List. In its announcement, USTR noted, "overall protection of intellectual property rights remains weak." 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.” The USTR decided in its Special 301 2005 Announcement to keep Indonesia on the Priority Watch List and conduct an out-of-cycle review (OCR). Although USTR acknowledged some IPR progress in Indonesia, namely the approval of optical disc regulations, it was noted that “serious concerns remain, however, over numerous issues, including: lack of effective IPR enforcement; the adequacy of the new regulations to reduce the production, distribution, and export of pirated optical media products; trademark infringement; and deficiencies in Indonesia’s judicial system.” In January 2006, USTR completed its OCR of Indonesia. Indonesia remains on the Priority Watch List.

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 2004, \$1.3 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 11.9% of its total exports to the U.S. During the first 11 months of 2005, \$1.4 billion worth of Indonesian goods (or 13% 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 21.4% increase over the same period in 2004.

IRELAND

Ireland does not currently appear on any of the USTR lists. Ireland first appeared on a Special 301 list in 1996 when USTR accorded it Special Mention status for patent law deficiencies. IIPA recommended Ireland for the Watch List in its February 1997 filing and highlighted at that time its significant enforcement deficiencies and high levels of piracy, particularly in the software and video areas. IIPA also included Ireland in its Priority Practices section in that February 1997 submission because its outmoded law (and its enforcement regime) were hopelessly out of compliance with its TRIPS obligations, which became effective in Ireland on January 1, 1996. USTR agreed with IIPA’s recommendation and placed Ireland on the Watch List in April 1997. Simultaneously, Ambassador Barshefsky announced that USTR would commence a TRIPS case in the near future. During 1997, following a series of bilateral negotiations with Ireland, it became clear that the Irish government had no intention of introducing and adopting a TRIPS-compatible law within any reasonable time. As a result, USTR commenced the TRIPS case on January 9, 1998. In early February 1998, following the commitment of the Irish government to “accelerate its implementation of comprehensive copyright reform legislation,” USTR decided not to bring the case before a dispute settlement panel, though it reserved the right to do so if the timetables were not met. Ireland remained on the Watch List in 1998, 1999 and 2000. USTR noted in the May 1, 2000 Special 301 Announcement that “Ireland’s commitment to enact comprehensive copyright legislation has not been met. We understand recent progress has been made toward finalizing this legislation and expect it will be enacted by Parliament before its summer recess.” Ireland enacted new IPR legislation in June 2000. The Alliance made no recommendation concerning Ireland in its 2001 Special 301 submission. Consequently, USTR did not place Ireland on any list during 2001. Ireland has not appeared on any list since 2000.

ISRAEL

IIPA recommends that Israel remain on the Priority Watch List where it has been since 2005, due to copyright legislation that would weaken protection and could violate Israel’s bilateral obligations to protect works and sound recordings in accordance with the principle of national treatment. See IIPA’s 2006 Israel country report at <http://www.iipa.com/rbc/2006/2006SPEC301ISRAEL.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 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 out-of-cycle review decision on Israel. In its 2005 Special 301 Announcement, USTR elevated Israel to the Priority Watch List, while noting, among other things, an apparent breakthrough at the time on the national treatment issue:

Israel made progress by giving written assurances that it will continue to provide national treatment for U.S. rights holders in sound recordings. In addition, the U.S. copyright and trademark industries report a more serious treatment of IPR violations by Israeli courts and continuing efforts by Israeli authorities to improve enforcement of copyrights and trademarks. However, the U.S. copyright industry notes that the persistence of a significant level of piracy, such as the “burning” of copyright-infringing content onto CD-Rs and DVD-Rs, suggests that additional IPR enforcement resources are needed.

ITALY

IIPA recommends that Italy remain on the Watch List, where it has been since 2001. See IIPA’s 2006 Italy country report at <http://www.iipa.com/rbc/2006/2006SPEC301ITALY.pdf>. Italy was listed on USTR’s Watch List throughout most of the 1990s, primarily due to enforcement shortcomings that allowed piracy (especially of U.S. motion pictures, sound recordings/music, and computer software) to reach levels unmatched in any other western European country. By February 1998, Italy had still not passed the Anti-Piracy Bill and IIPA recommended its elevation to the Priority Watch List from the Watch List, where it had been listed since 1989. USTR agreed, and Italy was on the Priority Watch List in 1998 and 1999. In February 2000, USTR kept Italy on the Priority Watch List, and added a September out-of-cycle review (OCR). USTR also noted the possible initiation of a future WTO dispute settlement case against Italy for noncompliance with TRIPS obligations.

In recognition of the July 2000 passage of the Anti-Piracy Bill, USTR announced in November 2000 that Italy would be moved from the Priority Watch List to the Watch List. In the 2001 Special 301 submission, the IIPA recommended that Italy be placed on the Watch List with an out-of-cycle review based on concerns that Italian authorities may not adequately implement the new Anti-Piracy Law. USTR kept Italy

on the Watch List in 2001, noting in its April 30, 2001 Special 301 Announcement its own concern about full implementation of Italy's Anti-Piracy Law. In 2002, IIPA recommended that Italy be maintained on the Watch List, noting enforcement problems and a need for judicial reform. USTR again placed Italy on the Watch List in 2002, noting that "Italy still has not clarified the Anti-Piracy Bill's implementing regulations for business software." In its 2003 Special 301 Announcement, USTR described further problems with Italy's new laws: "Notwithstanding new government procedures to exempt business software that were enacted on January 25, 2003 . . . Italy continues to enforce a problematic program requiring copyright owners to pay for and apply a government-approved sticker on genuine copyrighted works." Italy therefore remained on the Watch List in 2003. 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." In its 2005 Special 301 Announcement, USTR decided to retain Italy on the Watch List. Although acknowledging an increase in raids and a reduction in piracy rates, USTR stated in its Report that, ". . . Italy continues to possess one of the highest overall piracy rates in Western Europe."

JAMAICA

Jamaica has been on the Watch List since 1998. The 2003 USTR Special 301 Announcement stated that "Jamaica's trademark and copyright regimes are generally consistent with international standards and enforcement efforts over the last year have been commendable." It remains on the Watch List, however, because of lack of parliamentary action to bring patent and industrial design laws into conformity with international standards. In 2004, USTR maintained Jamaica 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."

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 2004, \$5 million worth of Jamaican imports to the United States benefited from the GSP program, accounting for 1.6% of its total exports to the U.S. During the first 11 months of 2005, \$7.4 million worth of Jamaican goods (or 2.2% 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 60.8% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$93.3 million worth of Jamaican goods entered the U.S. in 2004, accounting for 29.1% of total exports to the U.S. in 2004. During the first 11 months of 2005, \$92.1 million worth of Jamaican goods (or 26.9% of Jamaica's total exports to the U.S. from January to November) entered under the CBI, representing a 7.6% 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, \$73.4 million worth of Jamaican goods entered the U.S. in 2004. During the first 11 months of 2005, \$49 million worth of Jamaican goods (or 14.3% of Jamaica's total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

JAPAN

In 2006, IIPA highlights copyright concerns in Japan in its Special Mention section this year. See IIPA's 2006 Japan country report at <http://www.iipa.com/rbc/2006/2006SPEC301JAPAN.pdf>. Japan does not currently appear on any of the USTR lists. Years ago, Japan appeared on USTR's Special 301 Watch List from 1989 until 1993. Japan was elevated to the Priority Watch List by the USTR in 1994 where it remained through 1996. In its Special 301 1997 announcement, USTR moved Japan from Priority Watch

List to Watch List, citing improvements to Japan's IPR legislation along with concerns regarding Japan's protection of trade secrets and end-user software piracy. Japan remained on the Watch List through 1999.

JORDAN

Jordan does not currently appear on any of the USTR lists. In 2005, IIPA recommended that the U.S. government commence a dispute settlement action under the U.S.-Jordan Free Trade Agreement for failure to meet the requirements of that Agreement unless the deficiencies raised could be promptly and satisfactorily resolved. 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 2004, \$89.8 million worth of Jordan's imports to the United States benefited from the GSP program, accounting for 8.2% of its total exports to the U.S. Due to the Free Trade Agreement which Jordan entered into with the United States in 2000, Jordan no longer benefits from GSP (since it already receives more beneficial treatment under the FTA). Thus, during the first 11 months of 2005, only \$10.9 million worth of Jordanian goods (or 0.9% of Jordan's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

KAZAKHSTAN

IIPA recommends that Kazakhstan remain on the Watch List, where it has been since 2000. See IIPA's 2006 Kazakhstan country report at <http://www.iipa.com/rbc/2006/2006SPEC301CIS.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 2004, \$158 million worth of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 29.3% of its total exports to the U.S. During the first 11 months of 2005, \$185.8 million worth of Kazakh goods (or 17.3% 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 39.6% increase 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." Noting that some progress had been made with regards to Kazakhstan's IPR regime in 2004, namely the ratification of the WIPO Internet Treaties, amendments to the copyright law and proposed amendments to the criminal code, USTR retained Kazakhstan on the Watch List in its 2005 Special 301 Announcement. The Announcement stated that, "Kazakhstan's Civil Procedure Law still does not appear, however, to provide for civil ex parte search procedures needed to provide enforcement against end-user software pirates. In addition, there are few convictions, and those who are convicted receive only minimal penalties. As a result, piracy is still a major problem."

KENYA

In 2006, IIPA identifies copyright concerns with Kenya in its Special Mention section "because of rampant piracy for all sectors, and a Government system that is unwilling and unable to address the problem." See IIPA's 2006 report on Kenya at <http://www.iipa.com/rbc/2006/2006SPEC301KENYA.pdf>. In 2005, IIPA also identified copyright concerns with Kenya in its Special Mention section, noting "the country's extremely high piracy rates, inadequate legislative and enforcement efforts."

The country currently participates in the Generalized System of Preferences (GSP) trade program which requires, as one of its eligibility criteria, that a country provide "adequate and effective" copyright protection. In 2004, \$6.8 million worth of Kenyan goods entered the U.S. under the duty-free GSP code, accounting for 1.9% of the country's total exports to the U.S. During the first 11 months of 2005, \$5.3 million worth of Kenyan goods (or 1.7% 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 5.6% decrease over the same period in 2004. Kenya also participates in the African Growth Opportunity Act (AGOA) which, like the GSP, has an intellectual property component. In 2004, \$279.9 million worth of Kenyan goods entered the U.S. under the AGOA, representing 79.5% of the country's total exports to the U.S. During the first 11 months of 2005, \$248.8 million worth of Kenyan goods entered the U.S. (or 78.6% of the country's total exports to

the U.S. from January to November) under the AGOA, representing a 1.5% decrease over the same period in 2004.

KUWAIT

IIPA recommends that Kuwait be lowered to the Watch List. See IIPA's 2006 Kuwait country report at <http://www.iipa.com/rbc/2006/2006SPEC301KUWAIT.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, 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), kept Kuwait on the Watch List in those year's announcements.

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. In 2005, IIPA once again recommended, and USTR agreed, to keep Kuwait on the Priority Watch List, "due to its high rates of copyright piracy and its lack of progress in amending its copyright law to meet international obligations." USTR went on to note:

Kuwait has not yet fully implemented the 2002 work plan that outlined the steps it would take to increase IPR enforcement. In 2004, IPR enforcement efforts remained insufficient and penalties for infringement remained inadequate to deter potential offenders. Kuwait proposed a draft copyright law in 2004, which has not yet been passed by Kuwait's legislature. The U.S. copyright industry reports that Kuwait continues to have high levels of retail optical disc piracy, as well as problems with corporate end-user software piracy, cable piracy, and Internet piracy. We urge Kuwait to improve the situation by making public declarations at the highest level that piracy in Kuwait will not be tolerated, increasing the frequency of raids on suspected infringers, prosecuting offenders, imposing deterrent sentences, publishing the outcomes of inspection raids in order to deter others, and amending its copyright law in the near future to correct its deficiencies. Kuwait has made some progress, such as Kuwait Customs' creation of a special IPR unit in April 2004 that began taking some enforcement actions. The Ministry of Commerce also stepped up enforcement efforts in late 2004.

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 Special Mention 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 2004, \$49,000 in Kyrgyz exports to the United States benefited from the GSP program. During the first 11 months of 2005, \$4,000 of Kyrgyz goods (or 0.09% 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 92.5% decrease over the same period in 2004.

LAOS (LAO PEOPLE'S DEMOCRATIC REPUBLIC)

Laos has never appeared on a USTR list. In 2006, IIPA includes Laos in its Special Mention section, urging the Government of Laos to “implement the Agreement on Trade Relations by passage of a modern copyright statute” and “enact or issue regulations to allow licensing of optical disc manufacturing facilities and to provide a level of transparency and oversight into these groups that are producing pirate and other illegal materials in Laos.” See IIPA's 2006 Laos country report at <http://www.iipa.com/rbc/2006/2006SPEC301LAOS.pdf>. In its 2003 through 2005 submissions, IIPA noted Laos in its Special Mention section, citing optical disc piracy concerns.

LATVIA

IIPA recommends that Latvia remain on the Special 301 Watch List, where it has been since 2000. See IIPA's 2006 Latvia country report at <http://www.iipa.com/rbc/2006/2006SPEC301LATVIA.pdf>. IIPA first filed a Special 301 report on Latvia in 2000, when we recommended that Latvia be added to the Watch List for serious deficiencies in the copyright law, criminal code and implementation of the new customs code. USTR accepted our recommendation, and placed Latvia on the Watch List for the first time in 2000. Latvia remained on the Watch List in 2001. In its April 30, 2001 Special 301 Announcement, USTR noted that “[l]arge volumes of pirated products are transshipped through Latvia from Russia and Ukraine.” Local

enforcement is poor and “[l]egislation is needed to improve the ability of law enforcement and judicial authorities to combat this piracy, such as providing for adequate civil *ex parte* search remedies.” Again citing Latvia as a major transshipment point for large volumes of pirated products, USTR kept the country on the Watch List in 2002. The USTR 2003 Special 301 Announcement noted that there was some positive movement in 2002, including raids on sellers of pirated optical media. Latvia stayed on the Watch List, however, because of the continuing transshipments and the fact that “police, customs officials, prosecutors and judicial authorities have not placed sufficient emphasis on combating piracy.” 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.” Citing that little progress had been made concerning issues highlighted in the 2004 Special 301 Announcement, USTR retained Latvia on the Watch List in its Special 301 2005 Announcement. USTR acknowledged that progress was made in the form of legislative actions but also called attention to the problems of IPR enforcement and piracy levels.

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. When Latvia joined the European Union on May 1, 2004, Latvia was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

LEBANON

In 2006, IIPA recommends that Lebanon remain on the Priority Watch List, where it has been since 2001, and notes that due to its failure to meet the eligibility criteria, its GSP benefits should be suspended. See IIPA’s 2006 Lebanon country report at <http://www.iipa.com/rbc/2006/2006SPEC301LEBANON.pdf>. Isolated from normal world trade patterns due to years of civil strife, Lebanon did not appear in IIPA reports until 1995, when IIPA first recommended placement on the Special Mention list because of its high levels of piracy and outmoded copyright law. IIPA’s 1996 filing recommended a Watch List placement, stressing pervasive TV piracy, an ineffective judicial system, and lack of any progress toward copyright and broadcast law reform. In 1997, IIPA recommended once again that Lebanon be placed on the Special 301 Watch List, noting a video market dominated by piracy, increasing book and software piracy, an immobilized copyright reform process, and backlogged and inefficient courts that continued to pose major impediments to effective enforcement of copyright infringement across the board. In 1998, IIPA again called on USTR to place Lebanon on the Watch List for failure to pass a new copyright law, and for uncertainty over whether the law would include a Berne- and TRIPS-incompatible “compulsory license” on computer software. USTR agreed for the first time to place Lebanon in its Other Observations category, noting “widespread copyright piracy and an inadequate law,” and that “[u]nauthorized use of software is pervasive among private firms and government ministries.” USTR’s Ambassador Barshefsky called on the Lebanese government “to pass a TRIPS-consistent copyright law, to take effective measures to eliminate use of unauthorized copies of software in government offices, and [to] reduce the rate of video piracy.”

Lebanon was kept on the Watch List in 2000 largely because of the continued international deficiencies in the copyright law, pervasive piracy and inefficient enforcement against piracy. In the 2001 Special 301 submission, the IIPA recommended that Lebanon be elevated to the Priority Watch List due to a lack of enforcement against copyright piracy. USTR agreed, and elevated Lebanon to the Priority Watch List,

citing continuing piracy problems, particularly cable piracy. In June of 2001, the IIPA filed a request for review of Lebanon's GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners. USTR accepted this request on September 3, 2003, and the review remains ongoing. In 2002 and 2003, IIPA continued to recommend that Lebanon remain on the Priority Watch List (and in 2002, requested that USTR conduct an out-of-cycle review to ascertain whether sufficient progress was being made in the fight against cable piracy and pervasive retail piracy; USTR did not accept the recommendation for the OCR). USTR decided to keep Lebanon on the Priority Watch List in 2002, noting the country's "severe copyright piracy problem and the lack of a comprehensive governmental commitment to eliminate piracy and foster legitimate business." USTR also retained Lebanon on the Priority Watch List in 2003, noting that while "some raids of pirate stores and operations occurred in 2002, leading to the first sentencing of a software pirate," otherwise there was very little progress; USTR also noted an "overly broad software exception for certain educational uses."

On September 3, 2003, the United States Trade Representative "accepted for review" a Petition filed by the IIPA with the U.S. government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Lebanese products into the U.S., USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." IIPA's Petition noted three major deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing "adequate and effective" copyright protection in practice: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective. Since 2003, IIPA has testified twice, most recently on November 30, 2005, and made several supplemental submissions in the GSP Review.¹ On all of these occasions, IIPA states its view that the GSP Subcommittee should recommend to the President that he make a determination that Lebanon fails to meet the eligibility requirements of the GSP program, and remove Lebanon's eligibility to participate in the Program until such time as it has achieved adequate and effective copyright protection and enforcement as contemplated by the GSP statute. During 2004, Lebanon imported \$33.2 million worth of products into the United States duty-free, or 44.6% of its total imports into the U.S. In the first 11 months of 2005, Lebanon imported \$30.4 million worth of products into the United States duty-free, or 37.4% of its total imports into the U.S.

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

¹ On October 7, 2003, IIPA testified regarding the deficiencies of Lebanon's protection of copyright that warranted immediate suspension or withdrawal of Lebanon's GSP benefits. On February 14, 2004, IIPA provided the GSP Subcommittee a copy of IIPA's February 2004 Special 301 report on Lebanon to supplement the public GSP file on this investigation. On May 25, 2004, IIPA wrote to the GSP Subcommittee advocating the immediate suspension or withdrawal of Lebanon's GSP benefits for its continuing failure to comply with the IPR obligations under the GSP program. On November 9, 2005, IIPA filed a pre-hearing Brief advocating withdrawal of GSP benefits, and on December 14, IIPA filed answers to post-hearing comments (the GSP hearing was held on November 30, 2005).

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.

IIPA recommended Lebanon be maintained on the Priority Watch List in 2004 due to the continued dominance of pirated product in the market. USTR agreed, keeping Lebanon on its Priority Watch List in 2004. While USTR commended Lebanon for many of the positive 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," USTR noted 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. In 2005, IIPA once again recommended, and USTR agreed, to keep Lebanon on the Priority Watch List. In its Announcement in April 2005, USTR praised Lebanon for conducting IP product raids and for its judicial and border enforcement activities. It was decided however, that Lebanon would remain on the Priority Watch List, "...due to continuing problems with rampant cable piracy, retail piracy of pre-recorded optical discs, [and] computer software piracy...."

LITHUANIA

IIPA recommends that Lithuania remain on the Special 301 Watch List, where it has been since 2000. See IIPA's 2006 Lithuania country report at <http://www.iipa.com/rbc/2006/2006SPEC301LITHUANIA.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 was retained on the Watch List in USTR's Special 301 2005 Announcement for several outstanding issues including high piracy rates, problems with customs enforcement and the absence of

deterrent penalties within the judicial system. When Lithuania joined the European Union on May 1, 2004, Lithuania was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

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 identified 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 2004, \$6.5 million worth of Macedonian goods entered the U.S. under the duty-free GSP code, representing 8.4% of the country's total exports to the U.S. During the first 11 months of 2005, \$6.5 million worth of Macedonian goods (or 13.9% of the country's total exports to the U.S. from January to November) entered the U.S., representing an increase of 3.6% from the same period in 2004.

MALAYSIA

In 2006, IIPA recommends that Malaysia remain on the Watch List (where it has remained since 2002), and that an out-of-cycle review should be conducted. See IIPA's 2006 Malaysia country report at <http://www.iipa.com/rbc/2006/2006SPEC301MALAYSIA.pdf>. IIPA first identified Malaysia in 1985 as a country with a serious piracy problem, and supported the bilateral negotiations that led to Malaysia's adopting a comprehensive copyright law in 1987, and joining the Berne Convention in 1990, thus extending protection to U.S. works. In 1994, IIPA filed a "Special Comment" on Malaysia calling for judicial reforms so that deterrent sentences could be imposed on copyright pirates. In 1999, IIPA filed an "Open Recommendation" report on Malaysia focusing on optical media piracy and calling for the adoption and implementation of a comprehensive regulatory system for the import, export and operation of optical media production equipment and materials; sustained and consistent anti-piracy enforcement policies; and the prompt and consistent imposition of deterrent penalties on commercial pirates by Malaysian courts. In the April 30, 1999 Special 301 Announcement, USTR announced that an out-of-cycle review (OCR) of Malaysia would be conducted in September 1999. As a result of the OCR, USTR announced in December 1999 that Malaysia would not appear on any Special 301 lists but would be monitored for both TRIPS compliance and the passage of a comprehensive optical disc law. Because Malaysia was slow to

enact and implement legislation to deal with the optical disc piracy problem, USTR placed Malaysia on the Priority Watch List in 2000.

In 2001, IIPA recommended and USTR agreed to keep Malaysia on the Priority Watch List, and USTR also decided to conduct an out-of-cycle review (OCR) to assess Malaysia's enforcement efforts and implementation of its new Optical Disc Act. On October 31, 2001, USTR kept Malaysia on the Priority Watch List as a result of the out-of-cycle review. In 2002, IIPA recommended that Malaysia be lowered to the Watch List, but provided a series of target actions the government needed to take to sustain progress achieved in 2001; IIPA also recommended that USTR conduct an out-of-cycle review to re-examine Malaysia's 301 status based on the degree of fulfillment of the target actions. USTR placed Malaysia on the Watch List in 2002, citing that country's serious optical media piracy problem, and stating, "there is concern that Malaysia has not established a climate of deterrence." USTR continued: "[w]ithout criminal prosecutions and the imposition of serious criminal sentences, there is no true deterrence to piracy in Malaysia." In 2003, IIPA recommended that Malaysia be retained on the Watch List, and that an out-of-cycle review be conducted, noting "lack of deterrent sentencing results in organized criminals remaining free to produce and export product with impunity around the globe." The USTR 2003 Special 301 Announcement, keeping Malaysia on the Watch List in 2003, noted that "[p]rosecution is a weak link, and the judicial process remains slow," while also noting that the Malaysian government intensified anti-piracy efforts in 2002, leading to closures of some unlicensed manufacturers of optical discs. 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 toward 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. In 2005, IIPA recommended that USTR retain Malaysia on the Watch List, and that it conduct an out-of-cycle review to evaluate progress on various enforcement and legislative fronts. In its April 2005 Special 301 Announcement, USTR retained Malaysia on the Watch List. While acknowledging the Malaysian Government's stepped up enforcement efforts in 2004, USTR stated that Malaysia "has high piracy rates for optical media and is a substantial exporter of counterfeit and pirated products."

MEXICO

In 2006, IIPA recommends that Mexico remain on the Watch List and that high-level engagement continue to combat the very high levels of piracy in that marketplace. See IIPA's 2006 Mexico country report at <http://www.iipa.com/rbc/2006/2006SPEC301MEXICO.pdf>. 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." Mexico did not appear on any Special 301 lists between 1999 and 2002. In its April 30, 2002 Special 301 Announcement, USTR did not place Mexico on any list, but did state that it would conduct an out-of-cycle review (OCR) "to assess where there has been an improvement in enforcement efforts . . . specifically whether raids against intellectual property piracy operations have led to prosecutions and convictions." 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. In its 2003 Special 301 Announcement, USTR decided to add Mexico to the Watch List, citing "lax enforcement against copyright and piracy and trademark counterfeiting," difficulties for foreign firms attempting to enforce trademark rights in Mexico, the failure of raids to lead to prosecutions and convictions and

copyright amendments that do not meet international obligations. 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” USTR retained Mexico on the Watch List in its 2005 Special 301 Announcement stating that, “Despite an increase in the number of searches and seizures of counterfeit and pirated goods, the scope of IPR violations continues to outpace the Government of Mexico’s IPR enforcement efforts, with U.S. copyright industry loss estimates increasing in 2004 to \$870 million.”

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. IIPA included Moldova as part of its Special Mention section of the IIPA 2004 report, noting that while many legal reforms have been made over the past few years, Moldova “is not yet providing the type of effective enforcement necessary to stem the copyright piracy there, or to be in compliance with the enforcement obligations of the WTO TRIPS Agreement.”

In 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 2004, \$673,000 worth of Moldavian imports to the United States benefited from the GSP program, representing 1.4% of its total exports to the U.S. During the first 11 months of 2005, \$1.1 million worth of Moldavian goods (or 2.4% 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 71.1% over the same period in 2004.

NEW ZEALAND

In 2006, IIPA highlights copyright concerns with New Zealand in its Special Mention section at http://www.iipa.com/rbc/2006/2006SPEC301NEW_ZEALAND.pdf. New Zealand does not currently appear on any of the USTR lists. New Zealand appeared on the Special 301 Watch List in 1991 and 1992. In 1998, at the urging of IIPA, USTR initiated an out-of-cycle review in response to New Zealand’s sudden decision to abolish the right to control unauthorized (“parallel”) imports for all copyright owners. This erosion of intellectual property protection, combined with what USTR described as an “enforcement regime [that] does not effectively deter piracy,” led USTR to follow IIPA’s 1999 recommendation and place New Zealand on the 1999 Watch List. New Zealand did not appear on any Special 301 lists in 2000. In the April 30, 2001 Special 301 Announcement, USTR noted it had placed New Zealand on the Watch List for a failure to introduce promised legislation banning parallel imports on “newly-released

copyright products.” By the time USTR made its designations for 2002, New Zealand had still not introduced this legislation. Therefore, in the April 30, 2002 Special 301 Announcement, USTR kept New Zealand on the Watch List. It was dropped from the Watch List in 2003 after partial protection was restored for copyright owner control of importation. In 2005, IIPA recommended that New Zealand be returned to the Watch List, from which it was removed in 2003, to encourage it to focus on its long-delayed copyright law reform efforts.

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.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner will take place on a rolling basis in 2006. Once the FTA enters into force in Nicaragua, it will cease to benefit from a variety of U.S. trade programs. 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 2004, \$134.6 million worth of Nicaraguan imports to the United States benefited from the CBI program, accounting for 13.6% of its total exports to the U.S. During the first 11 months of 2005, \$122 million worth of Nicaraguan goods (or 11.4% of Nicaragua’s total exports to the U.S. from January to November) entered the U.S. under the CBI, representing a 0.5% decrease 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 2004, \$195.8 million worth of Nicaraguan goods benefited from the CBTPA program, accounting for 19.8% of Nicaragua’s total exports to the U.S. During the first 11 months of 2005, \$234.3 million worth of Nicaraguan goods (or 21.8% of Nicaragua’s total exports to the U.S. from January to November) benefited from the CBTPA program, representing an increase of 32% over the same period in 2004.

NIGERIA

In 2006, IIPA highlights Nigeria in its Special Mention section “to highlight the alarming growth in optical disc production capacity, and rampant piracy concerns, and an enforcement system which is ineffective in tackling the problem.” See IIPA’s 2006 Nigeria country report at <http://www.iipa.com/rbc/2006/2006SPEC301NIGERIA.pdf>. In 2005, IIPA highlighted 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 2004, \$691,000 worth of Nigerian goods entered the U.S. under the duty-free GSP code. During the first 11 months of 2005, \$493,000 worth of Nigerian goods entered the U.S. under the GSP code, representing a decrease of 24.7% over the same period in 2004. Nigeria also participates in the African Growth Opportunity Act (AGOA) which, like the GSP, has an intellectual property component. In 2004, \$12.7 billion worth of Nigerian goods entered the U.S. under the AGOA, representing 78.5% of

the country's total exports to the U.S. During the first 11 months of 2005, \$16.3 billion worth of Nigerian goods entered the U.S. (or 74.6% of the country's total exports to the U.S. from January to November) under the AGOA, representing a 40.9% increase over the same period in 2004.

OMAN

Oman does not currently appear on any of the USTR lists. IIPA reported on Oman for the first time in 1995, urging that Oman be placed on the Special Mention list (equivalent to USTR's Other Observations category) because it had no copyright law and was a potential haven for piracy in the Persian Gulf region. USTR agreed, and thereafter raised Oman to the Watch List in 1996, describing the country's intellectual property protection regime as "minimal and stagnant." In 1997, USTR decided to keep Oman on the Watch List, noting that efforts to modernize Oman's copyright law were "progressing slowly." In 1998 and 1999, IIPA recommended that Oman be kept on the Watch List, as Oman's market was "dominated by piracy," and was "a haven for pirates fleeing less hospitable neighboring states," and in 2000, IIPA recommended keeping Oman on the Watch List primarily for failure to stop piracy of business software. USTR agreed all three years. On May 21, 2000, Oman enacted copyright legislation as one of the final pieces in Oman's WTO accession process (Oman joined the WTO in November 2000). In the 2001 Special 301 submission, the IIPA recommended that Oman be placed on the Watch List, to ensure the market would be cleaned up, and encourage enforcement against corporate end-user piracy of business software. USTR decided to remove Oman from the Watch List, and they remained off the list in 2002 (IIPA did not file a report on Oman in 2002).

Oman currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective protection of intellectual property rights." In 2004, \$47.7 million worth of Oman's exports to the United States benefited from the GSP program, accounting for 11.4% of its total exports to the U.S. During the first 11 months of 2005, \$53 million worth of Oman's goods (or 11.5% of Oman's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 22.8% from the same period in 2004.

PAKISTAN

In 2006, IIPA recommends that Pakistan be lowered to the Watch List, and that USTR conduct an out-of-cycle review. See IIPA's 2006 Pakistan country report at <http://www.iipa.com/rbc/2006/2006SPEC301PAKISTAN.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 2002 and again in 2003, IIPA recommended that Pakistan be elevated to the Priority Watch List, noting the alarming rise of pirate optical disc production. USTR, in keeping Pakistan on the Watch List both years, recognized Pakistan's position as "one of the world's largest exporters of pirate CDs and optical media" (2002). USTR's 2003 Special 301 Announcement described Pakistan as the "fourth largest source of counterfeit and piratical goods seized by the U.S. Customs Service" in 2002, and notes again the substantial increase in optical media production in 2002. IIPA recommended that Pakistan be designated as a Priority Foreign Country 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 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 Priority Watch List, citing worsening piracy and counterfeiting problems. USTR retained Pakistan on the Priority Watch List in its Special 301 2005 Announcement stating that, “... the overall piracy and counterfeiting problems in Pakistan have not improved significantly over the past year...”

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 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 was accepted but on January 24, 2006, the U.S. Government review was terminated, due to progress made in reducing the impact of optical disc piracy in Pakistan. IIPA endorsed the termination of the GSP review of Pakistan, while noting that outstanding issues such as book piracy continue to merit attention through other mechanisms. As a result of termination, Pakistan continues to enjoy duty-free status for imports of certain products into the United States. During 2004, the United States imported \$94.2 million worth of products into the United States duty-free, or 3.3% of its total imports to the U.S. During the first 11 months of 2005, \$87.7 million of products from Pakistan were imported into the U.S. duty-free, representing 2.9% of Pakistan’s total imports into the U.S.

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 2004, \$362,000 of products imported from the West Bank benefited from the GSP program, representing 81.7% of the Palestinian Authority’s total exports to the

U.S. During the first 11 months of 2005, \$729,000 of products (or 47.4% 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 135% increase over the same period in 2004.

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.

Panama and the U.S. are nearly completion of negotiations for a Free Trade Agreement (FTA). Know that after the FTA enters into force in Panama, it will cease to benefit from a variety of U.S. trade programs. In 2004, \$6.3 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 2005, \$15.9 million worth of Panamanian goods (or 5.3% 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 164.5% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$32.5 million worth of Panamanian goods entered the U.S., accounting for 10.3% of total exports to the U.S. in 2004. During the first 11 months of 2005, \$35 million worth of Panamanian goods (or 11.8% of Panama's total exports to the U.S. from January to November) entered under the CBI, representing a 33% 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, \$340,000 worth of Panamanian goods entered the U.S. in 2004. During the first 11 months of 2005, \$287,000 worth of Panamanian goods (or 0.1% of Panama's total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

PARAGUAY

In 2006, as 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 2006 Paraguay country report at <http://www.iipa.com/rbc/2006/2006SPEC301PARAGUAY.pdf>. The bilateral history of engagement between the U.S. and Paraguay has been a lengthy and intricate one. In 1992, IIPA reported that Paraguay was the central point for the production, export, and transshipment of pirate audiocassettes throughout South America. By that time, the recording industry had already spent several years working to improve the on-the-ground enforcement situation in Paraguay. In April 1992, USTR placed Paraguay on the Watch List. In early 1993, Paraguayan officials made a political commitment to end the widespread piracy of sound recordings. By April 1993, because Paraguay had substantially reduced the level of piracy of sound recordings and music, Ambassador Kantor removed Paraguay from the Watch List. In early 1994, despite some positive enforcement efforts made by Paraguayan authorities, the recording industry reported a recurrence of the pre-1993 problems involving the export of pirated product at the Brazilian border. In 1994 and 1995, USTR kept Paraguay on the Special Mention list, despite industry recommendations to elevate back to the Watch List. In 1996, IIPA recommended a Priority Watch List placement because of increasing piracy problems in Paraguay, especially at the border. USTR elevated Paraguay to the Watch List on April 30, 1996. During an out-of-cycle review (OCR) in October 1996, USTR kept Paraguay on the Special 301 Watch List, noting "the Government of Paraguay must take strong, coordinated, government-wide action to institute effective enforcement systems." In early 1997, IIPA recommended that USTR designate Paraguay as a Priority Foreign Country because of the longstanding problems of piracy, ineffective enforcement and an inadequate copyright law. In April 1997, USTR elevated Paraguay to the Priority Watch List, noting that "despite efforts of concerned government officials, piracy and counterfeiting in Paraguay have reached alarming levels and much more needs to be done." In late 1997, USTR conducted an OCR of Paraguay's Special 301 status. Because Paraguay simply failed to meet the standards laid out in that review, USTR designated Paraguay as a Priority Foreign Country on January 16, 1998. A Section 301 investigation commenced on February 17, 1998. During the investigation, U.S. and Paraguayan officials met several times for consultations. The U.S. had hoped for dramatic progress in many areas by July 1998, but this did not happen. Some accomplishments were achieved, however. On April 23, 1998, the Attorney General (Fiscal General)

issued a circular to his prosecutors, urging them to apply the maximum penalties in cases of piracy, and requesting that they report on pending IPR proceedings. While this is a useful instruction, no copyright cases have reached the sentencing stage in Paraguay.

On November 17, 1998, USTR announced that a comprehensive bilateral intellectual property agreement with Paraguay was concluded which “will significantly improve intellectual property protection for copyrights, patents and trademarks and ensure continued progress in the fight against piracy and counterfeiting in Paraguay.” By signing the Memorandum of Understanding and Enforcement Action Plan, USTR decided not to take further trade action at that time and terminated both the Section 301 investigation as well as its review of Paraguay’s IPR practices under the Generalized System of Preferences, which had commenced in October 1996 as part of the 1995 GSP Annual Review. In IIPA’s 1999 and 2000 Special 301 filings, IIPA supported USTR’s continued Section 306 monitoring despite concerns that Paraguay had already missed most of the interim deadlines of the November 1998 MOU/Action Plan, and that Paraguayan courts had not yet issued a sentence in a copyright infringement case.

In 2001, IIPA continued to support USTR’s Section 306 monitoring of Paraguay. USTR’s April 30, 2001 Special 301 Announcement noted inadequate implementation of the MOU and that “Paraguay continues to be a regional center for piracy and counterfeiting and a transshipment point to the larger markets bordering Paraguay, particularly Brazil, where the sales of pirated copyright products in optical media and other formats have been of particular concern.” In 2002, IIPA recommended that Paraguay remain subject to Section 306 monitoring. USTR agreed, noting in its April 30, 2002 announcement Paraguay’s failure “to implement vigorous border enforcement measure, as agreed to in the MOU,” and that “pirate optical media production has been dispersed to smaller enterprises, in order to evade law enforcement efforts.” Paraguay remained subject to Section 306 monitoring in 2002. The Memorandum of Understanding expired in January 2003, but USTR and Paraguay 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, and IIPA recommended 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. These issues were revisited in USTR’s Special 301 2005 announcement which continued Paraguay’s Section 306 monitoring and stated, “We remain concerned over several issues, including: persistent problems with enforcement due to porous borders; the involvement of organized crime in piracy and counterfeiting operations; ineffective prosecutions for IPR infringements; and the lack of consistent deterrent sentences, including imprisonment, in court cases.”

The second IPR MOU expired at the end of 2005, but it is anticipated that it will be extended, somehow, in 2006. 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 2004, \$18.9 million worth of Paraguayan imports to the United States benefited from the GSP program, accounting for 32.3% of its total exports to the U.S. During the first 11 months of 2005, \$21.1 million worth of Paraguayan goods (or 43.2% 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 17.8% increase from the same period last year.

PEOPLE’S REPUBLIC OF CHINA

In 2006, IIPA recommends that USTR maintain China on the [Priority Watch List](#), pending a revisiting of this recommendation based on the outcomes of the scheduled April 2006 U.S.-China Joint Commission

on Commerce and Trade (JCCT). See IIPA's 2006 People's Republic of China country report at <http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf>. After USTR placed China on the Priority Watch List in both 1989 and 1990 to encourage it to commence a law reform process, China passed a new copyright law in September 1990 (effective June 1, 1991). That law was incompatible with the Berne Convention and had numerous other defects, and as a result of these inadequacies as well as high and growing losses due to copyright piracy, USTR named China a Priority Foreign Country in April 1991. In January 1992, China and the U.S. settled the resulting Section 301 action by entering into a Memorandum of Understanding (MOU). This MOU committed China to adopt Berne-compatible regulations to its copyright law and to join the Berne Convention (which China did, effective October 15, 1992) and the Geneva Phonograms Convention (which it also did, effective June 1, 1993). U.S. works became fully eligible for protection in April 1992 under the 1992 MOU, and China was consequently placed on the Watch List in April 1992.

On September 30, 1992, China's Berne-compatible regulations went into effect (but only applied to foreign works, leaving domestic Chinese copyright and related rights owners with less protection for their works, performances and sound recordings than that enjoyed by foreign right holders). China remained on the Watch List in 1993, with IIPA and USTR pushing for passage of legislation to make copyright piracy a criminal offense, as well as to beef up enforcement measures. On November 30, 1993, Ambassador Kantor elevated China to the Priority Watch List due to China's failure to enforce its laws. In February 1994, IIPA reported significantly increased trade losses, up to \$823 million for 1993. Due to the absence of criminal penalties and a total lack of enforcement, USTR once again named China as a Priority Foreign Country in June 1994, though the National People's Congress, through a "Decision" of the Standing Committee, adopted criminal penalties for copyright piracy in July 1994. It was not until 1995 that the "Decision" was implemented by a set of "Interpretations" issued by the Supreme People's Court. However, because the "Decision" appeared not to have the full effect of a "Law" (which was not adopted until March 1997, effective October 1997), the criminal provisions were rarely used and deterrence suffered accordingly. Meanwhile, U.S. trade losses continued to mount. On February 4, 1995, the U.S. government announced \$1.08 billion in retaliatory tariffs to compensate for trade losses due to copyright piracy in China. Imposition of these tariffs was narrowly averted by the U.S.-China IPR Agreement on February 26, 1995. As a result of this agreement, the second Section 301 case against China was terminated, China was made subject to monitoring under Section 306, and, on April 30, 1995, USTR moved China to the Watch List.

While some progress was made during 1995 to set up the enforcement infrastructure promised in the 1995 agreement, its principal provisions (those dealing with CD factories, with imposing deterrent penalties and with eliminating onerous market access barriers) remained largely unfulfilled. This led IIPA, in February 1996, once again to urge that China be named a Priority Foreign Country and that the previously terminated Special 301 investigation be reopened. USTR took these actions on April 30, 1996 and a retaliation list, comprising over \$2 billion worth of products, was published on May 15, 1996. This was followed by protracted and often heated discussions, which led to the closure of 15 CD factories, other enforcement actions by Chinese authorities, and the announcement of certain market-opening measures. Finally, on June 17, 1996, the U.S. and China agreed on a set of announcements which averted the imposition of trade sanctions, and which led to the Section 301 action once more being terminated. This left China subject to monitoring of its compliance with the 1995 and 1996 agreements under Section 306 of the U.S. Trade Act as it remains today. The U.S. government, led by USTR, has continued since then to meet regularly with Chinese authorities to monitor compliance with China's agreements. In 2001, China amended its copyright law and joined the World Trade Organization, stating it would implement its obligations under the TRIPS Agreement, from the time of its joining the WTO.

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." In the out-of-cycle review, IIPA recommended 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." In its April 2005 Special 301 Announcement, USTR announced in its out-of-cycle review results that China would be "elevated to the Priority Watch List on the basis of serious concerns about China's compliance with its WTO TRIPS obligations and commitments China made at the April 2004 JCCT to achieve a significant reduction in IPR infringement throughout China, and make progress in other areas," concluding that "China has failed to significantly reduce IPR infringement levels, as required under the JCCT." USTR also decided that it would "invoke the transparency provisions of the WTO TRIPS Agreement to request that China provide detailed documentation on certain aspects of IPR enforcement that affect U.S. rights under the TRIPS Agreement," would "for example, be seeking information on criminal and administrative penalties actually imposed," and that it would "use the JCCT and IPR Working Group to secure new, specific commitments concerning additional actions that China will take that result in significant improvements in IPR protection and enforcement, particularly over the [second half of 2005]."

PERU

IIPA recommends that Peru remain on the Watch List, where it has been since 2001. See IIPA's 2006 Peru country report at <http://www.iipa.com/rbc/2006/2006SPEC301PERU.pdf>. USTR first placed Peru on the Special 301 Watch List in 1992, where it remained for seven years. In February 1995, IIPA was greatly concerned about the inadequate copyright law and poor enforcement efforts in Peru and filed a petition to deny preferential trade benefits under both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA). Peru amended its copyright law in 1996 and established an administrative agency to handle copyright enforcement. As a result of such progress, these petitions were not accepted by USTR. USTR's April 1996 Special 301 Announcement noted that some progress had been taken by INDECOPI (a quasi-governmental agency), but urged the government "to intensify its anti-piracy efforts, particularly to combat sound recordings and book piracy." USTR kept Peru on the Watch List in both 1997 and 1998. In both 1999 and 2000, IIPA recommended, and USTR agreed, that Peru should be elevated to the Priority Watch List.

In 2001, IIPA recommended that Peru be put on the Watch List in recognition of noticeable progress INDECOPI has made on copyright issues. USTR agreed, placing Peru on the Watch List for 2001. In the April 30, 2001 Special 301 Announcement, USTR noted that "the government of Peru took several positive steps in cooperating with U.S. industry on intellectual property protection." The announcement points out that "[d]espite these efforts, however, criminal enforcement remains a problem." In 2002, IIPA recommended that USTR keep Peru on the Watch List, noting high piracy levels, weak enforcement, and a failure to require government agencies to use licensed software. Peru remained on the Watch List. USTR's 2003 Special 301 Announcement noted that Peru "took some steps to destroy pirated and counterfeit products" in 2002, but "piracy rates for all copyright industries remained high, in particular for sound recordings." Lack of prosecutions and deterrent sentences remain serious problems, so Peru remained on the Watch List in 2003. IIPA recommended that Peru continue to be on the Watch List 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 was retained on the Watch List in USTR's 2005 Special 301 Announcement for several outstanding issues highlighted in USTR's Special 301 2004 Announcement.

Peru and the U.S. have signed a Free Trade Agreement (FTA). Now that after the FTA enters into force in Peru, it will cease to benefit from a variety of U.S. trade programs. 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 2004, \$107.2 million worth of Peru’s imports 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 2005, \$159.6 million worth of Peruvian goods (or 3.5% of Peru’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 66.4% over the same period in 2004. An additional \$1.6 billion worth of Peruvian products benefited from the ATPA in 2004, accounting for 42.7% of total exports to the United States. In the first 11 months of 2005, an additional \$2 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 44.3% increase in ATPA benefits from the same period in 2004.

PHILIPPINES

In 2006, IIPA recommends that the Philippines should be placed on the Priority Watch List if significant progress has not been made to address various copyright enforcement and legislative issues noted in the report. For a list of those issues, see IIPA’s 2006 Philippines country report at <http://www.iipa.com/rbc/2006/2006SPEC301PHILIPPINES.pdf>. The Philippines has been on USTR’s list for well over a decade, and IIPA has a long history of involvement with copyright issues there. In 1992 and 1993, IIPA recommended that USTR identify the Philippines as a Priority Foreign Country, given the almost complete lack of attention by the Philippine government toward enacting copyright reform and improving enforcement. In 1992, USTR elevated the Philippines from the Watch List to the Priority Watch List. On April 6, 1993, the Philippine government exchanged letters with the U.S. government, committing the Philippines to provide strong intellectual property rights protection and improved enforcement. As a result of that agreement, USTR dropped the Philippines from the Priority Watch List to the Watch List in 1993.

In June 1997, the Philippines enacted a comprehensive modernization of its copyright law (effective January 1, 1998). In 1998, IIPA, asking USTR to keep the Philippines on the Watch List, commended the government on the law, but noted ongoing problems with enforcement and the need to clarify omissions and ambiguities in the new law. USTR agreed to keep the Philippines on the Watch List in 1998 and 1999. In 2000, IIPA called for the Philippines to be elevated to the Priority Watch List, noting that optical disc pirate production had taken root in the country and that fundamental improvements in the investigative, prosecutorial and judicial systems were needed. In its May 1, 2000 Special 301 Announcement, USTR maintained the Philippines on the Watch List, but also noted the possible initiation of a future WTO dispute settlement case against the Philippines for noncompliance with TRIPS obligations.

Noting increased pirate production and cross-border distribution, the IIPA recommended in 2001 that the Philippines be placed on the Priority Watch List “to underscore U.S. insistence that these long-standing and serious problems be effectively tackled.” USTR agreed and placed the Philippines on the Priority Watch List in 2001. In the April 30, 2001 Special 301 Announcement, USTR noted concern that “the Philippines has the potential of becoming a center of pirate optical media production in Asia.” In 2002, IIPA recommended, and USTR agreed, to keep the Philippines on the Priority Watch List and conduct an out-of-cycle review (OCR) due to rampant pirate optical disc production and to review whether the Philippines had passed and implemented an optical disc law. In 2003, IIPA recommended, and USTR agreed, to keep the Philippines on the Priority Watch List. The 2003 USTR Special 301 Announcement noted that optical media piracy had increased to the point where the Philippines was a net exporter of pirated optical media. In 2004, the IIPA recommended, and USTR agreed, that the Philippines be placed on the Priority Watch List. 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.”

In 2005, IIPA recommended that the Philippines be maintained on the Priority Watch List, and that an out-of-cycle review (OCR) be conducted to evaluate whether recently initiated enforcement and legislative

actions to eradicate copyright piracy were being sustained. In its 2005 Special 301 Report, USTR announced that The Philippines would be retained on the Priority Watch List and that an out-of-cycle review would be conducted. Positive improvements made by the Philippines, which include the implementation of the Optical Media Act and accession to the WIPO Internet Treaties, were acknowledged. USTR noted:

Despite these improvements, U.S. industry continues to raise serious concerns about high levels of copyright piracy and trademark counterfeiting, including book piracy, increasing levels of pirated optical media imported into the country, and pervasive end user software piracy. The U.S. copyright and trademark industries also report continued difficulty protecting their rights through the Philippine legal system due to low conviction rates and imposition of nondeterrent sentences.

In February 2006, USTR announced the results of the out-of-cycle review, lowering the Philippines to the Watch List.

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 2004, \$965.3 million worth of Philippine imports to the United States benefited from the GSP program, accounting for 10.6% of its total exports to the U.S. During the first 11 months of 2005, \$935.9 million worth of Philippine goods (or 11.1% 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 5.2% from the same period in 2004.

POLAND

IIPA recommends that Poland remain on the Watch List. See IIPA’s 2006 Poland country report at <http://www.iipa.com/rbc/2006/2006SPEC301POLAND.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 its 2005 Special 301 Announcement, USTR retained Poland on the Watch List, “... to monitor its progress in improving IPR protection.” Poland was praised for passing copyright legislation and optical disc regulations and for engaging in anti-piracy activities.

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. When Poland joined the European Union on May 1, 2004, Poland was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

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 Watch List, where it has been placed since 1999. See IIPA's 2006 Romania country report at <http://www.iipa.com/rbc/2006/2006SPEC301ROMANIA.pdf>. In a Side Letter to the 1992 trade agreement with the U.S., the Romanian government committed to take several actions to improve intellectual property rights, including adhering to the Berne Convention (1971 text) and the Geneva Phonograms Convention. Romania agreed to submit for enactment, no later than December 31, 1993, legislation necessary to carry out its obligations and to make "best efforts" to implement legislation by that date. In 1995, after Romania failed to meet these goals and deadlines, IIPA recommended that Romania be added to the Watch List, and USTR agreed. In 1996, USTR moved Romania to Special Mention following adoption of its new copyright law in February 1996. Romania remained as a Special Mention country in USTR designations in 1997 and 1998 because of its lax enforcement and the bilateral agreement shortcomings. Since 1999, IIPA has recommended that Romania be elevated to the Watch List as a result of unacceptable piracy rates, its non-TRIPS-compliant regime, and to encourage the commitment of resources to effective enforcement of its copyright law. USTR has consistently agreed. Romania is making legal reforms, including its February 2001 deposit of the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT). The USTR 2003 Special 301 Announcement noted that Romania "increased raids and seizures of materials in 2002," but "poor border enforcement, the low priority level given to piracy . . . and the lack of resources dedicated to the issue" are continuing problems. In 2004, IIPA once again recommended that Romania remain on the Watch List. 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." USTR retained Romania on the Watch List in its 2005 Special 301 Announcement stating that, "Although Romania improved its IPR regime in 2004 by amending its Copyright Law to include civil ex parte search authority, IPR enforcement did not improve in Romania in 2004. The U.S. copyright industry continued to experience high piracy rates and significant losses in Romania in 2004 due to weak enforcement and judicial deficiencies."

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 2004, \$211.4 million worth of Romania's imports to the United States benefited from the GSP program, accounting for 24.8% of its total exports to the U.S. During the first 11 months of 2005, \$248.9 million worth of Romanian goods (or 22.6% 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 25.2% increase over the same period in 2004.

RUSSIA

In 2006, as in 2005, IIPA recommends that Russia be elevated to Priority Foreign Country status. See IIPA's 2006 Russia country report at <http://www.iipa.com/rbc/2006/2006SPEC301RUSSIA.pdf>. In its 1995 submission, frustrated by the lack of progress in criminalizing piracy, IIPA recommended Russia for the Priority Watch List. USTR moved Russia from the Special Mention category in 1994 to the Watch List for 1995. Also in 1995, IIPA petitioned to remove Russia's status as a "beneficiary developing country" under the Generalized System of Preferences (GSP) program. The GSP program expired on July 31, 1995 and was not renewed again until October 1996. During this hiatus, IIPA's petition was, in effect, not accepted. In February 1996, IIPA urged that Russia be named a Priority Foreign Country. USTR kept it on the Watch List, subject to an out-of-cycle review (OCR), which occurred in December 1996. USTR again decided to keep Russia on the Watch List at that time (because of the expected passage of the criminal law amendments).

In our February 1997 submission, IIPA again pressed for a Priority Foreign Country designation if by April 1997 Russia had not taken a series of steps, including commencement of major enforcement actions, and the introduction of legislation providing full retroactive protection for both pre-1995 sound recordings and pre-1973 works. Some more aggressive enforcement actions were undertaken during this period, but there was no movement on even drafting a bill (or decree) on retroactive protection and little optimism that this would soon occur. Shortly following its submission, IIPA again petitioned USTR to deny Russia duty free trade benefits under the GSP program, for its clear failure to provide “adequate and effective” protection for U.S. copyrighted works. USTR moved Russia up to the Priority Watch List in its April 1997 announcement and later again denied IIPA’s GSP petition.

During the first year (1997) following adoption of the new criminal provisions making piracy a crime with real penalties, there was some progress in the enforcement area. In particular, raids commenced and some administrative actions were concluded; two criminal convictions with very low penalties were reported, only later to be voided by a government amnesty at the beginning of 1998. There was no progress at all with the legislative agenda concerning retroactivity or correcting other enforcement deficiencies. From 1998 through 2002, IIPA recommended that Russia remain on the Priority Watch List because of massive piracy losses, a rapidly growing optical media piracy problem, virtually no enforcement or deterrent system, and some deficiencies in the IPR regime, particularly around retroactive protection for sound recordings. USTR has followed IIPA’s recommendation, and Russia has remained on the Priority Watch List ever since 1997. The USTR 2003 Special 301 Report notes that Russia made considerable progress over the last year in revising intellectual property laws, but still needs amendments to the copyright laws in order to be compliant with TRIPS. Increasing piracy of optical media and ineffective enforcement of intellectual property laws remain serious problems, so Russia was kept on the Priority Watch List in 2003. 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 its Special 301 2005 Announcement, USTR retained Russia on the Priority Watch List citing similar concerns of past 301 announcements and stating that, “...overall IPR enforcement in Russia remains inadequate and piracy and counterfeiting levels continue to rise. Problematic IPR enforcement issues include the lack of an effective and deterrent criminal enforcement system (including many suspended sentences of major pirates), the lack of effective plant inspection and enforcement mechanisms; the lack of civil ex parte search procedures; an extremely porous border; delays in criminal prosecutions and adjudications; and infrequent destruction of seized pirate goods.” It was also announced that an out-of-cycle review would be conducted.

In August 2000, IIPA filed a petition with USTR requesting that the country eligibility of Russia under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In January 2001, the Administration announced that it accepted IIPA’s petition. The U.S. government has not yet decided whether to withdraw or suspend GSP benefits in Russia. In its April 30, 2001, Special 301 Announcement, USTR noted certain deficiencies in Russia’s copyright law making it incompatible with the 1991 bilateral trade agreement and TRIPS. In its 2002 announcement, USTR noted provisions in Russia’s enforcement regime that “appear to be inconsistent with the TRIPS Agreement and the intellectual property rights provisions of the 1992 U.S.-Russian Federation Trade Agreement.”² USTR also pointed to other problems such as weak enforcement and “[l]ack of an effective OD law.” In 2004,

² This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

\$541 million worth of Russia'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 2005, \$689.3 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 37.3% increase from the same period in 2004.

SAUDI ARABIA

In 2006, IIPA recommends that Saudi Arabia remain on the Watch List with an out-of-cycle review to monitor implementation of new enforcement and transparency commitments made to IIPA in a recent visit and following the Kingdom's recent and welcome WTO accession. See IIPA's 2006 Saudi Arabia country report at http://www.iipa.com/rbc/2006/2006SPEC301SAUDI_ARABIA.pdf. Saudi Arabia was on the Priority Watch List from 1993 to 1995. In April 1995, USTR kept Saudi Arabia on the Priority Watch List and added an out-of-cycle review (OCR) for October 1995. On November 13, 1995, USTR decided to keep Saudi Arabia on this list, and looked to the Saudi government to "increase its enforcement actions against pirate activity and to take action against the illegal use of computer software, particularly by large end-users in Saudi Arabia." In April 1996, Saudi Arabia was lowered to the Watch List in recognition of end-of-1995 enforcement actions taken by the Ministry of Information. It remained on the Watch List in 1997. In 1998 and 1999, IIPA recommended, and USTR agreed, that Saudi Arabia should remain on the Watch List, noting that copyright enforcement efforts by the Saudi government had improved over 1997, but raising several concerns, including lack of "transparency" and failure to impose "strong deterrent penalties."

In 2000 and 2001, IIPA recommended that Saudi Arabia be elevated to the Priority Watch List, for continued piracy, lack of effective and deterrent enforcement actions, and a TRIPS-incompatible copyright law. In both 2000 and 2001, USTR kept Saudi Arabia on the Watch List, but noted that "the level of activity undertaken by enforcement officials has been insufficient to deter piracy" in its 2000 announcement, and "[e]nforcement actions against copyright infringement are not carried out with sufficient regularity and are not accompanied by the appropriate level of publicity and sentences to reduce the level of piracy" in its 2001 announcement. In 2002 and 2003, IIPA recommended that Saudi Arabia remain on the Watch List, noting increasing enforcement, but many of the same structural difficulties, including lack of transparency. USTR agreed. In its 2003 Special 301 Announcement, USTR commented that "Saudi Arabia has made great strides in fighting copyright piracy . . . over the past year" and is working to revise its intellectual property laws, but "the United States remains concerned about continued high losses experienced by U.S. copyright . . . industries." In 2004, IIPA recommended that Saudi Arabia remain on the Watch List 2004, and that USTR conduct an out-of-cycle review 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 Watch List. The 2004 Special 301 Announcement praised Saudi Arabia for the improvements it made, but identified 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."

In 2005, IIPA recommended that Saudi Arabia remain on the Watch List. USTR announced in its 2005 Special 301 Report that Saudi Arabia would be retained on the Watch List and that an out-of-cycle review would be conducted and stated that, "[d]espite improvements made by Saudi Arabia on IPR legislation, the U.S. copyright industry reports that piracy rates remain high due to the absence of deterrent penalties and the lack of transparency in Saudi Arabia's enforcement system." In the out-of-cycle review of Saudi Arabia, IIPA noted the following:

IIPA recognizes that the government of Saudi Arabia has made progress through the passage of copyright law implementing regulations and has continued to run raids. However, the failure of these actions to effectively deter piracy, resulting from lack of transparency in the raids and subsequent enforcement processes (e.g., lack of knowledge about final disposition of infringing goods and implements, no decisions of

courts in writing), as well as the failure to impose meaningful deterrent remedies, makes it absolutely essential that Saudi Arabia remain on the Special 301 list. To take Saudi Arabia off the list at this juncture would subject copyright owners to many more years of excessive piracy in Saudi Arabia. Because of the magnitude of the continuing problems, which only appear to be getting worse, we would recommend that Saudi Arabia be elevated to the Priority Watch List and at a minimum be maintained on the Watch List as a result of this out-of-cycle review, pending further review of whether the government of Saudi Arabia adequately addresses these problems by the next annual Special 301 review.

USTR's out-of-cycle review of Saudi Arabia remains ongoing.

SERBIA AND MONTENEGRO

Serbia and Montenegro have never appeared on a USTR Special 301 list. In 2006, as in 2005, IIPA recommends that Serbia and Montenegro be placed on the Watch List, noting unacceptably high piracy levels, inadequate legislation, and ineffective enforcement remedies. See IIPA's 2006 Serbia and Montenegro report at http://www.iipa.com/rbc/2006/2006SPEC301SERBIA_MONTENEGRO.pdf. In its 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. Serbia and Montenegro participate in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. During the first 11 months of 2005, \$5.6 million worth of Serbian goods (or 11.1% of Serbia and Montenegro's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code

SINGAPORE

In 2006, IIPA mentions Singapore in its Special Mention section because of two legislative issues of major concern to copyright owners that were not addressed in recent legislation: adequate treatment/protection of non-interactive digital audio transmissions; and protection against unauthorized (parallel) imports, as well as, among other piracy and enforcement concerns, increasing evidence of pirate production in Singapore for export. See IIPA's 2006 report on Singapore at www.iipa.com/rbc/2006/2006SPEC301SINGAPORE.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 TRIPS-consistent copyright law.

In 1999 and 2000, IIPA recommended and USTR agreed that Singapore remain on the Watch List. In the May 1, 2000 Special 301 Announcement, USTR noted that while "[o]verall piracy rates in Singapore decreased slightly during 1999 the open retail availability of pirated CDs, VCDs and CD-ROMs in

notorious shopping malls and at stalls continues to be a serious problem.” IIPA made no recommendation regarding Singapore in 2001 or 2002; USTR did not place Singapore on any list in either of those years. IIPA highlighted Singapore in the Special Mention 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.” In its 2005 Special 301 Report, IIPA recommended that the U.S. Government initiate the dispute settlement procedures of the U.S.-Singapore FTA during 2005 to require Singapore to fully meet its FTA obligations, including some critical areas in which Singapore’s law (at that point) failed to fully comply with the FTA. On August 15, 2005, the Copyright (Amendment) Act 2005 went into force in Singapore, for the most part culminating that country’s efforts to bring its law into compliance with the copyright-related provisions of the U.S.–Singapore Free Trade Agreement.

SLOVAK REPUBLIC

The Slovak Republic is currently on the Watch List, where it has been since 2001. The Slovak Republic was originally placed on the Watch List because of concerns in the area of patent protection. The 2003 USTR Special 301 Announcement also noted that “home CD-burning is on the rise and pirate CDs continue to be available on the public market in Eastern Slovakia.” The Slovak Republic was placed on the Watch List 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.” USTR retained Slovakia on the Watch List in its 2005 Special 301 Announcement stating that, “The situation has not improved over the past year, although Slovakia has expressed its interest in taking steps to address inadequacies in its IPR regime.” When the Slovak Republic joined the European Union on May 1, 2004, Slovak Republic was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

SOUTH AFRICA

South Africa does not currently appear on any of the USTR lists. In 2006, IIPA included South Africa in its Special Mention section to highlight several copyright piracy, enforcement and legislative concerns. See IIPA’s 2006 report on South Africa at www.iipa.com/rbc/2006/2006SPEC301SOUTH_AFRICA.pdf. USTR placed South Africa on the Special 301 Watch List in 1995. After South Africa made progress on trademark issues, USTR provisionally removed it from the Watch List in April 1996, placing it in USTR’s Other Observations category. USTR conducted an out-of-cycle review (OCR) in September 1996 to confirm that legislative changes that South Africa had committed to implement were being carried out, and that other measures had been taken to resolve outstanding concerns regarding trademarks. As a result of this review, South Africa was taken off the Special 301 list. In 1997, IIPA recommended that South Africa be placed on the Other Observations list because of resurgent book piracy and TRIPS deficiencies in South Africa’s copyright law. USTR included South Africa in the 1997 National Trade Estimate (NTE) release, noting “substantial software losses, book piracy, and satellite signal piracy.” In addition, USTR recognized that “[e]nforcement remains a problem in part because of a lack of availability of enforcement resources.”

In 1998, USTR placed South Africa on the Watch List because of continuing problems in the patent system, “TRIPS deficiencies,” and U.S. copyright industry estimates that losses due to copyright piracy increased by 26% between 1996 and 1997. In 1999, IIPA recommended, and USTR agreed, that South Africa remain on the Watch List. In her April 30, 1999 announcement, Ambassador Barshefsky added a September 1999 out-of-cycle review, noting that “the U.S. copyright industry estimates that trade losses due to piracy of copyrighted works increased more than 35 percent between 1997 and 1998.” As a result of a health initiative related to pharmaceutical patents, USTR decided to remove South Africa from the Special 301 lists in late 1999, and despite IIPA recommendations in 2000, 2001, and 2002 to place South Africa on the Watch List, South Africa has not appeared on any Special 301 list since its removal in late

1999. In 2005, IIPA highlighted piracy, enforcement, and legislative concerns in South Africa in IIPA's Special Mention section.

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 2004, \$948.6 million worth of South Africa's exports to the United States benefited from the GSP program, accounting for 16% of its total exports to the U.S. During the first 11 months of 2005, \$941.4 million worth of South Africa's exports to the United States (or 17.6% of South Africa's total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 10.8% over the same period in 2004. South Africa also participates in the African Growth Opportunity Act (AGOA), another trade program which contains a basic intellectual property rights protection component. In 2004, \$668.1 million worth of South Africa's exports to the United States benefited from the AGOA program, accounting for 11.2% of its total exports to the U.S. During the first 11 months of 2005, \$311.4 million worth of South Africa's exports (or 5.8% of the country's total exports to the U.S.) benefited from the AGOA program, representing a decrease of 50.7% over the same period in the previous year.

SOUTH KOREA

In 2006, IIPA recommends that South Korea be placed on the Watch List, with an out-of-cycle review to determine whether publishers' and music industry issues have been adequately addressed, or whether a higher designation is warranted. See IIPA's 2006 South Korea country report at http://www.iipa.com/rbc/2006/2006SPEC301SOUTH_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.

In 2005, IIPA recommended that South Korea be maintained on the Priority Watch List. In its 2005 Special 301 Announcement, USTR lowered Korea from the Priority Watch List to the Watch List, stating:

Meaningful improvements made by Korea include: introducing legislation that will create protection for sound recordings transmitted over the Internet (using both peer-to-peer and web casting services); implementing regulations that restore the ability of the Korea Media Rating Board to take necessary steps to stop film piracy; and increasing enforcement activities by the Standing Inspection Team against institutions using illegal software.

On February 2, 2006, U.S. Trade Representative Rob Portman announced the U.S. Government’s intention to negotiate a free trade agreement (FTA) with the Republic of Korea. The negotiations are expected to commence in the coming months (after the expiration of a 90-day consultation period). Just prior to the FTA announcement, the long-standing motion picture screen quota issue was resolved, and it was hoped that an FTA with Korea would bring resolution to many other issues.

SPAIN

In both 2005 and 2006, 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 2006 Special Mention section at <http://www.iipa.com/rbc/2006/2006SPEC301SWITZERLAND.pdf>.

TAIWAN

In 2006, IIPA recommends that Taiwan remain on the Watch List. See IIPA's 2006 Taiwan country report at <http://www.iipa.com/rbc/2006/2006SPEC301TAIWAN.pdf>. Taiwan was the subject of the IIPA's first report on worldwide piracy in 1985. U.S. efforts to reduce the massive levels of piracy in Taiwan began in earnest in 1988-89 with the negotiation of a new bilateral treaty governing copyright protection. Concerns surged in the early 1990s over new pirate CD manufacture and export from Taiwan, escalating cable piracy, and mushrooming export levels of pirated software. U.S. trade losses reached an unprecedented \$370.0 million in 1991, and almost doubled in 1992, when Taiwan was named by USTR as a Priority Foreign Country. However, under the threat of retaliation, Taiwan adopted a new copyright law in May 1992, and finally signed a comprehensive Memorandum of Understanding (MOU) containing specific and wide-ranging commitments to improve copyright protection.

While some steps had been taken by April 1993 to implement the MOU, numerous commitments remained unfulfilled such that USTR decided to keep Taiwan on the Priority Watch List pending compliance with an "immediate action plan" that included a requirement that it finally adopt its long-pending cable law, legitimize the cable industry and reduce piracy. In 1993, Taiwan passed its cable law, implemented an export control system to block the export of counterfeit software and pirated CDs, and finally began to mete out serious fines and jail terms to convicted pirates. These improvements, and sharp reductions in piracy losses, led IIPA to recommend that Taiwan be moved to the Watch List in 1994. USTR agreed, and kept Taiwan in the same position in 1995.

In 1996, IIPA pointed to the prominent Taiwanese role in massive software piracy networks encompassing "Greater China" as a growing problem that Taiwan needed to address. Just before USTR's Special 301 Announcement in April 1996, Taiwan adopted an 18-point "Action Plan" that pledged improvements in tackling the "Greater China" piracy problem as well as other enforcement issues, including reform of the Export Monitoring System (EMS). Because this plan had the potential for continuing the "significant strides" Taiwan had made in improving IPR enforcement, USTR decided that Taiwan should be moved from the Watch List to Special Mention, with an out-of-cycle review (OCR) to be conducted in October 1996. On November 12, 1996, USTR announced that Taiwan's "considerable success" in implementing the Action Plan justified removing it from Special 301 lists. In 1997, IIPA noted that some issues addressed in the April 1996 Action Plan, such as bootleg audio products and the Export Monitoring System, had yet to be fully resolved, while other issues, such as the ongoing cross-straits networks for production and worldwide export of pirated videogames, were not adequately addressed by the Action Plan. While USTR decided to keep Taiwan off the Special 301 list, it continued to monitor the situation in Taiwan, reporting on Taiwan in the 1997 National Trade Estimate (NTE) report.

In 1998, IIPA recommended that Taiwan be elevated to the Watch List, noting that Taiwan remained a "node" in a web of "Greater China" piracy of entertainment video games; CD, CD-ROM, CD-R, and audio bootleg piracy remained problems, as did various structural deficiencies including the failure of the EMS to curtail exports of pirate videogames and components, and unreasonable documentary requirements imposed on plaintiffs by the Taiwanese courts (including the requirement that powers of attorney be

signed by the CEO of a corporation). USTR, in specially mentioning Taiwan, stated that Taiwan had made “recent assurances” and that USTR would “closely monitor implementation of the specific measures over the next several months.” The result of that monitoring was to place Taiwan on the Watch List on August 11, 1998, because of “continuing concerns about enforcement of intellectual property rights in Taiwan.” In 1999, IIPA recommended, and USTR agreed, to keep Taiwan on the Watch List.

In 2000, IIPA recommended that Taiwan remain on the Special 301 Watch List, with an out-of-cycle review to continue monitoring progress. With trade losses growing to over \$314 million by 1999, doubling video piracy levels and rapidly increasing piracy rates for sound recordings, musical works, business and entertainment software, the Alliance voiced its concern for the worsening situation that would affect the entire Greater China region. USTR agreed, and retained Taiwan on the Watch List in 2000.

In 2001, IIPA recommended that Taiwan be elevated to the Special 301 Priority Watch List due to the failure to enact and effectively implement comprehensive regulations to control and curtail the illegal manufacture of optical media goods in Taiwan, and the failure of the Taiwan government authorities to shut down known commercial pirates and curtail growing online piracy. USTR agreed, placing Taiwan on the Priority Watch List in 2001. On October 31, 2001, Taiwan passed the Optical Media Management Statute. It brings under the control of the Ministry of Economic Affairs (MOEA) a system of granting permits to persons/entities engaged in the production of “prerecorded optical discs”; otherwise regulating production of stampers/masters (through SID Code and other requirements); and requiring transparency (i.e., a reporting requirement) with respect to production of “blank” media.

IIPA recommended that Taiwan remain on the Priority Watch List in 2002, pointing to extremely high piracy rates and a pirate trade in optical media that remains at epidemic proportions. In its 2002 announcement, USTR stated that “the lax protection of IPR in Taiwan remains very serious.” Calling the country “one of the largest sources of pirated optical media products in the world,” USTR kept Taiwan on the Priority Watch List in 2002. IIPA also recommended that an out-of-cycle review be conducted to determine whether Taiwan has made serious progress in combating its significant optical media piracy problem through legislative and enforcement efforts. The 2003 USTR Special 301 Announcement described the numerous steps Taiwan took in 2002 – their “Action Year for IPR.” Positive measures included expanding an interagency task force to 220 people, opening warehouses to store seized pirated goods and manufacturing equipment, and introducing an amended copyright law to strengthen IPR protection and bring Taiwan into compliance with TRIPS and other international IPR standards. These steps, however, have not produced any noticeable results, and “piracy and counterfeiting levels remain unacceptably high.” USTR therefore kept Taiwan on the Priority Watch List in 2003. In 2004, IIPA recommended that Taiwan remain on the Priority Watch List. In addition, IIPA suggested that USTR conduct an out-of-cycle review 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 Priority Watch List, 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 out-of-cycle review to evaluate Taiwan’s progress in improving protection for intellectual property. 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. However, with Taiwan’s enforcement actions remaining at a high level, IIPA recommended in the November 2004 out-of-cycle review that Taiwan be lowered to the Watch List but not removed. On January 18, 2005, USTR announced that Taiwan was being lowered to the Watch List.

In the 2005 Special 301 report, IIPA noted that, even though enforcement was at a high level, some critical problems remained; thus, IIPA recommended that Taiwan remain on the Watch List. In Its Special

301 2005 Announcement in April 2005, USTR retained Taiwan on the Watch List to “monitor Taiwan’s efforts to combat Internet piracy, enact judicial reforms, . . . prevent illegal copying of textbooks, abolish the Export Monitoring System (EMS), and prevent unauthorized cable operations in South and Central Taiwan.” More specifically, USTR noted:

In August 2004, Taiwan’s legislature approved a number of amendments to its copyright law that provide greater protection for copyrighted works and increase penalties for infringers. In addition, Taiwan authorities made permanent an IPR-specific task force that has increased the frequency and effectiveness of raids against manufacturers, distributors, and sellers of pirated product. . . . With respect to the judicial process, Taiwan authorities continue to conduct regular training seminars for judges and prosecutors on IPR matters and plan to establish a specialized IPR court. During the past year, Taiwan’s IPR task force increased inspections of optical media factories and retail distribution centers, and the number of raids and inspections conducted by the National Police also increased sharply. The U.S. copyright industry reports that Taiwan’s increased enforcement efforts resulted in a significant drop in estimated trade losses from a high of \$847.9 million in 2002 to \$315.5 million in 2004. The United States commends Taiwan for its accomplishments on these important issues. However, we continue to look to Taiwan to improve its efforts in such areas as effectively combating increasing levels of Internet piracy of copyrighted works, further reducing corporate end-user business software piracy, and halting the illegal copying of textbooks. Other issues that require monitoring include transshipment of counterfeit and pirated goods to third areas, ensuring that changes to Taiwan’s export monitoring system do not result in a resurgence of counterfeit exports, . . . and stopping unauthorized cable operations in central and southern Taiwan.

TAJIKISTAN

IIPA recommends that Tajikistan remain on the Watch List, where it has stayed since 2000. See IIPA’s 2006 CIS country report at <http://www.iipa.com/rbc/2006/2006SPEC301CIS.pdf>. In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries, including Tajikistan, on the Special 301 Watch List.

In 2001, IIPA recommended, and USTR agreed, that Tajikistan be kept on the Watch List. In its April 30, 2001 Special 301 Announcement, USTR noted Tajikistan’s failure “to fulfill all of its intellectual property commitments under the 1993 U.S.-Tajikistan Trade Agreement,” citing failure to adhere to the Geneva Phonograms Convention as well as “weak enforcement of intellectual property rights” and failure to implement criminal provisions for IPR violations as required by the bilateral agreement. For these reasons, as well as the lack of protection for foreign sound recordings and retroactive protection for works or sound recordings, IIPA again recommended and USTR again kept Tajikistan on the Watch List in both 2002 and 2003. In 2004, IIPA recommended, and USTR agreed, that Tajikistan should remain on the Watch List. In its Special 301 Announcement that year, USTR pointed out continuing legal deficiencies with Tajikistan protection of sound recordings, as well as weak enforcement. In its Special 301 2005 Announcement, USTR reiterated several outstanding IPR issues and retained Tajikistan on the Watch List for failing to address these issues.

THAILAND

In 2006, IIPA recommends that Thailand be elevated to the Priority Watch List. See IIPA's 2006 Thailand country report at <http://www.iipa.com/rbc/2006/2006SPEC301THAILAND.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, where it has remained ever since.

GSP benefits were partially restored in August 1995, and the specialized IPR Court was authorized in 1996, although it did not begin operations until December 1997. 1998's IIPA filing focused on lack of progress in reducing persistently high piracy rates since the enactment of the new copyright law, but noted the potential for the new court to advance this goal by imposing deterrent penalties on commercial pirates, and recommended that Thailand remain on the Watch List. USTR agreed, pledging to monitor the activities of the new court to see if tough sentencing would reduce piracy rates. Subsequently, in June 1998, the U.S. restored virtually all Thailand's GSP benefits, as the Thai government committed to an ambitious action plan for better enforcement against piracy. IIPA's 1999, 2000, and 2001 filings stressed the growing role of Thailand as a source of pirate optical media production and export, and the need for the IPR court to impose deterrent penalties on commercial pirates. In June 2001, six copyright-based associations submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners. In May 2003, the petition was withdrawn. The U.S. government has since that time heavily engaged with Thailand in securing needed regulations to control pirate optical discs and ramped up enforcement efforts.

In 2002, IIPA recommended that Thailand remain on the Watch List, and requested that USTR conduct an out-of-cycle review, noting, among other problems, exponential growth in its capacity for production of optical media. USTR agreed, noting in its April 30, 2002 announcement that "the significant and growing problems of optical media production and end-user piracy of business software remain largely unaddressed." That review was not conducted. In 2003, IIPA recommended that Thailand be elevated to the Priority Watch List, citing increased concerns over rampant optical disc piracy for export. In the 2003 USTR Special 301 Announcement, in which Thailand was retained on the Watch List, USTR noted the United States' concern about "the explosion of copyright piracy within [Thailand's] borders," and noted that optical media piracy, signal theft and cable piracy all continued to increase. IIPA recommended that Thailand be elevation to the Priority Watch List 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 Watch List in 2004, citing "serious concerns about the Thai 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."

In the 2005 Special 301 report, IIPA recommended that Thailand be elevated to the Priority Watch List. In its 2005 Special 301 Announcement, USTR, while commending Thailand on its improved IPR protection efforts, retained Thailand on the Watch List to monitor future progress. UST noted "the growing problem of optical disc piracy at plants in Thailand, as well as deficiencies in Thailand's optical disc legislation.

Piracy also remains high in the areas of photocopying of books, cable piracy, videogame piracy, business software end-user piracy, Internet piracy of music, and unauthorized public performances of motion pictures and television programs in hotels, bars, and restaurants.”

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 2004, \$3.1 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 2005, \$3.2 billion worth of Thai goods (or 17.8% 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 12.3% over the same period in the previous year.

Thailand is currently negotiating a Free Trade Agreement with the United States, including an IP Chapter.

TURKEY

In 2006, IIPA recommends that Turkey be retained on the Priority Watch List. See IIPA’s 2006 Turkey country report at <http://www.iipa.com/rbc/2006/2006SPEC301TURKEY.pdf>. Turkey has been a regular on the Special 301 lists, and its intellectual property rights legislation and practices are currently under scrutiny as part of an ongoing investigation under the Generalized System of Preferences (GSP) program. There has been sporadic progress on copyright issues during this decade-long engagement. Turkey has been on the Special 301 Watch List (1990-1991, 2001-2002) and the Priority Watch List (1992-2000). In IIPA’s 1993, 1995 and 1996 Special 301 submissions, IIPA recommended that Turkey be designated a Priority Foreign Country for its failure to enact copyright reform and its lack of enforcement efforts to combat high levels of piracy, but these recommendations were not accepted by USTR.

In 1997, USTR outlined six benchmarks for progress in Turkey, which included: (1) taking effective enforcement actions to their conclusions to address widespread piracy; (2) passing copyright and patent law amendments to bring Turkey into compliance with its TRIPS and Berne obligations; (3) amending the Cinema, Video and Music Works Law to include higher, non-suspendable fines and jail terms; (4) issuing a directive to all government agencies to legalize software, (5) starting a public anti-piracy campaign about the software end-use problem and continuing training of enforcement officials so that the levels of piracy decline; and (6) equalizing taxes on the showing of foreign and domestic films. Progress in meeting these benchmarks has been slow; for example, USTR noted in its May 1, 2000 Special 301 Announcement that “Turkey has not yet addressed all of the benchmarks set out in the 1997 review,” and that enforcement efforts remain ineffective.

In 2001, IIPA recommended that Turkey remain on the Priority Watch List. However, USTR downgraded Turkey to the Watch List in April 2001, noting that “the Turkish Parliament passed amendments to the Copyright Law designed to bring Turkey into compliance with its TRIPS obligations.” In 2002, IIPA recommended that Turkey be elevated to the Priority Watch List, noting a worsening situation for most copyright industry sectors, specifically the abject failure of the “banderole” system and poor enforcement. Even though USTR again kept Turkey on the Watch List in April 2002, it acknowledged that “[l]ack of effective IPR protection in Turkey is a serious concern,” that “broadcasting regulations issued last year by the Ministry of Culture undermine the intent of the 2001 copyright law,” and that “[p]iracy levels remain extremely high and government efforts to control piracy, specifically the ‘banderole’ system, have failed.” In 2003, in acknowledgment of resolutions to the broadcast regulation issue and the false licensee issue, IIPA recommended that Turkey remain on the Watch List. USTR agreed, and in its May 1 announcement, USTR noted “some positive movement” on these issues. 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.

In 2005, IIPA recommended that USTR place Turkey on the Watch List. In its April 2005, USTR retained Turkey on the Priority Watch List, noting in part:

With regard to copyright piracy, large-scale commercial photocopying of books and highly organized print piracy continue to be the chief problems in Turkey. During 2004, Turkey improved its copyright legislative regime and the U.S. copyright industry reported an almost immediate effect of the new law on retail street piracy. As a result of the new copyright legislation, major campaigns have been carried out against street piracy and courts have been willing to impose higher penalties.

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 2004, \$967.6 million worth of Turkey's exports to the United States benefited from the GSP program, accounting for 19.6% of its total exports to the U.S. During the first 11 months of 2005, \$985.8 million worth of Turkish goods (or 20.5% of Turkey's total exports to the U.S. from January to November) entered the U.S. under GSP, representing an increase of 11.5% over the same period in the previous year.

TURKMENISTAN

IIPA recommends that Turkmenistan remain on the Watch List, where it has been since 2000. See IIPA's 2006 Turkmenistan country report at <http://www.iipa.com/rbc/2006/2006SPEC301TURKMENISTAN.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 twelve CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time, including Turkmenistan.

In 2001, USTR kept Turkmenistan on the Watch List. In its 2001 Special 301 submission, IIPA suggested again that ten of the twelve 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. In its 2005 Special 301 Announcement, USTR retained Turkmenistan on the Watch List for failing to address several outstanding IPR protection issues cited in previous Special 301 Announcements. USTR stated in its announcement that, "IPR enforcement is inadequate, since Turkmenistan has not adopted criminal penalties for IPR violations, and the Turkmen Customs Code does not provide ex officio authority to seize suspected infringing material at the border. There are no known civil ex parte search procedures."

UKRAINE

IIPA recommends that Ukraine remain on the Special 301 Priority Watch List. See IIPA's 2006 Ukraine country report at <http://www.iipa.com/rbc/2006/2006SPEC301UKRAINE.pdf>. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Ukraine, Belarus and Kazakhstan, the CIS countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, both Belarus and Kazakhstan were placed on the Other Observations list, and Ukraine was on the Watch List. The next year, Belarus was elevated to the Watch List, Kazakhstan was removed from the Special 301 list, and Ukraine was elevated to the Priority Watch List. In 2000, IIPA recommended that all of the CIS countries be placed on the Special 301 Watch List. In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Belarus and Kazakhstan are also on the Special 301 Watch List in 2000. Russia and Ukraine were placed on the Priority Watch List.

In 2000, Ukraine became Central and Eastern Europe's number one pirate CD-producing country. Fueled by serious reform and on-the-ground enforcement deficiencies, IIPA recommended that USTR designate Ukraine as a Priority Foreign Country. USTR placed Ukraine on the Priority Watch List, with the caveat that it was prepared to designate Ukraine as a Priority Foreign Country if sufficient action were not taken to curb pirate production by August 1, 2000. When Presidents Clinton and Kuchma endorsed a Joint Action Plan to address the piracy problem in June 2000, USTR announced that it would defer a decision on whether to identify Ukraine as a Priority Foreign Country.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. government held public hearings on the GSP petitions regarding these five countries. Hearings were again held with respect to Kazakhstan and Uzbekistan on October 7, 2003. On October 23, 2000, the IIPA requested that its petition on Moldova be withdrawn, as a result of cooperation with the government of Moldova on legal reforms following the filing of the petition. The U.S. government accepted that action and the GSP review of Moldova ended. The U.S. government has not yet decided whether to withdraw or suspend GSP benefits in Armenia, Kazakhstan, or Uzbekistan. GSP benefits have been withdrawn from Belarus, but for reasons unrelated to intellectual property matters.

In 2001, IIPA recommended that USTR designate Ukraine as a Priority Foreign Country, due to its continued position as the largest producer and exporter of illegal optical media disks in Central and Eastern Europe. USTR agreed, designating Ukraine as a Priority Foreign Country, on March 12, 2001 for

its failure to implement the Joint Action Plan agreed to by then-President Clinton and President Kuchma in Kiev on June 1, 2000. The designation in March commenced a formal investigation of the IPR protection and enforcement failures in Ukraine, consistent with Special 301 legal requirements. On December 20, 2001 that investigation formally ended and the U.S. government announced the imposition of trade sanctions amounting to \$75 million, effective on January 23, 2002 as the result of the continued failure on the part of the government of Ukraine to meet its obligations under the Joint Action Plan, namely to properly regulate optical media production.

The imposition of sanctions in January were in addition to the complete withdrawal of trade benefits to Ukraine under the General System of Preferences program; that suspension was announced on August 10, 2001, effective September 24, 2001. In its April 30, 2001 Special 301 Announcement, USTR noted Ukraine's "persistent failure to take effective action against significant levels of optical media piracy and to implement intellectual property laws that provide adequate and effective protection." In February of 2002, Ukraine enacted a deficient law intended to regulate optical media production and distribution (Optical Disc Licensing Bill #8278-1), hoping to avoid sizable, looming trade sanctions. The U.S. government properly reacted to that bill, calling it an insufficient measure and refusing to forestall the trade sanctions or to re-institute the GSP benefits. On January 17, 2002, USTR announced that it would begin implementing trade sanctions against Ukraine on January 23.

In 2002, IIPA recommended that Ukraine remain a Priority Foreign Country for its failure to adopt an effective optical media regulation and its continued failure to implement the Joint Action Plan of June 1, 2000. USTR designated Ukraine a Priority Foreign Country in 2002, pointing to the country's significant optical disc piracy problem. Although production of pirated media has declined, USTR extended Ukraine's status as a Priority Foreign Country in 2003, noting that "any positive movement on copyright is still overshadowed by the continued lack of adequate OD media protection." In 2001, \$37.8 million worth of Ukrainian imports to the United States benefited from the GSP program, accounting for 5.8% of its total exports to the U.S. There are no GSP figures for Ukraine in 2002 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. Citing continued high levels of piracy, weak IPR enforcement efforts and a failure to address previously raised issues, USTR maintained Ukraine's status as a Priority Foreign Country in its 2005 Special 301 Announcement. It was decided that an out-of-cycle review would be performed, "... to monitor Ukraine's progress in passing amendments to its optical media law, implementing the new law, and deterring optical media piracy through adequate enforcement."

The 2005-2006 history of Ukraine's 301 placement, the restoration of trade sanctions and GSP eligibility is as follows: after Ukraine's adoption of the optical disc law in August 2005, the U.S. government announced on August 31, 2005 that it was terminating the 100% *ad valorem* duties that had been in place since January 2002 on Ukrainian exports. It then announced an out-of-cycle review in October 2005 which concluded in January 2006. On January 23, 2006, the U.S. government announced that it was lowering the designation of Ukraine from a Priority Foreign Country to placement on the Priority Watch List; coupled with that designation, the U.S. government also announced on January 23rd, the reinstatement of GSP benefits for Ukraine.

UNITED ARAB EMIRATES

The UAE does not currently appear on any USTR lists. The UAE was on the USTR Watch List from 1991, after being named by IIPA as a major pirate exporter of audiocassettes in the Gulf Region. Although the UAE passed a copyright law in 1992, piracy losses continued to rise until September 1, 1994, when the Ministry of Information and Culture (MOIC) began its enforcement campaign following a moratorium to permit shops and manufacturers to sell off existing pirate stock. By early 1995, audio piracy had been

virtually wiped out, and video piracy sharply reduced, but little had been done to clear pirate software from the market. Because of software piracy and the continuing need for the UAE to bring its copyright law into compliance with international standards, USTR kept the UAE on the Watch List after an out-of-cycle review (OCR) in November 1995. In April 1996, Ambassador Barshefsky maintained the UAE on the Watch List, noting continued deficiencies in the copyright law. In 1997, the UAE was kept on the Watch List by USTR, who noted that efforts to reduce software piracy had “not been sufficient to reduce the level of illegal activity.”

In 1998, IIPA, in recommending that the UAE be kept on the Watch List, noted that the UAE authorities had taken sufficient enforcement actions to reduce piracy rates for nearly all the copyright industries, but that a court decision (Shama Delux) potentially jeopardized the protection of all foreign works in the UAE. Ambassador Barshefsky, in announcing USTR’s 1998 decision to keep the UAE on the Watch List, called upon the government “to clarify that U.S. copyrighted works are protected,” and to ensure that the copyright law is “TRIPS-consistent before the end of the transition period for developing countries.” In 1999, IIPA recommended that USTR drop the UAE to the Other Observations list, to acknowledge the progress of the UAE government in “fighting piracy through a sustained enforcement campaign.” Ambassador Barshefsky kept the UAE on the Watch List for certain deficiencies in the patent area, but finally dropped the UAE from the Special 301 lists because of significant progress in eradicating piracy in 2000. USTR placed UAE on the Watch List in 2001 for concerns over adequate and effective intellectual property protection unrelated to copyright. IIPA made no 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.

The UAE is currently negotiating a Free Trade Agreement with the United States, including an IP Chapter.

URUGUAY

Uruguay currently appears on the Watch List. USTR placed Uruguay on the Other Observations list in 1996 and again in 1997 to encourage Uruguay to “accelerate its efforts to enact TRIPS-consistent legislation and to continue its IPR enforcement efforts.” In July 1998, the President of Uruguay, Dr. Julio Marie Sanguinetti, met with Ambassador Barshefsky to discuss regional issues and intellectual property issues in his country. Reportedly the President responded positively to the Ambassador’s entreaties to press for passage of the long-pending copyright bill, indicating that he will work with the Uruguayan legislature to pass a good law. Unfortunately, passage of this bill has not yet been achieved and the most current draft legislation is still problematic, and not TRIPS-compliant. USTR kept Uruguay on the Watch List in 1999 and 2000.

In 2001, IIPA recommended that Uruguay be elevated to the Priority Watch List due to the long delay in passing much-needed copyright legislation, the continued high levels of piracy, and inadequate enforcement. IIPA also recommended that USTR conduct an out-of-cycle review to monitor Uruguay’s advances on these copyright issues. In its April 30, 2001 Special 301 Announcement, USTR elevated Uruguay to the Priority Watch List, noting Uruguay’s failure to update its copyright law: “Uruguay’s draft copyright legislation has become entangled in legislative wrangling and currently contains numerous shortcomings even in its draft form, most notably the separation from the comprehensive copyright bill of software protection into a stand-alone bill.” In June 2001, the IIPA filed a request for review of the intellectual property practices of Uruguay. USTR has not yet decided whether to accept the request. In 2002, IIPA recommended that Uruguay remain on the Priority Watch List, noting the country’s failure to pass much-needed copyright legislation and ineffective criminal and civil enforcement against high levels of copyright piracy. USTR kept Uruguay on the Priority Watch List in 2002, noting that “inadequate civil remedies and lax border enforcement have caused high piracy rates to persist, and have allowed

Uruguay to become a major transshipment point for pirated products.” In 2002, Uruguay amended its copyright law, and the new law went into effect January 2003. The 2003 USTR Special 301 Announcement noted that the new amendments “represent an improvement . . . and contain many provisions that upgrade the prior Uruguayan copyright scheme.” These changes convinced USTR to downgrade Uruguay to the Watch List in 2003, but they noted that enforcement and transshipment are problems that still need to be addressed. 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.” USTR retained Uruguay on the Watch List in its Special 301 2005 Announcement. Although progress with Uruguay’s IPR protection efforts was acknowledged, it was stated that, “Despite this progress, however, we note that Uruguay has not yet ratified the WIPO Internet Treaties. Piracy of copyrighted works still proliferates and IPR enforcement remains ineffective.”

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 2004, \$58 million worth of Uruguay’s exports to the United States benefited from the GSP program, accounting for 10% of its total exports to the U.S. During the first 11 months of 2005, \$55.5 million worth of Uruguayan goods (or 8.2% 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 5.4% increase from the same period in 2004.

UZBEKISTAN

IIPA recommends that Uzbekistan retain its position on the Watch List, where it has remained since 2000. See IIPA’s 2006 Uzbekistan country report at <http://www.iipa.com/rbc/2006/2006SPEC301UZBEKISTAN.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.” USTR retained Uzbekistan on the Watch List in its 2005 Special 301 Announcement stating that, “Uzbekistan does not provide protection for sound recordings or pre-existing works, and is not a member of the Geneva Phonograms Convention or the WIPO Internet Treaties. In addition, IPR enforcement in Uzbekistan remains very weak due to a lack of ex officio authority that would allow customs officials to seize infringing materials at the border, a lack of civil ex parte search procedures, and inadequate criminal penalties for IPR violations.”

In 2004, \$3.4 million worth of Uzbek exports to the United States benefited from the GSP program, accounting for 3.9% of its total exports to the U.S. During the first 11 months of 2005, \$11.3 million worth of Uzbek exports to the United States (or 12.3% of Uzbekistan’s total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 292.9% from the same period in 2004.

VENEZUELA

In 2006, IIPA recommends that Venezuela remain on the Priority Watch List, to which it was elevated in 2005. See IIPA’s 2006 Venezuela country report at <http://www.iipa.com/rbc/2006/2006SPEC301VENEZUELA.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 2004, \$813.5 million worth of Venezuela’s exports to the United States benefited from the GSP program, accounting for 3.3% of its total exports to the U.S. During the first 11 months of 2005, \$679.5 million worth of Venezuelan goods (or 2.2% 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 8.8% decrease from the same period in the previous year.

In 1999 and 2000, Venezuela remained on the Watch List, as recommended by IIPA. In 2001, IIPA recommended that Venezuela remain on the Watch List. USTR agreed, noting in its April 30, 2001 Special 301 Announcement that “Venezuela continues to present a mixed record of success with respect to its protection of intellectual property rights, although in some respects it is gradually moving in the right direction.” IIPA recommended that Venezuela remain on the Watch List in 2002, citing continued high piracy rates, lengthy judicial delays, and the failure to impose deterrent penalties. In its April 30, 2002 Special 301 Announcement, USTR kept Venezuela on the Watch List, noting that “limited resources and a lack of IPR enforcement by Venezuela customs have hampered the government’s efforts to lower copyright piracy levels.” USTR’s 2003 Special 301 Announcement commented that Venezuela’s commitment to protection of intellectual property rights appeared to be decreasing in 2002. Piracy and counterfeiting increased, while deterrence and prosecution levels stayed low. USTR kept Venezuela on

the Watch List in 2003, adding that it intended to review the country's progress later in the year. USTR kept Venezuela on the Watch List in 2004, noting signs of decline in its commitment to IPR protection. USTR elevated Venezuela to the Priority Watch List in its 2005 Special 301 Announcement, "...due to the continuing deterioration of its already weak IPR regime and its declining commitment to IPR protection."

VIETNAM

In 2006, IIPA recommends that Vietnam remain on the Watch List, where it has remained for years. See IIPA's 2006 Vietnam country report at <http://www.iipa.com/rbc/2006/2006SPEC301VIETNAM>. Vietnam first appeared on the Special 301 list in 1995 in the Other Observations category, after IIPA reported that its market was completely dominated by piracy. In 1997, IIPA renewed its call for Priority Watch List status, citing the troubling trend of government involvement in audiovisual piracy, and the failure to take any meaningful steps toward protection of U.S. works in Vietnam. On the eve of USTR's 1997 Special 301 decision, the U.S. and Vietnam announced the conclusion of a bilateral copyright agreement providing such a point of legal attachment. Ambassador Barshefsky called this "an important step in bringing Vietnam's copyright system into line with international standards," but because of the serious and growing piracy problem in Vietnam, she placed the country on the Special 301 Watch List. IIPA renewed its Priority Watch List recommendation in 1998, because the bilateral copyright agreement had not been implemented, piracy levels remained at or near 100 percent, and the Vietnamese government appeared to be consolidating its role in audio-visual piracy. USTR decided to keep Vietnam on the Watch List, calling copyright piracy "the most pressing problem" to be faced, and scheduling an out-of-cycle review (OCR) for December 1998. That OCR was subsequently postponed, and on December 27, 1998, the U.S.-Vietnam Bilateral Copyright Agreement went into force.

In 1999, IIPA recommended that Vietnam remain on the Watch List so that USTR could effectively monitor and support government efforts to implement the commitments of the Bilateral Copyright Agreement. USTR agreed, and Vietnam maintained its position on the Watch List. In 2000 and 2001, USTR agreed with IIPA's assessment of continuing IPR problems in Vietnam, and retained Vietnam on the Watch List in both years. In 2002, USTR kept Vietnam on the Watch List, noting that "[e]nforcement of intellectual property rights . . . in Vietnam remains weak, and violations of IPR are rampant." Vietnam remained on the Watch List in 2003 as well; the 2003 USTR Special 301 Announcement commented that "Vietnam has increased the number of administrative and law enforcement actions against IPR violations, but effective enforcement remains the exception rather than the norm." IIPA noted Vietnam in the Special Mention 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 Watch List in 2004. The 2004 Special 301 Announcement noted that IPR violations and enforcement continue to be problems despite improvements in laws and regulations.

In IIPA's 2005 Special 301 report, IIPA mentioned Vietnam in its Special Mention section to urge the U.S. government to ensure that Draft copyright 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, as well as to note serious piracy concerns, including book piracy and software piracy, and to note that Vietnam is a country of concern given the possible migration to its territory of optical disc and cartridge manufacturing facilities engaged in illegal activities. In its April 2005 Announcement, USTR retained Vietnam on the Watch List, stating, "IPR infringement remains rampant in Vietnam, and enforcement continues to be ineffective despite some improvement in laws and regulations. Judges in Vietnam have been reluctant to impose penalties or fines at levels sufficient to deter future infringements, and *ex officio* raids are sporadic at best."