

# **Copyright Protection and Enforcement Around the World**

## **IIPA's 2007 Special 301 Report**

**Submitted to USTR  
by the  
International Intellectual Property Alliance®**

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

**February 12, 2007**

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE  
2007 SPECIAL 301 REPORT

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February 12, 2007

Ms. Victoria Espinel  
Assistant U.S. Trade Representative  
for Intellectual Property and Innovation  
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"), 72 Fed. Reg.  
1033 (January 9, 2007)

Dear Ms. Espinel:

This filing responds to the Request for Written Submissions appearing on January 9, 2007 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 60 separate country reports. We also recommend where these countries should be ranked on the various Special 301 watch lists. We highlight challenges and initiatives in this letter that define the copyright industries' agenda for the coming year. We also highlight four countries which we believe could be considered for dispute settlement under their respective FTA obligations. Finally, we mention 15 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 comprises 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).

On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, the eleventh study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the “core” U.S. copyright industries<sup>1</sup> accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)). In addition, the “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker. Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading other major industry sectors. Those sectors include: chemicals and related products (not including medicinal and pharmaceutical products); motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products.

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 sustain U.S. economic competitiveness that our country’s response remains flexible, innovative and committed. There are certain sectors of the U.S. copyright community, notably the music sector, that has already witnessed 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 each 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 2007; (2) summarizes our submission this year; and (3) points the reader to various appendices;

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<sup>1</sup> The “total” copyright industries include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The “core” copyright industries are those that create copyrighted materials as their primary product. *The 2006 Report* is posted on the IIPA website at <http://www.iipa.com>.

- 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' methodologies for calculating estimated trade losses, piracy levels, and global data on optical disc factories and production capacity;
- Appendix C, which includes all the country surveys<sup>2</sup> and at the end lists **15** 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 our industries faced in the early 1980s. In that world, most countries' laws did not 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 helped produce 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 importantly, the failure of governments to adequately enforce their new laws against the rampant piracy of our members' intellectual property. An effective response to these challenges will require a renewed and expanded commitment to use both the old and new tools available to industry and governments.

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 foreign 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 2007. 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

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<sup>2</sup> Country surveys were prepared by Michael Schlesinger, Maria Strong, Eric H. Smith, Steven Metalitz, and Eric Schwartz, and are based on information furnished by IIPA's seven member associations. We also thank the Smith, Strong & Schlesinger LLP staff, Kristen Schumacher, Tracy Baker, Jennifer Stroud and Eunice Kim, for their contributions in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

meaningfully and to lower piracy rates locally and globally. The following objectives are not necessarily listed in order of priority, since different issues may demand priority attention in different countries.

### **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 industries and the U.S. government have been engaged for over twenty years in many countries to secure deterrent levels of enforcement that would bring piracy 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 against pirate production, wholesale and retail sites, such enforcement activity has not been adequate or effective. Adequate and effective deterrence requires capable and aware prosecutors and judges (or, where applicable, administrative agencies) willing to impose penalties that would remove the monetary incentives that drive the pirate trade. Many enforcement systems reflect a lack of willingness at the political level. 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 industries have witnessed major pirates either evading conviction (often as a result of systemic delays or corruption) or being slapped with monetary fines that do not 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 pirate product, or major pirate 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 millions more 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 increase the capacity of willing governments to take effective action. Among the strategies that could be employed are:

- Continue to coordinate enforcement training, including localized training and capacity-building that demonstrates the benefits of deterrent enforcement.
- Foster further coordination among and between U.S. agencies, industry, and international organizations with training resources;
- Create "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 assess what penalties

- will actually deter pirates;
- Set specific enforcement targets for countries in bilateral negotiations.

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 has not 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 (and, conversely, that they will see a change when such actions are in fact undertaken).

### **Internet Piracy, Electronic Commerce and the WIPO Internet Treaties**

**The Scope of the Problem:** Copyright piracy on the Internet and through other digital media, 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 digital 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 laws and enforcement in the online environment in many countries, has effectively turned the Internet into a highly efficient network for distribution of infringing copyright materials. Infringing product can now reach any part of the world with ease, no matter where the uploader or infringing service is 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.

An unfortunate consequence of the global nature of online communications is that inadequate protection or enforcement practices that exist in one country can foster abuses in other countries—even those quite cognizant of and responsive to online piracy challenges. Increasingly we perceive this to be the case in the United States, for example, where access to pirated products is often facilitated through the operation of “tracker sites” or repositories of pirated content housed in other countries. Insofar as countries’ abilities to successfully address challenges relating to online piracy are in many ways interdependent, we encourage countries’ collective attention to this large and growing problem.

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 fully take into account piracy on the Internet. Yet we know that Internet piracy is growing rapidly, frequently resulting in displaced sales of legitimate product, and that an urgent response is greatly needed. For example, independent surveys in just ten of the biggest markets reveal that an estimated 20 billion songs were illegally downloaded through file sharing services in 2006 alone. This translates into billions of dollars in lost revenue at a time when sales of physical products are in decline. Entertainment software publishers estimate that as many as 10,000 to 20,000 copies of the most popular videogame titles are successfully downloaded each week. And new phenomena, like the illegal pre-loading of songs, games, and other content onto handheld devices, pose yet new digital threats to healthy electronic commerce. We hope to continue to



evolve measures and metrics to gauge the prevalence and impact of online piracy, and to find ways of expressing these figures in a manner that identifies those countries that should be held accountable.

Meanwhile, we urge governments to 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. This entails not only the establishment of adequate rights and remedies under copyright, but also the establishment of rules that compel reasonable practices on the part of all entities involved in the transmission of copyright 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 the new e-commerce economy. 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 form a key 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, 2007, official deposits of the treaties with WIPO stood at 62 for the WCT and 60 for the WPPT. More and more countries are now beginning to legislate in this area. From the EU, Belgium has now ratified both treaties. It is expected that the other 14 original EU member states that have yet to ratify will also deposit instruments for both treaties in the near future.

Ensuring that these standards are effectively embodied in national law is at the heart of the critical second phase of the WIPO Treaties implementation effort. Since the WIPO 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.<sup>3</sup>

Even in the online world, there is no substitute for vigorous enforcement of the 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 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, and the deployment of available technological measures that can restrict or prevent infringing transmissions 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.

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<sup>3</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.

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.<sup>4</sup>

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 materials.

### **Optical Disc Piracy**

Piracy of optical disc (OD) products continues to cause major 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 the legitimate demand for such products, whether pre-recorded discs or blank media, with much of the difference inuring to the benefit of illegal pirate enterprises. Increasingly, blank recordable optical media are also used to “burn” unauthorized copies on a commercial basis and the manufacture and sale of blank media are often specifically targeted to support the piracy trade. 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 80 countries/territories:

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<sup>4</sup> In 2006, Ministers of the 21 Members of the Asia Pacific Economic Cooperation regional group recommended that “government entities” (which should include educational institutions funded by the State) should ensure that copyright usage, including on P2P networks, is legal. The APEC Ministers specifically “Recommended that APEC Leaders should endorse the principle that government entities should not use illegal software or other content on their computer networks, especially pertaining to Internet usage,” noting that “This keeps APEC at the forefront of addressing the growing problem of illegal file sharing on the Internet.” Leaders cemented the understanding among the APEC Members in November 2006 in Hanoi, Vietnam that all “government agencies” should ensure that copyright usage is legal. The APEC Leaders stated the following:

We ... called on member economies to exercise appropriate oversight to achieve the objective that central government agencies use only legal software and other copyright materials; that such bodies implement effective policies intended to prevent copyright infringement on their computer systems and via the Internet, in accordance with relevant international conventions and domestic laws and regulations concerning copyright and related rights; and that central government funds are not used by contractors or recipient institutions to purchase illegal software or other illegal copyright materials.

- There were as many as **1,077 optical disc production plants** in 2006.
- Those plants had at least **8,928 production lines**.
- Total production capacity worldwide was estimated at more than **31.8 billion discs per year** in 2006.

It must be noted that in certain markets, the mere fact that there are sizable numbers of plants and production lines does not directly correlate to piracy or over-production. This is due to the fact that the plants in many markets, such as Hong Kong, Taiwan, the United States, and many European markets, fill legal orders for finished and blank discs. The following chart details this information. For 2007, IIPA identifies the key optical disc piracy production trouble spots as: **China, Russia, Thailand, Indonesia, and Nigeria**. These are markets where immediate actions should be taken by the governments to curtail optical disc pirate production.

Estimated Optical Disc Production Capacity in 80 Countries/Territories <sup>5</sup>						
	Plants (Including CD-R)		Production Lines (Including CD-R)		Capacity in Millions (Including CD-R)	
	2006	2005	2006	2005	2006	2005
<b>ASIA</b>						
Australia <sup>6</sup>	13	13	33	24	115.5	84.0
Bangladesh	6	2	14	6	49.0	21.0
Burma/Myanmar	NA	1	NA	1	NA	3.5
Cambodia	NA	1	NA	1	NA	3.5
China	92	86	1,482	1,374	5,187.0	4,809.0
Hong Kong	90	106	733	817	2,565.5	2,859.5
India	20	20	166	166	581.0	581.0
Indonesia	28	29	145	100	507.5	300.0
Japan <sup>6</sup>	32	32	260	NA	910.0	NA
Korea	28	28	75	78	262.5	273.0
Laos	NA	0	NA	0	NA	0.0
Macau	1	3	1	3	3.5	10.5
Malaysia	32	41	163	NA	570.5	NA
New Zealand	3	3	6	3	21.0	10.5
Pakistan	1	11	1	38	3.5	133.0
Philippines	10	11	45	38	157.5	133.0
Singapore	20	20	99	106	346.5	371.0
Sri Lanka	2	2	2	2	7.0	7.0
Taiwan	83	89	2,795	2,755	9,782.5	9,642.5 <sup>7</sup>
Thailand	41	42	190	155	665.0	542.5
Vietnam	5	5	12	12	42.0	42.0
SUB-TOTAL	507	545	6,222	5,679	22,071.0	19,826.5
<b>E. EUROPE/CIS</b>						
Belarus	1	1	2	2	7.0	7.0
Bulgaria	9	9	13	18	45.5	63.0 <sup>8</sup>
Croatia	NA	NA	NA	NA	NA	NA
Czech Republic	4	4	14	14	49.0	NA
Estonia	3	2	4	2	14.0	7.0
Hungary	4	4	14	14	49.0	49.0
Kazakhstan	2	2	2	2	11.6 <sup>8</sup>	11.6 <sup>8</sup>

<sup>5</sup> The methodology used by IIPA to calculate estimated capacity is discussed in Appendix B of IIPA's 2007 Special 301 submission at <http://www.iipa.com/pdf/2007spec301methodology.pdf>.

<sup>6</sup> In Australia and Japan, we believe there are more production lines but that the lines listed represent those that are dedicated to production of finished discs.

<sup>7</sup> We revise our Taiwan estimate for 2005 for disc production capacity based on updated line numbers.

Lithuania	1	1	2	2	7.0	7.0
Poland	11	9	153	122	830.0 <sup>8</sup>	775.0 <sup>8</sup>
Republic of Montenegro <sup>9</sup>	NA	NA	NA	NA	NA	NA
Republic of Serbia <sup>9</sup>	4	4	6	10	21.0	35.0
Romania	2	2	3	3	10.5	10.5
Russia	53	54	130	113	455.0	395.5
Slovenia	2	2	5	5	17.5	17.5
Ukraine	7	5	17	14	90.0 <sup>8</sup>	49.0 <sup>8</sup>
SUB-TOTAL	103	99	365	321	1,607.1	1,427.1
<b>WESTERN EUROPE</b>						
Austria	5	5	10	8	35.0	28.0
Belgium	3	3	17	25	59.5	87.5
Denmark	4	5	36	36	126.0	126.0
Finland	2	3	4	6	14.0	21.0
France	15	18	146	204	511.0	714.0
Germany	28	42	240	144	840.0	504.0
Greece	11	12	31	40	108.5	140.0
Ireland	8	8	70	70	245.0	245.0
Italy	37	29	124	101	434.0	353.5
Luxembourg	1	2	18	19	63.0	66.5
Netherlands	13	17	96	107	336.0	374.5
Portugal	2	3	5	5	17.5	17.5
San Marino	1	2	1	2	3.5	7.0
Spain	16	16	108	119	378.0	416.5
Sweden	2	5	3	12	10.5	42.0
Switzerland	3	3	12	11	42.0	38.5
United Kingdom	14	16	112	128	392.0	448.0
SUB-TOTAL	165	189	1,033	1,037	3,615.5	3,629.5
<b>WESTERN HEMISPHERE</b>						
Argentina	9	9	30	30	105.0	105.0
Brazil	13	13	84	88	294.0	308.0
Canada	17	17	130	132	455.0	462.0
Chile	2	2	2	2	7.0	7.0
Colombia	2	2	8	9	28.0	31.5
Costa Rica	1	1	1	1	3.5	3.5
Dominican Rep.	1	1	1	1	3.5	3.5
Mexico	10	9	208	205	728.0	717.5
Paraguay	4	1	15	1	52.5	3.5
Peru	2	2	3	3	10.5	10.5
United States	185	181	679	740	2,376.5	2,590.0
Uruguay	1	1	1	1	3.5	3.5
Venezuela	2	2	7	7	24.5	24.5
SUB-TOTAL	249	241	1,169	1,220	4,091.5	4,270.0
<b>MIDDLE EAST</b>						
Algeria	4	4	10	10	35.0	35.0
Egypt	3	4	5	6	17.5	21.0
Iran	2	2	2	3	7.0	10.5
Israel	5	7	15	19	52.5	66.5
Jordan	1	1	1	1	3.5	3.5
Kuwait	1	1	3	3	10.5	10.5
Lebanon	1	1	1	1	3.5	3.5
Palestinian Auth.	1	1	1	1	3.5	3.5

<sup>8</sup> The capacity numbers for Bulgaria (2005 numbers only) and for Kazakhstan, Poland, and Ukraine do not follow the IIPA methodology, and are based on plant visits and/or different per line capacity estimates.

<sup>9</sup> Formerly part of Serbia and Montenegro, the Republic of Montenegro formed in June 2006, and it is unclear whether any of the plants in the former Serbia and Montenegro are located in the territory of the Republic of Montenegro, hence the chart lists "NA."

Saudi Arabia	1	1	1	6	3.5	21.0
Syria	2	2	2	5	7.0	17.5
Turkey	10	10	21	25	73.5	87.5
SUB-TOTAL	31	34	62	80	217.0	280.0
AFRICA						
Nigeria	15	15	52	36	182.0	126.0
Senegal	1	1	1	1	3.5	3.5
South Africa	6	5	24	24	84.0	84.0
SUB-TOTAL	22	21	77	61	269.5	213.5
TOTALS	1,077	1,129	8,928	8,398	31,871.6	29,646.6

The growing optical disc problem confronting the copyright sectors, 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 should 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, the Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, have reportedly been enacted in Nigeria, and are under consideration in Bahrain, Oman, India, Vietnam, and other countries. 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 or do not enforce them, such as Bangladesh, Nigeria, 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 and increasingly Africa—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 disk 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 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, more mobile 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/territories, like Taiwan, Brazil, Mexico, Spain and many others, seizures of pirate product in 2006 were overwhelmingly of “burned” product. Commercial “burning” has probably 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.

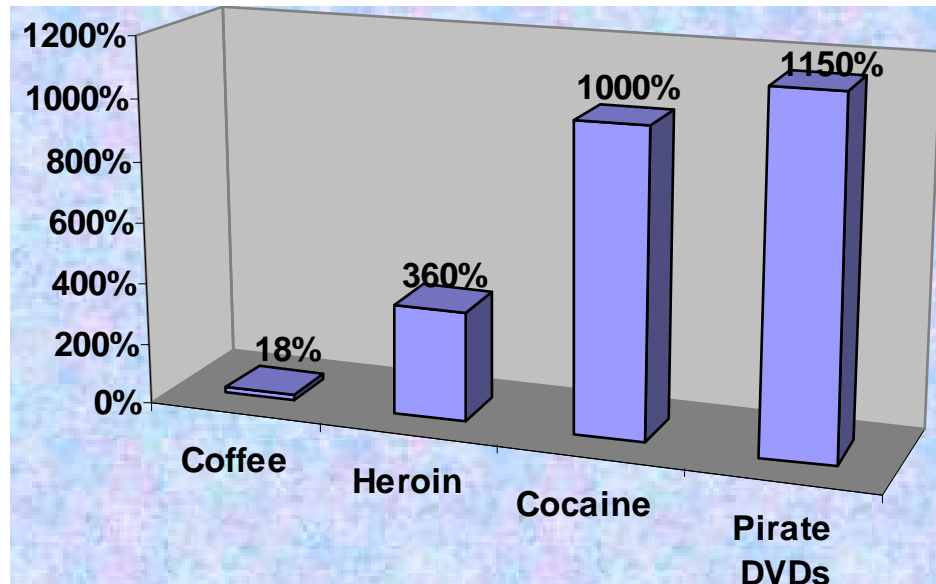
In sum, regulations controlling and monitoring production need to be adopted, implemented and enforced, and must be accompanied by general copyright enforcement. As we have monitored the development of these regulatory regimes, it has become increasingly apparent, as it has with all piracy, that enforcement 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 the production and 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.<sup>10</sup> The following table from that same study shows graphically that the mark-up for DVD piracy is higher than that for cocaine and heroin, with the risk of getting caught and receiving deterrent punishment very significantly less.<sup>11</sup>



**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 December 2005, Italy's anti-terrorist squad conducted a series of raids aimed at dismantling an arm of the Algerian-based GIA Islamic terrorist network. The group was securing funding by selling pirated CDs, DVDs and fashion goods.
- In March 2006, Uruguayan Customs seized two containers containing 2 million blank CD-Rs manufactured in Malaysia and Taiwan destined for illegal use in Brazil.
- In April 2006, Spanish police raided a gang that has produced very high quality pirate sound recordings for many years that were sold at or near the price of legitimate CDs. The pirates enormous financial benefit from their activity, included a house valued at €2 million (US\$2.6 million). Their total fraud could amount to €15 million (US\$19.50 million)
- In June 2006, Nigerian police raided an international marketplace in Lagos, during which pirates shot two police officers and burned a police vehicle. Tear gas had to be used to quell the violence.
- In July 2006, in a raid on a residential suburb of southern Metro Manila, authorities found, in addition to pirate (and pornographic) DVDs and CD-ROMs, several hand grenades, hundreds of rounds of 5.56 mm ammunition, and sachets of a highly addictive and illegal amphetamine derivative known locally as "Shabu" and

<sup>10</sup> 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.

<sup>11</sup> *Id.*, at 3

- elsewhere as “ice.” The seized ammunition is of the sort used in high-powered automatic assault weapons.
- During the summer of 2006, Italy’s Fiscal Police acted against a nation-wide operation involved in the online sale of pirate CDs and DVDs.
  - In September 2006, Mexican police raided several warehouses and laboratories containing huge quantities of blank and pirate CDs, reproduction machinery, as well as large quantities of cocaine, marijuana and other drugs.
  - In October 2006, an industry representative who was working on an anti-piracy team was shot and killed in Nakorn Pratom Province, Thailand, and in December 2006, a staff person of a company supporting the industry was attacked during a raid in Open Market in Nonthaburi Province.

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 2006 were attributable to this end-user software piracy. To safeguard the marketplace for legitimate software, governments 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 96 countries/territories provided protection for temporary copies as part of the reproduction right either explicitly or by interpretation, or had committed to do so, or had draft legislation pending which would provide such protection.

Enforcement is a critical part of reducing global piracy rates for business software, which exceed 50% of the market 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, many 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 now affects all copyright sectors. For example, 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.

Increasingly, for all sectors, the Internet has allowed end-user piracy to proliferate. Online venues are used to advertise and sell pirate hard goods, and unauthorized downloading of music, movies, videogames, books and journals from websites as well as through peer-to-peer file swapping services has 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.

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 individuals, enterprises 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. This shift from physical copy machines to electronic files—allowing a shop to print infringing books on demand—complicates the enforcement process due to lack of infringing stock in hard goods form. Authorities must recognize this shifting pattern and tailor enforcement incentives and activities accordingly.

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. In some cases, 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, China and other countries with large printing capacity, and where printing may still be 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 submission to USTR, FTAs with Singapore, Chile, Australia, Jordan, Morocco and Bahrain have entered into force. FTAs with four of the six nations in the Central America-the Dominican Republic-U.S. FTA have entered into force. Negotiations with Oman,

Peru, Colombia and Panama have been concluded. Negotiations with the United Arab Emirates, South Korea and Malaysia will hopefully conclude soon. Unfortunately, negotiations with Thailand are stalled. IIPA trusts and expects that the valuable precedents established in these earlier agreements will be carried forward to the ongoing FTA negotiations, and with any more FTA negotiations opened in the future. In all these negotiations, we 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 Schwab 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.

We cannot leave the important subject of the FTAs without noting the Trade Promotion Authority is about to expire soon. Without extension of this authority, it will be virtually impossible to get those important FTAs, whose negotiation are not completed by the end of March, approved by Congress so that they can enter into force. IIPA strongly urges the Congress to support the extension of Trade Promotion Authority so that this incredibly valuable FTA process can proceed to lift levels of copyright protection and enforcement in many more countries.

### **Market Access**

In the experience of IIPA, its members and companies, there is a strong connection between a country's ability to foster the introduction of legitimate product quickly and efficiently to market, and its ability to combat piracy effectively. We call upon policymakers to recognize and draw on this relationship to help make the reduction of market access impediments a key component of ongoing efforts to combat piracy.

Our experiences show that where there are unjustifiable prohibitions on the distribution of legitimate products, impediments to the establishment of companies involved in the creation, manufacture or distribution of such products, or the imposition of prohibitively high tariffs and taxes on legitimate products entering the country, illegal operations fill the voids with piratical product. Pirates are thus able to become exclusive distributors of the prohibited content or the products that have been priced out of reach for most consumers due to high tariffs, and are rewarded accordingly by cementing strong loyalties with their dedicated consumer base.

Pirates also gain a stronger position in instances where the introduction of new products to market is unreasonably delayed, whether through lengthy content review periods, specialized packaging or stickering requirements, or arduous licensing or registration protocols. Here again, illegal operations will move to take advantage of any temporary product voids by speeding piratical copies to market, maximizing the advantage provided by their informal but highly effective exclusive distribution windows.

These delays can be particularly damaging to "hit-based" businesses that depend on strong initial sales of a relatively small number of highly popular products to recoup investments made in other, less immediately successful ones.

We urge U.S. officials and national policymakers to make elimination of market access barriers—whether such barriers are content or investment based—a priority in their discussions



with relevant foreign governments with the conscious objective of streamlining market access for legitimate products to further aid efforts to combat piracy. Specifically, policymakers should:

- Reexamine the effectiveness of, and policy justifications underlying, market access prohibitions or impediments that restrict legitimate producers' ability to compete with pirates. Industries involved in the creation and distribution of content-based products stand willing to abide by reasonable and fairly applied censorship processes. However, it is both legitimate and necessary to ask whether these measures serve their intended purpose, or whether alternative channels of distribution for these products (such as through authorized or unauthorized online delivery) render these policies ineffectual or less capable of achieving that purpose.
- Work with industry to consider ways of further streamlining those restrictions and/or processes that are deemed essential, including applicable content review, labeling or licensing requirements.
- Work with industry to promote greater understanding and transparency of applicable rules, regulations and procedures governing compliance. Greater transparency in governing regulations facilitates more rapid and more uniform compliance, and affords fewer opportunities for abuses of these processes.
- Enforce penalties for non-compliance with regulatory requirements uniformly, including against vendors of piratical product, and consider the creation of enhanced penalties for non-compliance by piratical operations.

We will continue to monitor various countries' progress along these lines, and would encourage the U.S. government and foreign governments to consider market-opening policies as an additional tool to combat piracy, and to promote economic and technological competitiveness.

#### **D. IIPA RECOMMENDATIONS FOR THE 2007 SPECIAL 301 LISTS**

This year IIPA has analyzed the copyright law and enforcement problems in 60 countries/territories and has recommended them for placement in the categories on the Priority Watch List, Watch List, and Section 306 Monitoring. We also mention specific issues in 15 additional countries/territories that deserve increased U.S. government attention.

IIPA recommends that 16 countries be placed on the Priority Watch List: Argentina, Canada, Chile, Costa Rica, the Dominican Republic, Egypt, India, Israel, Mexico, the People's Republic of China, Russia, Saudi Arabia, 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: Russia, Indonesia, Pakistan, the Philippines, South Korea, Taiwan, and Switzerland.

IIPA recommends that USTR conduct an out-of-cycle review of Russia in 2007, and that Russia's eligibility for GSP benefits be suspended if it fails to meet the commitments that it undertook in the 2006 IPR Agreement with the United States. 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 2006 and piracy losses exceed 2.18 billion. Despite the repeated efforts of industry and the U.S. government to convince the Russian government to provide meaningful and deterrent enforcement of its copyright and other laws against OD

factories 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](http://www.allofmp3.com)—only limited 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.

With respect to the People's Republic of China, IIPA recommends that USTR maintain China on the Priority Watch List. China has failed to "significantly reduce infringement levels," 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. At the same time, it is exceedingly important that Paraguay, and the USG, recognize that Paraguay is not in compliance with the terms of its IPR Agreement with the United States, and that the two governments quickly reach agreement on how to improve the situation.

Appendix C contains a survey of a total of 60 countries/territories. The countries/territories appear by recommended category and in alphabetical order within each category.

[illegible]

Appendix D provides a history of countries/territories appearing on IIPA and USTR lists since 1989, a year after the Special 301 legislation became effective. Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of “priority foreign countries,” provides that the U.S. Trade Representative must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.”<sup>12</sup> Under this criterion, these 15 countries/territories named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 18 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.<sup>13</sup> As of February 12, 2007, the U.S. government is continuing GSP IPR investigations on the copyright law and enforcement practices in three countries in which IIPA was the original petitioner: Russia, Lebanon, and Uzbekistan. Now that Congress has reauthorized the GSP program, it is imperative that the Administration actually use this program and hold beneficiary countries accountable to the IPR obligations in the statute.

#### **E. ADDITIONAL COUNTRIES: THOSE SUBJECT TO FTA DISPUTE SETTLEMENT AND THOSE DESERVING SPECIAL MENTION IN 2007**

In addition to the 45 countries/territories for which IIPA has provided comprehensive country reports, IIPA also highlights issues in 15 countries/territories which deserve special attention this year but which are not recommended for placement on the Special 301 Lists. These latter countries and the problems encountered in them are divided into two sections. The four FTA trading partners identified in the FTA dispute settlement category are Bahrain, Jordan, Morocco and Singapore. The twelve countries/territories deserving special mention are: Azerbaijan, Cambodia, Hong Kong, Japan, Laos, Latvia, New Zealand, Oman, Singapore, South Africa, Sweden and Switzerland.

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

As a result of deficiencies in the copyright regimes of the **60 countries/territories** highlighted in this submission, the U.S. copyright-based industries suffered estimated trade losses due to piracy in these **60 countries/territories of over \$15.2 billion in 2006**.<sup>14</sup> On a

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

<sup>13</sup> 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 8 cases (Armenia, Moldova, Dominican Republic, Ukraine, Brazil, Pakistan, plus Turkey—a case which IIPA petitioned for in 1993 and was closed in 2001). In May 2006, USTR closed its investigation against Kazakhstan.

<sup>14</sup> 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](http://www.iipa.com/pdf/2006spec301methodology.pdf).

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 2005 and 2006. In most surveys, IIPA has described the piracy levels in each of the sectors in each of these countries/territories (where available). This should prove helpful in identifying trends and in determining whether enforcement efforts have actually been successful in reducing piracy levels in the particular country.

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY IN 60 SELECTED COUNTRIES IN 2006 (in millions of U.S. dollars)		
Industry	Estimated Losses 2006	Estimated Losses 2005
Sound Recordings & Musical Compositions	2,374.4	2,456.3
Business Software	10,345.0	8,684.4
Entertainment Software <sup>15</sup>	1,951.0	2,652.8
Books	582.5	600.5
Motion Pictures <sup>16</sup>	Not Available	2,913.0
Total	15,252.9 <sup>17</sup>	17,307.0 <sup>17</sup>

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.

<sup>15</sup> 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.

<sup>16</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>17</sup> 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.

## **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 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,

Eric H. Smith  
International Intellectual Property Alliance

# **APPENDIX A**

## **ESTIMATED TRADE LOSSES DUE TO PIRACY & PIRACY LEVELS (2007-2008)**

**FOR  
IIPA's 2009 SPECIAL 301 RECOMMENDATIONS**



**APPENDIX A**

**IIPA 2007 "SPECIAL 301" RECOMMENDATIONS**  
2005 and 2006 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY  
(in millions of U.S. dollars)  
and 2005-2006 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software <sup>1</sup>				Records & Music <sup>2</sup>				Motion Pictures <sup>3</sup>				Entertainment Software <sup>4</sup>				Books		Totals	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005
<b>PRIORITY WATCH LIST</b>																				
Argentina	215.0	109.0	76%	77%	82.0	69.5	60%	60%	NA	318.0	NA	90%	NA	NA	65%	NA	4.0	4.0	301.0	500.5
Canada	551.0	491.0	34%	33%	NA	NA	NA	NA	NA	118.0	NA	8%	NA	NA	NA	NA	NA	NA	551.0	609.0
Chile*	65.0	55.0	64%	66%	29.6	22.7	44%	51%	NA	10.0	NA	35%	NA	NA	20%	NA	1.0	1.0	95.6	88.7
Costa Rica	12.0	10.0	65%	66%	15.1	18.3	60%	60%	NA	2.0	NA	100%	NA	NA	NA	NA	NA	NA	27.1	30.3
Dominican Republic	10.0	5.0	77%	77%	9.9	10.8	65%	75%	NA	3.0	NA	89%	NA	NA	NA	NA	1.0	1.0	20.9	19.8
Egypt	47.0	45.0	63%	64%	12.0	9.0	70%	60%	NA	NA	NA	NA	NA	14.3	NA	85%	31.0	30.0	90.0	98.3
India	318.0	255.0	70%	72%	52.7	56.4	55%	57%	NA	NA	NA	29%	85.6	65.2	82%	86%	40.0	42.0	496.3	418.6
Israel	41.0	39.0	32%	32%	45.0	28.0	50%	35%	NA	61.0	NA	61%	11.4	NA	84%	95%	1.0	1.0	98.4	129.0
Mexico	296.0	263.0	63%	65%	486.6	376.5	67%	65%	NA	483.0	NA	62%	182.0	137.7	85%	75%	41.0	42.0	1005.6	1302.2
People's Republic of China	1949.0	1554.0	82%	86%	206.0	204.0	85%	85%	NA	244.0	NA	93%	NA	589.9	NA	92%	52.0	52.0	2207.0	2643.9
Russian Federation (OCR+GSP)	1433.0	894.0	83%	83%	423.0	475.9	65%	67%	NA	266.0	NA	81%	282.1	223.9	72%	82%	42.0	42.0	2180.1	1901.8
Saudi Arabia	112.0	105.0	51%	52%	20.0	20.0	50%	50%	NA	95.0	NA	95%	NA	NA	NA	95%	8.0	10.0	140.0	230.0
Thailand	164.0	155.0	80%	80%	20.7	21.9	50%	45%	NA	149.0	NA	62%	NA	NA	82%	75%	35.0	30.0	219.7	355.9
Turkey	203.0	157.0	66%	65%	20.0	18.0	80%	80%	NA	29.0	NA	NA	NA	NA	NA	NA	20.0	23.0	243.0	227.0
Ukraine	290.0	131.0	85%	85%	30.0	30.0	60%	60%	NA	38.0	NA	NA	NA	NA	NA	NA	NA	NA	320.0	199.0
Venezuela	124.0	95.0	84%	82%	50.6	33.0	80%	83%	NA	30.0	NA	63%	NA	NA	NA	NA	NA	NA	174.6	158.0
<b>WATCH LIST</b>																				
Bangladesh	NA	NA	NA	NA	40.0	NA	70%	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	6.0	48.0	6.0
Belarus	NA	NA	NA	NA	NA	25.0	NA	70%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	25.0
Brazil	497.0	383.0	62%	64%	176.5	334.5	40%	52%	NA	101.0	NA	22%	159.3	120.8	88%	77.0	18.0	18.0	850.8	957.3
Bulgaria	24.0	21.0	69%	71%	7.0	7.0	75%	80%	NA	8.0	NA	NA	NA	21.0	NA	81%	NA	NA	31.0	57.0
Colombia*	48.0	45.0	56%	57%	62.5	47.7	71%	71%	NA	41.0	NA	75%	NA	NA	35%	NA	6.0	6.0	116.5	139.7
Ecuador	16.0	9.0	68%	69%	33.0	26.3	98%	90%	NA	NA	NA	NA	NA	NA	NA	NA	2.0	2.5	51.0	37.8
Greece	106.0	88.0	65%	64%	30.0	26.0	60%	60%	NA	72.0	NA	NA	30.2	NA	68%	NA	NA	NA	166.2	186.0
Hungary*	67.0	55.0	44%	42%	20.0	12.0	35%	30%	NA	102.0	NA	73%	NA	NA	40%	30%	NA	4.0	87.0	173.0
Indonesia (OCR)	156.0	153.0	85%	87%	17.2	13.8	91%	88%	NA	NA	NA	87%	NA	NA	NA	NA	32.0	32.0	205.2	198.8
Italy	716.0	812.0	50%	53%	48.0	40.0	27%	20%	NA	161.0	NA	22%	647.7	639.2	40%	30%	20.0	20.0	1431.7	1672.2
Kazakhstan	61.0	38.0	86%	85%	NA	20.0	NA	66%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	61.0	58.0
Kuwait	49.0	35.0	71%	66%	9.0	8.5	70%	70%	NA	NA	NA	NA	NA	1.3	NA	82%	0.5	0.5	58.5	45.3
Lebanon (GSP)	20.0	20.0	72%	73%	2.6	3.2	60%	75%	NA	1.0	NA	1%	NA	NA	NA	NA	NA	4.0	22.6	28.2
Lithuania	20.0	14.0	59%	57%	13.0	12.0	85%	85%	NA	NA	NA	NA	NA	1.7	NA	88%	NA	NA	33.0	27.7
Malaysia	NA	82.0	61%	60%	22.0	38.8	45%	49%	NA	NA	NA	91%	28.0	23.4	90%	91%	9.0	10.0	59.0	154.2
Nigeria	59.0	46.0	82%	82%	52.0	52.0	95%	95%	NA	NA	NA	NA	NA	NA	NA	NA	8.0	6.0	119.0	104.0
Pakistan (OCR)	20.0	26.0	84%	86%	25.0	25.0	100%	100%	NA	NA	NA	NA	NA	NA	NA	NA	55.0	55.0	100.0	106.0
Peru	27.0	22.0	70%	73%	53.5	66.0	98%	98%	NA	12.0	NA	63%	NA	NA	NA	NA	NA	9.0	80.5	109.0
Philippines (OCR)*	35.0	46.0	72%	71%	50.3	21.0	62%	40%	NA	NA	NA	78%	NA	11.3	NA	85%	49.0	48.0	134.3	126.3
Poland	264.0	202.0	58%	58%	24.0	25.0	35%	31%	NA	102.0	NA	66%	NA	NA	75%	60%	NA	5.0	288.0	334.0
Romania	66.0	61.0	69%	72%	12.0	17.0	60%	80%	NA	12.0	NA	NA	NA	NA	77%	75%	NA	2.0	78.0	92.0
South Korea (OCR)	NA	200.0	45%	46%	0.3	1.3	7%	13%	NA	NA	NA	7%	353.5	415.1	68%	55%	45.0	43.0	398.8	659.4
Spain <sup>c</sup>	501.0	417.0	46%	46%	25.0	27.0	22%	22%	NA	253.0	NA	32%	111.5	NA	48%	NA	NA	NA	637.5	697.0

**APPENDIX A**

**IIPA 2007 "SPECIAL 301" RECOMMENDATIONS**  
2005 and 2006 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY  
(in millions of U.S. dollars)  
and 2005-2006 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software <sup>1</sup>				Records & Music <sup>2</sup>				Motion Pictures <sup>3</sup>				Entertainment Software <sup>4</sup>				Books		Totals	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005	2006	2005
Taiwan (OCR)	90.0	56.0	41%	43%	16.2	21.5	28%	26%	NA	98.0	NA	51%	NA	161.9	NA	42%	18.0	18.0	124.2	355.4
Tajikistan	NA	NA	NA	NA	NA	5.0	NA	80%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	5.0
Turkmenistan	NA	NA	NA	NA	NA	7.0	NA	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	7.0
Uzbekistan (GSP)	NA	NA	NA	NA	NA	30.0	NA	80%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	30.0
Vietnam	40.0	21.0	88%	90%	NA	NA	95%	95%	NA	NA	NA	NA	NA	NA	NA	NA	18.0	16.0	58.0	37.0
<b>SPECIAL 306 MONITORING</b>																				
Paraguay <sup>2,4</sup>	7.0	6.0	81%	83%	128.0	128.0	99%	99%	NA	2.0	NA	86%	NA	NA	98%	NA	NA	2.0	135.0	138.0
<b>FTA DISPUTE SETTLEMENT</b>																				
Bahrain	12.0	12.0	60%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	12.0	12.0
Jordan	11.0	11.0	64%	63%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	11.0	11.0
Morocco	30.0	31.0	66%	68%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	30.0	31.0
Singapore	NA	43.0	NA	40%	1.2	2.4	5%	5%	NA	NA	NA	57%	NA	NA	NA	NA	2.0	NA	3.2	45.4
<b>SPECIAL MENTION</b>																				
Azerbaijan	NA	NA	NA	NA	NA	15.0	NA	80%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	15.0
Cambodia	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	5.0	4.5	5.0	4.5
Hong Kong	91.0	56.0	54%	54%	2.9	4.3	17%	18%	NA	NA	NA	9%	59.9	90.8	60%	71%	5.0	6.0	158.8	157.1
Japan	909.0	811.0	27%	28%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	na	NA	909.0	811.0
Lao People's Democratic Republic	NA	NA	NA	NA	NA	NA	NA	NA	NA	102.0	NA	15%	NA	NA	NA	NA	3.0	3.0	3.0	105.0
Latvia	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
New Zealand	105.0	18.0	23%	23%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	28%	NA	NA	105.0	18.0
Oman	14.0	12.0	62%	63%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	14.0	12.0
Singapore	NA	43.0	NA	40%	1.2	2.4	5%	5%	NA	NA	NA	NA	NA	NA	27%	NA	2.0	NA	3.2	45.4
South Africa	119.0	116.0	35%	36%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	3.0	2.0	122.0	118.0
Sweden	170.0	185.0	26%	27%	NA	NA	NA	NA	NA	NA	NA	NA	NA	135.3	NA	43%	NA	NA	170.0	320.3
Switzerland (OCR)	165.0	168.4	25%	27%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	165.0	168.4
<b>TOTALS</b>	<b>10345.0</b>	<b>8684.4</b>			<b>2374.4</b>	<b>2456.3</b>			<b>NA</b>	<b>2913.0</b>			<b>1951.0</b>	<b>2652.8</b>			<b>582.5</b>	<b>600.5</b>	<b>15252.9</b>	<b>17307.0</b>

Endnotes:

<sup>1</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in each country, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2006 piracy statistics will be updated later in 2007 and will be made available on the IIPA website at such time.

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

Spain: RIAA's 2005 estimated losses in the \$75 million range reflect U.S.-only estimates; all-industry (local plus international repertoire) are in the \$75 million range.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." ESA's methodology is described in Appendix B of IIPA's submission. Several piracy rate estimates included for 2006 in this report (for Chile, Colombia, Hungary and Paraguay) reflect only the piracy rate for handheld products -- which may differ from and often underestimate overall piracy levels in a given country.

"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**

## **2007 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 2006 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 obtained 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.
- In some instances, downloads of pirated games, when likely to have displaced legitimate sales, have been assigned values comparable to pirated hard goods products.

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.

In recent years, MPAA has revised and updated its methodological measures. We include here these measures, identified by year.

### **METHODOLOGY FOR 2005 DATA:**

Prior loss calculations reported by MPA involved supply (see discussion below). 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.

### **METHODOLOGY FOR 2004 and PRIOR YEARS' DATA:**

**Video:** This term encompasses movies provided in video cassette as well as in all optical disc formats. Losses were 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 were 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 were estimated using the following method.

- The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year.
- The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate broadcast television and cable transmissions that would have been made of the motion pictures is also estimated.
- These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal performances.

## **RECORDS AND MUSIC**

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

- Optical disc industry data provided by third-party consultants;
- Legitimate sales;
- Enforcement data and anti-piracy developments;
- Historical piracy estimates; and where possible,
- Economic indicators, 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 generally reflect estimates of the level and value of pirate 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. In cases where circumstances permit, rather than merely reporting pirate sales, RIAA projects unit displacement (real losses). In such cases, "loss" data does not reflect the value of pirate sales but rather the value of estimated lost sales. In most cases, this would be significantly higher than the value of pirate sales.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a particular country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale.

## **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 80 countries/territories, which are represented in the “Estimated Number of Optical Disc Plants and Production Capacity in 80 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 2005 and 2006. The production capacity reported represents our best estimates of combined finished disc and blank disc capacity, except where specifically noted otherwise.

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 in 2005, 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, for example, 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).

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# **APPENDIX C**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ARGENTINA

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

#### **EXECUTIVE SUMMARY**

During 2006, internet piracy and optical disc piracy became major threats to what is left of the copyright industries' legitimate markets in Argentina. Despite cooperation with police on criminal raids, few prosecutions reach final judgment. Border enforcement remains weak. Legislative reform efforts to modernize the copyright law and improve enforcement measures have languished and must be invigorated in 2007.

#### **PRIORITY ACTIONS IN 2007**

##### **Legislation**

- Reinvigorate efforts to revise Argentina's 1933 copyright law and implement its WIPO Treaties' obligations into national law. Long overdue amendments to the current law should include, for example: (i) implement the "making available right to the public" as required by WIPO treaties in order to give legal background to digital businesses for authors, performers and phonogram producers; (ii) implement protection for technological protection measures (TPMs) and rights management information (RMI); (iii) increase the term of protection for sound recordings and performances up to 80 years; (iv) extend the scope of reproduction right to clearly cover temporary copies. (v) increase the minimum penalty for piracy (1 month) up to 3 years in order to apply deterrent sanctions; (vi) create statutory damages provisions for civil cases allowing judges to apply deterrent compensations; (vii) provide notice and takedown provisions and for ISP liability; and (viii) 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.
- Select, at an appropriate moment in the near future, a method of protection against the unauthorized re-distribution of digital broadcast signals.

##### **Enforcement**

- Have the government, at the highest level, commit to a coordinated anti-piracy campaign as a matter of national priority.
- Enforce the current law by conducting raids on a periodic basis, and importantly, pressing for more criminal prosecutions.
- Duplicate the resources assigned to police Internet crime units to address the problem of illegal downloads.
- Instruct Argentine prosecutors and courts to make copyright piracy cases a priority.
- Improve border enforcement. 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.

**ARGENTINA<sup>1</sup>**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006<sup>2</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>3</sup>	82.0	60%	69.5	60%	41.5	55%	30.6	53%	26.0	60%
Business Software <sup>4</sup>	215.0	76%	109.0	77%	63.0	75%	44.0	71%	10.7	62%
Entertainment Software <sup>5</sup>	NA	65%	NA	NA	NA	80%	NA	NA	NA	NA
Motion Pictures <sup>6</sup>	NA	NA	318.0	90%	30.0	45%	30.0	45%	30.0	45%
Books	4.0	NA	4.0	NA	4.0	NA	4.0	NA	NA	NA
<b>TOTALS</b>	<b>301.0</b>		<b>500.5</b>		<b>138.5</b>		<b>108.6</b>		<b>66.7</b>	

## **COPYRIGHT PIRACY IN ARGENTINA**

**Optical disc piracy, “burning” and street piracy:** Blank optical media products, mostly from Southeast Asia, including Taiwan, enter the Argentine market via Uruguay or Paraguay, and sometimes directly via the Argentine border. As a result of this influx of blank media, the phenomenon of “burning” is widespread throughout the country, and adversely affects the markets of almost all the content industries. According to statistics published by CAFMO, the Argentine trade organization for optical disc manufacturers, in 2006, 140 million CD-Rs and 53 million of DVD-Rs entered the country.

The recording industry reports that music piracy remains at 60% of total market with no signs of recovery. This rate of piracy amounts to 26 million units. The two major threats involve physical piracy (usually burned CD-Rs) and the Internet. In addition, MPA reports that street vendors and

<sup>1</sup> Argentina is a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program. During the first 11 months of 2006, \$597.6 million worth of Argentine goods (or 16.7% of Argentina's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 7.5% increase over the same period in 2005.

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Argentina under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. Prior IIPA reports on Argentina are also posted on the country reports page at <http://www.iipa.com/countryreports.html>.

<sup>3</sup> Estimated trade losses for the recording industry reflect the impact of significant devaluation during 2002. The levels of pirate product in 2004, 2005 and 2006 are based on a third-party survey to improve accuracy of the statistics.

<sup>4</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Argentina, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>5</sup> ESA's estimated piracy rates for Argentina in 2006 reflect the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in-country. 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.

<sup>6</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

small black markets (often using burned products) are beginning to become a bigger issue as they are starting to appear in important areas/markets. Theatrical exhibitors and small video rental stores in the interior of Argentina are being harmed by illegal commerce of pirate DVDs. Pirates often have the new film releases more than a month in advance from local theatrical release, and an average of 6 months in advance of the official home video releases in Argentina. Unfortunately, video rental stores are also an important distribution channel for pirate products, especially in smaller cities.

Throughout the country, thousands of street vendors sell burned CD-Rs. 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. There are some “kioscos” – newspaper and magazine kiosks or street stores -- that have started using this channel to distribute pirate DVDs and music. MPA has been working with other IP groups, especially music, to identify and confront this particular problem.

Another major concern in 2005 and 2006 has been 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.

**Internet piracy grew in 2006:** Over the last two years, internet piracy in Argentina has grown dramatically. With the increased availability of broadband both in homes and Internet cafés, industry concerns are escalating that illegal Internet downloads will become more of a threat to legitimate sales and distribution for all copyright-based sectors. The latest estimate based on a third party survey is that over 600 million songs were downloaded illegally during 2006. Given the street piracy and internet piracy situation, the recorded music industry reports that because of the dire piracy situation, there are very few legitimate music retailers left in the countries for consumers wanting to buy legitimate product. The recording industry has been taking action against internet cafés (see discussion below). MPA reports that most of its internet problem is still focused on the sales of hard goods via internet. Argentina does play an important role as a distributor of subtitled and dubbing for the rest of Latin America; in fact, some of the top visited websites in Argentina are subtitles sites. Furthermore, the entertainment software industry also faces problems with widespread piracy of its games in internet cafés.

**Business software piracy and the need for software management:** The Business Software Alliance (BSA) reports that there was no major improvement in the software piracy situation in Argentina in 2006. 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. The 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. With respect to market legalization efforts, the industry continues to support efforts by the Argentine government (in particular, the *Subsecretaría de la Gestion Publica* — 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.

**Book piracy:** The book publishing industry reports photocopying, especially 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.



**Entertainment software piracy:** During 2006, the entertainment software industry continued to suffer from the combined forces of piracy in Argentina including: (a) widespread piracy at flea markets; (b) reproduction-on-demand whereby entertainment software is burned onto blank CD-Rs; (c) Internet piracy, where websites offer pirated videogame software for sale; and (d) the importation of cartridge-based videogames (primarily from the People's Republic of China and Hong Kong). Pirated video games on optical disc appear to mostly be of the burned variety, with very little replicated product appearing in the market. While pirated video games are no longer being sold in mainstream retail outlets, the flea markets where they continue to be widely available appear to be very well organized. An ESA member company also reports that PlayStation 2 consoles with pre-installed mod chips are being sold directly through established retail chains, though these stores do not appear to be selling pirated entertainment software.

## **COPYRIGHT ENFORCEMENT IN ARGENTINA**

**Cooperation on criminal raids:** 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 remains somewhat encourage in 2006. For example, the recording and film industries worked with the police in the Province of Santa Fe to raid two businesses in Rosario, which resulted in the dismantling of an illegal "home delivery" organization in July 2006. These businesses ran two websites which were major suppliers of pirate film and music products at the wholesale and retail levels. Four people were arrested and were in prison, pending trial; the head of the organization was charged with running a criminal organization, tax evasion, money laundering and other criminal charges.

On internet cases, MPA reports that there has been a lot of support from the Federal Police Cyber Crime division. The recording industry also has been active in internet piracy enforcement for the last two years. For example, 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. There the recording industry identified 20 cases involving sizeable uploads of music files using P2P technology, and pursued civil actions. In 9 cases, the defendants paid compensation to recording companies of around US\$1,500 each. Another 3 cases were sent to mediation. 23 new cases were filed in October 2006 and at present 20 court orders have been issued against the ISP's to disclose the names and personal data of the P2P users. More recently, Phase II of "Operation Cyber Shutdown," an initiative of the international recording industry, resulted in coordinated raids of 1,000 law enforcement officers in six Latin American countries, raiding 213 internet cafés. The recording industry reports, unfortunately, that the enforcement program against cyber cafés ended in 2006 with poor results (only 12 locations raided) because a criminal judge in Buenos Aires ruled against the recording companies stating that offering "P2P" downloading services and blank CD-Rs to customers is not a crime. The appeal is still pending in this case.

BSA reports that 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. In small provinces in particular, the police do not cooperate in civil actions or do not have police officers trained in computer crimes.

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. Overall in 2006 the recording industry reports: 482 raids conducted, resulting in seizures of 85,300 VCDs, 322,294 DVDs, and 1.33 million CD-Rs. There were 570 investigations and 250 cases initiated, resulted in 1,103 indictments. 14 defendants were convicted (11 had a maximum of 6 months and 2 were sentenced for over 2 years). 27 cases resulted in criminal fines; 20 of those were fined less than US\$1,000. In addition, 92 cases were acquitted or dismissed, and 755 cases remaining pending.

**But few criminal prosecutions are secured and copyright enforcement overall remains ineffective:** Despite good cooperation from police, few prosecutions are pursued and there are few criminal cases that reach final judgment in Argentina. This has been a longstanding problem in Argentina. The recording industry reports that the average case take two years to reach a verdict in the first instance, and that usually results in no jail time or jail time is suspended because the judges do not consider intellectual property crimes as serious offenses. However, there was a breakthrough in 2006, when an Argentina court in September 2006 issued a two-year prison sentence against two major music pirates who were arrested in September 2003 when a raid on their business resulted in the seizure of 11 CD-R burners, 10,000 CD-Rs and a gun. The defendants controlled a piracy organization distributing product at the infamous flea market known as “La Salada” and the complaint was originally brought by the industry to the police. As mentioned above, the recording industry obtained 14 convictions and the situation regarding the slowness of the judicial system remains the same.

**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. No coordinated actions were taken in 2006, at least not to the knowledge of the industries.

MPA reports that, during 2006, Argentine Customs authorities have been more supportive and alert about piracy problems and blank media imports. The recording industry worked with the border authorities and, in August 2006, Argentine customs officials at the Port of Buenos Aires seized approximately 1 million blank CD-R/DVD-Rs (valued at over US\$300,000) manufactured in Hong Kong; this shipment’s documentation was falsely labeled “heat reflecting tiles.” The discs contained two brand names commonly found in the pirate music markets of Greater Buenos Aires; an investigation has commenced against the importer. BSA reports that 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. Usually, customs authorities seize shipments of blank CDs, but their activities are directed mostly at tax evasion rather than copyright infringement.

In 2006 it can be said that, in general, Customs authorities improved *ex officio* inspections of suspicious shipments and started actions not only based on “Philips” injunction. The industries continue 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. In fact, the recording industry reports that Argentine Customs started 2007 with a major seizure of 3 million blank CDRs/DVDs at the Port of Buenos Aires. This investigation took off when Custom officials noticed a significant difference in the declared weight of the targeted shipment versus its actual weight. The goods that had been declared as “general electronics & optical media” showed some “risk factors” such as origination from Taiwan that prompted Customs to conduct a more thorough

review. With the help of industry (Apdif Argentina), it was determined that the declared importers had nothing to do with the electronics and or optical media business. Customs officials summoned the declared importers to provide original importation documents. However, the original importers never appeared and the entire shipment, that included three containers, was seized as suspected contraband. The investigation is continuing but preliminary intelligence indicates that the declared importers were fronting for a third party that Customs suspects was going to provide the blank optical media to the pirate market. The estimated retail value of the optical media seized was almost 25 million pesos (US\$8 million).

**Delays and no deterrent damages in civil infringement cases:** In 2006, the business software industry continued to rely on civil enforcement in Argentina, 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.

## **COPYRIGHT LAW AND RELATED ISSUES IN ARGENTINA**

**1993 Copyright Act, as amended:** Argentina has already 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.<sup>7</sup> There have been a number of legislative attempts in recent years to improve various Argentine laws related to copyright protection and enforcement. Some bills have the support of the industries while one in particular threatens to undercut protection, below:

**Proposed criminal code amendment coming in 2007:** MPA and IFPI have drafted an amendment to the Criminal Code and expect the amendment to be presented in Congress in 2007. This bill will increase penalties for copyright piracy, and would provide criminal sanctions for the circumvention of technological protection measures and modification or suppression of digital rights management, and include statutory damages. Two years ago the recording industry supported the introduction of a similar bill which would expand the scope of criminal copyright infringement (Bill No. 1546-S-2005, June 1, 2005), but it fell off the legislative agenda. The two industries do not know what the future holds for its proposal given that the current Government does not seem to have a very strong pro-copyright perspective.

**Bill to extend the term of protection for sound recordings:** This is an important initiative to ensure protection of the vast and rich catalog of Argentine music. 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, and the bill was expected to return to the Senate. The bill is still on the legislative docket with no political support to get passed.

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<sup>7</sup> For example, IIPA has identified in prior 301 reports that legal deficiencies in the copyright law which still need to be addressed include: express protection of temporary copies, and the communication to the public/making available right; protection against the 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.

**Opposition to the Draft Law of the Musical Performer:** (Bill No 3447/05): As a result of a very aggressive lobbying campaign developed by the local and international recording industry, with the support from performers groups and U.S. Embassy, the Senate left out the bill from its agenda and the ordinary sessions ended in 2006 without considering the bill. IFPI's national group, CAPIF, is preparing a new bill to comprise implementation provisions for both groups (record producers and performers) on a more balanced way. Submission of this bill is expected in the first half of 2007. To recap, this draft law was introduced to the Senate in November 2005, and in late 2006, legislative consideration at the committee level moved forward. There was an open hearing on the subject in September 2006 at which CAPIF, the chamber representing music producers, complained strongly, objecting to the bill's elimination of individual artists' ability to negotiate contracts and called the clause ordering 10% of revenue to go to support cultural events an "expropriation." The law not only assigns responsibility to the association representing performers, but also fixes revenue sharing formulas between performers and producers. In other words, this bill rejects the fundamental proposition that parties should be free to contract as they wish for the use of their works. First, it would recognize a particular collecting society (performers) as having the mandate to collect on behalf of parties (record companies) that have not vested their rights with that particular society. Second, it would entrust administration of the "right of making available" to a collecting society, thereby depriving copyright owners of the ability to determine how they wanted to exercise digital distribution. Further, the proposal to vest the administration of the right of making available to this collective also is objectionable, and would violate Argentina's obligations under the WPPT to provide an exclusive right of making available to producers (and performers). Removing the ability to license this on an individual basis would violate this treaty.

**Border enforcement measures:** (Bill No. 1340-D-2006, April 3, 2006): This Bill creates a new department under the supervision of AFIP (Argentine custom and taxes authority) named the *Registro de Marcas y Derechos de Autor*, which is in charge of registration of copyright. This registration is completely voluntary and is different from the registration of copyright at the Copyright Office. If the registration is made before custom authorities, each time a shipment is exported or imported, the authorities give notice to the copyright holder, in order to have the chance to control and stop the shipment. Also, shipments can be seized *ex officio*. If in fact this proposal facilitates enforcement but does not condition copyright on a second registration, it might garner industry support.

**Bill to afford statutory damages and destruction of infringing materials:** The IFPI/MPA proposal (above) will include statutory damages provisions and anticipated destruction of seized merchandise. The Government of Argentina should reintroduce and pass a bill which would address the difficulties in obtaining deterrent damages and destroying infringing copies and implements. In 2001, a bill was introduced and approved by the Chamber of Deputies which would allow the courts to impose compulsory damages in copyright infringement cases and also the destruction of infringing material and reproduction equipment.

**Reform of the Penal Code:** Software industry colleagues report that proposed legislation to reform the Penal Code (File No. 5864-D-2006), which has advanced in the Chamber of Deputies, contains some troubling provisions.<sup>8</sup> The incorporation of certain intangibles as object of protection in the damage is welcomed since current law does not provide for the punishment for damage to

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<sup>8</sup> Clause 12 of this bill states: "the following should be added to clause 183 from the National Penal Code as second and third paragraphs: that who, in any way, destroyed in whole or in part, erased, temporarily or permanently modified, or in any way prevented the use of data or programs, whichever the support in which they are contained, during a process of electronic communication may be sentenced to prison for a term of one month to two years. The same sanction will be applied to those who sold, distributed or in any way disclosed or introduced in an IT system any program destined to cause damage like the ones described in the previous paragraph, in the computing programs or in the data contained in any kind of IT and telecommunications system." (emphasis added).

intangible assets. However, the second part of the proposed clause (underlined) does not appear to be compatible with the WIPO Treaties to which Argentina has joined. There Argentina undertook to provide legal protection and effective legal resources against the action of circumventing effective technological measures used by copyright holders to prevent copyright violations. The serious concern here is that the proposed reform would render illegal the behavior of those who distribute software that contains a security measure that impedes the access to a program or to data contained in a program. This clause improperly neglects to distinguish between legal and illegal use of such devices, a distinction that is made by the WIPO Agreements (as well as by the Council of Europe's Convention on Cybercrime).

**Protecting works in digital format:** (Bill No. 0719-S-2006, March 28, 2006): This bill would amend the 1933 Copyright Act to explicitly include works codified in digital format (such as CD-ROMs, DVDs, VHS and other support materials). It would also require that copies be deposited with the National IP Registry. It is unclear to some IIPA members as to why this bill has been proffered, given that the copyright law already protects works fixed in a tangible medium of expression.

**Digital TV:** MPA reports that in 2006, Argentina announced that it will adopt and implement a digital terrestrial TV system. Although Argentina has not yet announced which system will adopt, MPA calls attention to the need to select a method which will protect against the unauthorized redistribution of digital broadcast signals, as this is critical to guaranteeing the future viability of this sector.

**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.

## **IPR TRAINING AND PUBLIC AWARENESS**

BSA reports that, through its local colleagues, the business software community in Argentina organizes and participates in a variety of events, workshops and seminars aimed at improving public awareness and training of local officials. For example, the business software community cooperated with IT Chambers and Universities in holding various events in 2006, including the Primer Congreso Mercosur de Derecho Informático held in Córdoba in August 2006. BSA's local counsel also provides training for judges at the *Escuela Judicial del Consejo de la Magistratura* (Judicial School of the Council of Judges). Recording Industry conducted 4 IPR seminars with the government of the City of Buenos Aires to public officers, one seminar to the criminal and civil judges in the Provincia of Santa Fe, and with the support of the Ministry of Education one educational campaign called "Todo empieza con una canción" (everything starts with a song) intended for public schools and universities in Buenos Aires and Provincia of Buenos Aires. MPA reports that its local program also offered several training sessions to different law enforcement groups, such as Federal Police, Customs, Gendarmeria and others, during 2006.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### CANADA

**Special 301 Recommendation:** IIPA recommends that Canada be elevated to the Special 301 Priority Watch List in 2007.

#### **EXECUTIVE SUMMARY**

Canada's long tenure on the USTR Watch List seems to have had no discernible effect on its copyright policy. Almost alone among developed economies in the OECD, Canada has taken no steps toward modernizing its copyright law to meet the new global minimum standards of the WIPO Internet Treaties, which Canada signed a decade ago. Its enforcement record also falls far short of what should be expected of our neighbor and largest trading partner. Pirates have taken advantage of the gaps in Canadian law to make it a leading exporter, both of camcorder masters that feed audio-visual piracy worldwide, and of devices – illegal in most global markets besides Canada – that are intended to circumvent technological protection measures used by the publishers of entertainment software. Canada lacks effective border controls on pirated products, and most of its other enforcement efforts suffer from insufficient resources and a lack of deterrent impact. To underscore U.S. insistence that Canada take action to address the serious piracy problem it has allowed to develop just across our border, and that it bring its outmoded laws up to contemporary international standards, IIPA recommends that Canada be elevated to the Priority Watch List in 2007.

#### **Actions Which the Canadian Government Should Take in 2007:**

##### **Copyright Law Reform**

- Enact legislation bringing Canada into full compliance with the WIPO "Internet" Treaties (WIPO Copyright Treaty [WCT] 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 are a violation because they authorize infringement
- Amend the Criminal Code to make unauthorized camcording an indictable offense

##### **Enforcement**

- Make legislative, regulatory or administrative changes necessary to empower customs officials to make *ex officio* seizures of counterfeit and pirate 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

<b>CANADA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2005-2006<sup>1</sup></b>				
INDUSTRY	2006		2005	
	Loss	Level	Loss	Level
Records & Music	NA	NA	NA	NA
Business Software <sup>2</sup>	551.0	34%	491.0	33%
Motion Pictures	NA	NA	118.0	8%
Entertainment Software	NA	NA	NA	NA
Books	NA	NA	NA	NA
<b>TOTALS</b>	<b>551.0</b>		<b>609.0</b>	

## 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, even most of the major developing countries have progressed further and faster than Canada in meeting this challenge. Although the new Canadian government that took office in March 2006 expressed its commitment to modernization of Canada's copyright laws, to date it has not even released a draft of legislation.

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). Although Canada was one of the original signatories to the WCT and WPPT a decade ago, Canadian copyright law remains far out of compliance with the standards set in these treaties. The previous government unveiled legislation (Bill C-60) in 2005 that, while positive in some respects, fell far short of meeting the WCT and WPPT benchmarks. While we continue to urge the current government to jettison the approach taken by Bill C-60, in favor of legislation more consistent with international norms for nations that have already implemented these treaties, the direction Canadian copyright reform will take remains unknown.

When Canada signed the WCT and WPPT a decade ago, it pledged support for treaties that were designed to respond to what were then new technologies. Notably, as a crucial element to foster the healthy development of e-commerce in copyrighted materials, these

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at <http://www.iipa.com/pdf/2007spec301methodology.pdf>. For information on the history of Canada under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf> of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Canada, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions are reflected above.

treaties obligated adhering countries to enact effective legal regimes to protect technological measures used by copyright owners to control access to and copying of their works. While nearly every other OECD country either has met this obligation or is well on the way to doing so, Canadian law remains hopelessly outdated in this area. IIPA urges Canada to fulfill its pledge by enacting laws that deal with technological protection measures (TPMs) in a manner that fully complies with the WCT and WPPT. This means legislation that:

- comprehensively protects TPMs, both in so far as they manage access to copyright 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 exceptions or 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.

Canada's failure to provide legal protection for TPMs is not a mere theoretical lapse: it has already had concrete consequences. In the absence of strong prohibitions to the contrary, Canada now finds itself one of the world's epicenters of the manufacture and export of important categories of tools aimed at circumventing TPMs – so-called “modification chips” and similar devices that enable pirated and counterfeit video games to be played on videogame consoles. Highly organized international crime groups have rushed into the gap left by Canada's outmoded copyright law and now use the country as a springboard from which to undermine legitimate markets in the United States, the United Kingdom, Australia and elsewhere, through the export of circumvention devices. It is long past time for Canada to put into place the legal tools that will enable it to put a stop to this increasing pollution of the markets of its trading partners.

Copyright reform legislation in Canada is also needed to counter the growing problem of Internet piracy. It can best do so by conditioning liability limitations for Internet Service Providers (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.

New legislation must also address 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 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. The Copyright Act should be amended to enable rights holders to obtain effective remedies against those who in the Internet context knowingly facilitate infringements (such as P2P service providers and distributors of file sharing software who offer services or software knowing that their actions will likely result in infringement), or who encourage, induce or materially contribute to the infringement.<sup>3</sup>

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. These should be brought forward in new copyright reform legislation. On the other hand, Bill C-60 also included flawed proposals in the area of educational and library exceptions, such as an ill-defined new exception for use of a work in a "lesson, text or examination" in educational settings, and a provision authorizing interlibrary distribution of digital copies, that would have had a significant detrimental impact on publishers of scientific, technical and medical materials in particular. These should be carefully re-examined. The 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.

Finally, along with reform of Canada's substantive copyright law, legislative changes are necessary, though not alone sufficient, for Canada to begin to remedy its serious deficits in copyright enforcement (discussed in more detail in the next section). Among other critical changes, the Canadian Border Services Agency (CBSA) must be given the independent authority it currently lacks to act *ex officio* against any suspected pirate or counterfeit imports; and unauthorized camcording of films in Canadian theaters must be made an indictable criminal offense through an amendment to Canada's Criminal Code.

## **COPYRIGHT PIRACY AND ENFORCEMENT**

There is no doubt that the piracy problem within Canada is getting worse, not better. Canadian piracy is also a serious problem for markets in other countries, including the U.S. For example, Canada is becoming notorious as one of the world's leading sources for "mod chips" and other videogame circumvention devices, and for the camcordered master copies for digital audio-visual piracy.

Pirate and counterfeit videogame products continue to flow into and out of Canadian territory. Pirate games are manufactured throughout the country, notably in Vancouver/Richmond, Calgary, Toronto/Markham, and Montreal. Much of the pirate product in the market continues to flow in from Asia across Canada's porous borders. Disturbingly, Quebec, Ontario and British Columbia have become havens for the manufacturers and

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<sup>3</sup> Bill C-60 failed to address this problem, and would in fact have exacerbated it, because it would have provided sweeping safe harbors to network service providers without creating any incentives for them to cooperate with copyright owners to deal with copyright infringements that take place in the digital network environment. In particular, it would have immunized service providers against liability even when they had actual knowledge of infringement and the power to restrict or prevent it, until an independent court order was obtained; would also have sheltered P2P file sharing services that contribute to massive infringement; and would have prevented rights holders from even obtaining injunctions against service providers whose services are used to facilitate infringement. Such an approach failed to comply with the mandate of the WIPO Internet Treaties that national law "permit effective action against any act of infringement of rights covered by this Treaty."

distributors of devices that bypass TPMs that entertainment software publishers use to protect their product from piracy. “Mod chips” for videogame consoles such as the Sony PlayStation 2, Microsoft Xbox and Nintendo GameCube are made in Canada, both for domestic consumption and for export to the United States, Europe and parts of southeast Asia. Other devices, such as the “Flash ROM Linker” that enables piracy of games designed for play on the Nintendo console, are assembled in Canada for distribution both domestically and internationally. Burned pirate optical discs are manufactured in “micro-replication facilities,” often located in private residences, and are then distributed either in local retail markets or via Internet websites maintained by the pirates. However, much of the thriving activity in importation, manufacturing and distribution of pirate entertainment software products and circumvention devices appears to be controlled by organized crime rings, such as the Hells Angels in Quebec, and the Big Circle Boys in Ontario and British Columbia.

The problem of unauthorized camcording of films in Canadian theaters is now nearing crisis levels. MPAA analysis of counterfeit copies of recently released movies on DVD seized throughout the world reveals that more than 90 percent can be sourced back to theatrical camcording. As of August 2006, MPAA had documented 179 member company titles that had been stolen in this manner since 2004, providing the source copies for pirate DVDs discovered in the markets of 46 other countries on every inhabited continent. In 2006, 20-25 percent of camcordered masters worldwide were sourced to Canada. Through sophisticated pirate replication and distribution networks, DVDs produced from camcordered masters are on the street literally within hours: for instance, pirate DVDs of *Poseidon* were being sold a mere 13 hours after the film’s theatrical debut in Canada.<sup>4</sup> The number of titles affected is consistently trending upwards, and the problem is national in scope; theaters from Nova Scotia to British Columbia have been identified as sites of unauthorized camcording, although the worst problem is in Montreal.

The estimated piracy rate for business software in Canada of 33% far exceeds that of the U.S. or of most Western European countries. Servers at universities continue to act as digital storage facilities for large quantities of pirate intellectual property, including, games, music and movies. In the United Kingdom and Germany, the number of regular buyers of legal downloads of music now exceeds the number of regular unauthorized file-swappers.<sup>5</sup> In Canada, by contrast, unauthorized file-swapping swamps legal sales of digital music on the order of 100 to 1.<sup>6</sup> According to the OECD, Canada has the highest per capita incidence of unauthorized file-swapping in the world.<sup>7</sup> In short, Internet piracy appears to be on the increase in Canada, aided by the uncertain legal environment and serious shortfalls in enforcement.

These realities point to serious deficiencies in enforcement against piracy. Much of the problem is attributable to the inaction of Canada’s government on law reform. For instance, Canada has become a leading global source of camcordered pirate master copies of films because there is no federal criminal prohibition against unauthorized camcording in movie theaters unless it can be established that it is for commercial purposes. Because of this gap in the law, neither Canada’s federal law enforcement agency (the Royal Canadian Mounted Police [RCMP]) nor local authorities will take action against the practice. Remarkably, one theater owner who sought assistance from law enforcement was told that the only reason the police

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<sup>4</sup> MacDonald, “Pirates of the Canadians,” *Globe & Mail*, Jan. 13, 2007.

<sup>5</sup> International Federation of Phonographic Industries (IFPI), *Digital Music Report 2006* (Jan. 2006), p. 15.

<sup>6</sup> IFPI, *The Recording Industry 2006 Piracy Report* (July 2006), p. 11.

<sup>7</sup> Organization for Economic Cooperation and Development, “Digital Broadband Content: Music,” Dec. 13, 2005, p. 75, <http://www.oecd.org/dataoecd/13/2/34995041.pdf>.

would attend the theater was to arrest the theater owner if he tried either to confiscate the recording equipment or detain the person operating it. Making unauthorized camcording an indictable criminal offense is the indispensable first step toward cracking down on this serious problem.

Similarly, Canada's outmoded copyright law contains no criminal prohibitions on the manufacture or distribution of devices (such as mod chips and the like) whose only plausible use is to circumvent technological protection measures used by copyright owners to fight piracy. Consequently, although both RCMP and local authorities are well aware of the organized criminal groups in Canada who dominate trade in these circumvention devices, they are powerless to act against them. Only when Canada's copyright law is modernized to include clear criminal prohibitions against this activity will Canadian law enforcement even have the legal authority to enforce against mod chip manufacturers, distributors and exporters. Until then, rather than attacking the problem at its source, the burden of combating this activity is unfairly shifted to law enforcement in the countries to whose markets these devices are being exported, and whose governments (unlike Canada's) have already stepped up to the problem by adopting laws to enable implementation of the WIPO Internet Treaties.

A third anti-piracy battlefield where Canadian government inaction has effectively handcuffed its law enforcement agencies is at the border. Canadian customs officers in the CBSA lack statutory authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained<sup>8</sup>, only the 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, and Canada's borders are effectively wide open to imports of pirate CDs, DVDs or videogames and other infringing materials. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports. Although the Canadian government has acknowledged this deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes. It is long past time for the Canadian government to identify which statutes, regulations or policies must be amended in order to confer meaningful *ex officio* authority on border enforcement agencies, and to act promptly to institute the needed changes.

The same deficiencies that undercut enforcement efforts in Canadian movie theaters, at "mod chip" factories, and at the border also hamper attempts by copyright owners or law enforcement to combat piracy on the Internet. Though the online piracy problem is pervasive and growing, Canadian law lacks the fundamental legal tools for addressing it. Notably absent are clear legal incentives for network operators to cooperate in anti-piracy efforts, whether through a notice and takedown system such as the regime that has been in place in the U.S. since 1998, or through the use of liability doctrines to encourage network operators to take more proactive steps to detect and deal with pirate activity online. Until Canada adopts a modernized legal regime that includes such incentives, prospects for progress against online piracy will remain dim.

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<sup>8</sup> Court orders, however, can only be obtained upon the filing of an application by the right holder, supported by affidavit evidence, including information regarding the identity of the importer, exporter or vendor; country of origin or export; quantity and value of the infringing goods; estimated date of arrival in Canada; mode of importation; identity of the ship, train or truck used to transport the infringing goods, and (if available) the serial number of the container in which these goods may be found. In many instances, a right holder will not have access to this information and the necessity of obtaining the court order is itself unduly burdensome and not designed to prevent pirated and counterfeit imports from entering the country.

However, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada's response to it all too often falls short. While Canadian authorities may say that combating copyright piracy is an important objective, their actions – in terms of priority setting, resources, training, and the outcome of prosecutions – suggest the contrary. Piracy is a serious problem in Canada, but the evidence is that the Canadian government is not taking it seriously.

In its Special 301 announcement last April, USTR called for more anti-piracy resources and training to be provided both to CBSA and to domestic law enforcement officials. This has not happened. Both CBSA and RCMP remain short of dedicated resources – including manpower and data and intelligence management – to address Canada's growing piracy problems. CBSA officials also lack training in identification of pirate imports; while training by the private sector has been offered, and some law enforcement agencies have responded positively, CBSA personnel have rarely been made available for training. Nor is there progress to report on interagency cooperation, another problem flagged by USTR last year. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.

The continued prevalence of pirate product in Canada's 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 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. Although the RCMP has now listed intellectual property crimes among its top stated priorities, its actions too often belie this label. Under the Justice/RCMP Copyright Enforcement Policy, RCMP still will not take action against retail outlets engaged in piracy, except in exceptional cases in which it is shown that the target is a repeat offender. The Enforcement Policy does not account for the reality that as technology constantly advances, the "retailers" now use ordinary computer equipment to become mass manufacturers, producing literally hundreds of thousands of pirated DVDs, CDs, software and video games. Not surprisingly, the retail piracy problem in communities such as Vancouver, Montreal, Edmonton, Calgary and Greater Toronto continues to worsen. While there have been some important successes – for instance, RCMP criminal actions have been critical in the near-total suppression of the pirate retail videogame market in Quebec City – on the whole the Canadian law enforcement commitment to enforcement against retail piracy is inconsistent and generally under-resourced.

The same problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training and (apparently) any interest in obtaining it; and too many judges seem to deprecate the seriousness of copyright piracy. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment. An illustrative example is the story of Chui Lau, a well known owner/operator of a pirate retail store in Richmond, British Columbia, who pled guilty to over eighty counts of criminal copyright infringement over a three year period beginning in 2003, as a result of a series of raids in which equipment for manufacturing counterfeit DVDs was seized, along with a large quantity of pirate product. Despite being charged on three separate occasions, the total punishment Mr., Lau received for his repeat offenses was a fine of C\$11,000 (US\$9400) and an order to remain in his residence from 11pm to 7am for 12 months. Even the RCMP acknowledges that the penalties for engaging in copyright piracy in Canada – usually insignificant fines – remain simply insufficient to deter people from engaging in this highly profitable and relatively risk-free crime.

The light penalties also encourage recidivism. As the RCMP concluded in recent policy assessments of Canada's rampant piracy problem: "Counterfeiters have stated to police they will continue to sell counterfeit goods because the deterrents offer no incentive. ... Minimal sentences and low fines offer little incentive for law enforcement to pursue this issue more vigorously, and every incentive for criminals to continue pirating copyrighted goods."<sup>9</sup> A notable example involves a Markham, Ontario pirate video game retailer: "Fun Desk," located at Pacific Mall and owned by Ka Man Chan. In April 2005, RCMP officials raided "Fun Desk" and seized thousands of pirate video game optical discs, mod chips and other counterfeit game devices. Chan pled guilty to six offenses and was sentenced to pay a fine of C\$67,000 (US\$57,175). Clearly that sentence did not deter Chan. After being sentenced, he purchased two new stores at Pacific Mall, "Xtreme Video Entertainment Inc." and "Genesis Video Games," where he, again, sold pirate video game optical discs and other circumvention devices. RCMP officials also found Chan to be manufacturing much of the infringing products from his home, a short distance away from Pacific Mall. In July 2006, Chan was arrested and charged with over twenty counts of infringing on copyrighted works. Such recidivism will continue so long as the penalties imposed for piracy amount simply to a cost of doing business for the pirates.

USTR should press the Canadian government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include a nationwide program to crack down on the importation of pirate goods at all major Canadian points of entry. Raids and seizures against retail targets, as well as against the manufacturers of pirate products, must be stepped up, and unnecessary roadblocks to enforcement eliminated (such as the informal requirement in cities such as Vancouver, Montreal and Toronto that retail targets must receive a formal "cease and desist" notice from a right holder before any raid will be considered). Since 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 consistent deterrent sentences, including jail time for piracy cases. Canadian authorities should be encouraged to accord a high priority – in practice, not just in rhetoric – to the serious piracy problems within their country, and to devote adequate resources to the investigation and prosecution of these cases.

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<sup>9</sup> RCMP, "An Assessment of Commercial Scale Criminal Copyright Piracy and Trade-mark Counterfeiting in Canada", 2000. See also, RCMP, "A strategic intelligence assessment of Intellectual Property Crime in Canada", 2004; RCMP, "Intellectual Property Crime in Canada – Hazardous and Costly", 2005.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### CHILE

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2007.

## **EXECUTIVE SUMMARY**

The copyright industries in the IIPA have very little positive news to report on progress on the numerous copyright law and enforcement issues (particularly growing piracy problems) we have highlighted over the past year. In response to USTR's request for comments on the Chile's 2006 out-of-cycle review, IIPA recommended in September 2006 that Chile be elevated to the Priority Watch List, given both the lack of progress on combating piracy and the slow process of legislative reform. The current situation is of particular concern given that Chile was the first U.S. trading partner in the Americas to sign a Free Trade Agreement (FTA), which provides a high level of copyright and enforcement obligations. Although the FTA entered into force on January 1, 2004,<sup>1</sup> some of the copyright and enforcement obligations were subject to transition periods, many of which will come due in 2008. 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.

## **PRIORITY ACTIONS IN 2007**

**Fully implement the copyright and enforcement obligations in the FTA:** Develop and adopt 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;
- Adopting provisions on technological protection measures (TPMs) and the enforcement (both criminal and civil) against their circumvention;
- Providing an effective civil *ex parte* search remedy;
- Establishing statutory damages;
- Affording express protection of temporary copies;
- Providing protection to encrypted program-carrying satellite signals;
- Establishing ISP liability in concert with the FTA obligations; and
- Adopting appropriate provisions to regulate the acquisition and management of software by government agencies.<sup>2</sup>

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<sup>1</sup> 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](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html).

<sup>2</sup> In May 2001, President Lagos issued an executive order called "Instructions for the Development of the Electronic Government" (Decree No. 905 of 11 May 2001), which included a guideline for the executive branch to properly

**Improve criminal 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;
- More criminal actions against illegal downloaders of music, movies, and software should be initiated;
- The police should coordinate their investigations and actions with customs officials at international airports and border areas, as well as with finance ministry officials;
- More prosecutions should be pursued and the courts need to impose deterrent-level criminal sentences;
- More raids should also be initiated using organized crime legislation.

**Improve civil remedies:** The speed of civil copyright infringement litigation must be improved and an effective civil *ex parte* search remedy must be afforded in law and in-practice (as mentioned above);

**Improve border enforcement:** Customs should establish a system to track blank optical media imports and coordinate with rightsholders to ensure accurate invoicing. The border program would greatly benefit from limiting the ports of entry for blank optical discs, instituting a reference price for CD-Rs and DVD-Rs and creating an approved importers' register. In addition, custom and tax authorities may want to follow the distribution of these goods to a final consumer to ensure adequate tax payments.

**Announce a national anti-piracy campaign:** The Ministry of the Interior should develop and launch a national anti-piracy campaign which would contain specific action-oriented elements aimed at specific enforcement efforts, improved interagency cooperation, and enhanced public awareness. The IPR enforcement area of the civil police should play a critical role in the campaign.

For more details on Chile's Special 301 history, see IIPA's appendices, specifically, Appendix D (History) at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>), Appendix E (List of 301 placements) at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>), as well as previous years' country reports, at <http://www.iipa.com/countryreports.html>.

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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, we understand.

**CHILE**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006** <sup>3</sup>

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>4</sup>	29.6	44%	22.7	51%	24.8	50%	21.1	40%	14.0	35%
Business Software <sup>5</sup>	65.0	64%	55.0	66%	49.0	64%	42.0	63%	34.0	51%
Motion Pictures <sup>6</sup>	NA	NA	10.0	35%	2.0	40%	2.0	40%	2.0	40%
Entertainment Software <sup>7</sup>	NA	20%	NA	NA	37.9	70%	NA	NA	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	1.1	NA	1.1	NA
<b>TOTALS</b>	<b>95.6</b>		<b>88.7</b>		<b>114.7</b>		<b>66.2</b>		<b>51.1</b>	

## **COPYRIGHT LAW ISSUES IN CHILE**

**The U.S.-Chile FTA:** 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 delayed 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.<sup>8</sup> For example, 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. The longest transition deadlines will soon become due, and the IIPA and its members continue to urge Chile to fully and promptly comply with its WCT/WPPT and FTA obligations.

**2003 copyright law reforms adopted:** Chile has already amended its law to implement some of its substantive FTA copyright law obligations. During 2003, Chile adopted two sets of amendments to its 1970 copyright law (Law No. 17.336), the first to better implement its long-

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf).

<sup>4</sup> Estimates for the recording industry in 2006 are based on a third-party survey in order to improve the accuracy of the statistics. The loss increase in 2006 is due to the inclusion of pirate DVDs in the calculation that are sold at a higher price.

<sup>5</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Chile, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>6</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>7</sup> 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.

<sup>8</sup> 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](http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf).



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.

**Proposed 2004 anti-piracy bill finally died:** In January 2004, President Lagos introduced Bill No. 228-350 into Congress on January 12, 2004, with the stated purposes of fighting piracy. However, the bill was not satisfactory and did not receive the full support of the copyright-based industries, and in fact, contained many deficiencies.<sup>9</sup> While the goal of such reform was laudable, it was not a comprehensive attempt to fully implement the rest of the Chile FTA enforcement obligations. After much delay and legislation inaction in the House of Deputies' Economy Commission, we understand that this bill has, fortunately, died in committee.

**2005 laws affecting judicial processes:** The Chilean Congress passed a number of IPR-related bills in early December 2005. While much was directed at industrial property issues, there was some legislation which aimed at streamlining judicial processes by changing the criminal procedure code. The key changes which would improve IPR enforcement included: (1) giving judges greater freedom to order preventive incarceration, and (2) giving the police the authority to search locations without a warrant in the case of a flagrant crime. IIPA has been informed that these laws have the support of the local copyrights sectors. In fact, some report the new processes are being applied as part of new cases. However, this is not regularly producing jail terms unless the industry identifies a specific case as being particularly serious. On those occasions, some people have been incarcerated.

**2005 efforts to impose dangerous exceptions:** 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. It seems that this project may have been merged with more recent initiatives (see below).

**2006 proposed Copyright Law reform initiatives:** Under the Bachelet Administration, authority for copyright has shifted from the Ministry of Education to the Ministry of Culture. During 2006, the Minister of Culture announced two initiatives affecting copyright, and the copyright industries, both Chilean- and U.S.-based, look forward to reviewing the proposed legislation.

The first legislative project involves a bill that will address some FTA compliance issues, including enforcement measures (perhaps including deterrent-level penalties and fines, statutory damages and *ex officio* authority), exceptions and limitations to rights and protection for technological protection measures. During 2006, this process moved forward, with internal draft legislation being circulated to other ministries, including the Ministry of the Secretary General of the Presidency, the Ministry of Foreign Relations and the Ministry of Economy. IIPA

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<sup>9</sup> See IIPA's 2006 Special 301 report on Chile for a full accounting of the problems in the proposed anti-piracy legislation, available at <http://www.iipa.com/rbc/2006/2006SPEC301CHILE.pdf>.

was told that this bill was to have been presented to the Congress by the end of 2006. The second legislative project reportedly involves comprehensive reform of the copyright law in 2007. Local industry was informed that Ministry of Culture intends to create consultative commissions, whereby private industries may participate in discussions over the legislative proposal, sometime in the second quarter of 2007. There also was a third project outstanding since 2005 which was to have expanded on exceptions permitted under the copyright law (see above).

Recent reports suggest that all three of these initiatives have been merged into one bill, but this bill has not yet been released to the public for review. Transparency in this legislative reform process is critical.

**Alternative proposal on anti-piracy reform:** A local intellectual property coalition known as CONAPI (of which MPA and the recording industry, IFPI, are members) presented in January 2004 to the Ministry of Culture a new, shorter and revised version of the Anti-Piracy bill which had been pending in Congress. This new bill is known as the “Ley Corta,” and the industries were seeking its fast-track congressional approval. CONAPI. Unfortunately, some government authorities amended the bill, significantly distorting its key objectives. The resulting project even put in jeopardy some existing anti-piracy tools in the law. As a result, CONAPI requested that the project be killed and no further legislative actions were taken.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN CHILE**

Piracy levels in Chile remain high for such a developed market in the region, with the copyright industries reporting no improvement in the piracy situation during 2006. Many industries continue to be very concerned over the growth in digital piracy and piracy involving hard goods remains a serious problem. The Chilean enforcement system fails in practice to meet Chile’s existing bilateral and multilateral obligations, and the industries report no noticeable improvement in 2006. The U.S.-Chile FTA contains significant enforcement measures which clarify and elaborate on the WTO TRIPS Agreement. The FTA contains a four-year transition period to implement the enforcement obligations, and a five-year transition period to implement Chile’s already existing WCT/ WPPT obligation regarding protection against circumvention of technological protection measures.

**Street piracy remains notorious:** Sidewalk vendors continue to sell their pirated wares, simply covering them 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. In 2006, the situation worsened with these organized groups becoming more aggressive in their operations.

**Importation of blank CDs:** Chile continues to experience a significant problem involving the massive importation of blank CDs from Southeast 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 a free trade zone. In fact the port has become a gateway for blank discs destined for Bolivia, Paraguay and Brazil. The Motion Picture Association (MPA) reports that optical disc piracy remains a major problem in Chile. The latest estimate is that 160 million blank CD-Rs were imported in 2005. 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. No progress on establishing such a register was made in 2006.

**Internet piracy is growing:** Another important concern of all the copyright industries is the rapidly growing internet broadband penetration (Chile has one of the highest broadband penetrations in the region). The recording industry reports that the music piracy situation is worsening with the rapid growth of illegal downloads of music files over the Internet due to the increase in broadband lines, and access to peer-to-peer (P2P) sites have fueled this problem. The local recording industry association commissioned a third-party survey which revealed over 220 million songs of local and international repertoire are being downloaded annually in Chile.

The local recording industry association is addressing this problem by working with local Cyber-crime units to raid Internet cafés contributing to illegal downloads; it is also considering alternative actions against individual uploaders. The operation against Internet cafes covered 12 locations, mainly in Santiago, where authorities seized 21 computers and approximately 12 thousand optical discs. It is imperative to control the level of Internet piracy that is continuing on a regular basis. The industry estimates that about 25% of all downloading and burning is done in Internet cafes.

**Business software piracy:** 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. As with other industries, BSA is also concerned about Internet piracy in Chile.

**Piracy of music and sound recordings:** Piracy of music and sound recordings, primarily in the form of pirate CD-Rs, continues to wreak havoc in the Chilean market. A sharp decrease in the legitimate recording market during 2006 of 26% strongly suggests that music piracy in Chile is growing. 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 2006, 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 596 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 2006 by conducting training seminars on piracy for police, prosecutors and tax auditors.

**Audiovisual piracy:** Back-to-back duplication of VHS in video stores continues to be common. The black market and the growing number of street vendors remain problematic. 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. MPA reports that there is a growing problem of “delivery piracy” in the offices of the main areas of Santiago. For example, a well dressed person, armed with a film catalog, goes into office buildings offering to sell copies of the latest movie releases. To fight this situation, MPA has started an “educational” campaign to the managers of these buildings, alerting about the illegal activity of these delivery service. More than 400 companies have been contacted by letters and phone calls. The audiovisual industry is also concerned about the growth of Internet piracy in Chile. Furthermore, signal piracy remains a significant problem in Chile, especially involving the creation of mini-head ends that receive pirate programs that are then provided to particular buildings, condominium associations and small towns. Unfortunately, the Chilean Government and its municipalities accept registrations from and grant licenses to pirate companies without investigation so long as those companies pay taxes.

**Book piracy:** 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. Commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors.

**Entertainment software piracy:** 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

**Police raids but no deterrent results:** 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. The recording industry reports that raids continue to be focused in Santiago and Valparaiso but there is no change or improvement. Most raids are requested by the industry; the local authorities rarely initiate any type of actions. Flea markets such as Bio-Bio in the outskirts of Santiago are still plagued with pirate product. With respect to the theft of satellite signals, industry reports that 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.

Although no specific, separate organized crime law exists in the Chilean criminal code, some provisions address organized crime activities and are stricter than those for piracy. Some industries have determined that in some locations piracy is in the hands of groups with the necessary resources to buy equipment and blank media, and set up replication facilities. As a result, the authorities should consider applying these provisions to these instances and other more serious cases. The recording industry reports that they have not succeeded in applying the organized crimes provisions in any case so far.

**Inadequate border enforcement:** Chile (primarily Iquique) continues to play a major role as an entry point for blank optical disc media that is coming from Southeast Asia with a final destination of Paraguay and/or Bolivia. Chilean authorities are aware of this fact but much improvement is needed in order to track and intercept these imports. The Chilean Government has not organized any type of border program to curtail importation of over 160 million blank optical discs known to end up as pirate product.

**Internet piracy and cybercrime cases:** 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. This unit should take a more active role in fighting Internet piracy. Toward that end, the recording industry organized a training seminar for some of this unit's members in 2006.

**Inadequate civil *ex parte* remedy and slow civil cases:** For years, Chile has failed 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, and it also undercuts the effectiveness of the remedy because it affords a defendant the opportunity to remove/erase all traces of piracy or to take other steps to protect him/herself from the inspection. This remedy is particularly important because the BSA conducts only civil (no criminal) actions in Chile. In addition, 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.

**Criminal prosecutions are few and sentences are not deterrent:** Only a small number of criminal copyright prosecutions are brought in Chile. It is very rare for a case to reach the sentencing stage, and copyright infringement cases are usually abandoned before being adjudicated. Although the 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 rarely incarcerated for copyright infringement. The recording industry reports 26 sentences issued in 2006 with 2 people incarcerated and 4 serving their time on a part time basis (they sleep in jail).

## **IPR TRAINING AND PUBLIC AWARENESS**

In 2006, the music industry continued to reach out to many local and state authorities by conducting training seminars on piracy for police, prosecutors and tax auditors. They provided at least eight seminars in the course of the year including three on Internet piracy. The goal is to maintain this level of training during the current year.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### COSTA RICA

**Special 301 Recommendation:** IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2007.

## **EXECUTIVE SUMMARY**

The copyright industries report that no significant improvement to halt widespread copyright piracy in Costa Rica occurred in 2006. Optical disc piracy is on the rise and street piracy remains pervasive. Most disturbingly, there has been little-to-no prosecutorial interest in pursuing criminal copyright cases, and this problem rests at the higher levels of the Costa Rican Government. Despite many efforts by copyright industries, including meetings with the Costa Rican ambassador to the U.S., to raise awareness about the level piracy and lack of enforcement, the Costa Rican Government has not taken any effective measures to address the issue. Further work will be needed to amend the legislative package which is being put forth to implement the CAFTA-DR IPR chapter. IIPA supports the Free Trade Process and urges Costa Rica to complete its ratification. To that end, proper implementation of the CAFTA-DR IPR Chapter, both in terms of copyright law and enforcement reform, is needed.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Urge the Attorney General to instruct his prosecutors to process and expedite copyright violation cases, and promptly take action on the dozens of cases that have been submitted to his prosecutors.
- Reduce unwarranted delays in investigations and prosecutions.
- Reduce delays in sentencing in criminal copyright cases.
- Increase and apply vigorously criminal sanctions for copyright infringement (the improved statutory basis was included in the now defunct industry-supported Bill No. 15.076).
- Create a Public Prosecutor's Office specialized in IP matters (as found in Bill No. 15.077) and assign resources and personnel to the office.
- Improve training of enforcement officials and technical experts in Costa Rican agencies.
- Implement in-practice the software asset management practices in government agencies called for in the 2002 Decree.

### **Legislation**

- Improve the proposed CAFTA-DR IPR implementation legislation (Bill No. 16.117) to match the obligations found in the CAFTA-DR IPR Chapter. If needed, resurrect and reintroduce Bill No. 15.076 which would bring back the "public action" for copyright infringements and extend felony sanctions for criminal copyright violations to a minimum of three years and a maximum jail time of five years (the maximum is now three years). FTA-compatible provisions on TPMs and RMIs should be included.
- Modify Bill No. 16.117 to delete "minimum statutory damage of one legal salary" as included in Article 40 which is insufficient and not a deterrent against piracy.
- Support adoption of Bill No. 15.077 which would create a Specialized IP Prosecutor Office.

**COSTA RICA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006 <sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>2</sup>	15.1	60%	18.3	60%	NA	NA	7.2	56%	7.0	50%
Business Software <sup>3</sup>	12.0	65%	10.0	66%	9.0	67%	10.0	68%	6.7	61%
Motion Pictures <sup>4</sup>	NA	NA	2.0	100%	2.0	40%	2.0	35%	2.0	40%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>27.1</b>		<b>30.3</b>		<b>11.0</b>		<b>19.2</b>		<b>17.6</b>	

IIPA and its members also support the U.S.-Central America-Dominican Republic Free Trade Agreement.<sup>5</sup> The CAFTA-DR is an important means encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions.<sup>6</sup> This FTA was signed on August 2, 2004, and entered into force with the U.S. on January 1, 2005.<sup>7</sup> Costa Rica is the only CAFTA country which has not yet completed its ratification of this agreement. Also of note, Costa Rica is currently is a beneficiary country of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Caribbean Basin initiative.<sup>8</sup> Once CAFTA is in force with Costa Rica, these trade benefits will be phased out.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Costa Rica under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> Estimated trade losses for the recording industry in 2002 reflect the impact of significant currency devaluation that year.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</sup> 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>.

<sup>6</sup> The final text of the CAFTA-DR IPR Chapter is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html).

<sup>7</sup> 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](http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html).

<sup>8</sup> During the first 11 months of 2006, \$106 million worth of Costa Rican products entered the U.S. under the duty-free GSP code, representing a 28.6% increase from the same period in 2005. In addition, \$959.9 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 60.3% from the same period in 2005, and \$321.7 million worth of Costa Rican goods entered the U.S. under the CBTPA.



# **COPYRIGHT PIRACY AND ENFORCEMENT IN COSTA RICA**

IIPA and its members in recent years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system.<sup>9</sup> Unfortunately, no progress was made in addressing these problems in 2006, and in fact, Costa Rican law enforcement authorities took several detrimental actions which undermine effective copyright enforcement

**Piracy rates remained high in 2006:** The recording industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica, and the production of local talent has disappeared. CD-R burning is the most prevalent form of music piracy. The recording industry estimates piracy to be in excess of 60 percent of total units sold in the market mostly through street stands and flea markets, especially in San José, Heredia and Alajuela. Due to the lack of action of the Prosecutors in San Jose's metropolitan area, anti piracy efforts has been diverted to other areas such as Alajuela and Heredia where some police units and local governments are more receptive to industry complaints. There has been little to no action taken against Internet cafés. As a result, their growth has increased significantly, not only in the main cities, but also in the countryside.

The business software industry reports that the most devastating form of piracy in Costa Rica continues to be the use of infringing or unlicensed software by legitimate businesses and Government agencies. Access to broadband Internet services constitutes a new medium for users to obtain unauthorized software from websites that offer low-priced pirate software for download. BSA's activities in Costa Rica include IPR training sessions, in coordination with the Judicial School. The motion picture industry reports that optical disc piracy (DVD) continues to grow, damaging legitimate theatrical and home video markets (MPA does not currently have an anti-piracy program in-country).

**Enforcement remained very difficult in 2006:** There are 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. Simply put, enforcement of copyright infringement cases has declined, in both quantity and in quality. In general, lack of adequate resources to conduct an effective anti piracy campaign and the negative attitude from the prosecutors are the two main causes behind the disastrous situation of the enforcement of IPR in the country.

There have been no major prosecutions conducted or convictions issued in the last two years mainly because cases have not been pursued by prosecutors who apply the "non-significant-case" provision in the current Law on Enforcement. In addition, prosecutions remain weak because many pending cases were dropped by local prosecutors, as directed by the Attorney General in early 2005. As a result of this decision, 12 major music piracy cases were dropped by the prosecutors and all raids were conducted with the "voluntary" cooperation of the Municipal police. 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.

Some legislative solutions to improve this situation remain pending (see discussion below), and include *ex officio* ("public") actions and creating a section of specialized IPR prosecutors. Unfortunately, the Government does not appear to be actively supporting these ideas.

**Delays in criminal cases:** 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

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<sup>9</sup> 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/2007SPEC301HISTORICALSUMMARY.pdf>.



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.

**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 Judicial Investigation Office (OIJ); this procedure is consistent with Costa Rican legislation.

**Need for special IPR prosecutors:** The creation of a specialized prosecutor’s office with nationwide jurisdiction has been urged by the copyright industries for years as a way which could 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 remains a priority. In addition, the copyright industries continue to support the need for these “link” prosecutors. Back in 2002, the Costa Rican General Prosecutor announced that 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, were going to be appointed to handle, “with priority,” intellectual property cases. Unfortunately such specialized IP prosecutors were not appointed, already existing prosecutors were given IP duties. The recording industry still supports the creation of a specialized prosecutor’s office because something is direly needed to correct the current unacceptable situation with prosecutors.

**Inadequate civil remedies:** BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the *Ley de Observancia* (Law 8039) requires the rightsholder to (a) prove it is the legitimate owner and (b) to deposit a bond to protect the target in case the action is found to have no legal basis. The law does not say what is the rate or the percentage to be used in setting the amount of the bond. Therefore, the judge has discretion in setting the bond. Usually, the minimum rate that is use is 25% of the amount of damages claimed (this 25% figure comes from the preventive embargo figure, a civil procedure.) Another problem is that the judge may, prior to the injunction, inform the defendant of the proposed action, so he can oppose the action and request that a higher bond be set. BSA did not bring any civil cases in 2006 in Costa Rica.

**Copyright office reinstates the 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 applied reconsideration, and subsequently received notice that a reinstatement was issued

## **COPYRIGHT AND LEGAL ISSUES IN COSTA RICA**

Given the higher standards of copyright obligations and enforcement measures contemplated in the TPA, however, Costa Rica will have to make additional reforms to its copyright and enforcement-related laws in order to fully comply (taking note that CAFTA-DR does contain transitional periods). Ideally a comprehensive initiative to integrate the enforcement provisions which were in Bill No. 15.076 plus adding comprehensive provisions to protect technological protection measures and rights management information would be advisable (but it is not known whether the current legislative environment would support such an idea). Especially important is increasing the minimum penalty of three years for all piracy crimes in order to secure deterrent sanctions.

**CAFTA-DR Implementation and Bill No. 16.117:** Costa Rica has developed legislation to implement the IPR provisions of CAFTA. Bill No. 16.117 was presented to Congress in February 2006,<sup>10</sup> then processed by the Legal Affairs Committee, and is to be forwarded to the full Congress soon. Specifically, this bill would amend the Law on Enforcement (discussed below). One very positive amendment addresses methods to quantify civil damages in absence of an expert study; this would definitely aid civil enforcement efforts. The bill also contains proposals affecting liability and sanctions for the circumvention of technological protection measures (TPMs) and rights management information, and the reception and distribution of program-carrying satellite signals.

However, there are several troubling points in this bill. First, the provisions on technological protection measures fail to rise to the standards in CAFTA in many respects (e.g, no coverage of services, no provisions for access controls, no coverage of components, overly broad exceptions to criminal liability, failure to clearly afford civil liability for circumvention, no definitions for what is a TPM, for example). Second, while the bill would add statutory damages, they are too low to be deterrent. The bill offers 1-50 times the minimum wage of unskilled workers (one wage is about US\$195, so the range would be US\$195-\$9,750. Third, proposed criminal penalties are too low to be deterrent; the bill proposes only a minimum one-year penalty, which makes it impossible to ever imprison any defendants. The industries have advocated for many years that a minimum penalty of three years is needed in order to ensure possible jail time in criminal cases (refer to industry support of failed Bill No. 15.076, below). Fourth, another provision makes a general (and disturbing) statement about ISP liability, with reference to regulations which apparently have not been developed. Costa Rica does have a permitted 30-month transition period to implement the ISP liability provision; if the Government decides to implement it now, then the legislation must track the CAFTA-DR requirements. The industries do not support an incomplete implementation of this critical obligation. In sum, further work on these problematic issues, as well as refining other enforcement-related issues (such as border measures) is needed.

**Efforts to amend the Law on Enforcement (*Ley de Observancia*), then and now:** For years, the copyright industries have been working to amend enforcement procedures in Costa Rica. In October 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, with the objective of complying with the TRIPS Agreement. Unfortunately, the industry found numerous provisions not in compliance with TRIPS and an impediment to effective enforcement;<sup>11</sup> efforts to amend the bill before its adoption failed. The copyright industries continued

<sup>10</sup> The text of the Costa Rican bill to implement the CAFTA-DR IPR Chapter is available, in Spanish, on the Costa Rican legislature's website at <http://www.asamblea.go.cr/proyecto/16100/16117.doc>.

<sup>11</sup> The copyright industries identified four major deficiencies in the 2000 Law on Enforcement: (1) a lack of criminal ex officio authority, the ability to take action without the need for a complaint by a private party; (2) the need for deterrent-level penalties. The law only gave a maximum penalty of three (3) years of imprisonment for copyright violations, and sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended); (3) the law 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 because these terms are undefined and it was easy for pirates to avoid liability by simply

to work to introduce amendments to fix the *Ley de Observancia*. In 2002, the copyright industries, working with Congressional officials, developed a bill (Bill No. 15.076) which would increase criminal sanctions and make other necessary amendments to improve enforcement. However, the Costa Rican Government also presented its own bill (Bill No. 15.556) which would, unfortunately, reduce the minimum penalty for copyright piracy, making it nearly impossible to incarcerate pirates. Time lapsed, and both these bills have fallen off the legislative agenda. Nevertheless, it is important to keep in mind that the industries continue to support the key elements that were in Bill No. 15.076, many of which have not yet been reflected in the Costa Rican legislative effort to implement CAFTA (see above).

- Recall that **Bill No. 15.076** was the industry-supported bill to amend the *Ley de Observancia*, and contained these key provisions: (1) Maximum imprisonment penalties for IP violations would be elevated from three to five years. Minimum penalties would be increased from one to three years. This elevation is aimed at ensuring the imprisonment of copyright infringers; (2) Public officials, not only injured parties, will be able to file criminal actions for IP violations (“*acción pública de instancia pública*”); (3) A new Article 70 would call for closing pirate businesses and/or destruction of equipment used in the infringement. The objectionable “insignificance principle” (“*principio de lesividad e insignificancia*”) would be removed from the Criminal Procedural Code so that it does not apply to IP violations; (4) the unauthorized “use” of protected works is a crime; and (5) any fine imposed for IP violations should be in addition to the prison sentence, and not in the alternative. The industries would likely support the re-introduction of this bill, expanded to include relevant FTA-compatible provisions on TPMs and RMI.
- **Adopt Bill No. 15.077** which proposes to create a Specialized IP Prosecutor Office. IIPA encourages the Costa Rican government to make this a priority.

**Copyright Law of 1982 (as amended):** In 2000, Costa Rica amended its 1982 Copyright Law in large part to comply with TRIPS and the WIPO Treaties. Several positive improvements were made there, including: revising the right of reproduction; extending copyright term of protection; and recognizing the rightholder’s exclusive right to make a work or sound recording available to the public. Costa Rica was among the original set of countries to ratify the WIPO internet treaties. However, further refinements of the copyright law will be needed to comply with the comprehensive CAFTA-DR requirements. Issues which require attention include, for example: national treatment for performers and producers of sound recordings; expanded performers’ rights, including fixation of their unfixed performances; and an express and exclusive “right of making available” for performers and producers of sound recordings.

**Government software asset management:** In February 2002, the then-President of Costa Rica 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 then reiterated his administration’s intention to fully implement that decree. Both the issuance of the decree and President Pacheco’s reiteration of it were important steps towards demonstrating the Government of Costa Rica’s increasing awareness of the value of managing their software assets. Unfortunately, to date there has been no further action taken to implement the decree. The Government of Costa Rica should continue down the path toward implementation of the software asset management practices called for in this decree.

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reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### DOMINICAN REPUBLIC

**Special 301 Recommendation:** IIPA recommends that the Dominican Republic be elevated to the Priority Watch List in 2007.

## **EXECUTIVE SUMMARY**

Copyright piracy rates remain high in the Dominican Republic. Piracy of recorded music on the streets is prevalent, and widespread “burning” of compact discs full of infringing copyrighted materials is reported. What has been most disturbing over the past year has been the administrative agency’s (ONDA) continued poor coordination with the police and prosecutors. ONDA’s actions border on obstructionist to effective investigations and inspections. ONDA refuses to work with the recording industry on its actions. ONDA inspectors do not have the technical expertise to conduct effective inspections involving software piracy. Two industries involved in anti-piracy actions both report good cooperation with the police and prosecutors. However, these criminal agencies need additional resources. There is much more room for improvement on criminal prosecutions, too; for example, the recording industry reports that there were half the number of criminal actions and prosecutions taken in 2006, compared to the year before. The judicial system is overloaded; the recording industry has over 100 cases which are backlogged, waiting for prosecution under the old criminal code. With respect to legislative reform, legislation which would implement the copyright-related and enforcement provisions of the Free Trade Agreement passed in late 2006. IIPA supports the Free Trade Agreement process and looks forward to the prompt entry into force of the CAFTA-DR with the Dominican Republic.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- 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.
- Provide technical assistance and training to the IPR department in *Fiscalía* of Santo Domingo and the National District in order to strengthen its ability to investigate, file and prosecute IPR 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.
- Continue regular inspections of broadcast television stations and cable systems, and follow-up with criminal and administrative actions.
- Expedite prosecutions and judicial decisions in criminal cases.

- Improve training of judges, prosecutors and police on copyright matters in order to ensure proper implementation of the Criminal Procedure Code (2004), which also included *ex officio* authorizations of raids, inspections and closures of illegal activities.

<b>DOMINICAN REPUBLIC</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006 <sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>2</sup>	9.9	65%	10.8	75%	10.3	75%	9.9	65%	6.9	65%
Business Software <sup>3</sup>	10.0	77%	5.0	77%	2.0	77%	3.0	76%	3.6	61%
Motion Pictures <sup>4</sup>	NA	NA	3.0	89%	2.0	20%	2.0	20%	2.0	60%
Entertainment Software	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
<b>TOTALS</b>	<b>29.9</b>		<b>19.8</b>		<b>15.3</b>		<b>15.9</b>		<b>13.5</b>	

IIPA and its members support the IPR chapter in the U.S.-Central America-Dominican Republic Free Trade Agreement.<sup>5</sup> Bilateral negotiations with the Dominican Republic were concluded in March 2004, and the agreement was signed on August 5, 2004. President Bush signed the implementing legislation for the DR-CAFTA on August 2, 2005, and entry into force for the U.S. was January 1, 2006. Entry into force for the Dominican Republic is still pending, but may possibly happen in early 2007. The CAFTA-DR is an important means encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions.<sup>6</sup> The Dominican Republic is currently is a beneficiary country of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Caribbean Basin initiative.<sup>7</sup> Once the FTA is in force, these trade benefits will be phased out.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of the Dominican Republic under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> 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.

<sup>3</sup> BSA's 2006 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 Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</sup> 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>.

<sup>6</sup> The final text of the CAFTA-DR IPR Chapter is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html). The Dominican Republic also signed a Side Letter on IPR procedures.

<sup>7</sup> IIPA has used several U.S. trade laws over the past decade to encourage improvement in the piracy and legal situation in the Dominican Republic. For example, in June 1999, the IIPA filed a petition with the U.S. government to initiate a review

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

For many years, IIPA and its members have been working in the Dominican Republic to improve on-the-ground copyright enforcement which, we believe, is imperative to reducing the high levels of piracy in this country.<sup>8</sup>

**Piracy of recordings and musical compositions:** 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. There has been noted a dramatic increase in the number of CD-R burner labs operating, propagating the availability of pirated CD-Rs. Additionally, music pirates have added pirated music DVDs to their inventories of available product. Street vendors continue to operate throughout popular shopping areas and in the tourist areas around the country. The estimated trade loss due to piracy of sound recordings and music in the Dominican Republic was \$10.8 million in 2005.

**Business software piracy:** The Business Software Alliance (BSA) reports that its 2006 problems continued to be 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. Use of the Internet is growing in this market, and it is being used to either promote the sale of personal computers (including those with unauthorized pre-loaded software) as well as downloading software (thus far, the industry has not yet found a website based in this country which is engaged in such activity). Preliminary estimated trade losses to the business software industry jumped to \$10.0 million in 2006, with a piracy level of 77%.

**Film piracy and broadcast piracy:** MPA reports that broadcast, 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 several years, MPA and its member companies have taken action against television and video piracy in the Dominican Republic, many whom have been politically protected from effective enforcement. 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. In the last few years, the video piracy market has started to shift to DVD piracy, and this type of piracy has far-reaching market distortions as the use of pirate DVDs can harm the theatrical, home entertainment and TV markets.

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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. Regarding preferential trade benefits, here is a summary of 2006 activities. During the first 11 months of 2006, \$122 million worth of Dominican goods entered the U.S. under the duty-free GSP code; \$948.4 million worth of Dominican goods entered under the CBI; and \$1.3 billion worth of Dominican goods entered under the CBTPA,

<sup>8</sup> 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/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.



**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. Estimated trade losses to the publishing industry were approximately \$1 million in 2006.

## **COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC**

**Raids and inspections taken by both the police and administrative authorities:** In the Dominican Republic, anti-piracy actions can be taken by the police as well as ONDA. Two continuing problems remain a general lack of resources for enforcement agencies and an ongoing lack of coordination by ONDA with other enforcement agencies.

Recording industry reports continuing difficulties in 2006: Although the recording industry has a good working relationship with the police department, the police do not take self-initiated actions. The majority of 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: 113,764 pirate music CD-Rs, 4,770 music DVDs, 214 CD-R burners, and 16 computers used in the manufacturing of illicit product. There have been 41 people arrested during these operations. Criminal charges were brought against ten individuals by the prosecutor's office. There were four convictions that RIAA is aware of in 2006. These numbers represent more than a 50% decrease in seized music CD-Rs and persons arrested in 2005.

ONDA has refused to provide any data/statistics to the industry that would reveal their music anti-piracy activities. RIAA is aware of only four music piracy seizures conducted by ONDA during 2006, all of which targeted low-level street vendors. The industry's understanding is that ONDA refuses to work with the Attorney General's office, because ONDA believes they have sole responsibility for anti-piracy cases. Therefore, it seemed 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, and this remains a problem as of early 2007. 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.

Business software reports good criminal results and cooperation but difficulties in administrative actions: The BSA reports continued excellent cooperation and relations with local enforcement authorities. During 2006, BSA took twelve resellers actions and five end-user actions, using criminal laws, and working with prosecutors (the *Fiscalía of Distrito Nacional and Provincia de Santo Domingo*). Although *ex officio* authority exists in the copyright law and the criminal procedure code, the District Attorney has not been willing to take such actions on his own initiative; his office is helpful and does take actions but prefers to have at least a complaint (*denuncia*). With respect to the prosecutor's office in Santo Domingo, the main problem is the lack of resources. Both of the prosecutors assigned to handle IPR cases do not have the staff needed to assist them. Nevertheless, BSA is pleased with the work the DA's office has taken in the past year.

BSA took only three (3) administrative inspections with ONDA last year. BSA has identified three problems with ONDA and administrative enforcement: (1) the inspectors do not have the technical knowledge to conduct a software inspection, (2) lack of resources, and (3) a continuing

problem of not coordinating with other agencies, such as the District Attorney. For at least two years, there has been a miscommunication between ONDA and the DA's office.

**Results of criminal prosecutions are mixed.** 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. While the process is better, actual results are mixed.

Recording industry cases: Despite obtaining convictions of four individuals in early 2006, there were no other cases in which successful prosecutions were achieved. The RIAA remains hopeful that changes to the criminal code made in 2004 will expedite the adjudication of pending cases. 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.

Broadcasting piracy cases: 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 two broadcast stations, Digital 15 and Virus. However, in 2005, the only legal action filed was against Virus, which was settled; no other criminal actions were initiated. In 2006, cases were also prepared and are pending decisions by the District attorney to move forward.
- 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. As of early 2006, Canal del Sol entirely changed its programming and, for the past year 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 was expected to take place in March 2006.

No criminal prosecutions involving video piracy are reported by the industry. There are some defendants from *ex officio* actions taken by the authorities.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law (2000, as amended in 2006):** 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. While the 2000 law raised the level of copyright protection up to WTO TRIPS levels and also integrated some elements found in the two WIPO "Internet" Treaties, further reform was anticipated in order to satisfy all the obligations of the CAFTA-DR IPR Chapter. Importantly, 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.

In November 2006, the Congress of the Dominican Republic approved its CAFTA-DR implementation legislation, including IPR-related amendments (Law No. 424-06). These amendments will enter into effect when the CAFTA-DR enters into force for the Dominican Republic. The IPR legislation includes several refinements affecting the copyright law and its enforcement, including (for example): extending term of protection; expressly adding statutory damages; clarifying some contractual rights provisions; clarify and expand the scope of exclusive rights for rightsholders; increase the minimal level of criminal sanctions from three (3) months to six (6) months; clarify the scope of judicial authority and injunctive relief; delineate other enforcement measures, including border measures; expanded the chapters on TPMs (technological protection measures), RMI (rights management information), and encrypted program carrying satellite signals. The Dominican Republic also has chosen to take advantage of the permitted transition periods for certain issues (including protection of access controls/technological protection measures, government software legalization, and ISP liability). The 2006 law also includes a few elements which industry is concerned, especially with respect to implementation. For example, the legislation changed the calculation for criminal fines from “minimum wages” to a range with an indication of the amount in Dominican Pesos. With this, it not only lowered the minimum amount to receive as damages, but also means that the level of sanctions will be diluted due to local information. The minimum-wage-index ameliorated the inflation problem. For example, in the six years since the enactment of the 2000 Copyright Law, the exchange rate has dropped from RD\$12 per US\$1.00 to RD\$34 per US\$1.00. This fixed peso number was also included in the statutory damages section, though the level of sanctions there is quite high (if imposed).

**Criminal Procedural Code Amendments:** The amendments to the criminal procedural code (adopted in July 2002) entered into effect on September 21, 2004, and has helped to expedite new cases. The criminal cases underway at the time of the 2004 amendments will be adjudicated under the former procedural code.

**Constitutional Challenge to Copyright Law:** BSA is still 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 filed a brief refuting these arguments, and ONDA also filed a brief against this challenge. The hearing to consider whether Hard Soft committed a copyright infringement was scheduled for November 4, 2003, but was postponed until April 2004. A decision from the Supreme Court is still pending, as of early 2007.

## **IPR TRAINING AND PUBLIC AWARENESS**

RIAA offered training to the IP Prosecutor in the National District and in the Santo Domingo District that would highlight identification of pirate product, impact on the music industry, artist, employees of labels, distributors and retailers. Although the offers were met with positive reactions, no training actually occurred realized during 2006.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### EGYPT

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

#### **EXECUTIVE SUMMARY**

The copyright community has for several years held out hope that the government of Egypt would come to recognize that a strong copyright system is in its interest. Unfortunately, the enforcement infrastructure remains under-funded and staffed by some who are less than enthusiastic about taking the steps necessary to eliminate piracy and foster legitimate growth of copyright industry in Egypt. Problems in the enforcement system abound, from the highest levels of key government agencies, to courts which do not view copyright piracy as a commercial crime, to the police who are reluctant to take actions against commercial piracy and permit pirates to thrive. On top of the piracy woes, market access barriers in Egypt make it one of the most restrictive and uninviting markets in the world to legal copyright businesses. Egypt's creative community was once one of the most vibrant in the world. With the growth of Internet connectivity in Egypt, IIPA hopes that the government will move to foster growth in the creative industries rather than douse their forward progress.

#### **PRIORITY ACTIONS REQUESTED IN 2007:**

- **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. According to Ministry of Justice Decree No. 3286/2006, the Intellectual Property Unit at the Information Technology Industry Development Agency (ITIDA) is the enforcement authority which is empowered to take immediate action in case of software copyright infringements. Thus, it is crucial that MCIT acts to apply this Decree and establishes the necessary legal structure for the IP unit at ITIDA allowing it to take sustained enforcement actions against all illegal distributors and retailers of pirate entertainment and business software products. ITIDA must then significantly increase audits and enforcement against software piracy and unauthorized end-use 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 Egyptian 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” (some such determinations appear to have been based on false licenses). 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 his 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 and bureaucratic. They also mete out results that utterly fail to deter copyright piracy, 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 through the assignment of specialist IP judges to copyright cases. By doing so, the Minister could increase the ease with which *ex parte* orders and injunctions are issued in cut-and-dried piracy cases, and ensure 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 have to contend with such restrictions, 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).
  - *Ad valorem* duties (46% of the value of a film, i.e., 32% for a copy of the movie, 12% on posters and 2% on the movie reel) upon import into Egypt of films, and *ad valorem* duties on sound recordings and entertainment software.<sup>1</sup>
  - 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 imposed on foreign films that is not imposed on domestic films. This discriminatory tax should be removed.
  - A 20% box office tax for theatrical motion pictures.
  - 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).

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<sup>1</sup> Industry reports that this is generally a 5% duty imposed on entry into Egypt, but can be higher.

- **Amend Copyright Law (and to the Extent Necessary, the new Implementing Decree) to Cure TRIPS Deficiencies, and Implement and Accede to the WIPO Internet Treaties.**

For more details on Egypt's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>EGYPT</b> <b>ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY</b> <b>(IN MILLIONS OF U.S. DOLLARS)</b> <b>AND LEVELS OF PIRACY: 2002-2006<sup>2</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>3</sup>	47.0	63%	45.0	64%	28.0	65%	34.0	69%	12.7	52%
Books <sup>4</sup>	31.0	NA	30.0	NA	30.0	NA	25.0	NA	28.0	NA
Entertainment Software <sup>5</sup>	NA	NA	14.3	85%	NA	90%	NA	90%	NA	NA
Records & Music <sup>6</sup>	12.0	70%	9.0	60%	7.5	40%	8.0	45%	8.2	41%
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>90.0</b>		<b>98.3</b>		<b>65.5</b>		<b>67.0</b>		<b>48.9</b>	

## **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 piracy cause great losses to the business software community in Egypt, while piracy of entertainment software is decimating that industry's legitimate market 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 borders into Egypt. 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 (the ITIDA), the regulations

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Egypt under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Egypt, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> The piracy level for sound recordings reflects not only physical piracy but also the growing effect of Internet piracy – still at 95% - and its increasingly devastating impact on the recording industry in Egypt.

were ambiguous as to what role the Ministry of Culture (MOC) would play. In 2006, Decree No. 3286/2006 was issued by the Ministry of Justice (May 11, 2006). The Decree granted powers to ITIDA to enforce the law against copyrights infringers.<sup>7</sup> MCIT/ITIDA should immediately start activating its enforcement role and begin to take sustained enforcement actions against all illegal distributors and retailers of pirate entertainment and business software products. It should also 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 2006. In addition, while 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 interest in the Ministry of Interior to protect copyright, there has been no impact in the market in terms of losses felt by industry or increased sales.

**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 90%. U.S. right holders in texts on 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 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.<sup>8</sup> 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. All too frequently, however, universities are actively or tacitly involved in the problem, especially where illegal photocopies are concerned. Professors at major universities have been known to facilitate copying themselves, and the sophistication level of the copies has increased such that these illegal versions rival print versions in quality.

Burning of CDs to accompany the books (inclusion of CDs as supporting material is a longstanding practice among legitimate publishers) has become more prevalent. The piracy problem is further illustrated by the frequent requests received by publishers for "free" supplementary teaching materials, which are not supported by purchases of genuine textbooks. 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. This is causing deep harm to local industry as well, with many operatives in the legitimate supply chain being forced out of business due to the devastating losses attributable this growing problem.

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<sup>7</sup> ITIDA had placed an ad in the press, announcing they are now in charge of software copyright, calling on businesses to register software products and work permits, and asking them to comply with copyright laws in the use of software. While this is a positive development, IIPA is concerned that ITIDA will end up working aggressively on registrations but will do very little in the area of enforcement (a recent meeting at IIPA with the head of ITIDA confirmed that ITIDA had not started enforcement and was not prepared to do so).

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

In addition to the piracy plaguing the domestic market in Egypt, reports indicate that Egypt has become an exporter of pirated books, mostly to neighboring countries. The Egyptian government should look carefully at this issue before it grows to a massive scale.

**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, predominantly from Malaysia and Thailand, though some production also appears to be taking place domestically. The overall piracy rate for the video game products remains very high (the piracy rate was 85% in 2005). Piracy rings in Egypt continue to be run by large criminal syndicates, which also distribute to otherwise legitimate retailers. 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.”<sup>9</sup> The failure to include right holders’ experts in identifying pirate product is the cause of this problem.

**Internet Piracy in Small But Virulent Doses in Egypt:** Internet usage in Egypt has grown to five million users,<sup>10</sup> as the Middle East and Africa had among the fastest broadband growth in the world from 2005 to 2006, at over 65% growth year on year.<sup>11</sup> In fact, in the 3rd quarter of 2006, Egypt was the fastest growing DSL market in the world with a growth rate of 34.2%,<sup>12</sup> and Egypt was sixth in terms of percentage growth year on year, at well over 100% growth from 2005 to 2006 (only Greece, India, Croatia, the Philippines and Vietnam had higher percentage growth). Thus, it is not surprising that Internet-based piracy involving advertising websites (for pirate product on CDs, VCDs, DVDs, and the like) remains a problem. Internet piracy still makes up only a small percentage 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. Nonetheless, it is growing, and IIPA understands that there may be as many as 400 Internet cafés, none of which are using licensed software. The music industry, which suffers from the same forms of Internet-based piracy as the other copyright industries, also reports large-scale ring-tone piracy on the Internet, where ring-tones

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<sup>9</sup> An ESA member company reports that problems with the Egyptian government’s reliance on false licenses and related documentation continue, despite an understanding between the U.S. and Egyptian governments in 2001 that government sales licenses previously issued on the basis of falsified documents would be revoked. A particularly egregious case involves a company which is believed to be one of the largest distributors of pirated entertainment software products in the country. Sample product taken during a 2005 police investigation into this business were submitted to the Censorship Office of the Ministry of Culture for a determination of authenticity, and based solely on the documentation provided by the subject of the raid and absent an opportunity for the right holder to intervene, the Censorship Office determined that the products were “genuine.” Upon the insistence of counsel, the Censorship Office finally granted the right holder access to the documents upon which it had made its determination of legitimacy. Upon review of the documents, it became apparent that the Censorship Office’s determination of authenticity was (again) based on the same or similar false licenses which had been the subject of the 2001 discussions between the U.S. and Egyptian governments. The right holder has appealed this decision with the Public Prosecutor and the matter is ongoing.

<sup>10</sup> 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](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 5 million as of 2005. See <https://www.cia.gov/cia/publications/factbook/fields/2153.html>. See also <http://www.internetworldstats.com/africa.htm#eg> (which also indicates 5 million Internet users in Egypt).

<sup>11</sup> See Point Topic, Vince Chook, World Broadband Statistics: Q3 2006, December 2006, at <http://www.point-topic.com/contentDownload/dslanalysis/world%20broadband%20statistics%20q3%202006.pdf> (“With a relatively unsaturated market, the MEA is one of the fastest growing regions with an annual growth of 67.1% between Q3 2005 and Q3 2006”).

<sup>12</sup> This indicator includes all countries with a total number of DSL lines over 100,000.

and “ring-tunes” are illegally made available for downloading. With a dwindling physical market for recorded music, the importance of the digital market is growing by the day. However, it is still completely dominated by piracy, which accounts for over 95% of online ‘trade’ in music.

**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\$877).<sup>13</sup> Since collections take an unreasonably long time in Egypt, it is practically not worth pursuing cases in most instances. 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.

**Limited Enforcement Against Duplication Sites:** Industry has received sporadic reporting about enforcement actions in Egypt. In one involving pirate duplication of recorded music on CD-Rs and audiocassettes, the Cairo Anti-Piracy Police conducted a raid on a four-story apartment which was fully equipped as a factory. The police arrested two Egyptian nationals who were suspected as being responsible for the manufacturing and distribution of the “burned” CD-Rs and cassettes containing Arabic repertoire. In total more than 200 master CDs, several hundred “burned” CD-Rs, an estimated two million CD inlay cards, 120,000 cassettes, jewel cases, five cassette copying machines and computers were seized. In a separate case a few days later, another apartment was raided by the same police unit. The premises situated outside Cairo, was used as a cassette laboratory. During the raid police seized 25,000 recorded Arabic language cassettes and seven duplicating machines.<sup>14</sup>

## **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* Duties:** 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 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 motion pictures, the *ad valorem* duty can be as much as 46% of the value of a film, i.e., 32% for a copy of the movie, 12% on posters and 2% on the movie reel upon import into Egypt, and there are reportedly also similar *ad valorem* duties on sound recordings and entertainment software (for example, the import duty on finished music CDs has reportedly been 32% of the total value – cost according to invoice plus freight charges).

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<sup>13</sup> IIPA understands that there may now be some sentences in which the proper fine, of EL5,000, is being meted out per work rather than as a maximum fine. If so, this would be a positive development; however, we understand that judges and officials in Egypt still believe the EL5,000 fine is too high. Such attitudes are not helpful to achieve the deterrence necessary to drive piracy rates down in Egypt.

<sup>14</sup> See <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf>.



- **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. An Egyptian official claims that the 10% sales tax was repealed two years ago, but sources indicate this is still being charged on films. There is reportedly also a 20% box office tax for theatrical motion pictures; this tax should be removed.
- **A Censorship Certificate Release Fee:** Import costs are further increased by a release tax imposed on foreign films that is not imposed on domestic films. This discriminatory tax 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

**2002 Law and Implementing Regulations Leave Some Gaps in Protection:** The 2002 Intellectual Property Law and the 2005 Implementing Decree<sup>15</sup> appear to provide a reasonable basis to enforce the law and uphold the rights of copyright owners against piracy, whether of domestic or foreign materials. However, the Law and the Implementing Decree left many TRIPS deficiencies, some quite severe, and other ambiguous provisions, and failed to incorporate other changes recommended by IIPA in the past in order to create a truly modern copyright regime. The following recounts some of the key deficiencies and describes, where applicable, how the Decree deals with these issues. Where there is no mention below, the Implementing Decree did not address the issue raised.

- **Criminal Remedies:** The Code contains very low criminal penalties which appear not to meet the TRIPS test of criminal penalties available that are sufficient to provide a deterrent to further infringements. Specifically, Article 181 provides a prison sentence of “not less than one month” and a fine of EL5,000 to 10,000 (US\$877 to \$1,754). The minimum sentence of “one month” imprisonment is welcome, but there is no set maximum jail term (as there was in the old law), potentially rendering this provision much weaker than it was previously. Fines on their face appear insufficient to provide a deterrent. IIPA understands that the fine is to be imposed “per work” or “per title.” Fines should be increased, and, for example, should be

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<sup>15</sup> Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005).



doubled for recidivists (as of now a recidivist receives the mandatory minimum jail term and the maximum fine).

- **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. 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.
- **Ex Parte Civil Searches.** Article 179 does not 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 law should be amended to clarify the availability of this vital measure, in line with Article 50 of TRIPS.
- **Government-Sanctioned Sell-Off of Pirated Products Violates TRIPS.** 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 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.
- **Modern, TRIPS-Compatible Presumptions.** The law does not provide expressly for presumptions of copyright ownership (as required by TRIPS) or subsistence of copyright. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights. The law must be amended to comply with TRIPS.<sup>16</sup>
- **Requirement of 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 TRIPS and international obligations, is highly prejudicial to all right holders, including U.S. publishers, and it must be deleted.

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<sup>16</sup> The following formulation might, for example, be appropriate:

In civil cases involving copyright or related rights, each Party shall provide that the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner shall, in the absence of proof to the contrary, be presumed to be such designated right holder in such work, performance or phonogram. It shall be presumed, in the absence of proof to the contrary, that the copyright or related right subsists in such subject matter. A right holder or authorized person on his behalf may present evidence of the 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.

- **Broad Compulsory License.** Article 170 of the IP 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 contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed or deleted altogether.<sup>17</sup> The 2005 Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.
- **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.
- **Ambiguous Protection for Pre-Existing Works/Sound Recordings.** There is no provision in the Code ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion. Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS- and Berne-compatible) retroactivity for all subject matter under the law.<sup>18</sup>
- **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.
- **Article 171 Exceptions.** The law contains exceptions to protection which are quite broad and may be in questionable conformity with TRIPS Article 13. Preferably, 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

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<sup>17</sup> The Egyptian government must confirm that, if it intended to avail itself of Articles II and III of the Berne Appendix, it has kept up its renewals of its declaration, under Article I of the Berne Appendix. Otherwise, Egypt is no longer entitled to avail itself of these provisions.

<sup>18</sup> The simplest way to fix the retroactivity void in the Egypt draft would be to add a new article as follows:

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

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).

- **Civil Remedies.** 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 distrain this revenue in all cases,” although it is unclear whether this is intended to cover all civil damages. TRIPS requires the courts to have the authority to award “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity,” and in appropriate cases, suggests the availability of “recovery of profits and/or payment of pre-established damages,” even where the infringer did not knowingly (or with reasonable grounds to know) engage in the infringing activity. Egypt's law remains deficient on provision of adequate civil remedies.<sup>19</sup>
- **Restrictions on 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.
- **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.
- **Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.

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<sup>19</sup> The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

Where any of the rights conferred on the author in relation to his work under this Law [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.

- **Exclusive Rights for Producers of Audiovisual Works.** Article 177(5) clearly should not apply to sound recordings and therefore the word “audio” should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as “the natural or legal entity who produces the ... audiovisual work, and undertakes the responsibility of such achievement” [Article 138(11)]. Article 177(5) provides that the producer “shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing,” and “the producer shall be considered as the publisher, and will have the rights of the publisher ....” Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.<sup>20</sup> The producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.
- **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.

Unfortunately, the Implementing Decree creates additional problems. For example, Articles 11-16 appear to codify a registration (“recordal”) and deposit requirement in Articles 184-86 of the IP Code. These requirements may not in practice interfere with the exercise of rights (since the law expressly states that registration is not a prerequisite to protection), but certainly impose 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 another potentially 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.

There were two developments regarding the Intellectual Property Law No. 82/2002 in 2006. First, Prime Minister Decree No. 2202 was issued on November 26, 2006. This Decree introduced amendments to the schedule of fees related to the deposit of the works and other authorizations sought from the Ministry of Culture. Second, Decree No. 3286/2006 was issued by the Ministry of Justice on May 11, 2006, amending the powers of ITIDA.

**Generalized System of Preferences:** Egypt currently participates in the GSP trade 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 that it provides “adequate and effective protection of intellectual property rights.” In 2005, \$65.1 million worth of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 3.1% of its total exports to the U.S. During the first 11 months of 2006, \$65.4 million worth of Egyptian goods (or 3% of Egypt’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.<sup>21</sup> 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.

<sup>20</sup> The simplest formulation of the producer’s rights would be as follows: “Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof.”

<sup>21</sup> By contrast, 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### INDIA

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

## **EXECUTIVE SUMMARY**

Effective enforcement against widespread copyright piracy including, judicial reform and legislative improvements were actively discussed as part of the new U.S.-India Trade Policy Forum (TPF). However, there was little significant progress in any of these areas in 2006 though regular meetings are continuing. Piracy rates and losses remained essentially unchanged and progress on the problems that IIPA and its members have raised over at least the last five years has yet to emerge.

## **PRIORITY ACTIONS TO BE TAKEN IN 2007**

- **Establish Specialized IP Courts or IP Judges, Increase Speed of Adjudication of Criminal and Civil Cases, and Increase Deterrence:** While this topic has been a key part of the TPF, and is an essential ingredient for improvement in this area, there has been no progress to date. Piracy levels will remain essentially unchanged in India without the creation of efficient and deterrent judicial remedies. 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.
- **Adopt a System of Statutory Damages:** Existing law casts the entire onus of proving the amount of damages suffered on the right holder. India should introduce a system of statutory damages in civil cases to provide the right holders with an alternative to proving actual damages.
- **Create a National Anti-Piracy Task Force:** This continues as a major priority. The lack of national enforcement coordination (enforcement in India is a “state” matter) has resulted in low priority for anti-piracy enforcement and the absence of a national policy to provide effective copyright protection. 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.

- **Reinvigorate “IP Cells” within the State Police, Provide them with Significantly Increased Resources and Establish Specialized IP Prosecutors:** While the government announced in 2002 the setting up of 19 such IP cells, few are fully functioning. The local affiliate of the international recording industry, the Indian Music Industry (IMI) reports, for example, that more than 40% of all raids they conduct in Tamil Nadu and Kerala are in conjunction with these IP cells. However, all these cells are woefully under-resourced and in most states they do not function effectively at all. The one in Mumbai is located in the Social Service Branch, and focuses on illegal activities not related to IPR, giving anti-piracy work no priority. The Chennai cell merely acts as a data collection center and does not conduct raids. The lack of resources and manpower make all of these cells incapable of raiding larger pirate distribution and production targets. Training and funds are desperately needed. In addition, the lack of trained prosecutors severely hinders effective enforcement. States should set up specialized prosecutorial units, trained and unhindered by existing backlogs, to prosecute piracy crimes, guided and funded by the National Anti-Piracy Task Force and the government.
- **Increase the Number of *Suo Moto* Raids:** In a welcome development, virtually all states are now conducting *suo moto* (*ex officio*) raids in most copyright sectors (book piracy being a glaring exception). However, the number of raids must be significantly increased as part of the creation of the deterrence needed to drive piracy rates down. This means increased resources and manpower to the local IP cells as well as increased training. 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 Regulations:** India has 20 optical disc plants with an estimated 166 lines and known pirate production. Total capacity of these plants is 581 million units annually. Three of these plants were raided in 2006 and a substantial amount of pirate product was seized from two of the plants located in Delhi.<sup>1</sup> India should adopt modern optical disc regulations 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. This legislation has been under discussion for at least three years and must now be adopted without further delay.
- **Enact Copyright Law Amendments Consistent with WCT and WPPT:** After many years of discussion within a “core group” appointed by the Ministry of Human Resources Development (HRD), HRD finally released a draft in early 2006 and sought public comment. Since that time, we have seen no progress in introducing good legislation into the Parliament. 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. The draft amendments still fall well short of these goals. We hope that HRD is reworking its draft to include key

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<sup>1</sup> One plant raided by IMI in Kerala was owned by the wife of the Inspector General of Police. The raid was unsuccessful.

protections necessary for the digital age: An improved Bill should then be promptly introduced into Parliament and adopted into law.

- **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/circular (proposed by the U.S., UK and Indian publishing industries in early 2006 and promised then by HRD) 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. It is inexcusable that this Circular has not yet been issued.
- **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; (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film's Indian theatrical run; and (c) prevent the export of pirate and low-cost India editions of textbooks, including to the U.S. Given the vast import and export problem, Customs must develop a database of pirates and counterfeiters, link port information and conduct *suo moto* actions against infringing imports and exports.
- **Remove Market Access Restrictions in Andhra Pradesh and Tamil Nadu:** Market access restrictions in Tamil Nadu by way of discriminatory taxes on non-Tamil and dubbed films have only been exacerbated in 2006 by a further reduction in taxes on local films. A number of measures were also taken in 2006 in Andhra Pradesh to discriminate against non-Telegu films. These market access restrictions need to be removed.

For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>INDIA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>2</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	52.7	55%	56.4	57%	67.3	50%	6.0	40%	6.6	40%
Business Software <sup>3</sup>	318.0	70%	255.0	72%	239.0	74%	187.0	73%	257.7	70%
Motion Pictures <sup>4</sup>	NA	NA	NA	29%	80.0	60%	77.0	60%	75.0	60%
Entertainment Software <sup>5</sup>	85.6	82%	65.2	86%	59.5	86%	113.3	84%	NA	NA
Books	40	NA	42.0	NA	38.0	NA	36.5	NA	36.5	NA
<b>TOTALS</b>	<b>496.3</b>		<b>418.6</b>		<b>483.8</b>		<b>419.8</b>		<b>375.8</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN INDIA**

**Court Failure to Conclude Cases – Criminal:** The principle challenge posed by the Indian enforcement system is to make the criminal system work despite corruption, inefficient court procedures, lack of training, massively long delays, and few convictions (and even those are followed by low fines and virtually no significant jail terms). There have been few criminal convictions under the criminal copyright piracy provision of the Copyright Act (Section 63B) since January 1, 2000 – reportedly five for movie piracy, none for software piracy and only a few for music and book piracy. Since 2003, IIPA reported that in the over 15 years that IIPA has been working on Indian copyright issues, there have been no more than 15 convictions for copyright piracy under Article 63B the criminal copyright piracy provision as far as industry is able to ascertain. However, IMI has obtained more than 1200 convictions since 1997 under Section 52A of the Copyright Act which criminalizes failure to use the required certificate on sound recordings (Section 52A also applies to videos and DVDs). Fines in these cases have ranged from Rs. 50 (US\$1.14) to Rs. 200,000 (US\$4,550.00) and imprisonment of one day up to the maximum permitted under the law of three years.<sup>6</sup> While IMI reports increased penalties imposed under Section 52A, most of these cases involve very small fines and only a few have

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of India under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in India, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</sup> 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.

<sup>6</sup> Unlike Article 63 which carries minimum fines and jail terms, (Rs. 50,000 (US\$1,140) and six months), Article 52A offenses bear no minimum fine or minimum jail term and historically fines under Article 52A have been notoriously low and non-deterrent.



involved jail time. IMI reports that some states like Tamil Nadu are faster in concluding criminal cases than other states and in Rajasthan, penalties imposed have been more severe than other states.

In July 2006, MPA reported its fifth conviction for video piracy In India. This was in a Mumbai court which imposed a six month jail term on two pirates and fines of Rs. 55,000 each.<sup>7</sup> The case began with raids in 2004 against the defendants' roadside kiosks and it is hoped that these convictions will contribute to some deterrence. However, MPA has over 1,900 pending criminal cases, the publishing industry over 600 cases, the recording industry (mainly Section 52A cases) over 8,000 and BSA has 16 cases.<sup>8</sup> Despite this abject failure to actually convict pirates, pretrial detention (1,308 total days for book pirates over the last six years) and permitted one year maximum detentions under the Goonda Act in Tamil Nadu have resulted in some deterrent effect.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006</b>				
<b>INDIA</b>				
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS SOFTWARE</b>	<b>SOUND RECORDINGS</b>	<b>TOTALS</b>
NUMBER OF RAIDS CONDUCTED	716	0	2501	3217
NUMBER OF VCDs SEIZED	467,879	0	2,010,925	2,478,804
NUMBER OF DVDs SEIZED	258,465	0		258,465
NUMBER OF CD-Rs SEIZED	37,180	0	1,450,000	1,487,180
NUMBER OF INVESTIGATIONS	1,663	0	2708	4,371
NUMBER OF VCD LAB/FACTORY RAIDS	0	0	3	3
NUMBER OF CASES COMMENCED	698	0	1000	1698
NUMBER OF INDICTMENTS	0	0		0
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	4	0	70	74
ACQUITTALS AND DISMISSALS	0	0		
NUMBER OF CASES PENDING	2,062	16 <sup>9</sup>	8000	8000
NUMBER OF FACTORY CASES PENDING	169	0	4	173
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	0	0	40	40
SUSPENDED PRISON TERMS	0	0		0
MAXIMUM 6 MONTHS	0	0		0
OVER 6 MONTHS	0	0		0
OVER 1 YEAR	0	0		0
TOTAL SUSPENDED PRISON TERMS	0	0		0
PRISON TERMS SERVED (NOT SUSPENDED)	0	0		0
MAXIMUM 6 MONTHS	0	0		0
OVER 6 MONTHS	0	0		0
OVER 1 YEAR	0	0		0
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	0	0		0
NUMBER OF CASES RESULTING IN CRIMINAL FINES	0	0	30	30
UP TO \$1,000	0	0		0
\$1,000 TO \$5,000	0	0		0
OVER \$5,000	0	0		0
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	0	0		0

<sup>7</sup> It is positive and noteworthy that the fines exceeded the Rs. 50,000 minimum provided in the Copyright Law. Courts have generally been ignoring the Law's minimum fine and have imposed actual fines below this figure. In addition the jail terms were the minimum required under the law – six months – also ignored by the courts in many instances.

<sup>8</sup> 112 cases were at the prosecution stage at the end of 2006, with charges framed in 64 cases. In one book piracy case in Jaipur, the Magistrate let the accused go under the Probation Offenders Act 1958 without a prison sentence, and imposed a fine under the statutory limit.

<sup>9</sup> These cases date from as far back as 1998.

**Court Failure to Conclude Cases – Civil:** The business software and motion picture industries continue to use civil cases with varying degrees of success. In the last quarter of 2006, the software industry took four civil end-user actions, via Anton Piller orders, which were granted by the Delhi High Court, and out-of-court settlements are now being finalized. While BSA obtained a significant civil damages verdict in 2005,<sup>10</sup> India is not viewed as a country with a damages culture; there are few such examples in the copyright area. As noted elsewhere in this report, adoption of a statutory damages regime would be most helpful.

MPA had 18 civil actions pending at the end of 2006 but has had considerable success over the years in using the civil system to obtain preliminary injunctions against pirate cable systems and against rental shops. This preliminary relief has had some deterrent effect, even though these cases rarely if ever come to judgment with damages awarded and even contempt proceedings brought for violation of such injunctions rarely (if ever) are concluded.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006: INDIA				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF CIVIL RAIDS CONDUCTED	0	4		4
POST-SEARCH ACTION	0		3	3
CASES PENDING	27	1		28
CASES DROPPED	0			0
CASES SETTLED OR ADJUDICATED	0	4		4
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)	0	NA		0
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	0	NA		0

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 must 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.

**Suo Moto Raids Have Now Taken Hold in India:** In IIPA's 2006 report, it was noted positively that many states were taking *suo moto* raids in certain copyright sectors. MPA reports, for example, that they are now receiving such raids in all Indian states in which they operate, including Maharashtra, although, in this state, *suo moto* actions remain largely the exception to the rule. It still regularly requires the filing of a formal complaint. IIPA again commends the Indian state governments and the various police forces for recognizing the importance of and actually taking such *ex officio* action. The recording industry also reports that IMI has been obtaining *suo moto* raids in all parts of the country, especially Kerela, Tamil Nadu, Gujarat, Bihar, and West Bengal. In 2006 *suo moto* raids have become far more commonplace – a

<sup>10</sup> This was viewed as a landmark decision by the Delhi High Court where it 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.

welcome development – but they continue to remain the exception to the rule in the publishing sector. But we know that 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 a positive impact in deterring piracy. Under this Act, pirates can be placed under preventive detention for up to one year. This resulted in a dramatic decrease in piracy in this state. We understand that many OD “burning” operations have since moved from Chennai (where the police had been particularly proactive). The music industry also noted in IIPA’s 2006 report the deterrent effect on music piracy 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. However later reports are that, following the recent change in Government and with a new Chief Minister who is not so closely linked to the entertainment industry, the film piracy provisions of the Goonda Act are no longer being enforced in Tamil Nadu.

**Internet Piracy:** Growth of broadband in India increased by 185% between 3Q 2005 and 3Q 2006. India had 7.7 million Internet subscribers as of June 2006 and at the end of 3Q 2006, 1.825 million broadband subscribers.<sup>11</sup> While overall penetration is still small, the growth rate is very high and it is therefore not surprising that the record industry reports that MP3 music file-sharing and other P2P file-sharing is starting to significantly harm the music market in India.<sup>12</sup> Cell phone “ringtone” piracy has also become a major source of damage to the music industry, with massive numbers of unauthorized ringtones being downloaded in India every day. IMI has also filed two cases involving mobile chip piracy in Bangalore and Mumbai. Internet café piracy is a significant problem for entertainment software publishers. Most, if not all, of the 100,000 Internet cafés in the country use unlicensed entertainment software. An ESA member company also reports that Ebay India is teeming with vendors of pirated video game product. The Business Software Alliance (BSA) reports that online infringements of its members’ software increased significantly to 6,700 in the first 11 months of 2006. Furthermore, the book publishing industry is starting to see an increase in Internet-based book piracy. That Industry has engaged in a number of recent takedowns, with some success, but web sites remain, hosting hundreds if not thousands of scanned books for sale or download. There is still no formal notice and takedown system in the Indian Copyright Law and the copyright law has still not been updated to cover WIPO Treaties obligations. 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 2006 was notice and takedown.<sup>13</sup> In January 2006 the major music industry group in India announced it may soon target the Internet service providers facilitating online infringement; in 2006 ISP cooperation has not been forthcoming.<sup>14</sup>

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<sup>11</sup> Point-Topic, Inc., *World Broadband Statistics Q3 2006*, December 2006, on file at IIPA.

<sup>12</sup> The recording industry identified 875 pirate sites during 2005.

<sup>13</sup> For example, in the book publishing area, a takedown was effectuated by the UK Publishers Association (PA) against an Indian website in the fall of 2006. The infringer paid US\$4000 to the UK PA and US\$3,500 in damages to the Harry Potter series author, JK Rowling. The site was offering 700 e-books.

<sup>14</sup> 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

### **Optical Disc Piracy – Some Factory Production but Predominantly “Burned”**

**Discs:** In 2005, IIPA reported an alarming increase in optical disc (OD) production capacity in India. As noted above, there are now 20 OD factories in India, with at least 166 production lines and a capacity of at least 581 million discs per year. In the summer of 2006, the IMI with the cooperation of the Indian Censor Board raided the Deepak Arts OD plant in Delhi and seized over 21,000 infringing discs and over 350,000 inlay cards along with two production lines. In a welcome development the owner of the plant and three other suspects were arrested and remanded into custody. This raid demonstrates the need for India to adopt an effective and modern 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, but a draft law has yet to have been made public and appears to be held up within MIB. A good optical disc law should be adopted this year. Notwithstanding 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 in MP3 formats, pre-release music (lots of Indian titles and some international repertoire),<sup>15</sup> 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. 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 are now predominately “burned” product, saturating kiosks and flea-market type venues in the country. Burn-to-order operations are prevalent, with stalls/stores typically carrying little inventory on hand but capable of producing several hundred “burned” pirated products within a 24-hour period. Though large retailers are generally free of pirated video game products, the availability of pirated games at kiosks and informal markets makes it impossible for legitimate business to compete. The entertainment software piracy level is estimated at 82%.<sup>16</sup>

**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 2006, to US\$318 million (US\$ 706 million for all software publishers and vendors), while the piracy rate fell slightly from 72% to 70%, which is still much higher than the regional average in

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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. Since then there has been no cooperation.

<sup>15</sup> 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.

<sup>16</sup> Entertainment software publishers are continuing to find compilation discs of so-called “demo games” in the market. Demo games are shortened (sample) versions (e.g., 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, that is, putting demo games from various entertainment software publishers onto a single disc.

Asia of 58%. The four civil end user cases brought this year appear to have ended positively but criminal enforcement simply fails to work. In the one retail case in which BSA did achieve a conviction in 2002, the matter was successfully appealed by the defendant. In short, there has never been a successful criminal conviction for software piracy in India.<sup>17</sup>

**Book Piracy–Pirate Printing 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. The industry estimates that publishers lose about 50% of the market to pirates, despite the fact that prices for legitimate titles in India are among the lowest in the world. Percentages may soar even higher for certain individual works.<sup>18</sup> Photocopying remains a problem at public and private educational and research institutions and is on the rise with regard to medical texts.<sup>19</sup> Sales of CD-ROMs, medical, technical and reference books are also growing.

The publishing industry continued to be active in addressing all forms of book piracy in 2006. 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.<sup>20</sup> In contrast to IIPA's report for 2005, authorities in Bangalore have been far more cooperative in 2006 and the situation in this city is much improved. While there was some late-year cooperation in Mumbai, authorities' actions there remain spotty as reported in the 2006 report. All in all, the regional and city differences remain a huge problem. A national IP task force would help to address the uneven enforcement in various states and cities. Publishers have still not obtained a single conviction for book piracy.

One initiative new for 2006, on which there has been no progress and much disappointment, centers around the issuance of a circular to universities in India concerning illegal reproduction of academic materials by students and lecturers on campuses. After a high level delegation of U.S. and U.K.-based publishers visited India in February 2006, HRD agreed to work with appropriate administrations to make sure the circular is publicized and implemented. Industry reports that, despite much encouragement from their side, nothing has happened with this promise. Circulating and implementing this notice would be a good first step toward taking active measures to combat illegal copying of materials on India's university campuses.

**Book Exports Harm Markets Outside India:** For years publishers have complained about the unauthorized export to other countries of low cost reprints licensed for sale in India only. Action has rarely been taken despite repeated requests. However, in 2006, after several

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<sup>17</sup> Around 46 retail cases that have been pending for a few years without reaching court are now time barred.

<sup>18</sup> 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.

<sup>19</sup> Raids on the All-India Institute of Medical Sciences in Delhi, India's pioneer medical education institution, revealed that the originals used for making photocopies by the pirates were issued by that institution's library. In another action in Kanpur in the State of Uttar Pradesh, the copy shop raided by the police was found to be owned by an assistant Librarian of Kanpur Medical College, who was arrested. An inquiry is ongoing.

<sup>20</sup> But the problem remains severe for popular titles. For example, on October 26, 2006, the Bangalore police raided a number of printing enterprises, seizing more than 16,000 pirated trade best sellers and more than 40,000 covers.

months of investigation, Customs was finally persuaded to intercept a shipment of India-only reprints bound for Nigeria. 650 cartons were impounded at the port and the exporter was called in for questioning. Finding the name of the wholesaler will allow publishers to determine no longer to deal with those who export these books without authorization. Hopefully this action will send a clear message to those who engage in these practices. Pirates have also been increasingly using the Internet as a means for distribution and/or order management. Sites operated by Indian companies now offer shipment of pirated books in hard copy to users worldwide, including in the United States. Many operators of these websites are highly organized companies with sophisticated acquisition and distribution systems.

**Unauthorized Rental of Motion Pictures:** Piracy via unauthorized rental has been a problem but in 2006 MPA has achieved some success in bringing civil and criminal actions against these rental shops, resulting in obtaining preliminary injunctions and citations for contempt for violation of those orders. However, pirate rental libraries exist all over India and it will take some time for the legitimate rental business to become established. It is hoped that these actions will deter some of this conduct.

**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 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 against MPA. Pirates who are raided have formed organized groups, and 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.

## **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.<sup>21</sup>

IIPA has reviewed the new draft copyright amendments placed on the Copyright Office's website at the beginning of 2006.<sup>22</sup> These had been in preparation for the last five years. In prior

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<sup>21</sup> See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

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 was pleased to see that the Copyright Office has now completed this initial work and finally opened up the process for full public comment. However, since that time, IIPA has heard of no further developments, though a number of IIPA members have filed comments on the draft.

IIPA has reviewed the draft and notes that there are many positive amendments. 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.
- **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;<sup>23</sup> (b)

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<sup>22</sup> The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>

<sup>23</sup> The motion picture industry is concerned that this exception in Section 52(1)(a)(1) can also be interpreted to permit the making of camcorder copies in theaters under the pretext of their being for private and personal use. It appears that the HRD has attempted to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theatres by further limiting the exception for private use to “private and personal use”. However this does not alleviate the foreseeable difficulties with such an exception as such a broad exemption can completely undermine the anti piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use” is covered under the three-step test in the Berne Convention and TRIPS. Since India must adhere to *minimum* international standards of copyright protection and its treaty obligations and for clarity in application, MPA strongly urges the HRD to further revise this Section to explicitly incorporate the three - step test into the law and remove any potential for camcording in theatres as permitted personal use.

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 reproduction of books by libraries; (f) an overbroad exception with respect to making reproductions of books not available for sale in India; and (g) a change in the scope of the rental right.<sup>24</sup> These and certain other exception would violate India’s obligations under the Berne Convention and the TRIPS Agreement.

- **ISP Liability and Exceptions thereto:** While not required by the Treaties, the issue of secondary liability of ISPs and exceptions to such liability has been dealt with in the laws of most countries implementing the WIPO Treaties. Clarity on such issues is indispensable to the fight against online piracy, and implicate the enforcement provisions of the Treaties and of TRIPS. The draft appears to deal with this issue, at least in part in Section 52(1)(c)(ii), but that treatment is far too terse and oversimplified as to be appropriate for this complex area. We urge that this provision be substantially revised or replaced by detailed provisions modeled on the way these sets of issues were dealt with in the U.S., the EU and in many other countries in Asia.

**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. The MPA strongly supports legislation, in addition to copyright law amendments, that specifically make it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre. Legislation passed in the United States prohibiting “camcording” has been successful at stopping the use of these unauthorized copies for making pirate DVDs, and similar legislation in India would be a very positive step towards reducing the piracy hurting India’s motion picture industry.

## **GENERALIZED SYSTEM OF PREFERENCES**

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective” copyright protection. In 2005, \$4.2 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 22.3% of its total exports to the U.S. During the first 11 months of 2006, \$5.1 billion worth of Indian goods (or 25.8% 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 35.2% increase over the same period in 2005.

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<sup>24</sup> 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.



## **MARKET ACCESS**

Many market access barriers in 2006 hindered copyright owners' abilities to participate fully in the market in India for copyright materials. For the motion picture industry, entertainment taxes vary widely among Indian States, ranging from 15 - 40% in some key markets, 40 - 70% in other states, and in a small number of states, 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is reasonably estimated to be 35 - 40%, and constitutes a significant disincentive to the much-needed cinema construction in India. Additionally, at the request of their local state film industries, a few states now follow a differential tax regime under which the local state language films are charged nil or lower tax rates while the non-state language films are charged higher rates.

For the business software industry, high excise taxes on packaged software have increased the price of legitimate software, increasing the use and sale of pirated software. These taxes should be eliminated.

Of particular concern to the broadcast industry are the Downlinking Guidelines introduced by the Ministry of Information & Broadcasting in late 2005. These guidelines place significant disincentives on foreign investment via their tax implications for foreign broadcasters, who now must be registered in India and their requirement that all sport events be shared with the local Indian public broadcaster. Additionally, a 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.

The MPA also reports market access restrictions in the states of Andhra Pradesh and Tamil Nadu. In the former, three major problems arose in 2006. At the start of the year the Telegu Film Producers Council ("TFPC") effectively prevented television advertisements of non-local language (i.e. non-Telegu) movies by booking all the available advertising slots for television advertisements and quoting exorbitant resale prices for their subsequent use. Non Telegu movie companies also faced unfair restrictions against the simultaneous release of their movies in multiple languages and had to instead wait until several weeks after the first single language release before releasing other language versions. To make matters worse, on November 6, 2006 a Notice was issued by the TFPC to its members. The Notice asked that the TFPC's members immediately register all films already dubbed with the TFPC before November 6, 2006, and that no further films should be dubbed following that date.

In Tamil Nadu, the current tax structure has been heavily weighted against non-Tamil movies for some time. While Tamil movies with Tamil titles get complete state-wide tax exemptions, non-Tamil movies are currently effectively taxed at 50%. In Mid 2003 the Tamil Nadu State Government, under the then leadership of Chief Minister Jayalitha, via a Notification imposed a double rate of taxation on all films dubbed into Tamil. As the then prevailing rate of entertainment taxes was 25%, the tax for dubbed films became 50%. Lobbying by various local

groups (including MPA, the Film Federation of India (FFI), the Film and TV Producers Guild (FTPG) of India and also the local Tamil Film Industry Associations (SIFCC, TN Film Exhibitors Association, TN Dubbed Film Association etc.)) to move the Tamil Nadu State Government to withdraw this penal rate of double taxation on films dubbed into Tamil was unsuccessful and the local Government refused to recant on the notification. Accordingly, the Tamil Nadu Dubbed Films Distributors Association applied to the Madras High Court, which granted a Stay Order against the levy of the enhanced double rate of taxation on dubbed films. Local exhibitors are however continuing to pay the dubbed entertainment taxes at 50% on dubbed films and keep this money on deposit. The reasoning for this move is said to be as a contingency in case the high court removes the order. The local Government subsequently further reduced entertainment taxes from 25% to 15% on all non Tamil Films. However as the dubbed films (into Tamil) case was then pending before the High Court, this reduction was not made applicable to taxes on dubbed films. Consequently taxation of dubbed films continued, and continues, at 50% instead of at least a reduction to 30% (i.e. double the rate of 15% on normal non Tamil language films).

## **TRAINING**

IIPA member associations continued to conduct training in 2006. In February 2006 BSA's counsel in India spoke at the National Judicial Academy, Bhopal, to about 40 High Court Judges drawn from various High Courts in India on the issue of "Copyright Enforcement with Special Reference to the Entertainment and Software Industry". On 13th October 2006, BSA provided 35 officers of the Pune Police training on software piracy and product identification. In addition BSA's counsel also addressed the Delhi Police on 29-30 November 2006 on software piracy issues.

In November 2006, Electronic Arts (an ESA member company) participated in a cyber crime training program in New Delhi. The program, organized under the auspices of the Federal Bureau of Investigation (FBI), the U.S. Chamber of Commerce and the STOP! Initiative, was targeted to domestic police and related enforcement personnel.

The local recording industry association (IMI) has conducted more than 75 training programs in India in various states for the police, judiciary and public prosecutors. 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ISRAEL

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

#### **EXECUTIVE SUMMARY**

The Israeli government's legislative body, the Knesset, has passed the Copyright Amendment Bill 2005 on first reading. The Bill was returned to the Knesset Economics Committee for review before it proceeds to the second and third readings. The Bill, if passed in its current language, would discriminate against foreign producers of sound recordings specifically, and potentially violate Israel's bilateral obligations to the United States. The government of Israel should refrain from taking any steps that would weaken copyright protection, particularly for foreign sound recordings, at a time when copyright protection is increasingly fragile in Israel. In other respects, the Bill fails to address key WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) issues (e.g., there are no provisions in the Bill to protect technological protection measures from unlawful circumvention or trafficking in circumvention tools) and the Bill contains other problematic provisions.

#### **ACTIONS TO BE TAKEN IN 2007**

- **The Knesset should reject attempts by the government to pass copyright legislation that is hostile to right holders and may violate Israel's bilateral obligations to the U.S.:** The Knesset should send the Copyright Bill, 2005 back to the Executive for reconsideration in light of the many points made in this submission and previous submissions to the Israeli government. For example, notably, the draft does not include provisions to protect against circumvention of technological protection measures used by creators to protect their works in the online and digital ages or against trafficking in circumvention devices. Rather than moving backward on copyright, as this Bill proposes to do, the Israeli Government should move forward, including fully implementing the WCT and WPPT. Other attempts to change the copyright legislation include a Bill on the establishment of a new copyright tribunal which also proposes 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 are understaffed, under-funded, uncoordinated, and refuse to take actions *ex officio*. The National Police Unit should have the authority to coordinate districts for more effective and sustained enforcement.
- **Tackle Burgeoning Internet Piracy Problem:** The police are not actively pursuing Internet piracy cases and are not willing to assist in the raiding of Internet pirates.
- **Give Copyright Piracy Cases Priority Attention:** Police attorneys and prosecutors have shown little inclination to undertake criminal enforcement against commercial pirates. 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.

- **Apply Deterrent Penalties:** The courts are very lenient when imposing sentences on defendants in criminal copyright infringement cases in Israel. The sentences are very short and are suspended, and fines imposed are non-deterrent.
- **Introduce and Implement Optical Disc Legislation:** Israel should urgently introduce effective optical disc plant control measures including: (a) the registration and licensing of manufacturers of optical discs; (b) compulsory use of source identification (SID) codes; (c) provisions allowing for unannounced inspections/raids on plants to determine if they are operating outside the scope of the license and/or producing unauthorized product; (d) the seizure of infringing copies and machinery; and (e) the possibility of imposition of criminal penalties to deter the manufacturing and distribution of pirate optical media.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>ISRAEL</b> <b>ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY</b> <b>(IN MILLIONS OF U.S. DOLLARS)</b> <b>AND LEVELS OF PIRACY: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music</b>	45.0	50%	28.0	35%	34.0	40%	40.0	63%	34.0	50%
<b>Business Software<sup>2</sup></b>	41.0	32%	39.0	32%	30.0	33%	35.0	35%	29.9	37%
<b>Entertainment Software<sup>3</sup></b>	11.4	84%	NA	95%	12.4	88%	NA	75%	17.2	68%
<b>Books</b>	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
<b>Motion Pictures<sup>4</sup></b>	NA	NA	61.0	61%	30.0	40%	30.0	50%	30.0	50%
<b>TOTALS</b>	<b>98.4</b>		<b>129.0</b>		<b>107.4</b>		<b>106.0</b>		<b>112.1</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Israel under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Israel, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> 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. Piracy at the retail level remains problematic, though it appears to now be largely domestically burned hard goods. There has also been a substantial increase in Internet piracy, specifically the downloading of pirated materials.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

## **COPYRIGHT LAW REVISION**

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).<sup>5</sup> The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).<sup>6</sup> The various laws have been amended a number of times over the years, including an amendment in 2002 which strengthened criminal remedies and was helpful in other ways.<sup>7</sup> Nonetheless, there are a few TRIPS deficiencies in practice, including the unavailability in practice of adequate civil damages, and the inadequacy of the statutory damages system as a substitute.<sup>8</sup>

**Copyright Bill – 2005:** As noted, the Israeli government's legislative body, the Knesset, has passed the Copyright Amendment Bill 2005<sup>9</sup> on first reading, and it is now under deliberation at the Economics Committee before proceeding to the second and third readings. As also noted, the Bill, if passed, would set back protection in Israel, discriminate against foreign producers of sound recordings, and potentially violate Israel's bilateral obligations to the United States. The government of Israel should refrain from taking any steps that would weaken copyright protection at a time when copyright protection is increasingly fragile in Israel. The following recounts the major issues in the Copyright Bill 2005, prior to its revision in the Economics Committee.<sup>10</sup>

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<sup>5</sup> Other ancillary legislation includes the Copyright Order (Berne Convention) (1953) (as amended through 1981), which implemented the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, and the Copyright Order (Universal Copyright Convention) (1955), which implemented the UCC in Israel. The 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).

<sup>6</sup> Detailed discussion of the merits and deficiencies of the current legal regime has been included in prior reports, and can be found, e.g., at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-152.

<sup>7</sup> 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 therein"). The amendment also improves presumptions regarding copyright ownership that apply to both civil and criminal proceedings, although it remains unclear 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.

<sup>8</sup> 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.

<sup>9</sup> The "Copyright Bill – 2005" (published by the Government of Israel on July 20, 2005), according to the government, aims to modernize Israel's protection of copyright and to implement the key international agreements with respect to copyright, including the Berne Convention, Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on September 28, 1979), which is incorporated into the WTO TRIPS Agreement, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1994), as well as aiming to adhere to Israel's current bilateral obligations. 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." This has been confirmed by the Israeli government as meaning that U.S. sound recordings will be protected on the basis of the principal of national treatment. The Draft also included at least some issues addressed in the WIPO "Internet" Treaties, the WCT and WPPT.

<sup>10</sup> While the changes in the Economics Committee have not been made transparent to IIPA, we understand several changes are positive (e.g., on protection of temporary copies), but that some of the changes, particularly with respect to exceptions (temporary copies) and computer program exceptions may not fully comport with international

## Summary Comments

The Copyright Bill, 2005 (hereinafter Draft), if passed without change,<sup>11</sup> would result in weakened protection (e.g., with respect to phonograms), or in violations of Israel's international and/or bilateral commitments, and would result in other areas not being covered (e.g., protection against circumvention of "technological protection measures" used by creators to protect their creations).<sup>12</sup>

- 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 foreign 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.
- The Draft appeared 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 (but we believe this may be the subject of positive revisions in Committee).<sup>13</sup>
- 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.

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standards, and do not fully resolve the issues addressed in this report. In other respects, the changes do not address the issues raised in the report at all and these comments remain valid.

<sup>11</sup> As noted, some of the changes proposed by the Economics Committee would make positive improvements in some areas.

<sup>12</sup> There are also many other positive aspects of the Bill, and we do not list those aspects here.

<sup>13</sup> A major shortcoming in the Draft's criminal provisions was 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."

- **The reproduction right** in the Draft, read with the exception in Section 26 for certain indispensable transient reproductions, **appears now to protect temporary copies** (i.e., we believe it is one of the areas successfully addressed in Committee).
- Since the law provides **no automatic or express point of attachment** for foreign creations (including phonograms) in accordance with Section 9, appropriate **“Orders” that have been issued** in the past referring to the Berne Convention, TRIPS Agreement, Rome Convention, the U.S. Bilateral Agreements and other bilateral and international agreements to which Israel is a party, should be updated and amended 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 amended to ensure it complies with Israel’s TRIPS obligations.
- 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. (While we understand some changes were made with respect to exceptions, we do not believe they resolved potential TRIPS issues of overbreadth).
- 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

**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 could also 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 published in Israel 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.<sup>14</sup> Such discrimination is unprecedented in Israel's copyright history and, at least with respect to U.S. sound recordings, violates Israel's 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 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

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<sup>14</sup> 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, the Orders that have been issued do not seem to appropriately implement these obligations. The 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.



dispute that Israel must provide national treatment for works).<sup>15</sup> 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.

**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.

**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

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<sup>15</sup> 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]

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 [an] 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.<sup>16</sup>

#### **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.<sup>17</sup> TPMs are key enabling technologies for healthy electronic commerce, and protection of TPMs is a key feature of the WCT and WPPT. 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.

**Reproduction Right (Temporary Copy Protection):** The reproduction right in Paragraph 12(1) of the Bill as first proposed, along with the exception in Paragraph 26, apparently confirms that Israel protects temporary copies. We understand changes in the text that will be considered for second reading will confirm that temporary copies are

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<sup>16</sup> 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.

<sup>17</sup> 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.

covered under the reproduction right, but that the exception still may fall short of meeting the Berne three part test for exceptions,

**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:** 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 understand there may already be agreement to adopt the draft, and we register our concern that the result of this change could result in considerable case law interpretation

in Israel on “fair dealing” being 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 the introduction of 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 Draft exceptions as to computer programs run afoul of international standards and must be more narrowly tailored. While IIPA has not reviewed the latest draft in Committee, we understand that there have been certain improvements to the scope of the exceptions (for example, we understand the back-up copy exception may be limited to a single copy, subject to destruction once its back-up purpose is no longer needed). Nonetheless, the exceptions apparently still go beyond what can pass muster under international standards, since they apparently allow for reproduction or adaptation for purposes of interoperability and for purposes that go beyond interoperability, and do not contain the safeguards to ensure that the copying is limited to the portion of the work needed for purposes of achieving interoperability, etc. Assuming the purpose in the latest draft remains to enact a provision that allows lawful users to achieve interoperability, but keeping in mind the three-part test for exceptions, the drafters must ensure that the exception can meet the Berne three-part test, and it is suggested they should review and take into consideration the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6,<sup>18</sup> and appropriately narrow the exception.
- **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***

<sup>18</sup> 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

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.<sup>19</sup> The international trend is to provide at least seventy years for both audiovisual works and sound recordings, and the government of Israel should not do the creators of audiovisual works and sound recordings the extreme disservice of prejudicing them by providing shorter terms.

**Parallel Importation:** 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\$23,630). 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.”

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

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<sup>19</sup> 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.

## **OTHER COPYRIGHT-RELATED LEGISLATION**

**Copyright and Performers Rights (Royalties Tribunal) Bill 2006:** This Bill was published on July 10, 2006, has also passed first reading and is now pending before the Economics Committee. No date has reportedly been set for discussions on this Bill although it may be dealt with in conjunction with the 2005 Bill. Most of the provisions deal with dispute resolution procedures. The main problems with this Bill are: (a) it obliges the collection of broadcasting and public performance royalties for works recorded on phonograms to take place under one umbrella organization, for all right holders involved (authors, producers, performers), which must be approved by the Minister of Commerce; (b) broadcasting and public performance royalties will need to be pre-approved by the tribunal before any collection takes place. This means that all existing royalties will have to be reviewed by the tribunal.

**Optical Disc Legislation:** With a number of optical disc plants operating in Israel, IIPA recommends that the government of Israel introduce effective optical disc plant control measures, including: (a) 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; (b) the requirement to use source identification (SID) Codes to trace pirate discs to their source of production; (c) the establishment of licensee record-keeping requirements and an exemplar program; (d) the ability to inspect plants, including nighttime inspections; (e) government record-keeping of all plants/facilities and all actions taken; (f) the establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure; (g) the registration of commercial CD-R/DVD-R “burning” operations; and (h) to put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content.

## **COPYRIGHT PIRACY AND ENFORCEMENT UPDATES**

**Piracy Issues:** The most significant piracy problem in Israel for the motion picture industry is increasing CD-R and DVD-R burning of films downloaded from the Internet.<sup>20</sup> There are also: 1) pirate CD-R and DVD-R labs, which are difficult to locate as they can be set up in small rooms in domestic premises; 2) stores in major marketplaces, including in Tel Aviv, Haifa, Jerusalem, Rishon Le-Zion, Rosh Ha-Ayin, and Herzlia, which engage in in-store burning of major motion picture titles; and 3) flea markets which also carry extensive pirated product. These activities not only negatively impact the home entertainment market, but the theatrical market as well. The motion picture industry group, ALIS, reports that 200 legitimate video libraries have had to close down because of piracy. They also report that legitimate sales of the local distributors are declining. Theatrical box office has also been declining since 2001. There are organized crime factors in Israel in local production and distribution of pirate products in main markets such as central bus station in Tel Aviv, the Carmel market, Haifa's main street (Ha-Azmout st). Illegal public screenings continue to be a problem in hotels, cafes and pubs, one that has grown since the introduction of pirate DVDs and new sophisticated performance equipment. Parallel imports of Zone 1 DVDs of U.S. motion pictures (DVDs programmed for playback and distribution in North America only) also remain widely available.

**Enforcement Issues:** Despite the law enforcement authorities' lack of resources dedicated to IP enforcement, industry reports good relations in anti-piracy efforts. The motion

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<sup>20</sup> Dozens of websites are taking advantage of the approximately 3.5 million Internet users aged 13 and above.

picture industry enforcement group, ALIS, reported 227 criminal raids and 50 civil raids. Moreover, a number of pirate labs have been dismantled (since the beginning of the year until the end of November, ALIS raided 23 such labs seizing 208 CD-R burners and 183 DVD-R burners).<sup>21</sup>

Given the level of piracy in Israel, few raids have been conducted (84 raids during the first half of 2006 at Rosh-Ha-Ayyin market, Rishon-Le Zion market, Ha-Carmel market, Big market, and Yavne) and the level of piracy in those markets has not really decreased. This is because the owners of piracy operations are finding ways to ensure that their sellers are only caught once (the first time offense is usually penalized only with imposition of a non-deterrent fine, which is perceived as a cost of doing business). This is one symptom in a system characterized otherwise by a lack of deterrent sentencing by the courts.

Problems remain with the Special Intellectual Property Police Units created by the Israeli government in 2002, notwithstanding some good cooperation as noted. First, these units are understaffed: there are 29 officers handling all types of intellectual property infringement and these officers are spread across four separate districts and one headquarters. Second, the units are under-funded. Finally, they are lack in coordination and structure. They are not (nor is anyone else) actively pursuing Internet piracy cases and are not willing to assist in the raiding of Internet pirates. The Israeli authorities also refuse to act *ex officio*.

## **TRAINING**

The motion picture industry group in Israel, ALIS, provides training seminars for police and prosecutors each year in the area of IP. In addition, ALIS also participated in an annual IP conference held in Tel Aviv on November 20, 2006.

## **SECTORIAL ISSUES/MARKET ACCESS**

**Collections for Retransmissions of Broadcast Television Signals:** Notwithstanding protections accorded to retransmitted works under Israel's copyright laws and an Israel Supreme Court decision confirming that Israeli law affords such copyright protection to cable retransmissions, Israeli cable operators continue to refuse to make payment for retransmissions of any broadcast television signal. Collective management organization AGICOA filed lawsuits on behalf of its international members, including U.S. right holders, against cable operators in the District Court of Tel Aviv in 2000 only after the latter had rejected the years of efforts by

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<sup>21</sup> For example, the June 2006 IFPI Bulletin reported that For over two months IFPI Israel has been conducting investigations and gathering information against several persons suspected to be involved in the production, distribution and sale of pirate music products on CDR. As the result of investigations involving surveillance and careful analysis of information, premises were raided on 12 January and a clandestine laboratory operated by two suspects, closed down. In the premises were found 12 CDR towers each containing between 7 and 12 burners, 30,000 recorded CD-Rs containing music, 100,000 blank CD-Rs and approximately 500,000 printed inlay cards. Two suspects were arrested and subsequently remanded by the courts charged with copyright offences. On 16 March, IFPI Israel cooperating with a special crime task force raided several premises suspected to be used in counterfeiting music products. One house, controlled by members of a gang also suspected to control two markets in the towns of Ashdod and Ashkelon and known for the availability of counterfeit product, was subject to a thorough search including the employment of specially trained dogs. During the search 6 burning towers, thousands of counterfeit CDs and blank media were found in the property. A hand gun together with a silencer and quantity of drugs were found by the police dogs, hidden in a yard. The suspects some of whom have previous convictions for IPR offences, drug trafficking, robbery and other offences have been remanded pending a court appearance and forensic examination of the firearm. See June 2006 IFPI Enforcement Bulletin, at <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf>.



AGICOA to negotiate retransmission licenses.<sup>22</sup> These efforts to seek redress from Israeli courts have been hindered by bankruptcy filings of certain of the cable operators from which AGICOA sought remuneration.<sup>23</sup>

**Television Advertising Restriction Violates Israel's WTO Agreement:**<sup>24</sup> On May 9, 2002, Israel's Council for Cable and Satellite Broadcasting adopted a new provision to the existing Bezeq Law that regulates the pay television industry. The provision prohibits foreign television channels from carrying advertising aimed at the Israeli market, with the exception of foreign broadcasters transmitting to at least eight million households outside of Israel. This provision violates Israel's commitments in the World Trade Organization (WTO) Services Agreement to provide full market access and national treatment for advertising services. In addition, such restrictions impede the healthy development of the television industry in Israel.

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<sup>22</sup> Starting in the late 1990s, and for a number of years, Israeli cable operators had been retransmitting U.S., European and Russian content without the authorization of right holders.

<sup>23</sup> Subsequently, AGICOA claims were rejected by the bankruptcy trustee (Special Manager). These objections necessitated direct intervention by U.S. producers in the case as well as the filing of mandates for AGICOA intervention by its right holders. These claims remain pending in an endless protraction of the proceedings, lending the appearance that the courts will not enforce legitimate claims arising under copyright law, as confirmed by the Supreme Court, and that Israel rejects the obligations of relevant international treaties.

<sup>24</sup> IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### MEXICO

**Special 301 Recommendation:** IIPA recommends that Mexico be elevated to the Special 301 Priority Watch List in 2007.

## **EXECUTIVE SUMMARY**

The sheer dimension of the piracy problem in the Mexican market remains severe. Conservative estimates of trade losses due to copyright piracy in Mexico exceeded \$1 billion in 2006. Piracy involving hard goods, optical discs, Internet piracy, street piracy, and unauthorized photocopying at universities continued at high levels. The Mexican Government must focus not only on increased and more effective enforcement efforts, but also needs to increase resources for enforcement agencies and improve public awareness of the nature and repercussions of rampant piracy. More effective methods to work with state and municipal governments to attack the problem of rampant street piracy are needed. Judicial training must be intensified. Border measures must be strengthened.

To be clear, the efforts of various Mexican enforcement agencies differed greatly in terms of cooperation and results. The federal government, by and large, performed strongly last year. The criminal authorities (PGR) and administrative agencies (IMPI and SHCP) worked with rightsholders and took significant actions last year. However, performance by the state government is far less satisfactory, with only 4 of the 32 state governments appearing to be interested in combating illegal trade and piracy. Municipal government enforcement has been truly ineffective, with most of the local governments abdicating any responsibility, and permitting the widespread sale of all kinds of illegal merchandise, including pirated and counterfeit goods. Notwithstanding the immense piracy problem and despite numerous raids taken by police, prosecutions remain few as prosecutors are reluctant to push cases through the system and judges are quick to dismiss cases.

Furthermore, there are a number of bills pending, some for years, which would strengthen measures for law enforcement authorities (for example, amending the criminal code to grant *ex officio* authority). There is a long legislative agenda of proposed copyright law and criminal code amendments which need to be addressed in 2007.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Focus efforts to fight piracy in well-know street markets (San Juan de Dios in Guadalajara) and distribution centers (such as like Tepito in the Federal District) where vast quantities of pirated goods are sold 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.
- Improve police coordination between federal, state and municipal enforcement authorities.

- Stop illegal photocopying by copyshops on or near major university campuses.
- Improve administrative enforcement by the Mexican Industrial Property Institute (IMPI), for example: (a) IMPI agents should be accompanied by police with the authority to gain entry into the targeted premises during inspections; and (b) impose higher sanctions on door-closings in administrative raids (i.e., refusals to admit inspectors during a governmental audit or raid).
- Provide IMPI with additional resources (including personnel) to conduct inspections.
- Involve 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.
- Encourage prosecutors to act swiftly on complaints and recommend maximum sentences, including jail time, to the courts in order to improve deterrence.
- Involve the tax authorities (SAT) in sustained anti-piracy actions.
- 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.
- Continue to provide, and expand on, IPR trainings for law enforcement officials, including judges.
- 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.

### **Legislation**

- Support passage of four bills which would amend the criminal code to: (a) give *ex officio* authority for police; (b) impose criminal sanctions for the unauthorized circumvention of technological protection measures; (c) impose sanctions for the piracy of open TV signals; and (d) impose penalties for the unauthorized camcording of films in theaters.
- Support, with additional amendments, the passage of a bill to amend the Copyright Law to provide technological protection measures for works and sound recordings (amendments here should track developments made on the criminal code, above).
- Support passage of the bill to amend the Copyright Law to eliminate the private copy provision in the current law.
- Block the passage of an amendment to the Copyright Law which would create a legal monopoly to the existing author's society in order to receive remuneration for the reproduction, distribution, publishing and transmission of their works.
- Improve legislative and regulatory schemes to fill gaps in administrative enforcement measures and to equalize treatment of copyrights with trademarks.
- Work with the copyright industries on developing copyright legislation which would fully implement Mexico's WIPO Treaties' obligations as well as correct some longstanding inadequacies in the current law.
- Pass amendments to the Film Law to prevent parallel imports of films.
- Implement legislation that heightens penalties, establishes minimum penalties for specific conducts like door-closing and evidence-concealment, sets parameters or guidelines for imposing sanctions, and grants robust powers to federal inspectors.

### **Security and Partnership for Prosperity in North America (SPP)<sup>1</sup>**

This trilateral initiative between the U.S., Mexico and Canada was launched in March 25, 2005. Working groups on various issues have been established and are consulting with private sector representatives in the three countries to set specific goals and identify concrete steps the governments can take to implement those goals. With respect to intellectual property, a draft "action

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<sup>1</sup> For more information on this trilateral initiative, visit the SPP website at <http://www.spp.gov/>.

strategy” was compiled in late 2006 and is being finalized in time for the April 2007 SPP Summit in Mexico. IIPA has not seen the final product, but understands that there are elements with respect to issues such as enforcement, public awareness and industry metrics, for example. The copyright industries have been heartened by the attention and willingness the Mexican government has attached to this process, especially with working with its neighboring governments on enforcement matters. It is premature to comment on whether the SPP forum will result in any specific anti-piracy operations – which are especially important given our common borders, both in the physical and online realm.

<b>MEXICO</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>2</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>3</sup>	486.6	67%	376.5	65%	326.0	60%	360.0	61%	459.0	68%
Entertainment Software <sup>4</sup>	182.0	85%	137.7	75%	132.2	76%	136.9	66%	NA	NA
Business Software <sup>5</sup>	296.0	63%	263.0	65%	222.0	65%	220.0	63%	168.9	55%
Motion Pictures <sup>6</sup>	NA	NA	483.0	62%	140.0	70%	50.0	45%	50.0	40%
Books	41.0	NA	42.0	NA	42.0	NA	40.0	NA	40.0	NA
<b>TOTALS</b>	<b>1,005.6</b>		<b>1,302.2</b>		<b>862.2</b>		<b>806.9</b>		<b>717.9</b>	

## COPYRIGHT PIRACY IN MEXICO

Copyright piracy remains a serious problem in Mexico, with 2006 reflecting, unfortunately, no significant improvement in piracy. Piracy involving hard goods, optical discs, Internet piracy, photocopying and street sales continued at high levels. Notwithstanding the immense piracy problem and despite numerous raids taken by police, prosecutions remained few as prosecutors remain reluctant to push cases through the system and judges are too quick to dismiss cases that are not being actively pursued by prosecutors. The business software industry did report a slight improvement

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Mexico under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Mexico, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>6</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

in lowering piracy levels of its products last year, likely a result, in part, of continuing good cooperation with administrative enforcement authorities. 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. The Mexican government should deal with the strong market for pirated goods in parallel with efforts to address the production side of piracy. Without the government's sustained efforts to close down the notorious pirate markets, efforts to address production and distribution will continue to be hindered. The entertainment software industry reports that several of its planned enforcement actions were severely hampered in 2006 due to limited police resources, which were diverted to address matters that arose out of the disputed presidential elections and the resulting disruption in Mexico City. Enforcement slowed during the Fall 2006 election cycle, but picked up after that.

In March 2006, members of several copyright-based industries announced the formation of a new coalition dedicated to fight piracy. The new Institute for the Protection of Intellectual Property and Legitimate Commerce (IPIIC) lists its members as: AMPROFON (the Mexican Association of Phonogram Producers), BSA (the Business Software Alliance), CNIV (The National Chamber of the Garment Industry), and PRONAPHON (the National Producers of Phonograms). This association essentially gave a legal status to the group that was meeting with PGR and other government agencies.

**Street piracy, organized crime and efforts to legitimize markets:** A major problem throughout Mexico involves widespread, and well-entrenched, street piracy. For example, Tepito, one of the world's largest centers of pirate product and contraband sales (as well as of drugs and weapons), is well organized and continues to be politically protected. There are at least 80 very large, very well-known, "black markets" in Mexico. By some estimates, there are an estimated 44,000 points of sale involved with distributing infringing copyrighted materials. The main distribution centers for optical disc piracy are well known to law enforcement authorities: Tepito, Plaza Meave, Eje Central, Plaza de la Computación, Lomas Verdes in Mexico City, CAPFU in Puebla, Las Pulgas in Monterrey and San Juan de Dios in Guadalajara. Raids in Tepito and other large pirate markets are only conducted at night, as it is unsafe for law enforcement to run actions during the day. The morning after a raid where often tons of pirate product is confiscated, there is no real impact in the market because the same shops reopen and continue their business. There are very few, if any, arrests being made. However, if more police resources were committed to anti-piracy actions, then law enforcement would be able to conduct more raids in these markets. 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 CDs and DVDs.

These markets are very well structured, with discrete distribution chains, indicating in many cases that organized crime is involved. Some of these organized crime groups have exports and distribution activity to most of the Central American countries as well as a growing possibility to export to the U.S. and its Latin markets. On the other hand, Mexico imports a lot of blank media from Southeast Asia (China, Taiwan) which, because of high taxes in Mexico, enter Mexico as U.S. exports. 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. It remains imperative that any anti-piracy campaign by the government include as a top priority reducing this kind of distribution network.

**Audiovisual piracy:** MPA reports that Mexico is the most important Latin American market for the U.S. audiovisual industry and is ranked 9th in worldwide all-media revenue for MPA member companies. Mexico has the highest rate of optical disc piracy of filmed entertainment in the hemisphere. More than six times as many illegal DVDs were sold on the streets of Mexico (176 million) than legal DVDs (25 million) in 2005. It is estimated that Mexico imports around 800 million blank media units per year, most of which are used to create pirated product. Camcording piracy is another problem; in 2006, five illegally-camcorded movies were confirmed as originating in Mexican theaters. These films, with Spanish subtitles or dubbing, were quickly distributed on the Internet and reproduced into illegal DVDs for worldwide consumption. Although Internet piracy is currently not a major problem in Mexico, MPA reports that with the increased availability of broadband both in homes and Internet cafes, illegal Internet downloads and Internet-based hard good sales of CD-Rs and DVD-Rs are expected to become a more serious threat to legitimate sales and distribution in the near future. By the end of 2006, there will be 3.2 million households with broadband connections, with this number expected to increase to 6.1 million by the end of 2007 and 11.5 million by the end of 2008. The legitimate Mexican audiovisual industry employs approximately 100,000 writers, actors, producers, and technicians, and drives the business of film, video and television studios, post-production facilities, film and video distributors, 3,600 cinemas, 6,800 video outlets, 6,000 retailers (including 4,000 owner-operated outlets) selling legitimate film product, and 400 pay-TV operators. MPA reports that in 2006, Mexico was one of the few countries where theatrical admissions has increased over 2005, despite the huge piracy. In contrast, the home entertainment market has decreased over the past two years, and a growing signal theft problem is starting to show up.

**Piracy of sound recordings and musical compositions:** The recording industry in 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 \$486.4 million in losses and covers approximately 67% of all units sold in the country. The level of piracy has increased slightly in the last year by two percentage points (from 65% to 67%) 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. 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, which is threatening the development of an emerging legal download business now represented by two new important websites: Tarabu.com and Beon.com. According to a recent market survey, conducted by IPSOS-BIMSA, in 2006 1.7 billion illegal music files and 221 million illegal music videos were downloaded in Mexico via P2P networks. The number of songs downloaded per year is close to double the number of songs contained in the legitimate records sold in 2005 in the whole country. A conservative projection shows that around the country are 4.4 million Internet users who use P2P networks to download music, music videos and movies. Due to this critical situation, the Mexican recording industry (represented by AMPROFON) and the music publishers' association (EMMAC) decided to participate in a global litigation program, announced by IFPI in 18 countries during 2006, filing 20 civil actions against individual users of P2P networks and 6 cases against Internet cafés' owners and administrators. Although these cases are still being processed in the judicial system, more cases are expected to be filed in 2007.

In addition, 2006 also reflected a major anti-piracy effort against Internet cafés by the recording industry. In September 2006, anti-piracy groups across Latin America carried out a coordinated campaign to combat illegal music downloading at Internet cafes. The operation, named "Cyber Shutdown," took place in cities in Mexico, Brazil, El Salvador, Colombia, Chile and Argentina, with the support of more than 2,000 law enforcement officers. IFPI reports that the strategy behind this campaign was based on intelligence developed through local research that indicated Internet cafés were becoming a significant factor in the growth of digital and physical music piracy. In Mexico, 12 raids were conducted by PGR and PFP and 242 computers, 12 servers, 24 stand alone burners and

52,799 illegal music files removed in Internet cafes in the capital city area. Unfortunately, the PGR did not conduct more raids in the last trimester of the year due to the political turmoil caused by the presidential campaign and election.

**Business software piracy:** The estimated level of business software piracy in Mexico declined slightly in Mexico, down to 63%. BSA partnered with IMPI to conduct actions, with unprecedented results and wider geographical coverage. Teaming up with the Copyright Office (INDAUTOR) has produced a high volume of conciliations, with good results, quantitatively and qualitatively. BSA reports that preliminary estimated trade losses due to business software piracy in Mexico rose last year to \$296 million. 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 or conceal evidence during a governmental inspection or raid. Copyright certificates from abroad must be given full recognition. The number of actions should increase. Electronic audits should be fully implemented. Additional staffing in governmental agencies is necessary (particularly inspectors and conciliators). Government officers need to be more empowered to conduct investigations and raids, to issue resolutions and impose sanctions whenever applicable.

In 2006, the Mexican Software Consortium was launched. The Consortium is a Public-Private-Partnership formed by the Ministry of Economy, through the "Prosoft" initiative, together with the Mexican Internet Association (AMIPCI), the Instituto Politécnico Nacional (IPN), the Instituto Tecnológico Autónomo de México (ITAM) and the Instituto Tecnológico y de Estudios Superiores de Monterrey (ITESM), among others. The Consortium is holding a national road show to promote local technological innovation, and the protection of inventions and works of art. It also runs a hotline where inventors and innovators are offered assistance on how to protect their inventions.

In early 2006, BSA concluded a study on software piracy in Mexico, focusing on the Mexican psyche, motivations and perceptions surrounding software piracy. The results of the study have been shared with government officers and representatives of the media. These results constitute a useful tool in understanding the specifics of software piracy locally, and building an educational outreach campaign that is closer to the Mexican way of thinking.

As a result of the 2006 study, BSA launched a national digital animation contest entitled: "It all starts with an idea, and it could be yours!" It involved students between the ages of 15-30. The contest was launched by the Director General of IMPI on World Intellectual Property Day, which was hosted by WIPO and IMPI. It was a joint effort of the BSA, IMPI, INDAUTOR and IPN. The contest resulted in the selection of nine animated works that will be shown to Mexican children between six and twelve years old.

**Entertainment software piracy:** Entertainment software piracy on all platforms remains at a very high level, virtually unchanged from previous years, despite the industry's enforcement efforts in Mexico. Pirated entertainment software is sold blatantly throughout Mexico in permanent markets and on the street. Many of these permanent markets, such as Tepito and Plaza Meave in Mexico City, are also notorious production points and wholesale distribution centers of pirated games. It is believed that Tepito and Plaza Meave have deep connections with organized crime. Despite these links, piracy at both markets continues to flourish with impunity despite the fact that the industry (along with other copyright groups) has raised this issue of criminal strongholds with government officials on numerous occasions at various levels.

The most damaging form of piracy is hard-goods, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges that are present in the Mexican market. The industry's

enforcement work has revealed that large pirate operations are manufacturing optical discs locally through the use of CD and DVD burners and distributing them to a network of retailers. Also, even small pirate retailers located in informal markets are engaged in CD/DVD burning for on-the-spot orders of pirated games. Local CD-burning is common for console games, including Xbox®, PlayStation2®, GameCube, and increasingly, the Xbox 360™ which was released last year, as well as PC games. Counterfeit cartridges are imported from Asia, often in components which are then assembled in Mexico. Despite the flood of such counterfeits, there have been few seizures at the border due to the Customs agency's limitations in inspecting suspect shipments and its inability to take *ex officio* action against pirated and counterfeit entertainment software products.

Another significant problem is circumvention activity, which involves the bypassing of technological protection measures that the industry uses to protect its copyrighted games. This is often done by the installation of "modification chips" in consoles, which enables them to play pirated games. This activity occurs openly in many markets, alongside the sale of pirated games. The entertainment software industry is unable to bring enforcement actions against individuals and businesses that engage in circumvention activity, given that Mexican criminal law does not clearly prohibit the distribution and sale of circumvention devices and software. Finally, BSA reports that Internet-based piracy is expected to increase as the Mexican broadband market grows, although the industry has not yet determined the size of the online piracy problem in Mexico. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Mexican marketplace was \$182.0 million in 2006, with a 85% piracy rate.

**Book piracy:** Illegal photocopying of books remained a huge problem for the publishing industry in 2006. Schools and universities have photocopy machines in their libraries, in addition to private on-campus photocopying businesses, and selected contents of books are regularly copied. This copying routinely surpasses permissible levels even under the deficient provisions of the copyright law.<sup>7</sup> Copy shops in and around the UNAM (the national university) in Mexico City charge as little as 2-3 US cents per page, undercutting the market for legitimate texts. Universities often condone, either directly 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. Both enforcement officials and education/university officials should take a more active role in fighting this unauthorized reproduction, especially activity occurring on campus or using campus facilities. 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 were at \$41 million in 2006.

## **COPYRIGHT ENFORCEMENT IN MEXICO**

It is important to acknowledge those Mexican agencies which have been performing well on the anti-piracy front and those which experience problems in achieving results. The federal agencies, with some exceptions, have been taking actions and working with rightsholders. Work done by the PGR, IMPI and SHCP is improving. In contrast, anti-piracy actions taken by the States was not strong in 2006. Only four of the 32 State governments appear to be interested in combating illegal trade and piracy; these are the State of Mexico, the Federal District, Jalisco and Puebla. Enforcement at the

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<sup>7</sup> 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.



municipal government level is very weak. Mexico has 2,400 municipal governments, and about 190 of them have populations of over 100,000 inhabitants. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors. However, even with regulations in place and inspectors to enforce them, local anti-piracy actions have not been taken (possible reasons include local politics (votes) and corruption). Unfortunately, many of these local governments deflect their responsibility entirely, insisting that enforcement should be done only by the PGR.

It is hoped that the National Anti-Piracy Agreement is fully implemented in 2007, as a result of a public-private collaboration that focuses on specific actions and results.

**Criminal enforcement: raids, seizures and cooperation with the police and PGR:** A major structural impediment to enforcement remains in that piracy is still a “private” offense and a complaint (*querella*) must be prepared by the rightsholders and filed with the PGR before they consider conducting a raid. For years, the industries have been supporting amendments to the criminal code which would permit *ex officio* actions. As discussed below, a notorious problem in 2006 involves the limited police resources available for PGR raids.

**PGR:** The industries continue to report generally good cooperation with police in various jurisdictions around Mexico in 2006. Before the 2006 elections, the Assistant Attorney General for the Mexico City area met regularly with private sector representatives to review anti-piracy actions. The industries are waiting to know more as to which prosecutors will be appointed to the IPR sections of the PGR. 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. 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. Unfortunately, anti-piracy efforts have been concentrated in PGR with little or no support, in general, in most of the States and larger cities.

Another PGR unit (**PGR-SEIDF**, the “Subprocuraduría” Specialized in Investigation of Federal Crimes) has worked with industries and achieved significant results. SIEDF includes the Specialized Piracy Unit, with which has achieved results against piracy in the main black markets such as Tepito, San Juan of God, Simitrio, Capu, etc. However, this unit does not have sufficient personnel nor the capacity to dismantle the main networks of organized crime, which are closely associated with the black markets.

The recording industry reports that in 2006, 3,520 raids took place, from which 1,454 were street raids, 252 laboratories, 1,804 warehouses and 10 border operations. 40 persons were prosecuted and 15 condemnatory sentences were issued. Support continues from the Mexican federal and local police for several large actions. For example, on November 16, 2006, two big actions were completed. First, Mexican authorities raided 208 warehouses in Tepito and seized approximately 1 million blank CD-Rs, 310,000 recorded CD-Rs, 2.5 million Inlay cards, 40,000 cassette boxes and almost 1 kilogram of cocaine. Second, in a related operation Mexican authorities dismantled three laboratories with 85 burners and 1 million blank CDRs in Tepito. These actions are part of a holiday program that calls for stepped up operations to stimulate legitimate product sales. The significant amounts of pirate product seized are leading authorities to conduct follow-up investigations with the goal of determining a potential nexus to organized criminal groups in Tepito. In another large-scale action, in Veracruz, two warehouses and two laboratories were raided on October 21, 2006, with support from 200 federal and local police officers. Seized at these locations were 810,000 recorded CD-R units, 9,190,000 inlay cards, 72 burners and 600,000 DVD units, containing music videos and films. These Veracruz locations produced and distributed pirate product for the entire state. This

operation is the first of its kind in this part of Mexico and confirms the existence of a diversified network of pirating groups that incorporate both music and films piracy into their criminal enterprises. The local industry is encouraging the Attorney General to typify these pirate activities by these groups as organized crime cases. Despite a strong working relationship with Mexican IPR enforcement agencies, the recording industry's ability to bring criminal enforcement efforts was severely hampered in 2006 due to the limited police resources available for PGR raids.

For example, with PGR and the federal investigative agency's (AFI) resources being diverted to political matters, ESA reports that the PGR conducted only one raid in Mexico City (and this occurred only after an urgent meeting with the agency to schedule the raid on an expedited basis). The action took place in October 2006, when nine vendors at a popular Mexico City bazaar were raided. The raid resulted in the seizure of 8,356 pirated games for the Xbox, PlayStation2, GameCube and Game Boy Advance platforms, as well as numerous computers and CD/DVD burners. The ESA sought to conduct two more raids during the recent holiday season, but this, once again, was frustrated as police resources were diverted to other priorities. Several ESA member companies also work with IMPI and PGR officials on enforcement actions.

**PROFECO:** The Attorney General of Consumer Affairs (PROFECO) has the authority to take *ex officio* actions against black and informal markets, including the powers to seize product, close markets, and issue sanctions. 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. The recording industry reports 11 raids in Guadalajara conducted by PROFECO in 2006. 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.

**PGR-SIEDO (Organized Crime Investigative Unit):** This is the only division of the PGR which has not focused on piracy, due to PGR budget cuts ordered by the Congress in the beginning of 2004. SIEDO created, in name, a specialized area to fight organized criminal groups, but does not have the budget resources to appoint officials to work in this area. 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. Unfortunately, no copyright-related actions were taken by this unit in 2006.

**SSPF (Secretary of Public Federal Security):** Six years ago, at the beginning of the Fox administration, the PFP (Federal Preventive Police) appeared to be a new option for combating piracy. Since 2004, however, it has moved its focus to combating child pornography.

**SHCP and Customs:** Historically these entities have not been involved in domestic actions. However, cracking down on tax evasion is a motivation in fighting street vendors, and that would suggest a motivation for SHCP to get more involved.

**Anti-piracy efforts at the State level:** In January 2007, Metro authorities resumed internal operations against piracy. With nearly 200 stations and 4 million daily users, the metro system is occupied by between 6,000 – 8,000 pirate vendors. Thanks to the support of the Metro police, a large volume of pirate products have been seized and five important leaders of thirteen organizations that sell piracy have been arrested. Also in recent months with the backing of the Government of the Federal District, the Metro has also assisted in the creation of eight cooperatives (formed by visually impaired

merchants) who sell cheaper “alternative” product as part of the film industry’s pirate product substitution program.

**Few prosecutions:** Although the PGR 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. The obvious problem remains -- few criminal prosecutions are brought by the PGR.

COPYRIGHT ENFORCEMENT STATISTICS IN MEXICO IN 2006 (INCOMPLETE, STILL IN PROCESS)						
	MOTION PICTURE CASES	BUSINESS SOFTWARE CASES	ENTERTAINMENT SOFTWARE CASES	RECORDING INDUSTRY (LOCAL AND U.S.) CASES	2006 TOTAL	COMPARE 2005
TOTAL NUMBER OF RAIDS (CRIMINAL PLUS ADMINISTRATIVE)	NA	944		2,937		2,636
CRIMINAL RAIDS	NA	0	<sup>1</sup> (ESA ONLY, NOT INCLUDING MEMBER COMPANY ACTIONS)	2,937		2,217
ADMINISTRATIVE RAIDS BY IMPI	NA	756				419
ADMINISTRATIVE VISITS BY INDAUTOR	NA	188				
NUMBER OF PERSONS HELD IN PRE-TRIAL DETENTION	NA	0				
NUMBER OF INDICTMENTS	NA	0		5		
NUMBER OF CASES RESULTING IN CRIMINAL FINES OR JAIL TERMS	NA			15		
NUMBER OF CASES RESULTING IN ADMINISTRATIVE FINES	NA					
LEVEL OF CRIMINAL SENTENCES IMPOSED	NA			15		
RATIO OF CONVICTIONS/ FINES TO NUMBER OF CRIMINAL RAIDS CONDUCTED	NA					N/A
INFRINGING COPIES SEIZED	NA		8,356 (DOES NOT INCLUDE SEIZURES THROUGH SEPARATE MEMBER COMPANY ACTIONS)	16.5 MILLION UNITS OF RECORDED DISCS		AT LEAST 19.6 MILLION COPIES
OTHER MATERIALS RELATED TO INFRINGING ACTIVITIES WHICH WERE SEIZED (ITEMIZED)	NA			25.4 MILLION UNITS OF BLANK DISCS		(SEE LEFT)

NA = Not available

**Few Deterrent Penalties:** Even in 2006, the copyright industries continue to report that the Mexican judiciary continues to view copyright infringement as a minor offense, and issues very few deterrent sentences. 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.

The recording industry reports that only 15 sentences were issued in 2006 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.

However, there was a positive shift in late 2006. On December 17, 2006, a Mexican Circuit Judge in Guadalajara sentenced a music and film piracy defendant to a prison sentence of three years and nine months in jail plus a fine of \$100,000 Mexican pesos (US\$9,100) for IPR infringement. The recording industry reports that this is the first prison sentence in the “Mexico Plus” operation and dates back to a raid conducted in January 2006 when two laboratories owned by the defendant were raided in full operation. The authorities seized 60 burners, 10,000 recorded music CD-Rs, 2 industrial silk-screening machines, 6 industrial printers and 800,000 covers. Initially five subjects were arrested, but only two were formally charged. One co-defendant received a similar sentence but is currently a fugitive. This particular organization was one of the major suppliers of pirate film and music product to the major markets of San Juan de Dios and Parian in Guadalajara.

In 2006, BSA member companies brought more than 60 criminal actions, including street sweeps, system builder channel actions, warehouses and labs.

**Positive administrative copyright enforcement by IMPI and INDAUTOR:** BSA reports that 2006 was marked by cooperation and partnership with the Mexican Industrial Property Institute (IMPI) and the Mexican Copyright Office (INDAUTOR), which yielded an intensive campaign that expanded into more Mexican states. The software industries appreciate the coordination and assistance of the administrative enforcement authorities (IMPI) that resulted in an unprecedented volume and quality of cases, and hope to continue to expand on positive results in 2007.

As for administrative anti-piracy actions, BSA and IMPI collaboration continued to work very well: 141 IMPI administrative infringement actions and 676 *ex officio* IMPI visits. The SPP Initiative is a major opportunity in Mexico, and BSA is working with IMPI on SPP-related developments. Additional inspectors at IMPI will be needed in order to meet its ambitious 2007 goals.

BSA reports that IMPI continued to experience the problem of “door closures” during its administrative inspections. Fortunately, there has been a favorable resolution from the courts to strengthen IMPI’s enforcement ability. In the case of AOS SOLUTIONS, the court held that the authorities can presume an infringement in the event that the defendant closes its door and does not allow said authorities to conduct an inspection. IMPI has implemented this criterion in 2006; BSA hopes that this will improve IMPI’s ability to enter target premises in future actions.

MPA reports that IMPI was also its major enforcement means to ensure that licensed establishments continued to remain legitimate. Unfortunately, IMPI does not have enforcement authority to crack down on street vendors. It is hoped that IMPI will soon be able to become more useful in the street piracy fight, given the signing of the AECP (State Agreements Against Piracy).

**Conciliations and mediations by INDAUTOR:** Last year, BSA also worked with INDAUTOR, the copyright office, to implement a system of institutional mediations (*juntas de avenencia*). BSA and INDAUTOR held 276 conciliation meetings with end users. INDAUTOR completed 217 mediations in 2006, a huge increase from the 28 actions 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. The mediation model offered by INDAUTOR has become a very useful tool in legalizing software licenses.

**Border efforts to track blank optical grade media:** 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). Most of the seizures are due to fraudulent invoices or undervalued product.

**Improve border enforcement generally:** 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.

The recording industry reports several border actions last year. In one November 2006 action, Mexican Customs officials as part on that industry's ongoing border program seized an unauthorized shipment of 4.6 million blank CD-Rs and 900,000 blank DVD-Rs that intelligence indicated was destined to a major pirate distributors in Tepito. Total seizures for 2006 were more than 25 million units of blank optical discs.

MPA believes that it is imperative that U.S. and Mexican customs start to work together not only to prevent Mexican exports of pirate movies to the U.S. Latin Market, but also to put a control of blank media exports from Southeast Asia that passes through the U.S. to avoid tax burdens. In addition, there has been increased cooperation between certain copyright holder groups and Mexican Customs, but this conclusion does not apply across-the-board

**Civil copyright infringement cases:** BSA continued exploring civil actions in 2006, by following up on the 12 actions filed in 2005. Most of these actions were terminated during this year.

## **COPYRIGHT AND RELATED LAWS IN MEXICO**

### **Current Legislation**

**Federal Law on Copyright (1996, as amended) and its regulations:** Amendments to Mexico's 1996 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 those 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 two years later, in September 2005. In addition, Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) in 2002 (note, however, that the WIPO Treaties' Agreed Statements still need to be published in the Official Gazette).

The 2003 copyright law amendments failed, however, to address the comprehensive reform needed by Mexico to: (1) effectively implement the obligations of the WIPO Treaties (of which Mexico

is a member), and (2) correct existing deficiencies in the law with respect to Mexico's obligations under the NAFTA Intellectual Property Chapter and the WTO TRIPS Agreement. Mexican government officials have indicated that it is possible that they might consider initiating a long-term process to 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.

**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, no recent copyright actions have been based on the organized crime law.

### **Pending Legislation / Legislation Needed**

**Bill to amend the criminal code to provide for *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. In 2005, the bill was passed by the House of Deputies, and since then it has been pending before the Senate. On January 26, 2007, the bill was at the Commission of Justice at the Senate, waiting to be voted in the very near term. A vote on a joint session at the Senate is expected before the end of April. This bill is extremely necessary for the copyright because rightsholders will not have to file criminal complaints for every case of infringement. Such authority will also have the benefit of expanding anti-piracy nationwide.

**Stop the objectionable copyright bill affecting music and sound recordings (Bill Article 26 Ter):** In 2006, legislation opposed by both the recording industry (AMPROFON) and the music publishing industry (EMMAC) was presented to the House of Deputies. This bill was pressed by SACM, the Mexican music collecting society, in a blatant effort to deprive music publishers of the right to collect the author's share of the musical works they already control (or will control in the future) which is generated by the mechanical reproduction rights from the record labels, as well as all other rights. This bill would create a right of remuneration to authors for the reproduction, distribution, publishing and transmission of their musical works. The right to receive this remuneration could not be waived, but could be exercised directly by the author or through a collection society. This bill would also have a single collecting society (SACM) serve as the only entity which could set certain fees and rate conditions in Mexico, all without possibility of negotiation by the rightsholders (both music publishers and producers). The bill was approved by the Chamber of Deputies in 2006, then rejected by the Senate; it has since been sent back to the lower chamber. This bill should not move forward in 2007.

**Bill to remove the private copy levy and the "*lucro*" (for profit) requirement in the copyright law:** In 2006, an amendment to the Copyright Law was presented before the House of

Deputies which would remove Article 40 (which establishes a private copy levy) as well as the onerous “*lucro*” (for profit) requirement (a high standard required in order to bring an infringement action) from the current law. This initiative, supported by the copyright industries, is still pending before the Education Commission of the House of Deputies.

**Bill to amend the criminal code 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 still 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. Additional amendments were then proposed to better capture the kinds of acts which could circumvent TPMs, including devices, components and services. (The current Mexican copyright law does provide some civil anti-circumvention measures but these are only applicable to computer software, not other copyrightable subject matter; this is why further amendments to the criminal code as well as to the copyright law are required for full WIPO Treaties’ implementation.)

**Bill to amend the 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 cam-cording of films in theaters; the respective legal action would be *ex officio*. The bill was approved by the House of Deputies and is currently before the Senate.

**Proposed copyright law amendment regarding technological protection measures (TPMs):** Recently approved in the House of Deputies, a bill has been proposed to amend the copyright law to grant the right to authors, performers and record producers the ability to apply technological protection measures to their works, performances and sound recordings. However, much 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. This bill should be treated simultaneously with the initiative to establish criminal sanctions for circumvention activities (discussed above).

**Bill to amend 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. The bill was approved in the Lower House and is pending approval in the Senate. 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 of four to eight years for anyone who illegally 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.

**Bill to amend the Law of Industrial Property:** BSA is working on a bill to raise penalties, establish guidelines, minimum penalties and standards for issuing administrative fines. Special fines should be imposed on individuals and establishment who deny entry (close their doors) and conceal evidence during administrative inspections. IMPI inspectors should have more robust powers to



conduct raids, actions, issue decisions and impose higher fines. BSA hopes to join efforts with local associations to introduce this bill into Congress.

### **Related issues**

**Digital TV:** In 2006, Mexico chose the ATSC standard for the Mexican digital terrestrial TV system. However, Mexico has not yet announced which system will adopt to protect digital TV content. MPAA calls the attention to the need to select a method of protection against unauthorized redistribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

**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. 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.

## **IPR TRAINING AND PUBLIC AWARENESS**

Copyright industry associations and companies regularly conduct training and informational seminars for Mexican enforcement authorities. BSA offered specialized training seminars for IMPI and INDAUTOR officers regarding technical and legal aspects of software programs, servers, licensing models, and new developments in the software area. BSA has created the Mexican Software Consortium, in association with the Ministry of Economy, IMPI, INDAUTOR, the Mexican Internet Association (AMPICI) and several public and private universities. 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 recording industry carried out seminars for judges, trade officials and personnel from IMPI, the Consumer Defense Bureau, customs and inspectors of some State Governments. The recording industry held the following training events during 2006: (a) on June 21, 22 and 23, a Seminar on IPR for 43 Customs officers in Mexico City; (b) on August 3, a seminar on IPR to 40 administrators and police officers in Puebla (local authorities); and (c) on October 27, a training session for 30 officers from the State of Jalisco.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### PEOPLE'S REPUBLIC OF CHINA (PRC)

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List.

#### **EXECUTIVE SUMMARY**

#### **PRIORITY ACTIONS TO BE TAKEN IN 2007**

- **China Must Bring a Significant Number of Criminal Prosecutions for Copyright Piracy of U.S. Works:** China has been extremely reluctant to bring criminal cases for copyright piracy, and its failure to do so has left in place a non-deterrent enforcement system that has proven to be incapable of delivering on China's 2004 JCCT commitment (nor its TRIPS obligations) to "significantly reduce IPR infringements" in the near term. Bringing criminal cases against "commercial scale" piracy has also been thwarted by overly high and complex criminal thresholds and the failure of the administrative authorities to refer an appropriate number of cases to the criminal authorities for prosecution. The Public Security Bureau (PSB) and the Supreme People's Procuratorate (SPP) must investigate potential criminal infringements upon "reasonable suspicion" that a crime has been committed – as done in the rest of the world – and not require "proof" that the thresholds have been met or that a crime has been committed as a basis for even initiating an investigation. In particular, criminal cases must be brought in the following areas:
  - **China Must Prosecute Software End-User Piracy:** China continues to insist that use of unauthorized software in a commercial business environment is not a crime. The Criminal Law need not be interpreted so narrowly and the SPC should clarify that such unauthorized uses involve unauthorized reproduction or distribution in violation of Article 217 of the Criminal Law and that prosecutions should proceed when such acts are "on a commercial scale."
  - **China Must Significantly Increase the Prosecution of Infringements on the Internet:** Internet piracy is growing and must be significantly reduced, not only by administrative enforcement by the National Copyright Administration of China (NCAC), but through the prosecution of infringements that at least (under TRIPS, the "commercial scale" standard) meet the criminal thresholds in the 2004 Judicial Interpretations (2004 JIs) of the Supreme People's Court (SPC). China fails to initiate prosecutions despite the fact that a large number of these infringements meet China's copy or other thresholds in the 2004 JIs and, while there have been a few prosecutions this year involving videogame Internet piracy, prosecutions must be significantly expanded to cover Internet infringements of music, movies, literary works and all computer software.

- China Must Bring Many More Prosecutions Against OD Plant Owners Engaging in Unauthorized Production and Export of Pirate ODs:** Despite asserted administrative inspections (which in any case lack deterrence), OD piracy by China's factories continues unabated. The Chinese government should take effective and well-publicized action against factories pirating U.S. product to convey a strong message to Chinese society and to pirate producers that illegal production will not be tolerated. Temporarily closing plants without any further action, as China did in March 2006, will not deter China's pirates; they will re-open or move to new locations. The authorities must seize and destroy the offending equipment and prosecute those responsible. Investigations must be commenced based on "reasonable suspicion" that a crime has been committed and prosecutions, convictions and deterrent penalties should ensue. China should also cooperate with right holders to ensure proper forensic examination of discs found in the marketplace, and should criminally prosecute those plants found to be producing pirate materials.
- China must Significantly Increase the Manpower and Financial Resources Available to the NCAC in Beijing and to Local Copyright Bureaus to Improve Administrative Copyright Enforcement Against Hard Goods Piracy and Piracy on the Internet:** Industry reports and surveys indicate that the 2006 government campaign against piracy, though involving thousands of raids and seizures, had only a minimal and temporary impact in the marketplace. NCAC's and the local copyright bureaus' resources are inadequate to deal with piracy in China and administrative enforcement must not be left solely to inspections by other agencies (such as the Ministry of Culture) for licensing violations.
- Resources at the NCAC Headquarters in Beijing Should be Significantly Enhanced, Particularly to Combat Internet infringements:** While NCAC opened and concluded a number of investigations against Internet infringements in 2006, more training and resources are sorely needed, and deterrent administrative penalties must be imposed against website owners and P2P uploaders, and particularly against Internet Service Providers (ISPs) who fail to comply with takedown requests from right holders.
- Local Copyright Bureaus Throughout the Rest of China are also Woefully Understaffed, Insufficiently Trained (Particularly to Fight Online Piracy) and Require Much Greater Coordination with NCAC Headquarters in Beijing:** Some of these offices have no more than 5 employees and must depend on other agencies to enforce their own administrative regulations. Local Copyright Bureau staffs must be augmented to enforce the copyright law effectively.
- Enhance Pre-Release Administrative Enforcement for Motion Pictures and Sound Recordings, 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 that are found in the marketplace are deemed pirated and subject to enhanced enforcement." This should apply to all other subject matter including sound recordings as increasingly such pre-releases have been found to be distributed online from servers located in China, even before worldwide legitimate release. MPA reports moderate success in reducing pre-release piracy but it needs to receive even more focused attention and extended to other products.

- **Clarify China's New Internet Regulations to Ensure their Effectiveness and Enable Aggressive Administrative and Criminal Enforcement:** The promulgation of the Internet regulations was a positive step. However, Chinese authorities should clarify how they will be implemented and then implement them aggressively. China should clarify that the deep linking to infringing files, as well as the maintenance of directories of infringing materials, is prohibited. It should clarify that services that permit conversion of infringing files (e.g. MP3's to ring tones, or ring back tones) are banned. It should clarify publicly with all ISPs that right holder notices of infringement may be served on ISPs by email and extend notices to telephone communication in cases of pre-release materials or in other exigent circumstances. It should publicly clarify that "expeditious" in the Regulations means that ISPs must remove infringing content, or block access to it, in no case more than 24 hours after receiving notice. It should clarify that ISPs must restrict access to their systems in cases of repeat infringers. Finally, it is critically necessary that MII and NCAC maintain an accurate database of the many ISPs in China to ensure that notices can be timely filed.
- **Ensure Use of Legal Software by Government and SOEs:** China promised in the 2006 JCCT to begin the process of legalization of software in private and state-owned enterprises in 2006, and to implement its legalization plan in 2007. China must redeem this commitment. Despite statements by the government that software legalization at the national, provincial and local government level has been completed, the government of China must recognize that legalization is an on-going process with no fixed end-point. While industry sales have increased as a result of the government legalization program, the program is not complete. Working with industry, software asset management programs must be established at each Ministry and governmental level.
- **Legitimize Book Distribution Practices on University Campuses:** The General Administration of Press and Publications (GAPP) and the NCAC, in cooperation with the Ministry of Education (MOE), local copyright bureaus and right holders, have made great strides in addressing the problem of illegal copying by university textbook centers during 2006. These agencies should work together to ensure proper implementation of their August, September and November notices about such copying, and enforcement actions should continue against universities that fail to fully implement the notices.
- **Join the WCT and WPPT and Adopt Regulations Completing the Task of Updating the Legal Regime to Comply with the Internet Treaties:** Legislation authorizing the Chinese government to deposit their instruments of accession in Geneva and to join the Internet treaties was passed in December 2006. Deposit should be made as soon as possible.
- **Amend the Criminal Law to Bring It into Compliance with TRIPS:** China must criminalize all copyright piracy "on a commercial scale," including piracy involving acts not currently cognizable under China's Criminal Law. The "for-profit" criterion for establishing a criminal offense should also be eliminated. An amended law should eliminate all thresholds or, at a minimum, ensure that they are low enough to criminalize all "copyright piracy on a commercial scale" as required by the TRIPS Agreement. China is the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices; these criteria should be eliminated.
- **Allow Investigations by Foreign Right Holder Associations and Eliminate Burdensome Evidentiary Requirements:** Foreign right holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate

suspected infringements. Regulations limiting activities (and number of employees) of the trade associations representing U.S. and other foreign right holders should be, and can be, easily amended to permit them to fully cooperate with the government in fighting piracy. Evidence rules (including for establishing subsistence and ownership of copyright) for administrative and criminal actions must be reformed and made more transparent and logical.

- **Bring Significant New Transparency to the Enforcement Process through NCAC Reporting on Cases Involving Foreign Works and the SPC Extending their Reporting from Civil to Criminal Cases at All Levels:** NCAC and local copyright bureaus need to share with right holders information on administrative copyright cases, a request by right holders which has to date been refused. The SPC now regularly reports the results of civil cases on their website. This reporting should be extended to criminal cases as well.
- **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 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 and distribution rights), the Chinese government, if it wishes to address rampant piracy in the country and foster the growth of creative industries in China, must significantly liberalize market access for all copyright industries, looking beyond the bare minima of WTO toward a fairer and more open market for all. Such reforms would include vastly increasing transparency, eliminating the film quota, permitting full publishing and distribution activities within China and eliminating delays in reviewing content under its censorship regime, including for all products which require censorship approval, to ensure that legitimate products get to the market before pirate products. Censorship processes that merely slow the ability of legitimate enterprises to distribute products—whether in the physical market or through digital transmissions, but which are ignored by piratical or unauthorized enterprises, do not advance China's social and/or cultural concerns, and greatly prejudice the interests of U.S. right holders by providing further market advantages to pirate operations.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006<sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Motion Pictures<sup>2</sup></b>	NA	NA	244.0	93%	280.0	95%	178.0	95%	168.0	91%
<b>Records &amp; Music<sup>3</sup></b>	206.0	85%	204.0	85%	202.9	85%	286.0	90%	48.0	90%
<b>Business Software<sup>4</sup></b>	1949.0	82%	1554.0	86%	1488.0	90%	1787.0	92%	1637.3	92%
<b>Entertainment Software<sup>5</sup></b>	NA	NA	589.9	92%	510.0	90%	568.2	96%	NA	96%
<b>Books</b>	52.0	NA	52.0	NA	50.0	NA	40.0	NA	40.0	NA
<b>TOTALS</b>	<b>2207.0</b>		<b>2643.9</b>		<b>2530.9</b>		<b>2859.2</b>		<b>1893.3</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN CHINA**

**Piracy of “Hard Goods” Continues at the 85%-95% Level Despite China’s Anti-Piracy Campaign in the Second Half of 2006.** China announced the commencement on July 15, 2006 of a “100 Day Campaign” directed primarily at retail piracy. Statistics on raids and seizures were released almost weekly and at the end of the campaign, the government trumpeted its success and the vast number of raids and seizures conducted.<sup>6</sup> Reports and surveys received both during and after the campaign from industry sources, however, noted this vast raiding activity but concluded, as in many previous campaigns of this nature, that pirate product remained available throughout the campaign in virtually the same quantities as before

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of China under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>3</sup> 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.

<sup>4</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in China, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>5</sup> 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.

<sup>6</sup> What purported to be final statistics were reported widely in the Chinese press: “Since [the beginning of the campaign], China has destroyed nearly 13 million pirated CDs, DVDs and computer software products. Over the past two months, police and copyright officials have investigated more than 537,000 publication markets, shops, street vendors and distribution companies, and closed down 8,907 shops and street vendors, 481 publishing companies and 942 illegal websites.” Xinhua, China Daily, September 29, 2006. In its 2006 submission IIPA reported on China’s 15-month national anti-piracy campaign involving thousand of raids and the seizure of millions of units of pirate product. IIPA members also reported then that there was “no meaningful decrease in the widespread availability of pirate products” (<http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf>). In an IIPA meeting with GAPP/NAPP/NCAC in November 2006, Mr. Li Baozhong gave the statistics for the 100 day campaign from his information: 10,000 cases, 7,634 of which involved copyright infringement (the rest were presumably pornography but this was not clarified). A total of 270 cases were referred to the PSB and 63 of these cases were concluded involving 140 defendants. We were given no further information on these cases, what penalties were imposed, whether U.S. works were involved etc.

the campaign commenced. In some cases, however, pirate product became less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways.

What this story, and those following previous campaigns over many years, illustrates is that the otherwise commendable use of massive enforcement resources to go after piracy lacks the effective deterrence that China must create if it wishes to have a significant deterrent impact in the marketplace. As IIPA has pointed out on innumerable occasions, China's administrative enforcement machinery and penalty structure does not deter piracy in any significant way.

In addition, at the manufacturing and wholesale levels, industry continues to report large-scale pirate production by Chinese OD factories. Exports sourced from these factories continue to be seized around the world. The quality of the pirate product being produced and exported in large quantities by Chinese OD plants is some of the best being found by authorities in other countries. The continued lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China ensures that piracy rates of physical copyright products continues to be among the highest in the world, at 85-95% depending on the industry sector and product format (e.g., an estimated 95% of DVDs in China are pirate).

In June 2006, a campaign against hard disk loading of business software was launched to follow up on the earlier announcement by the government requiring manufacturers of computers (and imported computers) to be sold only with legitimate operating systems. This latter notice was jointly issued in March by the Ministry of Commerce (MOFCOM), the Ministry of Information Industries (MII) and NCAC. This complemented the 100-day campaign announced in July 2006 and the Internet piracy campaign (see below) announced in September 2006. BSA has commended the few actions on hard disk loading taken in a number of major cities, but action must be significantly enhanced for piracy levels in this area to be reduced.

**Internet Piracy Continues to Grow and Has Become a Major Threat to the Digital Marketplace:** Internet piracy is progressively worsening as the number of Internet users and broadband penetration increase in China.<sup>7</sup> China has become 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.<sup>8</sup> Official Chinese figures reported in the press indicate that there are about 843,000 websites now operating in China. Hundreds of these websites emanating from China now offer streams, downloads or links to unauthorized files of copyright materials (music, films, software, books and journals). The motion picture industry reports, for example, that all of the major P2P sites streaming broadcast programs (either entire channels or newly created channels composed of U.S. broadcast content) operate out of China. The recording industry reports that seven or more "MP3 search engines" offer "deep links to thousands of infringing song files. The largest of these is Baidu, which was sued by the international record companies for its deep linking activities. Unfortunately, the Beijing Intermediate Court sided with Baidu in a decision with massive adverse implications. The case is being appealed, as the court entirely misconstrued the nature of Baidu's activities and deep

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<sup>7</sup> China saw continued rapid expansion in 2006 in terms of the number Internet users and number of broadband lines. "The number of Internet users in China grew to 137 million at the end of 2006. China's netizens grew by 26 million, or 23.4%, and currently reach 10.5% of the total population, [China Internet Network Information Center](http://www.chinainternetnetworkinformationcenter.com/) reported. In China, 17 million people use their cell phones to go online, and 104 million have broadband Internet access. [http://www.itfacts.biz/index.php?id=C0\\_2\\_1](http://www.itfacts.biz/index.php?id=C0_2_1).

<sup>8</sup> *Id.* It has been reported that the number of broadband subscribers in China will surpass the number in the U.S. by the end of 2006, giving it the largest number of broadband subscribers in the world. <http://www.websiteoptimization.com/bw/0601/>.

involvement with infringing activity.<sup>9</sup> The international recording industry filed a similar civil suit in early 2007 against Yahoo China for copyright infringement. There are also at least eight Chinese based P2P services engaging in widespread illegal file sharing activities. The most widely known are Kuro (now shut down), Mupor and Kugoo. Most of these are advertising-driven sites (though some are subscription based), given the lack of development in China of credit card or similar payment mechanisms. Many eMule/eDonkey servers and Bit Torrent sites are based in China. Further, there are growing numbers of video locker sites in China, like Tudou, which are also advertising-driven sites providing infringing streaming of music videos.

In a welcome development, the licensee (Shandha) of the Korean entertainment software developer of the “Legend of Mir” videogame was successful in obtaining at least two criminal convictions against pirate servers dealing in the game. The division of the PSB that deals with Internet offenses has reported that there are now pending or concluded 48 Internet criminal cases. IIPA has been unable to find out anything further about these cases but they are a most welcome development, particularly if they result in publicized convictions with deterrent penalties.

With the adoption of the Internet Regulations in July 2006, the legal infrastructure for effective protection of content on the Internet in principle was significantly enhanced. In September 2006, the NCAC issued a notice of special actions to be taken against pirate sites, with the campaign lasting until January 2007. According to an NCAC news release on Feb 8, 2007, NCAC shut down 205 illegal websites, confiscated 71 illegal servers and transferred six cases to the courts for prosecution; one of those cases reportedly led to a conviction. NCAC investigated 436 cases, and ordered 161 offenders to stop their infringement. The authorities reportedly imposed total fines of RMB705,000 (US\$90,980). Both NCAC and the Internet division of the PSB reported to IIPA and its members in November 2006 on the difficulty of getting IP addresses and identifying right holders. We informed both offices that the associations stood ready to assist in this endeavor and that cooperation between enforcement authorities and right holder organizations was severely hampered by outmoded rules, and reforms would need to be made before Chinese enforcement could begin to resemble that in other countries, where such cooperation was a regular feature.

Certain key reforms would assist greatly in this area. First, it should be publicly clarified that email notices are permitted under the new Internet regulations and that takedowns following notice must be within 24 hours.<sup>10</sup> Second, ISPs that fail to immediately takedown sites following compliant notices from right holders are infringers and have violated the Internet regulations and the Copyright Law (by losing the “safe harbor” established under the regulations). As such, they should be subject to the same administrative fines as any other infringer. Until these fines are imposed and announced publicly, it will remain extremely difficult for NCAC and the local copyright bureaus to deter Internet piracy, given the difficulties to identifying and bringing administrative actions against the website or the like. Third, the agency must clarify the evidentiary requirements necessary to provide a compliant notice and to ensure that an administrative fine can be imposed. Fourth, with respect to the obligation of the NCAC to transfer cases involving criminal infringement to the PSB and SPP, it must be clarified exactly

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<sup>9</sup> In a meeting between IIPA and the State Council Legislative Affairs Office (SCLAO) in November 2006, the official responsible for drafting the *Regulations on the Protection of the Right of Communication through Information Networks* (“Internet Regulations”) which became effective on July 1, 2006 stated that under Article 23 of those regulations, ISPs were liable for their linking activities.

<sup>10</sup> NCAC officials stated in a November meeting with IIPA that takedowns should occur in no more than 48 hours. Unfortunately, this appears NOT to have been communicated officially to the ISP community in China, which continues to fail to comply with notices.



how the thresholds established in the 2004 JIs apply in the Internet environment and such clarifications should be widely circulated throughout all the agencies responsible for enforcement. NCAC must reach out to industry to create an effective notice and takedown and administrative enforcement system to combat Internet piracy. Finally, given that there are more than 1000 local ISPs throughout China, another reform that is critically necessary is for the MII and NCAC to provide stringent rules for ISPs to maintain accurate, up to date contact information, residing on the MII and NCAC website, so that notices may be timely served to the right entity. This is not the case today and such a list is urgently needed.

The recording industry filed complaints with NCAC for administrative action in 2006 against 44 internet sites. 29 of these sites have been taken down. One complaint was filed with the Beijing Copyright Bureau against a deep-linking site. Six complaints were filed with the National Anti-Piracy and Pornography Working Committee.

The motion picture industry sent seven take-down notices to ISPs between September and December 2006. Four sites complied after the MPA raised it with NCAC, however, as of February 9, two sites were reactivated, demonstrating clearly that deterrence is lacking.

Below are statistics provided by the record industry on Internet infringement actions in China in 2006.

<b>Record Industry Takedown Rate of Suspected Infringing Websites in China</b>			
	<b>Number of notices</b>	<b>Number of sites</b>	<b>Takedown rate</b>
<b>2003</b>	1320	2509	29%
<b>2004</b>	2632	7170	61%
<b>2005</b>	1778	4711	61%
<b>2006</b>	1495	1205	58% <sup>11</sup>

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 Must Take Effective Criminal Action Against Optical Media Plants Engaged in Piratical Activities, Particularly Mass Production for Export:** We believe there are approximately 92 optical disc plants in China, with 1,482 total lines bringing total disc capacity based on IIPA's conservative methodology to a staggering 5.187 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. A considerable amount of very high quality pirate Chinese OD production continues to be exported. In 2006, infringing product from China was found in nearly every major market in the world, including (but not limited to): Germany, Italy, Australia, Norway, Belgium, Canada, Mexico,<sup>12</sup> the United States, Russia, the United Kingdom, the Netherlands, Israel, Paraguay, Lithuania, Singapore, Taiwan, the Philippines, Indonesia, Vietnam, Hong Kong, Malaysia, Thailand, Chile, New Zealand and South Africa.

<sup>11</sup> Although a number of sites were taken down by ISPs/ICPs after receiving a takedown notice, some of the sites very quickly reappear on the same ISP/ICP offering different repertoire.

<sup>12</sup> 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.



The recording and motion picture industries have been urging that the Chinese government cooperate effectively with their industries to identify forensically infringing CDs and DVDs produced by Chinese OD factories. They have proposed specifically that Chinese authorities collect and maintain “exemplars,” (e.g. samples), from each production line and make them available to these two industries for use in forensic analysis of pirated product as is done by many governments around the world. In exchange, these industries would also, at the request of the Chinese government, use their international exemplar database to help the Chinese government determine the source of infringing product that the Chinese government has reason to believe was manufactured outside of China. This should facilitate greater regional and/or global cooperation in the fight against piracy. Regrettably, the Chinese government continues to refuse to collaborate with right holders in this manner.

In March 2006, after much discussion with the U.S. government about these issues, China announced administrative actions against 14 optical disc plants. It was then learned that 6 of these plants were reportedly closed (although it remains unclear whether such closures were permanent) and that the licenses of 8 of the plants were “temporarily” suspended. Finally, it was reported that only one or two of the fourteen plants were under “criminal investigation” despite pirate production levels at many or most of these plants that we believe far exceed even China’s high thresholds for criminal prosecution. Little further information was provided. Since then, industry has brought evidence of piracy to the PSB in cases involving 17 OD plants and formally requested criminal prosecutions against them. Industry has also asked the PSB to bring criminal actions against three other plants among the original 14 identified by the Chinese government, for a total of 20 requested criminal cases. Results to date have been discouraging; no criminal cases have been commenced (though in some the PSB is still considering the matter). A few of the cases have been rejected outright by the PSB. These rejections were either because the PSB believed the case should have been brought initially to the administrative authorities, or because it believed that the evidence presented, which clearly raised a strong, virtually irrefutable, inference that piracy meeting the thresholds was occurring, did not “prove” that the thresholds were met. In the first case, Chinese law expressly permits citizens/right holders to bring criminal cases directly to the PSB<sup>13</sup> and in the second case, China stands alone in the world in apparently requiring more than “reasonable suspicion” that a crime in being committed before commencing an investigation. Unless China shows an open willingness to bring criminal cases against major pirates in their country, there is little hope that levels of piracy can be significantly reduced, despite repeated Chinese government promises.

As bad as it is, the problem of pirate OD production for the domestic Chinese market and for export will multiply exponentially if China goes forward with its plans, announced in 2005, to create its own format of HD-DVD which will not be compatible with any existing DVD player, and that will not be bound by current copy protection.<sup>14</sup> The prospect of an unprotected format created in China harkens back to the advent of the VCD, a Chinese-invented pirate

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<sup>13</sup> Taking cases through the administrative machinery slows the case down, risks that evidence will not be preserved and under applicable criminal rules is not necessary. Indeed the PSB is obligated to take cases directly where criminal conduct is demonstrated. See Article 84 of the *Criminal Procedure Law of the People’s Republic of China* (adopted at the Second Session of the Fifth National People’s Congress on July 1, 1979, and revised in accordance with the *Decision on Amendments of the Criminal Procedure Law of the People’s Republic of China*, adopted at the Fourth Session of the Eighth National People’s Congress on March 17, 1996). See also, Article 18 of the *Rules of Public Security Authority on the Procedure of Handling Criminal Cases* (promulgated by the Ministry of Public Security under Decree No.35 on May 14, 1998).

<sup>14</sup> *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).

format, and would raise serious questions about the Chinese government's will to deal with the piracy issue.

**China Must Implement Deterrent Measures in Fighting Piracy of Books and Journals:** U.S. book and journal publishers suffer from piracy in three key forms—unauthorized commercial-scale photocopying, illegal printing of academic books and commercial bestsellers, and Internet piracy encompassing online academic and professional journals and sites offering scanned books 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 throughout China.

Throughout 2006, publishers worked with GAPP, NCAC and most recently MOE to deal with rampant piracy in “textbook centers” on university campuses. During the second half of 2006, these three agencies took unprecedented action on this issue, engaging in a series of enforcement actions against textbook copying activity in Hubei, Beijing, Shanghai and Guangdong. These actions, taken in response to industry complaints, involved administrative investigations at key universities in these cities and provinces, in most cases resulting in Punishment Decisions, including administrative fines. IIPA applauds this action and hopes to see it continue during the high copying periods in March and September of 2007.

One industry complaint, against Tongji Medical College of Huazhong University in Hubei Province, was acted on within 24 hours of the complaint, resulting in seizure of thousands of pirate books! In this case, authorities imposed the maximum fine of RMB100,000 (US\$12,900) as part of the Punishment Decision. Other cases have not made such a strong statement, and industry is concerned that the government investigations were conducted at the wrong time<sup>15</sup> or that fines (perhaps as a result) were too low to be deterrent.<sup>16</sup>

A welcome development, complementing the enforcement undertaken by GAPP and NCAC, is the involvement of MOE in sending messages to universities about this sort of copying. In August, September and November 2006, GAPP, NCAC and MOE joined forces in issuing notices to regional education bureaus and regional copyright bureaus that copying of books at universities was not to be tolerated.<sup>17</sup> These notices instructed universities that, among other things, they were to ensure that the textbook centers were free of infringing activity by December 31, 2006. Industry has received some reports that this message is being conveyed to certain universities. IIPA considers it imperative that these notices are properly conveyed to the appropriate university authorities and fully implemented. MOE, GAPP and NCAC should work together to formulate and undertake a strategy to ensure proper implementation and follow-through.<sup>18</sup>

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<sup>15</sup> The pertinent periods for enforcement against university textbook centers—or any type of copying of academic materials—surround the start of university terms. These most often begin in September and March. Several of the government investigations in response to right holder complaints were conducted outside of these time periods. For example, the first investigations took place in June and July, when universities were out of session. Low seizures and low fines are bound to result. Right holder groups requested in these cases that authorities return to the campus during the September high season, but these requests were summarily declined.

<sup>16</sup> In fact, in some cases fines were waived due to “low stock.” This again illustrates the importance of proper investigation during the seasons when infringing activity is likely to be taking place.

<sup>17</sup> Some of these notices were issued by one or two of the agencies in partnership, rather than all three.

<sup>18</sup> Universities in areas targeted for enforcement in 2006 seem to be aware that the authorities are paying more attention to these issues. Several university employees have made comments alluding to “copyright problems” or the “need to be careful.” While implementing the notices and continuing their enforcement activities, GAPP, NCAC and MOE should also be on the lookout for changing modes of operation, as these activities often go underground when enforcement becomes more frequent.

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.

Illegal printing of books continues to plague publishers in China as well. Local publishers report high levels of print piracy of their own academic materials. High level foreign technical or medical books marketed to professionals and bestsellers tend to be vulnerable to this type of piracy, severely undermining the legitimate market for foreign and Chinese publishers alike. In some cases these books are sold in bookstores, and also by street vendors and large book markets throughout China.

As noted earlier, Internet piracy also affects the publishing sector, most notably with respect to sites offering free or pay downloads of academic and trade titles, and abuse by users of licensed online academic journals. University gateways are too often left open to non-subscribers, allowing for-profit companies to download and resell journals, severely undermining the electronic journals market. Publishing industry groups have recently brought two complaints to NCAC about this problem. NCAC should continue work, along with the MII and local and regional copyright bureaus, to ensure immediate and effective action against such sites.<sup>19</sup>

**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.<sup>20</sup> China made a commitment in the JCCT to complete legalization within all government agencies, 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 indicates that this commitment has not been fulfilled. In the 2005 JCCT and again in 2006, China committed to the legalization program for state-owned enterprises and to discuss software asset management. An implementation plan has been issued (but detailed plans have apparently not yet been formulated) and, unfortunately, the responsibility for compliance and oversight seems to lie on each agency and not on any central authority to enforce the commitment. Software asset management is still under discussion and much progress must still be made. The commitment is to complete this program in 2007.

Among the most notable and far reaching commitment emanating from the 2006 JCCT was the commitment, discussed earlier as well, to prohibit sale of computers both manufactured in China and imported without legal operating systems. NCAC placed the compliance rate on this commitment at 65% in November.

NCAC is woefully understaffed and while it has run a few end-user raids, this entire area of much needed enforcement is not being given sufficient attention given the magnitude of the problem. BSA filed 39 end user actions with NCAC and local copyright bureaus in 2006, all of which were acted on, a major positive enforcement development for the industry. This resulted

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<sup>19</sup> AAP reports that its complaint against [www.fixdown.com](http://www.fixdown.com) and related sites, received good attention from NCAC and the Guangdong copyright authorities, and the site was taken down soon after it was listed as one of China's "Top 50" Internet priorities. AAP will continue to monitor the status of this site. AAP urges that similarly expedient action be taken with regard to its other complaints.

<sup>20</sup> The business software industry also loses revenue due to retail hard-disk loading (discussed earlier), and the production in China (generally for export) of high-quality counterfeit software packages.

in 16 settlements with targets (with others under negotiation, with only two cases resulting in administrative fines. However, much more needs to be done; NCAC must secure more manpower and resources, must issue many more deterrent administrative fines, and must confiscate equipment in many more cases.

**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. and Chinese film industry.

**Piracy of Entertainment Software Products:** The level of piracy in the market for physical product (PC games and games played on handheld devices) remains high.<sup>21</sup> However, the Internet gaming market has shown immense growth and entertainment software publishers are seeing significant development in the online games market.<sup>22</sup> Notwithstanding a developing online games sector, there has been an increase in Internet piracy, including downloading and corresponding burning activity (which is reportedly happening at the thousands of Internet cafés in the country).

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. Large export seizures in other countries 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.<sup>23</sup> In 2006, over 75,000 counterfeit *Nintendo* products, all originating from China were seized in 13 countries around world. However, Chinese Customs authorities failed to stop even one shipment of such pirated or counterfeit goods from leaving its territory.

Chinese enforcement authorities continue to fail to initiate criminal prosecutions against infringers. During 2006, 24 raids were conducted against factories, warehouses or workshops in Guangdong Province, resulting in the seizure of over 800,000 infringing *Nintendo* products. Many of these actions involved willful commercial-scale infringement, yet not a single action was initiated or prosecuted by the Chinese criminal enforcement authorities. Another troubling enforcement obstacle that has recently arisen is a new requirement (imposed by the administrative authorities in Shenzhen and Guangzhou) that obliges the complainant to submit samples of the counterfeit goods along with sales receipts. Many counterfeiters operate illegally

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<sup>21</sup> This includes sale of packaged games where piracy levels are high and legitimate sales are miniscule, as well as use of games in Internet cafes where owners often buy one copy and load it on all their computers or consoles. There are over 250,000 such cafes, and it is suspected that the losses from this piracy are enormous, though efforts by some entertainment software publishers to license such cafés are reportedly progressing well. Fortunately, the popularity of online games has at least delivered some promising returns for entertainment software publishers.

<sup>22</sup> The industry's use of technological protection measures has been relatively successful and is believed to have aided in promoting the development of this sector of the video game industry. There have, however, been recent reports of circumvention of these measures but courts have so far appeared sympathetic to this problem. See *In re Mr. ZHANG* (张某, Mr. HAN (韩某, Mr. LIU (刘某, Mr. QI (齐某) & Mr. HE (何某) (January 30, 2007, People's Court of Nanshan District, Shenzhen, Guangdong Province). This case involved the circumvention of TPMs on an online Korean videogame (which was discussed by the court) and the unauthorized reproduction of the game. Unfortunately, as discussed below, circumvention of TPMs, as a separate act, does not yet carry criminal liability in China, as required by the WIPO Internet Treaties which China is about to join.

<sup>23</sup> Hong Kong continues to be a key transshipment point for counterfeit *Nintendo* products. In 2006, over 34,000 infringing *Nintendo* products were shipped through the HKSAR.

without a business license and thus are quite unlikely to furnish invoices or sales receipts at the time of the sale of counterfeit products. This new requirement would make it a great deal more difficult to initiate actions.

**China must Significantly Increase Criminal Prosecutions for Copyright Piracy to Create Deterrence in its Enforcement System:** While there have been an increasing number of statements from Chinese leaders in the last year that criminal enforcement is a necessary component of its enforcement system, the reality remains that copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means.<sup>24</sup> China has not met its promises in the JCCT to increase the number of criminal prosecutions for copyright piracy. IIPA has sought to determine, through statistics issued in China and through its own investigations, the number of criminal cases brought under those provisions of China's criminal law that deal with piracy offenses. China does not separately break out criminal cases involving copyright. IIPA and its members remain aware of only six criminal cases involving U.S. works brought by China since it joined the WTO in 2001 (three in 2006 and three in 2005) and a few more cases involving the works of other WTO members.<sup>25</sup>

Without significant increases in criminal prosecutions resulting in deterrent penalties and a willingness (a) to devote the resources to such prosecutions; (b) to seek assistance from right holders with respect to training etc., and (c) to announce publicly throughout China that criminal prosecutions for piracy will be a primary feature of its enforcement system, we do not believe that China can make a meaningful dent in piracy levels. Other countries/territories that have to significantly reduced piracy levels have done so only through the aggressive use of deterrent criminal prosecutions.<sup>26</sup> China must learn this lesson.

In March 2006, China amended its rules on transferring administrative cases to the criminal courts for prosecution.<sup>27</sup> While the enforcement authorities regularly announce that a few administrative cases were referred to the PSB, industry is not able to ascertain what happens to these cases after being transferred and whether they are ever fully investigated or

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<sup>24</sup> On January 11, 2007, the SPC released to all lower courts in China, the "*Opinions on Strengthening All Respective Work on Intellectual Property Trials to Provide Judicial Safeguard for Building An Innovation-oriented State.*" Just one of the 26 sections of this document dealt with criminal enforcement and urged the lower courts to treat criminal piracy as an important crime. It is as yet unclear what effect this will have on lower criminal courts and on the enforcement authorities in prosecuting and concluding significantly more criminal cases.

<sup>25</sup> IIPA has been able to identify 51 cases since 2001 which it believes were brought under the piracy provisions of the Criminal Law, namely Articles 217 and 218. The vast majority of these involve only Chinese works, or we are unable to ascertain if foreign works were involved. China does bring criminal cases for "illegal business operations" under Article 225 of the Criminal Law and these cases can involve acts of piracy and most often prosecutions for manufacturing or dealing in pornography. Known Article 217-218 cases involving U.S. product include *In re SHEN Jiuchun* (沈久春) (December 20, 2006, People's Court of Shijingshan District, Beijing) (pirated Chinese version of book on Jiang Zemin); *In re CHEN Fuqiang* (陈富强), *WU Jun* (吴军) and *WU Xiaojun* (吴小军) (date decided unknown, possibly December 2006, People's Court of Beichen District, Tianjin) (MS SQL 2000); *In re HUANG Yilong* (黄毅龙) & *CHEN Zengcai* (陈赠才) (September 17, 2006, People's Court of Huli District, Xiamen) (online U.S. music and sound recordings) *In re TONG Yaxi* (People's Court of Yuzhong District, Chongqing, August 12, 2005), (U.S. motion picture product); *In re Randolph Hobson GUTHRIE III, Abram Cody THRUSH, WU Dong and WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005)(U.S. motion pictures on DVD); and *In re CHEN Fuqiang* (陈富强) (date decided unknown but probably early 2005; People's Court of Haidian District, Beijing)(U.S. software).

<sup>26</sup> South Korea, Singapore, Taiwan and Hong Kong are examples where criminal enforcement has been able to significantly reduce piracy levels.

<sup>27</sup> *Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement* (Issued by the Supreme People's Procuratorate, the National Office of Rectification and Standardization of Market Economic Order, the Ministry of Public Security and the Ministry of Supervision, March 2, 2006.) ("Criminal Transfer Regulations")

prosecuted. The entire system is non-transparent. The Chinese government must open up its system and provide right holders with meaningful information.

**Civil Cases Brought, Including Against Internet Pirates:** The copyright industries have fared better in the civil courts in China.<sup>28</sup> Unfortunately, the average awards do not come close to compensating the right holder for the injury suffered as a result of the infringement, though improvements are slowly being made. For example, the average damages awarded in the recording industry's cases were about RMB3,500 (US\$452) per title, which usually does not even cover legal fees and expenses, much less compensate the right holder for its loss. This paltry sum has fallen further to an average of about RMB2,000 (US\$258) per title in 2006. Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome in China, and, in the Internet environment, 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, courts have on occasion even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence. The civil system should be reformed to provide clear evidentiary and procedural rules and (a) to provide for statutory damages and reasonable compensation for legal fees and expenses, (b) to introduce a presumption of subsistence and ownership of copyright, and (c) to allow organizations that are authorized by right holders to conduct anti-piracy cases on their behalf to sue in their own name. As a result of all these difficulties, the recording industry decided not to file any civil cases in 2006.

## **MARKET ACCESS AND RELATED ISSUES**

IIPA has consistently stressed the direct, symbiotic relationship between the fight against piracy and the need for liberalized market access to supply legitimate product to Chinese consumers. It has been more than five years since China joined the World Trade Organization, and the copyright industries are still waiting for China to comply with a number of commitments it made in that agreement to open its market. China's failure to meet these commitments significantly harms U.S. right holders who would like to more effectively and efficiently provide their products to Chinese consumers. China's failure in this regard also subjects China to potential WTO dispute settlement claims over its failure to meet its obligations.

**Ownership/Investment Restrictions:** The Chinese government allows foreign book and journal publishers, sound recording producers, motion picture companies (for theatrical and home video, DVD, etc. distribution), or entertainment software publishers, at best, to enter the Chinese market except only as a partner in a minority-share (up to 49%) joint venture with a

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<sup>28</sup> During 2002 and 2003, the motion picture industry 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 at least 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. In 2006, the motion picture industry filed six civil cases, one against a Nasdaq-listed internet website and five against retail outlets. Two retail and the internet website cases received favourable judgements, while three cases against the retail outlets remain pending. In 2006, the Beijing Intermediate Court ruled against the recording industry in its civil cases against Baidu, which cases has been appealed to the Beijing High Court In 2007. The record industry has filed 11 cases against Yahoo China for its deep linking service.

Chinese company.<sup>29</sup> These limitations should be eliminated. In too many instances, China does not permit any foreign ownership.

**The Censorship System:** 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 only recorded, 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.

The Ministry of Culture's recently issued (December 11, 2006) *Opinion on the Development and Regulation of Internet Music*, discussed in more detail below, imposes unnecessarily burdensome censorship and ownership requirements on legitimate online music providers. The *Opinion* would require censorship approval for all foreign music licensed to such providers while requiring only recordation for domestic repertoire. Especially because of the large number of titles involved, implementation of this *Opinion* would impose virtually impossible delays on these foreign business and the right holders who license their product to them.

Entertainment software companies continue to 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 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.<sup>30</sup> The review function should be lodged with only one agency, either the GAPP or the MOC. As more entertainment software products distributed on physical optical disc media increasingly have an online component, such games would become subject to two separate content review processes before two different agencies. The effort to comply with two review procedures before two different agencies could potentially exacerbate the delay in getting new releases to market, but in addition, would be burdensome to publishers. Further, transparency in the review process is likewise sorely needed.

**Restrictions on Anti-Piracy Investigations:** China maintains severe restrictions on the ability of copyright industries' trade associations in China from engaging in investigations in the

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<sup>29</sup> In what was considered a positive development in IIPA's 2006 submission, ownership restrictions on cinemas had been lifted slightly, allowing up to 75% foreign ownership in Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing, compared to 49% everywhere else. However, these regulation were rescinded later in 2006 and after investments had been made under the new rules, returned to the 49% rule. As a consequence, one U.S. company simply left the market. Moreover, 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.

<sup>30</sup> 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 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 (including the new *Opinion* discussed above and below in the text) 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.

anti-piracy area as well as limiting the number of employees that such “representative offices” may employ. Companies that invest in China are not subject to these same restrictions. Because copyright-based companies conduct virtually all their global anti-piracy operations through their designated trade associations, and given the restrictions on becoming a foreign invested company in China, these rules severely hamper the fight against piracy in China. These rules make no sense and are apparently rules imposed by NCAC. They should be eliminated at the earliest date.

**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 distribute a recording in physical format except through a minority joint venture with a Chinese company (and may not “publish” a recording at all—a stage in the process of bringing materials to the market left entirely to state owned companies), 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.<sup>31</sup> 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.
- 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)).

The new *Opinion on Development and Regulation of Internet Music* would significantly stifle the development of legitimate online music commerce in China, including both Internet-based music services and the fast-growing mobile phone delivery of music content. It imposes a complete prohibition on foreign ownership of online and mobile music services and, as noted above, burdensome, discriminatory and unnecessary censorship requirements. Foreign record companies should be able to service Chinese consumers as part of these online music services and be able to import and deliver music content without restriction under China’s WTO commitments.

**Book and Journal Publishing Industry:** The U.S. book and journal publishing industry continues to suffer from severe restrictions on its activities within China. Below are listed the fundamental issues hindering this industry from offering the widest possible array of tailored products to the Chinese consumer.

- **Trading Rights:** Foreign companies are prohibited from importing material into China. Importation is limited to 38 State-owned trading companies, through which all imports must

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<sup>31</sup> 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.



be channeled. Under the terms of China's WTO accession, foreign-invested and foreign-owned companies should be permitted to engage in direct importation of their products.

- **Distribution:** Foreign-invested and foreign-owned companies should be permitted to engage in wholesale and retail distribution of all product (locally produced or imported) in the Chinese market. It appears that foreign publishing companies may be allowed to engage in distribution of Chinese-produced materials, but this does most foreign publishing companies little good, considering they are prohibited from publishing or printing (for the local market) in China.
- **Publishing:** Liberalizations to core publishing activities would allow foreign companies to better tailor a product to the Chinese market. Activities such as obtaining Chinese International Standard Book and Serial Numbers (ISBNs or ISSN), editorial and manufacturing work and printing for the Chinese market remain off-limits to foreign companies. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials most appropriate for Chinese users. These restrictions also create delays and a lack of transparency in dissemination of legitimate product in the Chinese market, opening the door for pirate supply.
- **Online content:** High fees related to access to foreign servers by users of the China Education and Research Network (CERNET) 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 options available to Chinese scholars and students.

**Motion Picture Industry:** There has been no change in 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. The monopoly import structure (described below) and the censorship mechanism go hand in hand with the way this quota is imposed and enforced. Demonstrably unfair and adhesive contractual conditions (under the so-called "Master Contract") still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office while in the rest of the world the convention is to split the box office 50-50 between studios and distributor. This creates a completely non-competitive environment for film importation and distribution in China.
- **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, in violation of China's WTO trading rights commitments. 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.<sup>32</sup> Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to China Film, which it effectively controls, thwarting any real competition between the two. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.

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<sup>32</sup> 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%.

- **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).<sup>33</sup> 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' 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).<sup>34</sup>
- **Black-Out Periods:** The Chinese government has on various occasions 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 the 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.

## **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.

<sup>33</sup> 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.

<sup>34</sup> 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.

**Administrative-Criminal Transfer Regulations:** It was hoped that the Criminal Transfer Regulation would lead to more and easier referrals from administrative agencies to the PSB. However, as IIPA noted in last year's filing with respect to the draft regulation, it was left unclear whether transfers were required upon "reasonable suspicion" that the criminal thresholds had been met. There appears to be no uniform practice among administrative agencies and PSB offices on this critical question and further clarification, which would allow such "reasonable suspicion" transfers, is critically necessary. Reports in the Chinese press routinely refer to such referrals occurring (though in a very limited number of cases, likely given that the thresholds are too high) but it is never, or very rarely, reported what happens to the case after that event. In general, however, the adoption of these regulations does not appear to have led to an increase in transfers or any further clarity on when they are required.

**Adoption of the New "Regulations for Protection of Copyrights on Information Networks":** In a welcome transparent process, the new "Internet Regulations" were issued and entered into force on July 1, 2006 and set out the legal infrastructure, along with provisions of the Copyright Law, for protecting content online. In general, IIPA welcomed the new regulations as responsive to many of the comments made by it and other members of industry over a long comment period. Some concerns remain, however:

- **Coverage of Temporary Copies:** The SCLAO which had ultimate responsibility, following a drafting and vetting process in NCAC, for the final regulations decided not to clarify coverage for temporary copies. While there is support in many quarters for an additional regulation clarifying this issue and extending the scope of the regulations to ALL the rights implicated by reproducing and transmitting content online, Director General Zhang of the SCLAO indicated to IIPA in its November meetings that this issue remains controversial. IIPA noted that over 100 countries around the world extend, or have committed to extend, such protection.
- **Coverage of the Regulation Generally:** IIPA had voiced concern in its series of comments that the regulations were limited only to the communication to the public right. Director General Zhang responded that he believed that all other rights were covered directly by Article 47 of the Copyright Law. This would appear to result in the conclusion that Article 47 also mandates the coverage of devices and services with respect to copy controls. We indicated that further regulations would be highly desirable to remove any ambiguity in coverage. He did not close the door to this possibility.
- **Technological Protection Measures:** The treatment of technological protection measures was substantially improved in the final regulations. Both devices and services are now covered by the prohibition as are "acts." Access controls are also covered. The test of what constitutes a circumvention device still remains unsatisfactory. Exceptions were significantly narrowed, though remain overbroad in some areas.
- **Service Provider Liability and Exceptions:** The final regulation is a substantial improvement over earlier drafts and generally tracks the DMCA and EU Copyright Directive provisions. The "safe harbors" provide limitations only for liability from damages, not injunctive relief, and ISPs are liable if they know or should have known that the material was infringing even absent express notifications (and of course there is no safe harbor unless the ISP takes down the infringing material after compliant notice). The nature of what constitutes a compliant notice is less than clear, however, and has given rise to some confusion, and therefore lack of compliance by ISPs. However, it was clarified in a letter to IIPA that email notices would suffice, though this must be directly communicated to all ISPs in China. Exceptions still cause some concern with Director General Zhang confirming that the Article 9 statutory license will apply to foreign works which are owned by a Chinese legal

entity. This would violate the Berne Convention and TRIPS. Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works. Zhang also said that ISPs are liable for linking activities under Article 23, which we believe is the correct reading and would appear to contradict the decision of the Beijing Court in the recent *Baidu* decision.

- **Exemptions for Libraries, Educational Bodies and “Similar Institutions”:** IIPA remains concerned about certain aspects of Articles 6, 7 and 8. A representative list of potential issues includes (a) overbroad language applying to teachers, researchers and government organs in Article 6; (b) Article 7’s reference to “similar institutions,” which may open up the scope of exemptions far beyond organizations that perform the traditional functions leading to these exemptions; (c) failure to limit Article 7 to “nonprofit” entities; and (d) failure to clarify that Article 8 does not apply to foreign works.<sup>35</sup>

**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. Examples of omissions include the exhibition and broadcast right, the translation right and others, the infringement of which do not constitute crimes even if done “on a commercial scale.” 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.<sup>36</sup> 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, or in the case of hard disk loading where the software might be characterized as a “gift”). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO Internet Treaties), to which, as discussed below, the NPC has now authorized China to accede. The most important update would be to criminalize the circumvention of TPMs. 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 interactive public communication right); (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 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).<sup>37</sup> We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not

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<sup>35</sup> Director General Zhang of the SCLAO confirmed to IIPA that Article 8 did not apply to foreign works but this should be confirmed in writing and a notice made available widely.

<sup>36</sup> As noted below, the new JIs 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.

<sup>37</sup> 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.”

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.<sup>38</sup>

**Criminal Thresholds Should be Lowered or Abolished Entirely:** The SPC's 2004 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, 3,000, 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 illegal gain threshold applies in those cases (which is far more difficult to meet particularly since pirates do not keep records showing their "profit"). 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 with clear copy thresholds and even if pirate profit is not proved.

**China Should Deposit Its Instruments Of Accession To The WCT And WPPT Immediately:** While China committed to pass accession legislation in the NPC by June 30, 2006, the NPC finally did so in December 2006. This was applauded by IIPA but it is unclear why China has delayed depositing in Geneva so that the treaties would go into effect 90 days thereafter. Director General Zhang indicated that something might have to be done to cover performers with respect to the Treaties' obligations and this may account for the delay.

**China Should Adopt Full Communication To The Public And Broadcasting Rights For Record Producers:** China should provide performers and phonogram producers with rights of communication to the public, including of course broadcasting, and it should clarify whether the right of public performance in sound recordings still exists. The right of public performance for foreign sound recordings was initially accorded in the "International Copyright Treaties Implementation Rules", in force since September 1992. The "Implementation Rules" were issued, *inter alia*, to comply with China's obligations under a January 1992 MOU with the U.S., in which China had undertaken to grant a public performance right to foreign works and sound recordings. However, the 2001 Copyright Act failed to confirm this right, so no public performance right is clearly acknowledged by legislation, and the status of the right for foreign sound recordings is unclear. China should also establish clear rules that promote more responsible practices on the part of all players involved in the digital transmission of copyright materials. Legal accountability will lead to the development and deployment of advanced technological measures which will advance legitimate commerce while preventing unfair competition.

**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.

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<sup>38</sup> 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."

China should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

## **TRAINING AND PUBLIC AWARENESS**

MPA, IFPI and BSA have undertaken many training and awareness programs throughout China in 2006. The trainings have involved police, prosecutors, judges, customs officials and administrative agency enforcement personnel. Training and awareness has always been a high priority for the copyright industries in China.

MPA, for example, has provided the following trainings:

- From January 16-20, 2006, the MPA's Greater China Team and representatives from Hong Kong Customs, the Content Overseas Distribution Association and the Japanese External Trade Organization conducted three IPR training seminars for 239 Chinese law enforcement officials in Beijing, Shanghai and Shenzhen.
- On May 17, 2006, the MPA, in association with the Internet Society of China's Copyright Union, held a very successful half-day seminar entitled "Global Enforcement of Motion Picture Copyright on the Internet" in Beijing. Some 75 attendees participated in the seminar, including representatives of Beijing, Shanghai, and Shenzhen ISPs and ICPs as well as officials from NCAC, the Beijing Copyright Administration and the Public Security Bureau.
- On May 30-31, 2006, the MPA provided training to 180 National Culture Market Administrative Enforcement officials during a seminar held in Taiyuan, the capital of Shanxi Province. MPA China representatives delivered presentations on global trends in copyright enforcement, MPA anti-piracy strategies, and the identification of illegitimate audio-visual products. Ministry of Culture officials delivered presentations on the Administrative Measures for Culture Market Enforcement, which came into effect on July 1, 2006. MOC delivered a report on a copyright infringement criminal case involving a pirated optical disc shop that was prosecuted in Nanjing.
- On September 5 and 7, 2006, the MPA and "Content Japan" representatives organized training seminars in Hangzhou and Shanghai for local law enforcement officials. In attendance were Director Chen Tong of the MOC's Market Supervision Bureau, Deputy Director General Tin of the Zhejiang Culture Administration, and Director General Zhou of the Shanghai Municipal Culture Market Administrative Enforcement Task Force, as well as representatives from the Tokyo and Shanghai offices of the Japan External Trade Organization ("JETRO").
- On July 28, 2006, the MPA organized a training seminar in Guangxi Province for the National Anti-Pornography and Piracy Working Committee (NAPP), the Guangxi Copyright Bureau, and the Guangxi Press and Publication Bureau. Also in attendance were representatives from the Japan External Trade Organization ("JETRO").
- Sponsored by the MPA, the NCAC Symposium on Cracking-down on Internet Piracy was held in Beijing on July 20, 2006. Wang Ziqiang, the Director General of the NCAC's Copyright Department, presided over the symposium. Officials from the NCAC, Beijing Copyright Bureau, and the Ministry of Public Security (MPS) described their experiences

and the difficulties encountered in the prosecution of internet piracy cases. Officials also provided an explanation of the internal working procedures of the MPS for the handling of criminal cases related to internet piracy.

- On September 29, 2006, the MPA participated in the “IPR Criminal Enforcement Seminar” organized by the US Embassy and MPS, which was held in Shanghai. The seminar focused primarily on copyright issues, but also dealt with trademark-related enforcement. National and local-level MPS enforcement officials participated in the seminar and discussed the use of criminal actions for IPR enforcement. Representatives from the MPS, the People’s Procuratorate, and the NCAC also attended. The seminar concluded with a panel discussion in which industry representatives had the opportunity to speak about the challenges of bringing criminal IPR actions in China.
- On August 9, 2006 MPA was invited to give a presentation on the impact of optical disc piracy on the film industry at a training seminar conducted by the Beijing Press and Publications Bureau and the Beijing Copyright Bureau. The training seminar was organized as part of the nationwide “100-Day Anti-Piracy Campaign”. The MPA’s involvement in enforcement training programs has led to requests from the Beijing Press and Publication Bureau for MPA involvement in expanded training programs to be conducted next year.

The record industry provided the following trainings:

- In April 2006, a training for the representatives of the business and legal departments from local branches of China Telecom in Beijing. This is the biggest ISP in China.
- In April 2006, there was a round table training course for about 40 IP judges of China in Hangzhou.
- The industry participated in a Workshop on Administrative & Judicial Protection of Copyright of the Shenzhen Copyright Enforcement Program in July 2006.
- It participated in the Copyright Criminal Protection Seminar in Shanghai in September 2006, organized by the US Embassy Beijing.
- In December 2006, it made a presentation at the EU-China Conference on the Development of Collective Management Societies and the enforcement of copyright.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### RUSSIAN FEDERATION

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List and that the U.S. Government also undertake an Out of Cycle Review (“OCR”) in 2007 to carefully monitor Russia’s progress on enforcement and necessary legal reforms.<sup>1</sup>

IIPA makes this recommendation in light of the recent signing of the 2006 U.S.-Russia IPR Bilateral Agreement under which Russia committed to taking actions (most of them by June 1, 2007) with respect to the issues that have given rise to prior IIPA requests for the designation of Russia as a Priority Foreign Country and the removal of Russia’s GSP benefits. IIPA recommends that the OCR review should commence immediately after June 1; this provides Russia an opportunity to implement its IPR protection and enforcement obligations as stipulated in the IPR Bilateral Agreement. If after the OCR review, the U.S. Government determines that Russia has not made significant progress fulfilling its obligations, then IIPA recommends that the U.S. Government should designate Russia as a Priority Foreign Country and should immediately suspend Russia’s entitlement under the GSP program. Further, since violations of trade agreements are subject to mandatory retaliation, the U.S. Government should also initiate an investigation that will lead to the imposition of trade sanctions as contemplated under Section 301 of U.S. trade law. Conversely, if Russia has met all of its obligations, then the U.S. Government should consider removing Russia from the Priority Watch List.

## **EXECUTIVE SUMMARY**

On November 19, 2006 the Governments of Russia and the United States entered into a IPR Bilateral Agreement (“Side Letter”) in the context of Russia’s efforts to accede to the WTO; it was signed by Russian Minister Gref and Ambassador Schwab.<sup>2</sup> According to the Side Letter, U.S. support for Russia’s entry into the World Trade Organization (WTO) is now conditioned on meaningful copyright law enforcement with specific obligations that Russia must take to reduce piracy “on a priority basis” as well as requirements to adopt the laws necessary to accomplish this goal. The IIPA recommends an OCR to ensure that Russia accomplishes the specific Side Letter obligations by the specified deadlines (many in mid-2007), and also that it meets its obligations under other existing bilateral and multilateral commitments. Russia needs to comply with its obligations and make appreciable progress on enforcement to continue to enjoy existing trade preferences, such as duty-free benefits (GSP), and in order to accede to the WTO.

At present Russia’s current copyright piracy problem remains one of the worst of any country in the world, resulting in losses of over \$2 billion in 2006. Piracy levels of all copyright

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<sup>1</sup> For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2007SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> The text of this Side Letter, known formally as the U.S.-Russia Bilateral Market Access Agreement on Intellectual Property Rights, is available at [http://www.ustr.gov/Trade\\_Sectors/Intellectual\\_Property/Russia/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html).



materials – motion pictures, records and musical compositions, business and entertainment software, and books – range from a low of about 65% to a high of 83%. These levels are 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.

In 2006, there was some enforcement progress to report, particularly with respect to raids and inspections of some of the optical disc plants. But, the situation has not materially improved due to the continued lack of criminal prosecutions and sentences, and the absence of a sufficiently effective regime to prevent the production of illegal optical discs at Russia’s numerous plants. In 2006, the Russian Government reported that it ran an increasing number of “raids” and “inspections” on the optical disc plants, even more than in 2005. However, few of these “raids” were surprise inspections and some were undertaken without the cooperation of rightholders. Much more needs to be done in 2007 for Russia to meet its bilateral obligations under the Side Letter, including undertaking real surprise inspections with rightholder cooperation at all of the plants and, in order to be effective, adopting more detailed licensing provisions (required by June 1, 2007). There are three components to effective optical disc enforcement, in addition to the need to adopt a comprehensive and effective licensing regime: (1) all of the plants involved in the manufacture of illegal material must be closed; (2) plant operators of such plants must be convicted and sentenced; and (3) the machinery used to conduct this piracy must be detained and sealed as evidence, and then seized and destroyed, regardless of the ownership of the machinery.

In 1996, when the IIPA first brought the optical disc (“OD”) piracy problem to the attention of the U.S. and Russian governments, there were 2 plants; in 2005, there were 47. This figure grew to 54 optical disc plants last year, but has now decreased to 53 due to a consolidation of two of the plants. While it is clear that many of these plants are producing illegal material for export, the lack of a comprehensive and effective inspection and enforcement system, makes it hard to precisely determine this figure. The Side Letter, obligates the Russian Government to address this problem with specific on-the-ground enforcement steps and legislative actions -- by June 1, 2007. As the Side Letter notes (listing OD piracy as a priority), Russia is committed to addressing the problem, inter alia, “[w]ith the objective of permanently closing down operations of plants that engage in [the] production of optical discs and other optical media containing pirated and counterfeit material.”

The aggregate number of criminal enforcement actions (raids and convictions) by the Russian police did increase in 2006, with the business software sector seeing a 300% increase in such actions. The significant increase in sales experienced by some in the business software sector may be attributable, in part, to this increase in enforcement activity.

Additionally, there were positive steps undertaken to improve the IPR legal regime. For example, the Criminal Procedure Code was amended in 2006 to allow Russian police (in addition to prosecutors, as it was previously limited) to initiate criminal investigations of IPR infringements.

Second, legislation was introduced (and is expected to be adopted and in force in 2007), to establish higher penalties for copyright infringements -- of up to six years imprisonment, and by re-classifying copyright infringements as a “grave crime.” Once adopted, this would allow Russian law enforcement authorities to use a wide spectrum of investigative measures which are not possible for the current classification of copyright as a “medium gravity” crime.

Also, on June 19, 2006, the Supreme Court of the Russian Federation passed a resolution of the Plenum of the Supreme Court that clarifies the practices courts must follow when applying civil procedures in copyright infringement matters.

Major legal reforms (i.e., the enactment of a comprehensive Civil Code, Part IV on IPR) were adopted in 2006. However, the practical result of the Civil Code reform is that it will more than likely cause confusion among practitioners and the courts and will actually weaken, not strengthen, existing protections. Some of the Civil Code provisions did improve existing legal protections. But, it is unfortunate that the Russian government and parliament focused almost all of their attention in 2006 on replacing the existing (and mostly sufficient) copyright law with a new Civil Code, Part IV (a substitute for all IPR laws). This diverted attention and resources from the much more important need to undertake effective enforcement and to change procedural enforcement measures. In fact, in 2006, the most significant IPR enforcement matters showed little appreciable signs of improvement: (1) optical disc piracy remains unacceptably high; (2) criminal enforcement, especially against optical disc piracy, is weak overall, non-deterrent, and certainly not directed against plant operators and organized crime syndicates, which it must be to be effective; and, (3) Internet piracy of movies, music, videogames and books is growing, with blatant pirates using Russian-based servers (an otherwise simple target for enforcement), for example, [allofmp3.com](http://allofmp3.com), operating with impunity.

**Enforcement Steps Required by the Side Letter for 2007:** Russia has agreed in the Side Letter to make copyright enforcement an IPR priority, especially against illegal optical media plants, and to improve overall enforcement. For years, IIPA has provided a list of the critical steps that the Russian Government could take to effectively confront its optical disc and other critical piracy problems. IIPA supports the inclusion of many of these steps as binding commitments of the Russian Government in the Side Letter.

In particular, the Side Letter requires the Russian Government to:

1. Address the optical disc problem, with the objective of permanently closing down illegal plants, by:

A. Conducting “repeated, unannounced inspections” of all known OD plants. “Such inspections will take place regularly, without prior notice, and at any time, day or night. If evidence of unauthorized production of optical media bearing content protected by copyright or related rights on a commercial scale is found, criminal proceedings will be initiated.” Russia will then be required to “[c]ontinue to conduct actions to find and shut down unlicensed plants producing optical media bearing content protected by copyright or related rights.”

B. Conducting actions to “find and inspect warehouses” storing pirate product, including the seizure and retention for evidence of illegal copies, as well as initiating “investigations to determine the owner, distributor, and manufacturer of such goods and prosecutions of these persons and enterprises” including “criminal proceedings...in cases of piracy or counterfeiting on a commercial scale.”

C. “Ensuring that facilities on the territory of government-controlled military-industrial [i.e., RARE] sites are not leased or otherwise made available to companies producing optical media bearing content protected by copyright or related rights and immediately take action to terminate any existing leases.”

D. Enacting legislation (by June 1, 2007) to “strengthen the licensing regime for optical media plants” including “grounds to deny applications for licenses and to suspend, and then immediately seek revocation by a court of, licenses of persons whose production premises are found to be manufacturing pirated product; enhanced recordkeeping requirements; and government monitoring of production.” This legislation must ensure that “each licensee will verify that the customers for whom it produces optical media bearing content protected by copyright or related rights have authorization from all relevant right holders” and that “licensees mark optical media with data that identifies the licensee and the license number” and “that licensees use additional markings, such as source identification codes.”

E. Ensuring that grounds to deny, suspend or “immediately seek revocation by a court of a license” include: violations of “any licensing condition,” and that by June 1, 2007 legislation will include a provision that “licenses will be denied to persons who have previously had a license revoked by a court for infringement of any license requirement, such as violation of copyright or related rights.”

2. Address the need for effective criminal enforcement, focusing in particular on piracy “committed for purposes of commercial advantage or private financial gain” by referring “to the Supreme Court of the Russian Federation a proposal for it to pass a resolution of the Plenum of the Supreme Court” to clarify for the courts their practices so that they impose stiff penalties for IPR violations, and requiring that judges “take into account the high degree of public harm from such infringement.”

3. Address the need for effective border enforcement by “significantly increas[ing] the percentage of export shipments inspected” and to provide information to “appropriate authorities for investigation and prosecution.” Also, the government will seek to enact legislation (by June 1, 2007) “strengthening Customs officials’ authority to take actions *ex officio* with respect to suspected exports and imports of pirated or counterfeit goods” and “encourage Customs officials to use such authority.”

4. Address the need to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites whose servers are situated in Russia (which in a footnote specifically says “[s]uch as allofmp3.com”) by:

A. Taking actions “against the operation of websites...that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings).”

B. “[I]nvestigat[ing] and prosecut[ing] companies that illegally distribute objects of copyright or related rights on the Internet.”

C. Enacting by June 1, 2007, legislative amendments to “provide that collecting societies may act only on behalf of right holders that explicitly authorize such action” and the “provisions needed to implement the World Intellectual Property Organization (WIPO) Copyright Treaty [WCT] and WIPO Performances and Phonograms Treaty (WPPT).”

5. Adopt legislation to “fully implement the TRIPs Agreement and other IPR-related international agreements” to which the United States and Russia are already parties (as

well as to “fully implementing the WCT and WPPT”). Ensure that any legislative, regulatory or other measures made prior to accession, i.e. Part IV of the Civil Code, will not “result in a lesser degree of consistency than exists on this date” (November 19, 2006) with the TRIPs Agreement or any other international IPR agreement to which the U.S. and Russia are parties.

6. Ensure on-going dialog and work to implement the obligations above through a Bilateral Working Group, as well as to provide appropriate training to Russian enforcement officials.

The summary of these six Side Letter obligations illustrates the important enforcement actions that Russia must undertake in 2007 (most by June 1). Note that even though the Side Letter has the status of an international agreement under U.S. and Russian law, as of February 1, 2007 (almost two and a half months after its signing), it still not been published in the Russian language in Russia, nor is it available in either English or Russian on any Russian Government website; it is only available in English on the USTR website.

The IIPA continues to recommend several enforcement steps without which Russia will not be able to meet its performance requirements under the 2006 Side Letter. These include:

1. Making certain that the optical disc licensing regime includes: (a) stricter controls on the importation of polycarbonate and machinery; (b) mandatory seizure and destruction of machinery used to produce pirate materials (regardless of the ownership of the machinery, and the relationship of the “owner” of the machinery to the infringement); and (c) the introduction of criminal penalties for the owners of such plants. Plant inspections must be undertaken regularly and exemplars tested jointly with rightholders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works;

2. Announcing from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities, and instructing the Inter-Ministerial Commission, headed by the First Deputy 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, Department K (the New Technologies Police), and the Police of Street Order;

3. Adopting 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) for all copyright violations, including Internet piracy as well as providing guidelines for the application of substantive copyright law in criminal processes (such as, a presumption of ownership). 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) and that legal entities be included as subjects of criminal liability (a bill to amend Art. 146 accordingly is under consideration in the Duma);

4. Using the existing authority to take down websites offering infringing copyright materials, against, not only [allofmp3.com](http://allofmp3.com) (music), but also websites such as, [www.threedollardvd.com](http://www.threedollardvd.com), [alltunews.com](http://alltunews.com), [mp3search.ru](http://mp3search.ru), [www.dvd-box.ru](http://www.dvd-box.ru) (films/music), <http://ebook-mega-store.com> and related sites (books), [www.stalevar.com](http://www.stalevar.com) (business software), [www.cdcheap.com](http://www.cdcheap.com) (business software) and criminally prosecute those responsible, including

unauthorized collecting societies (such as ROMS, FAIR, and FOSP) that purport to grant licenses for rights that they do not possess, as well as introducing ISP liability in civil and criminal cases;

5. Using the improved border enforcement authority to stop the import of machinery used to produce illegal product in addition to the export of large shipments of that product abroad;

6. Initiating 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);

7. Encouraging 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

8. Taking 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. Similar organizations have proliferated in Russia, including MAS (Interregional Authors Partnership), ROSA, and MO UIPKO (Interregional Union for Collective Management of Rights).

9. Developing effective measures to criminalize the camcording of motion pictures in theaters, since these are the primary source for illegal DVDs.

In 2004, Russia adopted important law reforms to bring its laws into compliance with the 1992 Bilateral NTR Trade Agreement and the Berne Convention – most in the copyright law. Unfortunately, in 2006, Russia decided to completely overhaul its IPR regime by adoption of the Civil Code and the repeal of the copyright law. As noted, there are now gaps in the IPR enforcement regime both in the Civil Code and elsewhere pertaining to enforcement, that Russia needs to address to come into compliance with the IPR Side Letter, including further updating the Criminal Code, the Criminal Procedure Code, and Administrative Code (as detailed in this and prior reports). Amendments to the Code of Administrative Misdemeanors adopted in 2005, entered into force in January 2006.

**RUSSIAN FEDERATION**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006<sup>3</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures <sup>4</sup>	NA	NA	266.0	81%	275.0	80%	275.0	75%	250.0	80%
Sound Recordings & Musical Compositions	423.0	65%	475.9	67%	411.9	66%	405.0	64%	371.9	66%
Business Software <sup>5</sup>	1433.0	83%	894.0	83%	800.0	87%	704.0	87%	370.0	89%
Entertainment Software <sup>6</sup>	282.1	72%	223.9	82%	255.8	73%	NA	80%	NA	90%
Books	42.0	NA	42.0	NA	42.0	NA	40.0	NA	40.0	NA
<b>TOTALS</b>	<b>2180.1</b>		<b>1901.8</b>		<b>1784.7</b>		<b>1424.0</b>		<b>1031.9</b>	

## **COPYRIGHT ENFORCEMENT IN RUSSIA**

### **Illegal Optical Media Production and Distribution**

By no later than June 1, 2007, the Russian Government has committed to making significant improvements in the manner in which it addresses the problem of illegal optical disc plants, including permanently closing down plants containing pirate material. As of January 1, there were 53 known optical disc plants licensed in Russia to manufacture and distribute products (including music CDs, DVDs, videogames, and VCDs); this includes 2 CD-R and DVD-R production facilities. However, of this number, only 42 plants (plus six mastering facilities, that do not need licensing under current law) were in operation on January 1. Of the total number of optical disc plants, at least 24 have been confirmed to be producing pirate product.

Moreover, the Side Letter requires Russia to specifically address the problem of the plants located on government owned or leased property. These plants on former military bases are known as “Russian State (owned) Restricted Access Regime Enterprises” (RARE) – there are currently 8 such optical disc plants. As of March 2005, Ministry of Interior officials and State

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf).

<sup>4</sup> MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Canada, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>6</sup> 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.

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 can, but to date have not used their full authority to undertake effective surprise inspections, including the seizure of illegal material and the closure of illegal plants. In September 2006, the Russian Government acknowledged (on national television) that at least 5 of these RARE plants were engaged in illegal production of optical discs; they further reported that the directors of those plants were dismissed – but, to date there have been no additional reports about any prosecutions of those directors. In the Side Letter, the Russian Government agreed to inspect all of these plants, to close the illegal ones, and to end existing and deny new leases to these plants.

The 53 optical disc plants have a total plant capacity of 455 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 130 lines (including the 6 mastering facilities), with 71 lines dedicated to DVD production, up from 34 less than two years ago. The local legitimate market is significantly less 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 80 and 100 million DVDs per year for export to markets outside of Russia (with markets in Bulgaria, Czech Republic, Estonia, Finland, Germany, Hungary, Israel, Poland, Romania, Turkey, Ukraine and the United Kingdom being negatively impacted, in particular). According to the recording industry, fewer than 85 million legitimate CDs were sold in Russia in 2006.

In 2006, the Russian Government continued to take raids against some of the plants – certainly a positive step, but merely a first step. The government has indicated that it has conducted “inspections” of all the known plants (i.e., license inspections) in 2006. As a result of these visits according to the official government statistics, licenses at 8 plants were temporarily suspended by the Ministry of Culture (i.e., the Federal Licensing Service – Rosokhrankultura), 6 plants had their licenses withdrawn, and 4 others voluntarily returned their licenses (although the Rosokhrankultura website notes the agency made only 14 license checks, suspending 3 licenses and cancelling 3 licenses). While this is certainly encouraging, it has done little to stem the production and distribution of pirate discs, and illustrates the need for comprehensive legal measures and effective enforcement techniques. In 2006, there were, to our knowledge, 8 criminal cases initiated against (7 different) optical disc plants.

After plant “raids” the Russian government has declared some of the plants to be “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 10 million DVDs were seized in the first nine months of 2006 (although, as noted, the motion picture industry reported that as many as 80 to 100 million discs were produced for export alone during the year).

The end results of the 2006 raids are telling, and underscore the significant amount of work Russia must undertake to address the piracy problem as well as to meet the Side Letter’s (and other pre-existing bilateral and multilateral) obligations. It would appear that almost all of the optical disc plants that were raided in the last three years remain in operation after those raids. For example, last year we reported on a raid of the Roff Plant in Odinstovo, near Moscow. At the time of the raid (November 2005), the plant’s license was suspended while a criminal prosecution proceeded. This was the first such suspension by Roskhankultura and several other

suspensions were announced in early 2006. However, although its license remains suspended, forensics evidence indicates the plant is continuing to replicate illegal (DVD) discs. Roskhankultura has been notified of this activity. This illustrates the problem--plants remain in operation even after raids, illegal material continues to be seized after an initial raid, and even, in many cases, operating licenses are not suspended by Roskhankultura. The Side Letter calls for significant improvements in plant regulations, and, among other important steps, requires the Russian authorities to "permanently close" illegal plants and to criminally prosecute the plant operators.

The ongoing piracy problem has continued in large measure, because the plant owners have, for years, remained unscathed by the criminal justice system. For example, a plant in Tver, Media Systems, was raided and though the director of the plant was arrested, the owner was not. Action against the plant owners is an essential element in combating OD piracy, and requires political willpower by the enforcement agencies. In short, a few plant employees, but no plant operators, have been convicted after over 10 years of optical disc piracy problems, and, even the prosecution of employees is usually accomplished only after extensive delays in the investigations and by the imposition of suspended sentences.

There have been a few exceptions: in December 2006, two plant employees operating in Rostov-on-Don were sentenced under Article 146(3) of the Criminal Code to four years and six months of actual imprisonment (and fined \$15,000). This is the toughest copyright-related sentencing ever assessed in Russia for copyright infringement. It resulted because these were the defendants' second convictions (their previous sentences had been suspended), so automatic prison sentences were imposed -- although the length of the sentences was surprising. On October 25, 2006, RAPO participated in a proceeding that resulted in the successful criminal prosecution of the director of the Simplex Disc DVD plant. The defendant was given a suspended two-year prison sentence and the plant's license was revoked. The court agreed to damages of 22 million rubles (US\$815,000) to be paid to RAPO's members (although this can only be secured through a subsequent enforcement proceeding). Another exception occurred in June 2002 when the Disc Press MSK plant (raided in 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. The plant long-ago changed its name and remained in operation; in 2006, after years of delay, a lower court finally heard a criminal case against the former plant director. Although he was convicted and sentenced, the director was ultimately acquitted by an appeals court.

In addition to raids and criminal actions, rightholders have brought civil law suits against the plants directly; these actions are summarized in the Civil Enforcement section below.

As the Side Letter requires, Russia must undertake vigorous criminal enforcement against the plants and, in particular, the plant operators (and not, as has been suggested in the past, leave this enforcement to private party action). 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, in some instances, 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. The music industry reports that Russian produced CDs have been found in many of these same countries – over 27 in all.

Since 2004, plant licensing authority has rested with the federal service known by the acronym FSCLMM — Federal Service for Supervising Compliance with Laws Regarding Mass Communications and the Protection of Cultural Heritage. The FSCLMM (also known as Rosokhrankultura) is a part of the Ministry of Culture. However, 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”). Separately, copyright policy is vested in the Ministry of Culture and the Ministry of Education and Science. The Federal Service on Intellectual Property (Rospatent) is now in charge of industrial property and trademarks.

Until recently, the Russian Government used (2002) reproduction and licensing regulations to provide licenses for replication facilities for optical discs and analog tapes. Changes were made in 2006 to the regulations. The regulations allow for unannounced inspections of replication plants and for the suspension, as well as the initiation of the cancellation, of operating licenses of facilities found to be in breach of the regulations (Article 13). Thus, Rosokhrankultura issues and checks licenses, and can suspend a license, but not close a plant, absent a court order. The revised Licensing Regulations (2006) foresee only one visit every five years to each plant, absent information about piracy at a plant. Making matters more confusing, inspection authority has been divided between two Culture Ministry bodies--Rospechat (regular plant visits) and Rosokhrankultura (license suspensions). Unfortunately, in late 2006, Rosokhrankultura, in a few instances, inspected plants and collected exemplars, without rightholder participation or knowledge. Inspections should be increased in frequency and intensity, and should also take place on a surprise basis. A high level of cooperation with rightholders is critical to the success of this program, as is the collection of exemplars (and sharing information with rightholders about them) to facilitate the effective forensic examination of discs found in the marketplace.

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. One continuing loophole that the pirates have exploited is that the equipment is leased by one party, and the plant owned by another – this allows the leasing party to seek a return of its equipment when a plant is raided because Article 81 of the Criminal Procedure Code bars confiscation of such leased equipment. It is expected that these deficiencies will be corrected by new regulations and legislation, as well as more effective plant enforcement activities, all of which are (June 1) requirements of the Side Letter.

As noted, according to special regulations adopted by the Ministry of Interior (MOI) in 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. As required by the Side Letter, Russia must now use whatever authority it possesses to suspend the operations of these enterprises involved in piracy, and to seize piratical goods and the machinery used to manufacture them pending a (court) order for destruction. Further, Rosokhrankultura must suspend plant licenses immediately upon presentation of evidence of piratical activity, and, the courts must act promptly to issue license revocation orders thereafter.

The business software industry reports that in 2006, optical disc piracy remained at the same level as in 2005. While the quantity of channel raids (including those against vendors/shops of burned discs) significantly increased, the business software industry reports only one raid conducted against an optical disc plant in 2005, and none in 2006. 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, but have yet to be adopted.

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 (as required by the Side Letter), however, the existing laws must be utilized to the fullest extent possible. Any new optical disc licensing regime must, among other things, include mandatory SID codes as well as the regulation of the importation of optical grade polycarbonates used in the production of optical media.

## **Raids and Seizures in 2006**

As noted, in 2006, although all of the plants were “visited” (albeit, not surprise inspected) by the government, there were only 8 criminal actions taken against individuals in seven of the optical disc plants. There were also many raids and the seizure of illegal materials, some involving the plants, according to Russian Government reports and the copyright industries.

In 2006, the recording industry was involved in 486 raids throughout the country. The raids resulted in the seizure of 2.57 million CDs, 113,776 (burned) CD-Rs, 189 stampers and 106,623 cassettes. In addition, during those raids, more than 5 million DVDs were seized (which included 130,000 music DVDs). The recording industry also reported that in 2006 it participated in raids of five suspected illegal optical disc plants. In four instances, the prosecutors initiated a criminal investigation. The recording industry is hopeful that in 2007, there will be further criminal proceedings brought against plant operators in the 19 cases of plant raids undertaken between 2004 and 2006 but for which no criminal actions have yet proceeded. Another positive outcome in 2007 would be the securing and removal by the police of the manufacturing lines at plants that have been raided (as happened in September 2006 against the Media Systems plant). This has, unfortunately, not been a regular occurrence.

In 2006, the motion picture industry's anti-piracy organization RAPO participated in twelve raids on suspected illegal DVD plants, including various plants in Tver, Zelenograd, Saint Petersburg, Moscow and elsewhere in the Moscow region. The motion picture industry reported that a total of 16 million DVDs were seized in 2006. RAPO and the police raided 15 warehouses in 6 cities (St. Petersburg, Tver, Kazan, Rostov, Samara and Mitishy), yielding a total of 9.68 million pirate discs.

In October 2005, a plant in Kazan, Tatarstan, located on a RARE facility, was raided. Although a case against the director of the plant (Laser Style) was commenced, it was closed due to a lack of evidence. In a second case in 2005 in Kazan, also against a RARE facility plant, a case against a plant director was closed due to a grant of amnesty. The plant in Tver that was also raided in December 2005 was found to have 5 unlicensed DVD lines and over 21,000 pirate DVDs. The lines were sealed by the local Economic Crime Police. The investigation is continuing and the plant director (but not the plant owner) is in prison awaiting the investigation to conclude.

Here are some recent examples of successful raids undertaken by RAPO and the Russian government: in Tver, a raid was run on the Media Systems plant in October 2006 in which 7 DVD lines were disabled and placed into a Moscow police storage facility. The plant director (but unfortunately, not the plant owner) was arrested and an investigation is ongoing. In November 2006, an optical disc plant and a warehouse in Kazan (another RARE facility) was raided. During the raid, moulds, a printer, 208 stampers and approximately 20,000 pirate DVDs were seized from the plant, and over 1 million pirate DVDs were seized from the warehouse. As a result of the plant and warehouse raid, two criminal cases have been initiated by the local prosecutor. In another raid, this time in Samara in late November 2006, a warehouse (in a block of apartments) was raided by the Criminal Investigation Department (and RAPO); over 1.5 million pirate discs, most of them DVDs, were seized. There were reports that the Samara warehouse belongs to a local company “Soyuz” whose warehouses were raided in September 2005 yielding over 3 million illegal discs. In November 2006, in Mytishchi, near Moscow, the Interior Ministry police (with RAPO cooperation) raided a warehouse and seized more than 500,000 pirate DVDs, 90% were pre-release titles (of MPA member companies), the rest were Russian pre-release titles. In December 2006, in St. Petersburg, the Economic Crime Police (DOI) along with RAPO raided a warehouse seizing 180,000 pirate DVDs; a criminal case was initiated.

In 2004, to address retail piracy, 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 did result, at least in the short term, in a significant reduction in the availability of pirated home video entertainment, especially on the streets of Moscow. The music industry reports that street sales are no longer a major problem, but market piracy is — for example, in markets such as in Tsaritsino. Absent, third party liability, action against the market operators is hard to effectively enforce. The motion picture industry reports very differently, that the street sale ban has been irregularly enforced and DVDs remain widely available. Piracy of DVDs in retail outlets such as in supermarkets (large and small), specialty shops, and large kiosks, is rampant. In Moscow alone, there are approximately 1,500 kiosks, shops and trading places (some in supermarkets) that sell only pirate DVD product. Such piracy can be eradicated: for instance, during a U.S. Government delegation meeting in Moscow with Russian officials in late January 2007, virtually all pirate product disappeared from shops, kiosks, and markets (or the stores were closed). On February 5, following the U.S. delegation’s departure, pirate product returned to these establishments. This clearly demonstrates that the Russian Government can effectively act against the pirate market when it chooses to do so.

Retail cases have resulted in some administrative fines, but these are generally of a *de minimis* nature. In 2006, amendments were considered but never adopted to expand the scope of the kiosk and street sale ban to (business and entertainment) software and databases; we recommend its immediate enactment.

The pattern of successful raids without prosecutions (with a few exceptions) is a recurring problem. It is estimated that about half of the pirated product seized in raids in Russia finds its way back into shops and kiosks. The Government of Russia must put a stop to these practices.

In 2006, as in other years, large-scale Ministry of Interior operations were undertaken, for example, one during the G-8 Summit in St. Petersburg, which resulted in police raids at numerous markets. In another operation (named Set), Department K officials acted against counterfeit products distribution and products in several regions — in Orenburg, Severdlovsk, Tomsk, Krasnoyarsk, Kazan, Tver, Gorno-Altai City, Penza City, Surgut City, and Kemerovo,

among others. These operations resulted in numerous raids at markets, shops, vendors, and warehouses, and the seizure of pirate audiovisual and software products.

The Business Software Alliance (BSA) reports that in November 2005, a hard disk loader was sentenced to one year of actual imprisonment and fine of \$900; and, in September 2006, there was a conviction in a CD-R case, with a sentencing of one year of actual imprisonment. BSA also reports that there has been progress in a case arising from a November 2005 raid by Economic Crime Police of Moscow on the Unitekhnoplast Ltd. plant located in Lobnya. In that raid, the police seized a number of CD stampers, moulds for CD replication and counterfeit CDs, including some containing illegal Microsoft software. Preliminary damages were estimated at over \$70 million. A criminal case was initiated in December 2005, with the first criminal hearing scheduled for February 2007.

## **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. In a 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. Foreign producers have worked to quickly get legitimate locally replicated DVDs into the Russian market and to lower the prices of legitimate product. However, development of the home entertainment market, as well as further growth in other markets, have been stymied by rampant piracy. The 2005 Russian home video revenue total was less than the total five years ago. Home video revenues represent just 4% of the total Russian market, as compared to nearly 50% of the global media market. Moreover, telecine copying of theatrical prints for online piracy is a major problem in Russia. (Telecine is the copying of theatrical prints into other formats, including digital, which can then be uploaded onto the Internet). Since 2004, 60 movies have been pirated using Russian prints as the source, and investigations have revealed 22 telecine machines in Moscow alone. Camcording from local theaters and Internet piracy, with such active websites as DVDAvenue.tv and www.film-dvd.ru, are also problems.

The recording industry reports that the closure of the former Gorbushka market resulted in the migration of illegal sales to other sites (although there have been improvements at one such site -- the Rubin Trade Center, known as La-La Park). The market problems are especially bad on the outskirts of Moscow, for example, at Tsaritsinio. Piracy levels remain very high (at 65%), 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 \$423 million in 2006. This figure represents physical copy losses; in 2005, the figure was \$450 million. The drop from 2005 can be attributed to a migration of piracy to the Internet.

The level of piracy for entertainment software is 72% of the market. Russian syndicates continue to be involved in a significant portion of the production and distribution of PlayStation® and PlayStation2® videogames and personal computer games. While the majority of pirated video game product in Russia is replicated domestically, pirated products replicated in Ukraine are also entering the market. The criminal syndicates involved in factory replication of pirated entertainment software also localize and customize the pirated products not only for the Russian

market, but also for markets such as Poland. At least one company (“Hobbydisc”) openly replicates and self-brands pirated versions of legitimate entertainment software titles. Although its products have been successfully removed from legitimate distributors’ inventory, it is still widely present in the Gorbushka market (and while there have been improvements at Gorbushka, additional anti-piracy work there is critical). The growth of other replacement pirate markets on the outskirts of Moscow is also of concern to the industry.

Although pirated entertainment software products continue to be available in Moscow and other larger cities, the entertainment software industry reports that the areas where pirated product is available on a commercial basis is narrowing. Many of the kiosks that used to sell pirated entertainment software products within Moscow have been removed, and it is rare to find pirated video games in larger retail chains. Most of the illegal product is found in flea markets (and there are estimated to be 50,000 such markets nationwide) and street vendor stalls. However, piracy remains rampant in other key cities such as St. Petersburg and Vladivostok. Piracy at Internet cafés continues to be problematic; there are approximately 6,000 cafés in the country with less than 5% licensed.

Pirate syndicates continue to run illegal distribution networks not only in Russia but also in the surrounding countries to which Russian-sourced pirated products are exported. It is widely believed that Russian groups are involved in the distribution of pirated entertainment software products in many Eastern European countries, including the markets in Poland and Latvia. Given these circumstances, it is imperative that the Russian Government initiate investigations into and criminal prosecutions against such piracy operations. In addition, the government must also improve border enforcement measures to address the export of Russian-produced pirated video games. With the majority of pirated product in Russia being domestically replicated, for both the local and export market, export controls or at least a robust inspection regime is critical to stemming the flood of pirated video games (on optical media) emanating from the country.

Book piracy, both in hard copy and in the digital realm, continues to cause significant harm to the publishing industry in Russia. 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.

Most importantly, publishers are also experiencing a significant increase in Internet piracy, in the form of unlicensed electronic files. Thousands of academic and professional textbooks and reference books as well as fiction bestsellers are widely available for download on websites in Russia, or for purchase as unlicensed ebooks. These websites, run by Russian entities and hosted on Russian ISPs, are operating without any interference from Russian authorities. Sites such as the “ebook” family of sites (<http://ebook-mega-store.com>, <http://ebooknetstore.com>, <http://download-ebook.org>, <http://ebookscollections.com>, <http://www.ebooknetstore.biz> and <http://www.ebooknetstore.info>) and others such as <http://www.avaxhome.ru>, <http://www.demonoid.com> among many others, are sure to stunt the growth of the book market in Russia. The Association of American Publishers (AAP) estimates losses in Russia in 2006 at \$42 million.

## Criminal Enforcement

The criminal enforcement system in Russia remains the weak link in the Russian copyright regime, resulting in the extraordinarily high piracy levels and trade losses. In 2003, the Criminal Code was improved, and cooperation with law enforcement on the ground has, as a result, been enhanced. However, significant problems continue, including delays in completing criminal investigations, failure to address major targets, and a judiciary that has failed to recognize the severity of the problem, and which therefore fails to deal with copyright offenses in a severe enough manner to provide deterrence. Although the Criminal Code was improved, enforcement continues to be hampered by a lack of uniform guidelines for police, prosecutors and judges.

Changes of the Russian Criminal Procedure Code, which entered into force in 2006, allowing Russian police to initiate criminal cases of copyright infringement, have had a positive impact on Russian police activities, as reflected in a sharp increase in the number of police raids. A change to the Russian Criminal Code, introduced in 2006 and expected to be finally adopted in 2007, would re-categorize copyright infringement as a “serious” crime. This too, will have a positive effect on enforcement.

Over the past five years, less than one-third of the criminal cases were heard by the courts, with the other two-thirds being dismissed for a variety of reasons. There has been a recent improvement in the number of cases initiated by prosecutors as well as an increase in the number of such cases brought to court. According to Ministry of Interior and the Prosecutor’s Office statistics, the Russian authorities initiated 4,001 criminal cases for copyright infringement in the first half of 2006 (compared to 2,924 in all of 2005); 2,298 cases were sent to criminal courts in that time period (compared to 2,195 in all of 2005); and, the Russian courts convicted 3,400 individuals in the first 11 months of 2006 under Article 146 of the Criminal Code (compared to 1,450 in all of 2005). Despite these improvements, the sentences imposed by the courts remain woefully non-deterrent; for example, the motion picture industry (RAPO) was only able to secure the imprisonment of five offenders in all of 2006 (and none for pirate DVD replication). A total of only 6 offenders were jailed in 2006.

The criminal enterprises are increasingly turning to 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 Intranets (which are difficult to police), as well as via unsolicited e-mail advertisements (spam) and mail-order services. The absence of clear methodologies for police and investigators to collect evidence and prosecute Internet crimes is a major stumbling block, as well as the lack of jurisprudence regarding ISP liability. The business software industry recommends that the Interior Ministry and the Prosecutor’s Office publish detailed methodologies on how to collect and fix (especially electronic) evidence pertaining to IPR crimes committed on the Internet. They further recommend that these cases be referred to Department K (high tech) at the Ministry of Internal Affairs. IIPA understands that in October 2006 Department K made internal recommendations to its police to target end-user piracy with warning letters to companies which could be used (if ignored) to show criminal intent. While well intended, this initiative may backfire as it will give warning to business in advance of any raids. To overcome the lack of experience by investigators and prosecutors, the business software industry continued its extensive training programs in Russia.

Internet piracy is growing, and remains virtually untouched by the Russian enforcement authorities. For example, the world’s largest server-based pirate music website – [allofmp3.com](http://allofmp3.com)

– remains in operation even after two on-going criminal investigations (including a criminal case pending for more than 8 months), and a singling out of this pirate for closure by the Russian Government in the Side Letter. The Russian law is clear (and has been confirmed by the Russian Government) that this type of piracy is illegal, and now as required by the Side Letter, that the Russian authorities will close pirate websites down permanently. In addition, the role of unauthorized collecting societies must be curtailed – which is required in the Side Letter (by June 1, 2007). ROMS and FAIR, in particular, have continued their illegal practice of issuing licenses for the Internet distribution of sound recordings owned by RIAA members (and underlying compositions owned by NMPA members), despite the fact that ROMS and FAIR have no rights to do so. Other rogue collecting societies have followed ROMS' example (including the distribution of sound recordings and musical compositions), including FAIR as well as FOSP. There are dozens of sites offering infringing copyright materials of films and music (such as [www.threedollardvd.com](http://www.threedollardvd.com), [www.dvd-box.ru](http://www.dvd-box.ru) and others noted above) and books (such as the ebook websites noted above) that also need to be criminally investigated, closed down, and prosecuted.

The business software industry (BSA) reports a welcome increase in activity by the police against end-user pirates (both private and state-owned companies). In fact, compared with 2005, end-user pirate raids increased 50%-300%, depending on the particular region -- but much more needs to be done, especially in particular problem cities such as St. Petersburg and cities in Siberia. However, only 10%-20% (again, depending on the particular region) of raids resulted in the initiation of criminal cases (although this number too has greatly increased in the past year). The police continue to prefer to target the easier-to-prosecute CD-R pirates over hard-disk loaders or end-user cases. The number cases against hard disk loaders has actually declined, although the market testing conducted by the software industry seems to show that the reluctance on the part of sellers to make blatant offers of illegal software is to a large extent attributable to activities of Russian law enforcement authorities. Many prosecutors are reluctant to bring charges against the managers of companies using unlicensed software in business operations. Court decisions usually result in suspended sentences or small penalties (with more cases being administrative, not criminal, actions).

The business software industry reported the following enforcement statistics for 2006: there were 550 end-user raids and 572 channel raids undertaken. There were 114 criminal actions initiated against end-users (compared with 9 civil actions). Another 288 criminal cases were initiated against channel (distribution) pirates. There was a total of 50 criminal judgments against end-users overall, and 131 against channel pirates.

In spite of a significant increase in overall IPR enforcement activity by the police in 2006, the software industry reported the on-going problems of corruption, political connections, insufficient knowledge and inexperience by investigators and too-high burdens of proof for the overall poor enforcement record, especially criminal enforcement in Russia. As noted, in 2006, 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, but that much more sustained action is needed.

In sum, criminal enforcement is hampered by: (1) poor coordination between police and prosecutors; (2) the reluctance of prosecutors to initiate and pursue IPR cases; and (3) the failure of prosecutors to conduct expeditious investigations. The creation of specialized units of

police and prosecutors responsible for combating IPR crime could help alleviate these problems.

## **Administrative Enforcement**

As in past years, retail cases are often handled under administrative machinery, resulting in very small fines. 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. In 2005, amendments to the Administrative Code (in force December 27, 2005) added copyright-related cases. Under the provisions, an administrative investigation is allowed for up to two months (the old provision, was two days), and the statute of limitations was extended to a year; there were also penalty increases — from 30-40 up to 100-200 times the minimum monthly wage. These were long-sought improvements in the Administrative Code.

The business software industry (BSA) reported 23 administrative end-user cases were resolved in 2006 (and another 24 initiated), and 2 additional ones against channel (distribution) pirates (and 7 more were initiated). Over the past few years, the average administrative fine imposed has been about \$150-200 per case. This is viewed by the pirates as a cost of doing business, and is obviously not a deterrent. Market seizures continue to involve the employment of huge resources, since administrative penalties remain totally inadequate to deter piracy 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, most administrative actions against shop owners and sellers require payment of the same average fine (about \$200).

## **Civil Enforcement**

In 2003, the recording industry (IFPI) commenced civil claims against some of the optical disc plants in Russia, seeking damages of millions of dollars, and a prohibition against production of the pirate CD titles named in the suits. This was the first time that civil causes of action were commenced in Russia against optical disc plants. IFPI was pressed to bring civil case by the Russian Government, which was convinced that civil procedures would prove effective. There were a total of 16 IFPI civil claims lodged against two plants. One of the plants settled and the other continued to fight the suit in the courts. Predictably, instead of this course proving effective, the case was bogged down with procedural hurdles, and by the time the court ruled against the plant (and ordered it to pay 500,000 rubles to each plaintiff, or about US\$150,000 total — a fraction of the actual losses) the plant had disbursed all of its assets. The plaintiffs have yet to recover anything from the defendants. As this indicates, civil proceedings are not a successful means to deal with optical disc piracy.

Civil enforcement is generally not effective, and especially not against Internet piracy because: (1) it requires filings with undue evidentiary burdens (such as exhaustive chain of title documents); (2) even successful verdicts are limited to specific titles, rather than a rightholder's catalog of titles; (3) it is virtually useless against criminal syndicates since they are not corporate entities and have no place of business to be properly served. This latter deficiency, especially, must be corrected in 2007. The business software industry (BSA) reported that civil remedies remain inadequate, but that arbitration matters are increasing in number (a total of 9 cases against distributors were initiated in 2006).



## **Border Enforcement**

Russia must significantly improve the lax border enforcement that permits the easy trafficking of illegal material into and out of Russia. Administrative changes were made in 2006 to move the border authority from the Ministry of Finance to the Presidential administration. The Side Letter requires the Government of Russia to direct customs officials to properly address this issue, as well as to fix the major legal flaw by providing border officials with proper and clear *ex officio* authority to commence criminal cases after making an inspection and seizure. Customs officials should be encouraged to consult and coordinate their actions with rightholders' 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 27 countries. The entertainment software industry reports that Russian-sourced pirate video games are shipped into Poland, Latvia, Lithuania and Israel.

## **Russian Government Efforts to Address Piracy**

In 2004, the government issued a "Working Plan of the Government Commission for Counteracting Intellectual Property Infringements" (after the 2002 establishment of an Inter-Ministerial Commission headed by the Prime Minister). Unfortunately, the commission has not properly involved rightholders in its activities which is essential if it is going to be successful.

Another impediment to effective enforcement is the fact that jurisdiction for such enforcement is scattered among many government agencies, including those responsible for policy and regulation (i.e., the Ministry of Culture and Mass Communication) 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. The newly adopted Civil Code, Part IV will only aggravate this situation. IIPA encourages the U.S. Government to press for clearer accountability on the part of the Russian Government. In the absence of an entity with responsibility for meeting the obligations of the IPR Bilateral Agreement, it is unlikely that compliance will be secured, resulting in delays in Russia's accession to the WTO and the unnecessary (but predictable) escalation of political tension.

## **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 (GSP) program. That petition is still pending; hearings were held in November 2005, October 2003, and March 2001. During the first 11 months of 2006, \$471.3 million worth of Russian goods (or 2.6% of Russia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code. While Russia was receiving these benefits, losses to U.S. industries from copyright piracy in Russia amounted to over \$2 billion. If Russia does not meet its Side Letter obligations by June 1 and does not show significant enforcement improvement, the IIPA recommends that Russia should immediately lose its eligibility for GSP benefits.

# **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

## **Overview of Legal Reforms**

On December 19, 2006, President Putin signed into law the Duma's final adoption of Part IV of the Civil Code. This new and extensive law (consisting of 118 copyright articles) is meant to replace the entire existing Russian IPR regime – i.e., the Copyright Law of 1993 (as amended through 2004), as well as the patent and trademark laws. The Civil Code will go into force on January 1, 2008. There are many other steps that will need to be undertaken to tie this complex new law to the other essential IPR related laws, including the Criminal Code, the Criminal Procedure Code, the Administrative Code, and the Customs Code.

The adoption of Part IV was undertaken over the strong objections of the U.S. Government, the European Union, and other governments, as well as the advice of many copyright law experts. First, the Civil Code is very hard to and rarely amended, so the repeal of the copyright law will be replaced (in 2008) with an inflexible law that needs to regulate new as well as developing technologies. Second, there are many deficiencies in the law (summarized below), some even acknowledged by its drafters, which means the current Civil Code does not comply with TRIPs or the WIPO digital treaties, among other concerns. The law is in some instances unclear – a fact not surprising given its breath and the expeditious manner in which it was drafted and adopted without input from copyright experts. The Russian Government has acknowledged in the Side Letter that the Civil Code is not compliant with TRIPs, the WCT or the WPPT, and has agreed to undertake amendments by June 1, 2007. In addition, repeal of the Copyright Law will, it is feared, create confusion about the enforcement of IPR violations via the Criminal Code, the Criminal Procedure Code, the Administrative Code, and the Customs Code.

In addition, to the Civil Code deficiencies, there are a number of other 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 remains the priority of the copyright industries in 2007, we simply list the legal reforms that are necessary at this time and provide detailed requirements only for the much-needed optical media regulations and the Civil Code deficiencies. Details about the other legal reforms can be found in prior IIPA reports at <http://www.iipa.com/countryreports.html>.

First, a proper optical media law must be adopted to:

- Seize infringing product and machinery, as part of the (unannounced) inspection process, undertaken with the cooperation of rightsholders.
- 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.

The complete details of what is necessary for effective optical media regulation can be found at the IIPA website at <http://www.iipa.com/rbc/2003/2003SPEC301RUSSIA.pdf> on page 14. The Side Letter requires Russia to adopt optical media law reforms by June 1, 2007. 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.

Also needed for effective enforcement are:

- Supreme Court guidelines directing that the *ex officio* authority in the Criminal Code and Criminal Procedure Code is properly utilized to commence criminal proceedings; also, amendments are needed to those codes to allow for the confiscation of equipment used to make illegal copyright materials. (The Civil Code in Articles 1252 and 1302 is meant to address this, but: (a) is it not linked to the Criminal Code or Criminal Procedure Code and (b) is flawed – allowing the seized equipment to be sold for state income).
- 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 (the code was last amended effective January 1, 2004). The *ex officio* authority amendments were drafted but never considered in 2006; they are now required by the Side Letter, and must, per that agreement, be adopted by June 1, 2007.
- Amendments to the Civil Code, Part IV to further clarify and 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. This is also a June 1, 2007 Side Letter requirement.
- 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. There was also a corresponding Criminal Procedure Code change to provide enforcement authority both to the police and prosecutors. On July 3, 2006, amendments to Article 151 of the Criminal Procedure Code went into force to enable the police to also have investigative jurisdiction of IPR cases (since the police actually do the investigations and since the prosecutors are often backlogged with other serious crimes). This was a positive step. Separately, IIPA continues to recommend that Article 146 be amended to specify that legal entities can be criminally liable for IPR violations. The Civil Code provides liability for legal entities in Article 1253, and the Administrative Code also provides this liability, but the Criminal Code does not provide criminal liability for these entities.

IIPA has additional recommendations to improve enforcement. First, there needs to be an all-embracing approach to fighting industrial piracy – to implement a comprehensive strategy of criminal prosecutions against the managers and owners of the optical disc plants and other legal entities involved in copyright infringement, as well as to adopt administrative procedures and penalties against legal entities (fines, confiscation of equipment) and deterrent criminal penalties. Second, there needs to be special anti-piracy groups and/or detailed IPR enforcement officers in the LEAs (within the police departments in each city). Third, there must be actions taken to confiscate equipment used for pirate production as evidence (irrespective of its ownership, for example, by third parties) until a court decision is rendered. Fourth, there needs to be a bifurcation of duties on IPR enforcement within the Ministry of the Interior – one directed against physical piracy and a second to combat high-tech crimes, such as Internet piracy. Fifth, there needs to be expertise developed to detect counterfeit products, to provide the necessary measures for conducting effective, professional, and expeditious investigations of counterfeit products (for example, by using an IPR matrix). Sixth there needs to be provisional measures, to provide broad and unrestricted implementation in conformity with the TRIPs Agreement and as foreseen by Supreme Court's Plenary resolution of June 19, 2006.

A few other miscellaneous legislative changes are needed: the Criminal Code needs to be amended to ensure that Internet piracy is a crime without regard to the “harm caused” by the infringement, and as noted, there must be criminal sanctions applicable for violations of the licensing regulations for the production of audio or audiovisual materials.

IIPA continues to recommend that the Supreme Court adopt a decree setting forth sentencing guidelines for judges, advising the courts to impose deterrent penalties as provided under the penal code (Article 146), and detailing the application of presumptions of ownership in criminal cases. The Side Letter requires a resolution noting to judges and prosecutors, the importance of the prosecution of IPR crimes and the harms caused to society by these crimes.

A major revision of the Civil Procedure Code (effective 2003) set the rules for initiating and examining civil cases, including disputes pertaining to copyright and neighboring rights infringements. 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, a new Arbitration Procedures Code in Article 72 included civil *ex parte* search provisions in a more limited context. In addition, the Plenum of the Supreme Court adopted a resolution regarding the application of civil code provisions to IPR cases. It urged the courts to apply provisional measures in copyright infringement cases and provide general guidelines. However, provisional measures have, in the past, proven ineffective because the courts have applied a very high burden of proof for *ex parte* searches, one that, for example, cannot be met in end-user cases where the evidence of infringement is in the hands of the defendant. The software industry continues to report that these provisions are rarely used and that overall, the procedure remains a difficult and onerous proposition.

The Civil Code, adopted on December 19, 2006, contains several deficiencies. These include two overarching concerns: first, that there are many new and unclear legal terms and definitions (that will likely be unenforceable); and second, that there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

The Civil Code contains many flaws, including: a “three-part” (fair use) test that is too broad, as well as overly broad private and other copying exceptions (Articles 1273 and 1274); a broad exception for the use of computer programs that violates the three-part test (Article

1280(3)); camcording provisions that are negated by a personal use exception (Article 1273(6)); provisions on technological protection measures that are too narrow for treaty compliance, are negated by a “fair use” exception, and which provide no remedy for TPM violations (Article 1299(3)); a too-narrow construction of the protection for temporary copies of computer programs, i.e., only where it is “essential for making available” (Article 1270(1)); the over-regulation of contracts (including registration requirements) in Articles 1232 through 1238; unclear provisions with regard to the protection of pre-existing works (Articles 1281 and 1282); and, similar problems regarding fair use, personal use, TPMs and the overregulation of contracts for neighboring rights (sound recordings) (Articles 1306 through 1309). It is unclear whether the Civil Code provides national treatment, as required by the treaties, for non-exclusive rights (Article 1231). Finally, and perhaps most importantly, steps need to be taken to make certain that essential – treaty required – remedies for IPR infringements found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code will continue to apply in light of the adoption of the new Civil Code and the repeal of the copyright law.

There are several positive features of the Civil Code as well: it purportedly would clarify that collective administration organizations can only operate within the mandates they receive from rightholders (Article 1242); it adds (civil, but not criminal) liability for legal entities at Article 1253; it adds remedies for the seizure and destruction of materials and equipment used in infringements (Article 1252 and 1302), but it negates these remedies with an exception for the sale of materials by the state for “income”; it clearly protects computer programs as “literary works” (Article 1261); it properly provides for the rights of ownership and exploitation of audiovisual works (Articles 1240 and 1263); it provides a clear making available right (Article 1270(11)) consistent with the digital treaties; it provides a private (personal purpose) levy (Article 1245); and, it provides for statutory damages (ranging from 10,000 to 5 million rubles) (Article 1301).

IIPA recommends the introduction into the Civil Code 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.

In December 2005, the Code on Administrative Misdemeanors was amended (consistent with IIPA recommendations). The amendments: (1) extended the timetable for pre-action investigation from two days to two months; (2) extended the statutory limitations to one year (from two months); and (3) increased the penalties for administrative violations of copyrights and related rights (from 30-40 up to 100-200 times the minimum monthly wage).

IIPA continues to note that the development of legitimate markets is harmed by 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.

In addition, customs authorities in Russia assess duties on the royalty value of imported audiovisual materials (such as television master tapes, DVDs, etc.), rather than solely on the physical value of the material. This is contrary to prevailing international and European legal practice. While a new Customs Code entered into effect in 2004, the Law on Customs Tariffs,

which underlies the royalty-included valuation, remains intact. Customs duties which are assessed on potential royalties serve as a form of double taxation, since royalties are also subject to withholding, income, value-added, and remittance taxes, and are a barrier to further growth of the legitimate Russian audiovisual market in favor of the illegitimate operators who do not pay any taxes at all.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SAUDI ARABIA

**Special 301 Recommendation:** Saudi Arabia should be elevated to the Priority Watch List.

## **EXECUTIVE SUMMARY**

In IIPA's February 2006 Special 301 submission to USTR, IIPA recommended that Saudi Arabia remain on the Special 301 Watch List.<sup>1</sup> This recommendation was based in part on the Saudi government's commitments to (a) make their enforcement system transparent; (b) begin imposing deterrent penalties on pirates (including enforcement against corporate end users of unlicensed software; and (c) legalize use of business software in government ministries. On April 28, 2006, USTR kept Saudi Arabia on the Watch List but stated, in announcing this decision and the out-of-cycle review:

To build on the positive cooperation established between Saudi Arabia and the U.S. copyright industry, the United States looks to Saudi Arabia to complete recent IPR actions that it has initiated. For example, the United States looks to Saudi Arabia to increase transparency of its IPR enforcement regime, continue sustained raids and inspections to combat piracy and counterfeiting, ensure transparency in the judicial system and imposition of deterrent sentences (including jail terms for serious offenses) against criminal IPR infringers, and improve border enforcement measures, among other IPR issues.

Since IIPA met with KSA officials in Riyadh in January 2006 and in Washington D.C. in September 2006, there has been almost no progress in remedying these three fundamental deficiencies identified by the copyright industry and by USTR in its April report and its October OCR submission.<sup>2</sup> Because of this lack of progress and despite continuing high levels of raiding activity, there has been little change in the marketplace for copyright products. For these reasons, IIPA, as it did in its October OCR submission, is recommending that the Kingdom be elevated to the Priority Watch List.

## **PRIORITY ACTIONS TO BE TAKEN IN 2007**

### **Transparency**

- Continue to press the IPR Committee and the MOCI to open up the MOCI enforcement process by having it 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;

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<sup>1</sup> See IIPA's Special 301 2006 report on Saudi Arabia, February 13, 2006, available online at <http://www.iipa.com/rbc/2006/2006SPEC301SAUDIAARABIA.pdf>.

<sup>2</sup> [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2006/2006\\_Special\\_301\\_Review/asset\\_upload\\_file473\\_9336.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf);  
<http://www.iipa.com/pdf/IIPA%20Saudi%20Arabia%20301%20OCR%20submission%20FINAL%20%20100206.pdf>

- 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.

### **Deterrent Enforcement**

- Activate the new Special Committee on enforcement set up by the Governor of Riyadh, Prince Salman, in January 2006 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 MOCI, or directly by right holders. It is essential that police-led raids also result in criminal charges against copyright violations;
- 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;
- Ensure that all actions not involving retail establishments result in the application of criminal charges. Unfortunately, raids effected against street vendors, distribution centers and duplication sites are not resulting in criminal charges unless a retail outlet is clearly identified with that same establishment;
- 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.

### **Ensure Legal Use of Copyrighted Materials**

- Secure and implement a mandate of the IPR Committee (and the Special Committee if activated) 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

- Complete internal “study” of the Treaties as soon as possible and 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.<sup>3</sup> Please see also previous years’ reports.<sup>4</sup>

<b>SAUDI ARABIA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>5</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	20.0	50%	20.0	50%	15.0	35%	16.0	40%	16.0	42%
Business Software <sup>6</sup>	112.0	51%	105.0	52%	73.0	52%	76.0	54%	13.3	50%
Motion Pictures <sup>7</sup>	NA	NA	95.0	95%	20.0	40%	20.0	40%	20.0	35%
Entertainment Software <sup>8</sup>	NA	NA	NA	95%	NA	68%	64.0	83%	NA	NA
Books	8.0	NA	10.0	NA	14.0	NA	14.0	NA	14.0	NA
<b>TOTALS</b>	<b>140.0</b>		<b>135.0</b>		<b>122.0</b>		<b>190.0</b>		<b>63.3</b>	

## PIRACY AND ENFORCEMENT UPDATES IN SAUDI ARABIA

The piracy situation has steadily worsened in Saudi Arabia across many copyright sectors active in the Kingdom. Several forms of piracy are at an all time high due to lack of deterrent penalties actually meted out (despite the maximum penalties available under the new Copyright Law) and lack of transparency. Some copyright industry groups report that the legitimate market is actually contracting, with many retail stores closing down due to high piracy rates. Industry anti-piracy efforts in 2006 continued to be substantial. The organization representing most U.S. right holders in the Kingdom, the Arabian Anti-Piracy Alliance (AAA) conducted a “fear factor” survey, which showed that the deterrent impact of the current enforcement and penalty system was virtually non-existent and this resulted in increased

<sup>3</sup> <http://www.iipa.com/pdf/2006SPECIAL301HISTORICALSUMMARY.pdf>.

<sup>4</sup> <http://www.iipa.com/countryreports.html>.

<sup>5</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Saudi Arabia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>6</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Saudi Arabia, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>7</sup> MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>

<sup>8</sup> 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.

awareness of the problem of piracy in the markets. This survey clearly demonstrated that 75% of the movie retail market indicated that a pirate will never be imprisoned; 89% felt that the owner would never be imprisoned; 70% felt that the retail establishment would never be closed; and 85% felt that a pirate would never be deported. The industry also held many meetings and engaged in many consultations with the Saudi government, but due to the intransigent attitude of the MOCI and others, very little progress was made. The President of IIPA even visited Saudi Arabia in January 2006 to address the many issues, and while promises to provide greater transparency were made at the highest levels, we have yet to see the positive results of the trip and the promises made.

**Optical Disc and Internet Piracy:** Optical disc piracy remains the major hard goods piracy problem in the Kingdom. Both factory produced discs (some locally made, but most imported) and “burned” discs have flooded the markets. Street vendor piracy is rampant throughout the Kingdom. Pirates sell pirate optical discs, including locally produced CD-Rs and DVD-Rs and imported pirate DVDs (predominately imported from the Asia Pacific Region (Malaysia, China, etc.) in commercial hubs. Even with low percentage of Internet penetration, there are already many instances of Internet piracy in the Kingdom. The authorities have been completely ineffective in dealing with this new threat.

**Organized Crime:** Piracy in the Kingdom has also been linked with organized crime elements in Saudi Arabia. Early in 2005, for example, Prince Salman ordered a series of raids in the Al Batha area of Riyadh against hard core criminal activities, which unearthed many criminal operations that were involved with prostitution and narcotics. The police also encountered and seized millions of pirate DVDs, showing that piracy is providing easy funds to sustain other hard core criminal operations.

**Signal Theft and Piracy in the Compounds:** Signal piracy on compounds remains a very serious problem in Saudi Arabia. The compounds may have upwards of hundreds/thousands of homes under one management/premise/security wall. Pay TV channels are usually centrally controlled and operated by the management of a given compound. The compounds utilize a smart card, installing it in their centralized head end and then redistribute Pay TV channels to thousands of homes.

Despite a continuous dialogue from the pay-TV industry and a number of raids, awareness campaigns and letters from the MOI, we have yet to see a significant change in the compounds. Part of the reason is that the owners of the compounds are very influential. Due to heightened security in entering compounds, affecting successful raids is next to impossible, since by the time the raid team finally gets to the head end, following delays navigating the multiple security checks, the evidence of piracy has conveniently disappeared.

IIPA raised the rampant theft of pay-TV signals and of audiovisual programming in the Kingdom's compounds in January and again in September. While the MOCI indicated that it can be involved in raiding such compounds, MOCI officials explained that the raids must be done with the police and that police participation must be authorized by each city's Governor's office. In January, IIPA raised this issue with Prince Salman, the Governor of Riyadh. Unfortunately, industry has received no reports that raids have been conducted on these compounds since these January meetings.

**Piracy of Business Software:** But even raiding activity has proved difficult for the business software industry. In response to all the pressures to reform, BSA has reported on the increasing defensiveness of the Breach Committee. Instead of reforming, they are finding new

ways to blame the industry on the grounds that the complaints submitted are faulty (but without making clear precisely what is required in a transparent way). A large number of the BSA complaints filed in 2006 have been rejected by the MOCI on these purely formalistic grounds (power of attorney, signatures, etc.). The industry is constantly informed that any objections should be filed before the Breach Committee while no information, on the cases and structure, location or leadership of this Committee is given. It has become clear to the software industry that certain individuals within MOCI are at the heart of the transparency problem and that the KSA government must recognize and take care of this personnel problem.

In contrast to the stonewalling of MOCI, BSA reports favorably of the enforcement activities of the Ministry of Commerce, responsible for trademark and commercial fraud offenses. While not used by the copyright industries for enforcement, its cooperative attitude must be starkly contrasted with the intransigence of the MOCI.

While over the years there have been only a few raids on enterprise end users of unlicensed business software, enforcement against such piracy, which causes the greatest losses to the software industry, is so rarely employed by the authorities that the piracy rate continues to be high (estimated at 51%, with dollar losses up from 2005 to \$112 million in 2006),<sup>9</sup> as a primary result of such enterprise end user piracy. If the MOCI is to be truly effective in combating end user and other forms of piracy, it must invest in increasing the number of anti-piracy inspectors to well beyond the present 10 - 20 full-time employees and use these resources to conduct proactive, *ex officio* raids.

**Book Piracy:** Saudi Arabia's publishing market continues to experience some piracy, especially at certain universities in the Western Province. Industry continues to be hopeful that the 2005 changes in practice by the King Abdulaziz University in Jeddah will help 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 hopes to see more universities legalizing their acquisition process by buying centrally and encourages the remaining universities in the Western Province to follow suit. Failing to do so invites an overrunning of the market by pirate copies, supplanting legal purchases.

**Entertainment Software Piracy:** Piracy of videogames is rampant in the Kingdom with recent hot-selling games being imported from countries like Malaysia and openly sold in stores and malls, whereas DVDs and music CDs tend to be made available through in-store catalogues with "runners" being dispatched off-site to obtain the selected product.

**Saudi Government Promises:** Following IIPA's visit to the Kingdom in January 2006, King Abdullah issued a "circular" which directed that transparency and deterrent penalties should be established in the Kingdom and that government ministries should legalize their

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<sup>9</sup> BSA reports that while 51% was the overall estimated piracy rate in the KSA in 2006, piracy in government and in small and medium enterprises and in the home consumer market is far higher. The lower piracy rate among larger companies, such as Aramco, SABIC and others, brings the overall national rate down. BSA also reports that the situation in 2006 is worsening with PC sales up an estimated 40% (as reported by IDC) with software revenue growth much slower, indicative of an increasing piracy rate.

software use. Despite this clear message from the King and promises to the IIPA delegation (and further USG and industry meetings in September 2006), we have yet to see any progress on these fundamental deficiencies. To date, transparency in the administrative enforcement process at the MOCI has not been established and the MOCI's Breach Committee, which is responsible for administrative adjudication of copyright piracy offenses and for imposing administrative penalties, has failed to issue deterrent fines. IIPA was particularly disappointed that the September meetings resulted in almost no progress on these critical commitments.

**Lack of Transparency:** IIPA members' local representatives report that the MOCI has yet to provide any right holder with information as to the results of the Breach Committee's administrative actions, including whether fines had been imposed and at what level, despite continuing requests for such information. At the September meetings, IIPA presented the delegation with a detailed list of issues that might be understood by MOCI to stand in the way of offering full transparency (e.g. a list of possible information that MOCI would demand from right holders as a condition to transparency). Despite indications that a response to this list would be given to the USG and IIPA before the delegation departed, the KSA government has STILL (four months later) not provided a response to these issues. It has been reported that the document purportedly containing such responses is being held up within the MOCI.

Under paragraph 266 of the WTO Working Party Report on Saudi Arabia's accession,<sup>10</sup> the Saudi government stated that right holders would have the opportunity to appeal any imposition of a fine by the Breach Committee to the Board of Grievances if the right holder felt that the fine was too low to act as a deterrent, as required by TRIPS. Paragraph 266 is binding on the KSA and such appeal right must be afforded under TRIPS and the KSA's Accession commitment. Without the promised transparency in that process, however, and despite the promise made in January and the King's circular, right holders have not been provided any information about, and have therefore been unable to appeal, ANY fine decision.

As noted above, efforts to ascertain the MOCI's requirements for right holders to receive such transparency have so far been unavailing.<sup>11</sup>

MOCI has regularly argued that right holders must at least file complaints as a condition for receiving transparency. Yet, for example, according to BSA, no raid has been run by the MOCI without BSA having filed a complaint, which they do on a regular basis<sup>12</sup> and no information on case results or fines have ever been provided. One of the problems that contributing to the ineffectiveness of the KSA government's enforcement system is that they rarely take proactive (*ex officio*) raid action but wait for right holders to complain, despite open and widespread piracy in the shops and in the markets, visible to all. As described above, the openness of pirate activity has even increased in 2006.

In addition to affording transparency to right holders, the Saudi authorities, if they are to be successful in reducing piracy levels, must also publicize their actions within the country and

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<sup>10</sup> Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61, January 11, 2005

<sup>11</sup> In most countries of course, such transparency is a matter of routine. The press routinely reports on decisions of administrative agencies and of courts and court decisions are publicly available or published.

<sup>12</sup> During the September meetings, an MOI official stated that right holders have not provided powers of attorney (POAs) and implied that this was at a minimum a necessary condition to receive the transparency promised. Later in the discussions, it became less clear whether POAs were needed at all, but, in any event, BSA (for its members active in Saudi Arabia) and the enforcement agency representing the Motion Picture Association (MPA), the Arabian Anti-Piracy Alliance (AAA), has provided POAs for all the MPA member studios to the MOI.

undertake a major public relations campaign about those actions and that piracy is not only illegal, but is a criminal act, in the Kingdom.

**Lack of Deterrent Penalties:** In its February 2006 Special 301 submission, IIPA reported that the average fine issued by the Breach Committee for an act of piracy was reportedly 10,000 riyals (US\$2,666) and the highest fine ever imposed, apparently in only one case, a mere 50,000 riyals (US\$13,332). The Saudi authorities themselves have acknowledged that no criminal case for piracy has ever proceeded or been concluded in the Kingdom. No pirate has ever served a jail term. Until this situation changes, and the KSA promised to change it in January, piracy levels will remain consistently high and the KSA will continue to fail to meet its TRIPS enforcement obligations. As of February 2007, nothing has changed!

IIPA also noted in February 2006 that the MOCI is to be commended for continued raiding activity. This must be tempered, however, as discussed earlier, with the reality that such raids are generally not self-initiated by the MOCI but only after a right holder complaint. Until the MOCI takes action *ex officio* and on a regular basis and employs adequate resources, piracy levels will continue to remain high.

In IIPA's OCR submission filed on October 2, 2006,<sup>13</sup> we provided a detailed list of raids conducted against audiovisual, game and software piracy so far in 2006 and selected raids from earlier years. As is evident from the size of the seizures in these cases,<sup>14</sup> the imposition of the usual paltry fines will never act as a deterrent to the levels of piracy that have become routine throughout the Kingdom. One of the largest seizures ever in the Kingdom was taken in September 2005 in Dammam and involved the seizure of over 2.2 million units of pirate product. The Breach Committee has yet even to levy a fine in this case, nor, as industry requested, refer the case to the Board of Grievances for criminal prosecution and, as would be necessary in this case, the imposition of the penalty of imprisonment.

Each of the raids and seizures represented on those lists deserve deterrent penalties far more severe than those being imposed by the Breach Committee. Most cases demand penalties that exceed the Breach Committee's jurisdictional limit/maximum fine of 100,000 riyals (US\$26,663) and need, therefore, to be referred by the Breach Committee to the Board of Grievances which has the authority to levy higher fines and to impose terms of imprisonment.<sup>15</sup> IIPA has no report of any copyright piracy case that has ever been referred from the Breach Committee to the Board of Grievances. If right holders were afforded the transparency that the Kingdom is obligated to provide, they could petition the Breach Committee (or the Board of Grievances) to move such cases to the Board for the imposition of penalties necessary to deter the kind of piracy reflected in these lists.

**Government Legalization of Software Use:** The software industry has estimated that the piracy rate in 2005 in government ministries was 70%. IIPA and BSA have asked that government ministries specifically budget for the purchase of legitimate software and that ministries set up software asset management systems to monitor software use. These two proposals must now be implemented by the government as part of meeting the King's

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<sup>13</sup> <http://www.iipa.com/pdf/IIPA%20Saudi%20Arabia%20301%20OCR%20submission%20FINAL%20%20100206.pdf>

<sup>14</sup> While the amount of seized product is known by right holders who accompany the authorities on the raid, no additional information is known about what happened in any of these cases, whether the infringer was declared to be an infringer, nor what penalty or other action (such as temporary shop closure) was taken.

<sup>15</sup> Members of the Board of Grievances with whom IIPA met in January assured the IIPA delegation that if a case were brought to them, either directly by the Breach Committee or as the result of an appeal by a right holder, they would impose deterrent penalties.

prescriptions against unlicensed software use in government. This should include an additional circular with a specific deadline and a requirement for each ministry to report back to the King.

**IIPA 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. The Kingdom's failure to implement these promises caused IIPA to recommend an out-of-cycle review to assess the implementation of these commitments and removal of the deficiencies listed. In October 2006, given no progress from the Saudi government, IIPA asked USTR to elevate it to the Priority Watch List. The OCR remains outstanding and the recommendation remains the same. Indeed the reasons for that elevation are even more apparent today.

## **COPYRIGHT ENFORCEMENT UPDATE**

<b>ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2006: SAUDI ARABIA</b>		
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>ENTERTAINMENT SOFTWARE</b>
NUMBER OF RAIDS/SEARCHES CONDUCTED	136	70
NUMBER OF ADMINISTRATIVE CASES BROUGHT BY AGENCY		
NUMBER OF DEFENDANTS FOUND LIABLE (INCLUDING ADMISSIONS/PLEAS OF GUILT)		
RATIO OF CONVICTIONS TO THE NUMBER OF RAIDS CONDUCTED		
RATIO OF CONVICTIONS TO THE NUMBER OF CASES BROUGHT		
NUMBER OF CASES RESULTING IN ADMINISTRATIVE FINES		
TOTAL AMOUNT OF FINES LEVIED		
US\$0-\$1,000		
\$1,001-\$5,000		
\$5,001-\$10,000		
\$10,000 AND ABOVE		
TOTAL AMOUNT OF RESTITUTION ORDERED IN HOW MANY CASES (E.G. \$XXX IN Y CASES)		

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006 SAUDI ARABIA		
ACTIONS	MOTION PICTURES	ENTERTAINMENT SOFTWARE
NUMBER OF RAIDS CONDUCTED	76	35
NUMBER OF VCDs SEIZED	12,960	
NUMBER OF DVDS SEIZED		
NUMBER OF CD-Rs SEIZED	76	
NUMBER OF INVESTIGATIONS	43	35
NUMBER OF VCD LAB/FACTORY RAIDS/DISTRIBUTION CENTERS	76	35
NUMBER OF CASES COMMENCED		
NUMBER OF INDICTMENTS		
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)		
ACQUITTALS AND DISMISSALS		
NUMBER OF CASES PENDING		
NUMBER OF FACTORY CASES PENDING		
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		
SUSPENDED PRISON TERMS		
MAXIMUM 6 MONTHS		
OVER 6 MONTHS		
OVER 1 YEAR		
TOTAL SUSPENDED PRISON TERMS		
PRISON TERMS SERVED (NOT SUSPENDED)		
MAXIMUM 6 MONTHS		
OVER 6 MONTHS		
OVER 1 YEAR		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		
NUMBER OF CASES RESULTING IN CRIMINAL FINES		
UP TO \$1,000		
\$1,000 TO \$5,000		
OVER \$5,000		
TOTAL AMOUNT OF FINES LEVIED (IN US\$)		

## **COPYRIGHT AND RELATED LAWS**

**Amendments to Adopt Key WIPO Internet Treaties' Requirements and to Allow Saudi Arabia to Join the WCT and WPPT:** While virtually all the deficiencies in the Saudi Copyright Law have been remedied in the new implementing regulations adopted in 2005,<sup>16</sup> IIPA impressed upon all relevant officials at its January and September 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. During recent meetings in Washington, the Saudi government representatives indicated that they had commenced a review of the WIPO Internet Treaties issues and that the next step was to seek WIPO's advice on how best to proceed with

<sup>16</sup> 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.

implementing legislation. IIPA is encouraged that the government is moving forward with this very important exercise.

**Optical Disc Legislation:** Reports are that there is at least one, and likely as many as four, known OD plants in the Kingdom. The authorities should adopt optical disc regulations to ensure that new optical disc production facilities only engage in legitimate licensed production. Saudi Arabia should join its neighbors that have adopted or are in the process of adopting a regulation to control the production of optical discs, i.e., a 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. In addition, commercial CD-R/DVD-R “burning” (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.
- 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). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

## **MARKET ACCESS**

**Ban on Cinemas:** All public exhibition of films is prohibited by law in Saudi Arabia. Despite the fact that in October 2005, the government allowed a trial of one cinema to screen cartoons to women and children only, there appears to be no further removal of prohibition of a theatrical market in Saudi Arabia. This total ban is not only unfair and market-closing, it also opens the door wide to pirate operators who simply do not follow the law and bring in movies



which the Saudi government has never had an opportunity to review for content or had any say in its distribution.

**Video Outlet License Requirements:** Video outlets must be licensed by the Ministry of Culture and Information. That Ministry has, however, demonstrated great reluctance in allowing general retail stores, such as supermarkets and toy stores, to obtain licenses. Such licensing requirements limit the ability of video distributors to reach important market segments.

**Restrictions on Home Video Distribution:** Foreign companies are prohibited from importing or distributing home video product in Saudi Arabia. Only Saudi nationals or Saudi-owned companies have this right. Such restrictions should be removed to encourage growth of the video market.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### THAILAND

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

#### **EXECUTIVE SUMMARY**

The Royal Thai government experienced turmoil in September 2006, when a coup d'état succeeded in overthrowing Prime Minister Thaksin Shinawatra. We recognize the upheaval to the Royal Thai government caused by these events and it is in some respects remarkable that the government organs dealing with intellectual property and trade issues managed to continue working to take actions against end-user piracy. Unfortunately, other piracy phenomena, like domestic retail piracy, optical disc piracy, book piracy, and cable and signal theft piracy, remained largely unchecked in 2006. All report that, notwithstanding many raids and seizures in some sectors, piracy continues to cause major losses. A principal cause may be the failure to prosecute key piracy players (as opposed to designated employees of pirates), and the lack of deterrence in the final outcomes of criminal cases brought to prosecutors and before the criminal court. This is exacerbated by the lack of a strategic approach by the Thai government to combating piracy in Thailand. Thailand needs a fulltime, fully staffed and funded enforcement body like that found in neighboring countries/territories like Malaysia, Singapore and Hong Kong. Simply put, while the Royal Thai government has responded to some industries' concerns, the outcomes of the government's actions to address these piracy concerns have not resulted in lowering the levels and amounts of piracy in Thailand.

#### **PRIORITY ACTIONS REQUESTED IN 2007**

- **Prosecute Owners of Pirate Production and Distribution Hubs in Thailand, with Deterrent Sentences Imposed:** With piracy levels remaining largely the same, notwithstanding some retail actions and plant closures, the Royal Thai government must swiftly seek prosecutions against key producers and distributors of pirate products (including the owners of the manufacturing plants) to the maximum extent of the law. The Royal Thai government is called upon to use its new forensic capabilities and knowledge of the plants to finally enforce against pirate production, as well as enforce against those distributing pirate optical discs. The Royal Thai government should also apply a system of "total enforcement" by employing other laws available to fight piracy as stipulated in the Prime Ministers Regulation of the Suppression of Piracy, 2536 (of April 16, 1993).
- **Establish Continuous Enforcement Against Retail Piracy:** Enforcement campaigns against retail piracy in Thailand have led to some impressive results, but need to be sustained in 2007. The MOU on suppression of piracy should be fully implemented and sustained throughout the year.
- **Effectively Curtail Pirate Imports and Exports:** The industries report increasing imports into Thailand from Malaysia and China, among others, and some industries continue to note pirate exports from and transshipments through Thailand. Royal Thai Customs officials must seize more pirate copyright product in 2007 and must work with express mail carriers to

establish mechanisms to inspect express shipments as other countries have done effectively in recent years.

- **Effectively Deal with End-User Software Piracy:** Unauthorized use of business software in commercial settings causes the greatest losses to the business software industry in Thailand. While the Royal Thai government has responded favorably to requests for enforcement made by the business software industry to the police for end-user software piracy and retail actions in 2006, the rate of software piracy still remains uncomfortably high at 80%. This clearly indicates that more must be done.
- **Legitimize Usage of Published Materials:** Book piracy in the form of illegal photocopying for the domestic market and print piracy for export continues to thrive in Thailand. To date neither the Royal Thai government nor the universities have taken a stand to ensure use of legitimate textbooks in schools and universities. Exceptions in the copyright law regarding educational use of copyright works – provisions that in the past have been applied in ways that place Thailand out of the mainstream of international norms – must be amended.
- **Modernize Copyright and Related Laws and Join WCT and WPPT:** To deal with increasing Internet penetration and to avoid the problems of Internet piracy, the Royal Thai government should take steps in 2007 to modernize its copyright law, in particular, to fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), and to include modern and effective enforcement provisions to eradicate all forms of piracy, including in the digital environment. The government should ensure that laws can effectively address book piracy (including by narrowing exceptions that at present are interpreted as allowing wholesale copying of books without authorization), signal theft (cable and satellite piracy), and illegal camcording of movies, among others.

For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006<sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	20.7	50%	21.9	45%	24.9	45%	26.8	41%	30.0	42%
Business Software <sup>2</sup>	164.0	80%	155.0	80%	100.0	78%	84.0	80%	57.3	77%
Entertainment Software	NA	82%	NA	75%	NA	76%	NA	82%	47.3	86%
Books	35.0	NA	30.0	NA	30.0	NA	28.0	NA	28.0	NA
Motion Pictures <sup>3</sup>	NA	NA	149.0	62%	30.0	60%	28.0	60%	26.0	70%
<b>TOTALS</b>	<b>219.7<sup>4</sup></b>		<b>355.9</b>		<b>184.9</b>		<b>166.8</b>		<b>188.6</b>	

## **PIRACY AND ITS EFFECTS IN THAILAND**

Piracy continues to have a detrimental effect on the market for the copyright industries. Most piracy phenomena continued largely unabated in 2006, despite the fact that the Royal Thai government is now in possession of optical disc forensic equipment and samples that should permit them to identify and act against the manufacturers of infringing OD titles. Some optical disc actions, some sporadic retail raids, and some noted actions against cable pirates at least demonstrate that the Royal Thai government recognizes the problem and is trying in some measure to do something about it, albeit in an *ad hoc* manner. Since the coup d'état in September 2006, enforcement has largely ceased and, as a result, the piracy rate and losses to U.S. industry have been increasing.<sup>5</sup> The record industry suffered the most pronounced effects of piracy, estimating that Thai music industry revenues dropped 30% in 2006. International labels have cut losses by downsizing staffs. IIPA understands that approximately 20 local Thai independent labels were forced out of business in 2006. Piracy of business software has seriously compromised the business of resellers and distributors of genuine software. Book piracy continues to hinder the growth of legal industry. The retail markets like Panthip Plaza and MBK shopping malls continue as black spots of piracy in Bangkok.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Thailand under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf> of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Thailand, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade losses and piracy levels for 2005 were 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 and for 2006 at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> Without factoring in the motion picture losses for 2005, the piracy losses actually went up in 2006, from \$206.9 million to \$219.7 million.

<sup>5</sup> Piracy of international recordings is higher than for domestic recordings. The recording industry estimates that in 2006, the piracy rate for local repertoire was in the range of 30-40%, while the rate for international repertoire exceeded 50%.

**Optical Disc Piracy (Factory and Burning):** Pirate production of optical discs in plants (CDs, VCDs, DVDs, CD-ROMs) remains a major hurdle to the growth of legitimate copyright industries in Thailand. Nonetheless, since the optical disc regulation came into force in late 2005, inspections have commenced, an “exemplar” program has been introduced (whereby plants provide samples from molds used to produce discs, which can be used for forensic matching to the injection mold machine in the plant and can be matched with any discs found in the market made on that mold machine as well),<sup>6</sup> and some suspected pirate plants have closed or leased out their equipment. On the other hand, a recently announced optical disc plant inspection program appears to be cosmetic in nature (hopefully not as a public relations ploy during the annual Special 301 review process). Foreign right holders groups have been informed that they will not be allowed to participate in these plant inspections and that the inspection team will not be allowed to take any exemplars from the plants visited.

IIPA reported 42 optical disc production plants in 2005, but as of January 2007, there are reportedly 41 plants,<sup>7</sup> with 190 optical disc production lines (up from 155 in 2005). A very conservative estimated capacity for production in Thailand stands at 665 million discs per year in the plants alone, greatly exceeding any rational legitimate domestic demand (e.g., estimated legitimate domestic demand stood at roughly 60 million discs in 2004). Most of the known plants are in Bangkok or the provinces surrounding Bangkok, while several are in neighboring provinces to the East and Southeast of Bangkok closer to the Cambodia border. 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, and in 2006 the MPA seized more than 25,000 DVD's that had originated from Burma.<sup>8</sup> 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 2006 in the United Kingdom, Belgium, South Africa, Taiwan, Sweden, and other ports in the EU, the U.S., and countries in Latin America (although the motion picture industry reports decreased exports, while acknowledging that some product may be transshipped through Thailand). In 2006, industry notes increased piratical imports from Malaysia and China (as well as Laos) as a concern.<sup>9</sup> Royal Thai Customs claims it has no power under the current law to examine and intercept transshipments. To the extent shipments are mixed (pirate imports, and transshipped pirate goods), this lack of authority is creating major problems.

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<sup>6</sup> In preparation for the establishment of the Optical Disc forensic laboratory in Thailand, the plant visit and exemplar collection program was launched, to gather necessary information on manufacturing from all plants visited as well as to collect samples of optical discs produced from those visited plants. The Thai Government, led by DIP and the Police, started the plant visits on March 9 (through March 20) with two teams comprised of two DIP staff, one police officer, and several industry representatives. The result was successful with a total of 38 plants visited and exemplars collected from all the plants except one (Verko, which refused to provide an exemplar, claiming its machines had been “down”). In addition, a series of training and seminars were conducted in conjunction with the program. In one, conducted on March 1, 2006, industry took 15 DIP and Police officials to visit the MPO (Asia) Plant in Chaeongsao Province to obtain a better understanding on how optical discs are manufactured.

<sup>7</sup> The known CD plants are listed in Appendix A to this report. There are reportedly three additional unregistered plants.

<sup>8</sup> 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](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 (apparently there was no international or U.S. repertoire), including pirate sound recordings. The driver was arrested and charged.

<sup>9</sup> Industry reported that on March 13, 2005, Royal Thai Customs of Songkhla Province intercepted 30,000 pirate discs suspected to have originated in Malaysia. It was also reported in Manager Daily Newspaper on February 6, 2007, that in 2006 Thai authorities seized Baht 30 million worth of pirate optical discs originating from Myanmar.

In addition to plant production, there is increasing local “burning” of all kinds of copyright content onto recordable discs (CD-R, DVD-R, etc.), mainly due to the affordability of burning machines.

**Retail Piracy (Optical Discs) in Thailand:** Pirate optical discs, whether factory produced or burned onto recordable discs, continue to harm the local market for copyright materials. 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.<sup>10</sup> 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, the Special Task Force was dissolved due to the coup d'état in September 2006. Following a meeting between several right holders and now former Police General Achirawit, the STF had been re-established. However, Police General Achirawit has since resigned from the Police force following the transfer of Police Commissioner General Govit to the Prime Ministers' office on February 5, 2007 (and it is unknown at the time of this report what the status of the STF will be).

**Signal Piracy (Cable and Satellite) and Unauthorized Public Performances of Audiovisual Works:** Piracy of cable and satellite broadcasting signals (the unauthorized transmission of U.S. programming over systems from original cable or satellite transmissions) remains rampant, causing revenue losses estimated at US\$160 million (the second highest losses in the Asia-Pacific region).<sup>11</sup> Illegal decoder boxes and smart cards are widely available in Thailand. The cable industry notes that in late 2006, there were over 1.33 million pirate cable hook-ups (representing a 10% increase over the prior year), compared with 509,000 legitimate subscribers to the major Pay TV operators in Thailand. Thailand has yet to establish an effective system to license and regulate broadcast and cable-casting 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.

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<sup>10</sup> 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. 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, Sukhimit Road (3-19), Night Bazaar Area, Patong Beach, Chaweng Beach, Pattaya Beach, Santisuk Market, Kinyong Market) and “Yellow Spot” targets (Sapanlek, Baanbor, Mahboonklong, Nomchit Mall, Pata Pinklao, Fortune Tower, Donmuang, Je Leng Plaza, Tawana Plaza, Zeer Rangsit, Kata Beach, Karon Beach, Computer Plaza, Icon, Rincom Market, Yongdee Market, BKS Market, Big C Bangyai, Tantawan Plaza, Bangsrimuang, Hua Hin). 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. In 2006, out of meetings with the Panthip Plaza Management Team in March, industry discussed Panthip's recent hiring of a Police Team from the Central Investigation Bureau to conduct daily inspections for 60 days in a row. This was coordinated in conjunction with a public awareness campaign to be carried out inside the buildings owned by Panthip, i.e., Panthip Plaza, Banglumpoo Ngamwongwan, Tawanna and Panthip Plaza Chiang Mai, including exhibition booths, legitimate copyright goods for sale and live-performances/activities. The campaign was carried out in June 2006. Unfortunately, due to tight budgets, the plan did not pan out in the end, and Phantip Mall and MBK Malls currently remain piracy hot-spots.

<sup>11</sup> 2006 revenue loss estimate were taken from The Cable & Satellite Broadcasting Association of Asia's (CASBAA) study “The Cost of Piracy: Asia-Pacific Pay-TV Industry Study,” October 2006 (prepared by Standard Chartered).

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.

**Book Piracy:** Illegal photocopying, illegal print piracy of entire books, and unauthorized translations, adaptations and compilations involving both entire books and substantial portions of books continue to devastate U.S. publishers in Thailand. Such piracy is rampant in and around university campuses,<sup>12</sup> where university presidents, professors, and students exhibit blatant disregard for the law and the rights of copyright owners.<sup>13</sup> Photocopy shops routinely make copies without question. Many of these books are “pre-copied” to fulfill anticipated 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. In addition, unauthorized translations of English books into Thai, and significant excerpts thereof, continue to be a problem. Despite regular contacts by publishers with lecturers and university authorities about the problem, the authorities have taken little action and government enforcers have not stepped in to help.

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.<sup>14</sup> If Thai law continues to permit what these judges say it does, Thailand will remain in violation of its international obligations under the Berne Convention and the TRIPS Agreement. This deficiency must be corrected through amendments, and/or through the free trade agreement process. Action is past due.

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<sup>12</sup> Photocopying and print piracy is rampant in primary and secondary schools as well.

<sup>13</sup> University campuses where piracy of published materials is particularly prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.

<sup>14</sup> See, e.g., *Prentice Hall Inc. v. Kanokchai Petchdawong*, Black Case No. Or. 326/2542, Red Case No. Or. 784/2542 (Cent. Int. Prop. Int. Trade Court, July 23, 1999) (unofficial translation) (on file with IIPA) (plaintiff claimed copyright infringement by a copy shop owner who was copying entire textbooks; court indicated strongly that receipts showing copies made on behalf of students would likely entitle defendant to avail himself of fair use defense under Article 32, setting no limit on scope of permissible copying under the Thai interpretation of the Berne three-part test). Article 32(6) of the Copyright Law provides, in relevant part:

An act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright. Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright

(1) *research or study of the work which is not for commercial profit;*

...

(6) *reproduction, adaptation, exhibition or display by an instructor for the benefit of own instruction which is not for commercial profit;*

(7) *reproduction, partial adaptation of work, abridgement or making a summary by an instructor or an academic institution for the purpose of distributing or selling to the attendants in the class or in the institution which is not for commercial profit;*

(8) *use of the work in questioning and answering in an examination.*



Books are also being reproduced and passed off as originals through professional printing houses capable of producing large quantities. U.S. Customs and Border Patrol agents have seized several shipments of these books destined to consumers in the United States, and industry suspects there are many similar pirate exports to major overseas markets. Royal Thai Customs must work with right holders to eradicate this problem.

**End-User Piracy Rate of Business Software Remains One of Highest in Asia:** The wilful use of unlicensed or pirate software in the workplace continues cause the greatest losses to the business software industry. The rate of unauthorized uses of business software in business settings remains unacceptably high in Thailand, at 80% in 2006, and revenue losses continue to increase year-on-year. Only Vietnam, China and Indonesia have higher rates of piracy in the Asia-Pacific region, where the average piracy rate remains above 50%. Thus, while the business software industry has been able to get full cooperation from enforcement authorities in conducting end-user raids (the police conducted a record fifteen end-user raids based on complaints filed by the Business Software Alliance) and retail raids, these raids do not seem to be having a significant deterrent effect on the overall piracy rate in Thailand.

**Entertainment Software Piracy:** Piracy of entertainment software products remains prevalent in Thailand, whether optical disc (imported factory-produced discs or locally produced discs or “burned” discs) or cartridge-based games. Entertainment Software Association (ESA) member companies continued to conduct “mall sweeps” (aimed at reducing game piracy in the malls) in cooperation with local police. While cooperation with the local police continued to be positive, they 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 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.

Piracy at Internet game rooms (IGRs) or Internet cafés remains a significant concern, although ESA member companies have had some success in turning such IGRs into legitimate operations through licensing arrangements with and the sale of authorized product to IGR owners-operators. However, ongoing support from enforcement authorities is needed to ensure continued improvement in this market.

Cartridge-based entertainment software continues to be heavily pirated in Thailand, with pirated and counterfeit cartridge-based video game products being imported from China. Enforcement by local authorities remains weak.<sup>15</sup> Thailand also continues to be a transshipment point for pirated Nintendo video game cartridges, especially to Europe.<sup>16</sup>

**Internet Piracy Has Grown:** With the growth of Internet usage in Thailand (NECTEC reports that as of January 2007, there were 7.08 million Internet users in Thailand, compared with 670,000 in 1998, and 3.5 million in 2001,<sup>17</sup> it is unfortunate that Internet piracy is also growing steadily, with a noticeable increase in optical disc hard goods web sites being hosted in Thailand. Though there is no legislation on ISP’s liability, ISPs remain cooperative in taking

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<sup>15</sup> In 2006, only one seizure occurred – products were seized by the local police at the Bangkok Airport.

<sup>16</sup> In 2006, there were 21 actions worldwide involving the seizure of counterfeit cartridge games from Thailand, with products being seized in France, Germany, The Netherlands, and the United Kingdom.

<sup>17</sup> See <http://iir.ngi.nectec.or.th/internet/user-growth.html>.



illegal websites down. The business software industry has seen increasing numbers of Internet-related cases.<sup>18</sup> The broadband penetration rate, however, remains low,<sup>19</sup> so much of Thailand's Internet usage is limited to mobile applications and Internet cafés. It has been reported that piracy at Internet cafés has increased significantly in recent years, with Internet café users/customers using café computers to download pirated material from the Internet and burn them on to CDs on the café premises. It is thus critical that the Royal Thai government ensure that all Internet cafés allow use of only legal copyright materials, including entertainment software products, and permit only legal activity at these establishments. Other Internet-related problems involve illegally “ripping” music and storing music in thumb drives or on MP3 players.

**Camcorder Piracy:**<sup>20</sup> In 2006 there were six reported cases of illegal copying of movies on camcorders in Thai cinemas. 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.

**Organized Crime in Piracy – Link:** Evidence of organized crime involvement in piracy in Thailand continued to mount in 2006. Threats to right holders and their representatives are commonplace, and right holder representatives were physically attacked and injured on several occasions again in 2006.<sup>21</sup> 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. IP violations have still not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).<sup>22</sup> 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

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<sup>18</sup> For example, in 2005, there were 8,915 Internet cases involving business software downloads, representing an increase of 583% from the year before, and 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 in 2005, 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.

<sup>19</sup> 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](http://www.researchandmarkets.com/reportinfo.asp?report_id=302150&t=e&cat_id=20).

<sup>20</sup> 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 U.S. theatrical release and well before their international debuts.

<sup>21</sup> An industry representative who worked on an anti-piracy team was shot and killed in Nakorn Pratom Province on October 14, 2006. The gunman was caught within a few days. Other industry representatives have been known to be threatened or attacked by armed criminals in Thailand. A staff person of a third party outsource company was also attacked during a raid in Open Market in Nonthaburi Province on December 21, 2006.

<sup>22</sup> Under the MLPSA, 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).

of State concluded that copyright should be removed as a predicate offense.<sup>23</sup> 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.

## ENFORCEMENT UPDATES IN THAILAND

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006 (SOUND RECORDING DATA COVERS JAN-SEPT) THAILAND			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS
NUMBER OF RAIDS CONDUCTED	1,809	20 <sup>24</sup>	437
NUMBER OF VCDs SEIZED	317,381		3,853
NUMBER OF DVDs SEIZED	590,787		69,017
NUMBER OF CD-S SEIZED	0		73,599
NUMBER OF INVESTIGATIONS	9,500	0	
NUMBER OF VCD LAB/FACTORY RAIDS	71,171	0	
NUMBER OF CASES COMMENCED	0	0	
NUMBER OF INDICTMENTS	2,189	0	437
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	0	0	403
ACQUITTALS AND DISMISSALS	0	0	
NUMBER OF CASES PENDING	N.A.	5 <sup>25</sup>	239
NUMBER OF FACTORY CASES PENDING	N.A.	0	
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	N.A.	0	65
SUSPENDED PRISON TERMS	18		
MAXIMUM 6 MONTHS	10		62
OVER 6 MONTHS	N.A.		
OVER 1 YEAR	N.A.		
TOTAL SUSPENDED PRISON TERMS	N.A.		
PRISON TERMS SERVED (NOT SUSPENDED)	N.A.	0	
MAXIMUM 6 MONTHS	N.A.		3
OVER 6 MONTHS	N.A.		
OVER 1 YEAR	N.A.		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	N.A.	0	
NUMBER OF CASES RESULTING IN CRIMINAL FINES	N.A.	0	131
UP TO 40,000 BAHT	N.A.		106
40,000-200,000 BAHT	N.A.		25
OVER 200,000 BAHT	N.A.		
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	N.A.		
	N.A.		
	N.A.		
	N.A.		

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

<sup>23</sup> 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>.

<sup>24</sup> This includes 15 end-user raids and 5 retail raids.

<sup>25</sup> As the retail raids were conducted in November and December, there has not been sufficient time for the cases to be concluded.

THAILAND CRIMINAL ACTIONS 2005	SOUND RECORDINGS	MOTION PICTURES
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	-	
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\$)	-	

**General Notes on Enforcement in Thailand:** The year 2006 was mixed for industry in terms of obtaining enforcement against copyright piracy. Enforcement, at least with respect to OD piracy, declined markedly after the coup d'état in September 2006. Industry noted some optical disc plant closures, but in most cases, the plant owners simply changes names and continue to operate in a different location. Industry also notes some sporadic activity against retail piracy (especially in June upon the 60th Anniversary of the King's accession to the Throne, in which retail piracy around Bangkok stopped for about two weeks),<sup>26</sup> as well as some significant actions against cable pirates throughout the year. The Royal Thai government has reported that in 2005, the Royal Thai Police conducted 5,610 raids and seized almost 1.4 million pirate goods,<sup>27</sup> and stopped 193 pirate shipments and seized almost 765,500 pirate goods at the borders. We do not have statistics at this date from the government on raids in 2006.

Most industry sectors report good relations with the key enforcement organizations in the Royal Thai government, including the Department of Intellectual Property, Royal Thai Police (and its Economic and Technological Crime Suppression Division – or ECO-TECH) and the Central Investigation Bureau (CIB), Customs, Office of the Public Prosecutor for IPR cases, and the IP Court.<sup>28</sup>

<sup>26</sup> See, e.g., *Thailand: Commerce Ministry Steps Up Anti-Piracy Campaign*, June 5, 2006, Thai News Service Section: General News (in which Deputy Commerce Minister Preecha Laohapongchana indicated that Thailand's Ministry of Commerce has intensively stepped up its campaign against pirated products starting from June 1 to show that the country is cooperating with the international community to stop using counterfeit goods, and indicated that more than 280 people had been arrested during the first four months of 2006 for intellectual property violations with more than 62,000 pirated goods seized).

<sup>27</sup> This compares with 5,179 raids reported in 2004, with seizures of almost 802,500 pirate products; 4,142 raids reported in 2003, with seizures of more than 1.1 million pirate products; and 3,363 raids reported in 2002, with seizures of more than 743,700 pirate products. See Thailand Country Report, ASEAN+3 Seminar. The Royal Thai government reported a total of 8,895 IP violations were brought to courts between January and November 2006, with 2.68 million units of illegal products seized, compared with 7,689 cases and 2.26 million units seized for all of 2005 (these numbers include copyright, trademark and patent cases). See *Thailand: Arrests for Intellectual Property Rights Violations Rose in 2006*, Thai News Service, January 15, 2007.

<sup>28</sup> Some entertainment software companies report that there have been several occasions where enforcement difficulties have been encountered when certain police officers demand updates powers of attorney (POA) and/or affidavits. But for the most part, the relationship with law enforcement has been positive.

**General Notes on Problem Areas:** Other areas like book, entertainment software, an end-user software piracy remained largely unchecked. In addition, the courts, while being held up as a model for specialized IP courts in the Southeast Asian region, meted out largely non-deterrent judgments both in terms of civil and criminal results in 2006. Prosecutors in Thailand seem satisfied trying employees rather than owners of businesses engaged in piracy.<sup>29</sup> The situation became more difficult as of September due to the coup d'état (e.g., the CIB IPR Task Force was dissolved). The Police Force under the now former Deputy Commissioner General Achirawit Suwanapasat (Number 2 of the Police Force and superior to the CIB and ECOTECH) set up a Special Task Force comprising of five teams with full authority to conduct piracy raids nationwide since 28 December 2006. However, General Achirawit has since resigned and the police officers assigned to be in these five teams were only recently been appointed. As of late January 2007, no right owner has had an opportunity to employ this Special Task Force. Due to political jockeying after the coup d'état, police were much less able to focus on IP issues.<sup>30</sup> Nonetheless, it appears enforcement efforts have returned as of early 2007, with primary enforcement problems remaining the lack of adequate manpower and budget. There also remain problems in terms of irregularities in the enforcement system, for example, leaks of major or sensitive targets occur all too often.<sup>31</sup>

**Optical Disc Enforcement Results Have Shown Some Promise:** The motion picture industry in particular, but others as well, have had some notable successes in 2006 in fighting optical disc piracy. The Royal Thai government reports that since September 2005, it has undertaken inspections of all of the now 38 plants, is requiring SID Code in all plants, and has either closed down some of the suspected pirate plants or those plants have leased out their equipment to others.<sup>32</sup> Seizures have been significant, which is a testament to increased cooperation, but, as IIPA has noted for years, also indicates the size and scope of the piracy problem – in other words, Thailand has obviously not implemented a zero tolerance policy towards piracy. For example, between January and October 2006, the motion picture industry program in Thailand undertook 1,816 investigations and participated in 1,477 raids, resulting in the seizure of 202,530 VCDs, 416,706 DVDs, 272,345 CD-Rs, 9,500 DVD-Rs, and 112 CD-R burners. In all, 459 new criminal prosecutions involving motion picture industry product were initiated. A further raid in November reinforces that this effort appears sustained.<sup>33</sup>

<sup>29</sup> Industry reports that most police IP enforcement teams will accept an owner's request to send a nominated employee as the offender in a case, meaning that the actual owner will escape a criminal record and will not have to worry about follow-up raids.

<sup>30</sup> IIPA also notes the continued existence of a Mobile Unit supported by industry which has been running largely retail raids against so-called "Red Zone" and "Yellow Zone" targets, mainly in Bangkok, but also operating in other provinces like Chiang-mai, Phuket, Pattaya and Haad-yai every month. The Unit is equipped with the power to raid and arrest as well as seize pirate products. Now that industry is supporting enforcement efforts, the DIP should be empowered to engage in anti-piracy work in parallel with the Police Force. The laws would not need to be amended to achieve this since the DIP is the competent authority under the Copyright Law, the Trademark Law, the Optical Disc Act, the Patent Act, the Semi-Conductor Act and the Geographical Indication Act.

<sup>31</sup> For example, in some enforcement actions, after filing charges against retail outlets in a particular mall, all shops in the mall may shut down that day making enforcement impossible to carry out.

<sup>32</sup> Thailand Country Report, The ASEAN+3 Copyright Seminar, "APEC Anti-Counterfeiting and Piracy Initiative" and "New Trends in Copyright Related Cultural Industries," March 1-3, 2006, Tokyo, Japan (on file with IIPA).

<sup>33</sup> Motion Picture Association, *Royal Thai Police And MPA Investigators Seize 30 Optical Disc Burners In Bangkok Raid*, November 24, 2006 (indicating that on November 23, acting on information generated during a previous enforcement action in Chon Buri Province, officers from the Royal Thai Police ECO-TECH division raided a four-story residential building in central Bangkok, arresting a woman and seizing 30 DVD-R burners, 8,000 pirated movie DVD-Rs, 75,000 DVD covers and 15,000 blank DVD-Rs. The majority of the pirated DVD-Rs were infringing MPA member company titles. The seized burners are estimated to have been capable of producing nearly 3.2 million pirated optical discs in one year, which could yield illegal revenues of US\$7 million. Many of the discs seized were already boxed and ready for shipment to Chon Buri province, in eastern Thailand, and Nakorn Sithamraj, in southern Thailand.

**Helpful Action Taken Against Pirate Cable Operators:** Industry is pleased at action taken in April 2006 in which 25 officers from Thailand's Central Investigation Bureau, led by General Eakarat Meepreecha and accompanied by industry representatives, raided four cable operators suspected of illegally broadcasting MPA member company movies.<sup>34</sup> The four pirate cable operators collectively represent the entire cable broadcasting market for the province of Phuket and had the potential to reach its entire population of 1.6 million people. Acting under search warrants granted by Thailand's Intellectual Property and International Trade Court, four teams of STF police officers were dispatched from Bangkok's CIB to the southern province of Phuket, one of the many provinces in Thailand where cable piracy is known to be rampant. The raids resulted in the STF sealing off broadcasting equipment and shutting down the unauthorized channels. Operators were charged with the unauthorized broadcasting of copyright content, a violation under Thailand's Copyright Act, and face possible imprisonment for up to four years, fines of up to US\$20,000, as well as the potential of forfeiture of their companies' equipment. The suspects may also be liable and subject to criminal penalties for unauthorized broadcasting (including up to one year in prison) under Thailand's Telecommunication Act. A second raid in November 2006 resulted in one arrest, seizure of equipment used for pirate cable operation, and the shutdown of three pirate cable operators.<sup>35</sup>

**Increased Business End-User Software Piracy Raids:** In 2006, the police conducted a record fifteen criminal end-user software piracy raids and five criminal retail raid actions. Most of these cases are still with police inquiry officers as the retail raids were only conducted in November and December 2006. Local law enforcement authorities (the Royal Thai Police) provided good support for these actions although the police manpower has been limited during some periods of the year. On November 9, 2006, the ECID section of the Royal Thai Police gave its first joint press conference where the Business Software Alliance announced the enforcement taken against software infringers and highlighted some of the retail and end user raids conducted. The press conference was followed by another a few weeks later. Both received wide local media coverage and are encouraging developments.

**Courts Fail to Mete 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 the peculiarities of copyright at the same time. Over the years, the IP&IT court has sped up dockets and done away with other procedural hurdles that have long plagued right holders.

There remain some serious weaknesses in adjudication of copyright cases in Thailand, 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.<sup>36</sup> Several other problems include the following:

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<sup>34</sup> *Thailand's Largest Cable Piracy Raid Nets Four Illegal Operators*, Companies Illegally Broadcasting MPA Member Company Movies Represented Entire Phuket Cable Market, May 5, 2006.

<sup>35</sup> Motion Picture Association, *Three Pirate Cable TV Broadcasters Raided and Shut Down in Thailand Enforcement Action Follows Release of Study Estimating Asia-Pacific Pay-TV Piracy Losses At US\$1.13 Billion This Year*, Hong Kong November 1, 2006 (noting that on October 31, police officers from Bangkok's Bangsue, Yannawa and Samray Districts, accompanied by industry representatives, raided three major cable channels suspected of illegally broadcasting Motion Picture Association member company movies in metropolitan Bangkok, and that the 30 people on the police task force arrested one man, seized broadcasting equipment and shut down unauthorized channels belonging to Thai Soon Cable TV, Golden Channel Cable TV, and Sunshine Entertainment Cable TV).

<sup>36</sup> Average fines for offenders at the IP&IT court have dropped considerably. A typical optical disc retail offender will receive a 15,000 Baht (US\$400) penalty with a suspended jail sentence.

- **Obtaining Search Warrants Has Become More Difficult:** For some industry members, obtaining search warrants from the IP&IT court has become problematic, with some judges rejecting search warrant applications from copyright owners without valid reason. There have even been cases in which the criminal judge has rejected a search warrant arguing that the right holder should take a civil action against the infringer rather than request a warrant. Difficulties in obtaining search warrants seriously undermine copyright owners' abilities to enforce their rights in Thailand.<sup>37</sup>
- **Bail-Outs Render Criminal Arrests Virtually Non-Deterrent:** Since early 2005, the Royal Thai government has allowed insurance companies to intervene in criminal proceedings to secure bail for poor defendants. As of January 2007, all 1,420 local police stations nationwide are installed with insurance bail-bond booths to allow defendants, including copyright pirates, to be released from custody for around 10% of the bail set for them (usually 50,000 Baht up to 200,000 Baht depending on the seriousness of the charge). While IIPA does not challenge the concept of bail bonds, the establishment of this system in Thailand results in copyright pirates viewing arrest as a mere cost of doing business, since they know they can get out immediately. That, in combination with lack of deterrent sentencing in the criminal cases, results in the system being completely non-deterrent.
- **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 in recent years.
- **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 Submission of Forensic Evidence:** Copyright owners face problems in having police units send seizures for examination. The main reason the police give for not sending such exhibits to the new forensic facility is that they claim they have not been given a directive from higher authorities to do so. The police should swiftly deliver seized products for examination upon seizure.

## **TRAINING, TECHNICAL ASSISTANCE, PUBLIC AWARENESS**

**Handover of Forensic Equipment:** On August 7, in a ceremony between the United States Embassy and the Royal Thai Police Office (organized by the motion picture and record industries), the U.S. government handed over a full set of forensic equipment to the Thai government for its enforcement activities related to optical disc piracy in Thailand. The installation of this forensic equipment in Thailand has been viewed quite positively.<sup>38</sup> The forensic system was originally designed by the International Federation of Phonographic Industries) and has been used for years by the copyright industries to successfully detect

<sup>37</sup> The motion picture industry, by contrast, reports no difficulties in obtaining warrants.

<sup>38</sup> See IFPI Enforcement Bulletin, September 2006. A specialist unit of the Department of Intellectual Property, headed by Deputy Director General, Mr. Banyong Limprayoonwong, has since February 2006 worked with the Royal Thai Police and industry to provide essential support services for the forensic laboratory unit. These services include training, formal visits to all licensed Thai plants, as well as information and exhibit exchanges.

copyright infringing disc production in 17 countries since 2000. Malaysia is the only other Asian country to have such a capability modeled on the IFPI/MPA process, and use of the technology there has resulted in the filing of criminal cases and optical disc license revocations across the country. The new equipment will enable the Thai authorities to identify the manufacturing sources of pirate product originating from local optical disc factories. All Royal Thai government agencies engaged in optical disc anti-piracy activity will be able to use the facility to track pirate manufacturing sources. The equipment will be operated by the Royal Thai Police's Forensic Division.

**Trainings/Public Awareness in 2006:** Copyright owners once again engaged in many trainings and public awareness activities in 2006 to assist the Royal Thai government to achieve its mission of eradicating piracy. For example, the Motion Picture Association participated in ten training sessions in Thailand between January and October 2006. In addition, the Royal Thai government reported trainings between the Business Software Alliance and the Department of Intellectual Property on software asset management aimed at corporate end-users, educational institutions and libraries. In November 2006, MPA and ESA representatives participated in a regional training program at the International Law Enforcement Academy (ILEA) in Bangkok. The ILEA program was attended by 44 law enforcement officers (both Customs and police officials) from several Southeast Asian countries and provided information on product identification (i.e. distinguishing counterfeit and pirated products from the authentic goods). Appendix B to this report contains a representative list of some of the many industry trainings and seminars carried out in 2006.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Memorandum of Understanding (MOU) on the Prevention and Suppression of the Distribution of Intellectual Property Rights Infringing Products:** On August 16, 2006, the Royal Thai Police, the Bangkok Metropolitan Administration (BMA), the Department of Intellectual Property, the Department of Special Investigation, copyright owners and representatives, and owners of leading department stores in Bangkok, entered into a Memorandum of Understanding (MOU) on the Prevention and Suppression of the Distribution of Intellectual Property Rights Infringing Products. The signing ceremony was witnessed by distinguished members of the diplomatic corps from the Delegation of the European Commission, Embassy of the United States of America, Embassy of France, Embassy of Switzerland, Embassy of Malaysia, Embassy of Myanmar, Embassy of Cambodia, ECAP II and JETRO. Parties adhering to the MOU are bound to help facilitate cooperation between public and private sectors to prevent and suppress the distribution of IPR infringing products by strictly applying all relevant laws. It is the first time that the major department stores, complexes and malls have agreed to help right owners and the government to prevent and suppress the IPR infringement. The MOU also prioritizes areas of operation in Bangkok and the major provinces as follows (this follows along the prioritization for retail raiding that has taken place in past years, but codifies it for the parties involved):

### **Red Zones**

#### **1. Bangkok**

- (1) - (3) Klong Thom, Sapan Lek and Baan Mor shopping areas
- (4) - (5) Patpong and Silom shopping areas
- (6) Mah Boon Krong (MBK) Center
- (7) Sukhumvit area (Soi 3 – 19)
- (8) Panthip Plaza

2. Chiangmai Province
3. Phuket Province
4. Koh Samui District in Surattani Province
5. Pattaya in Chonburi Province
6. Haad Yai District in Songkla Province
7. Ao Nang area in Krabi Province
8. Hua-Hin in Prajuabkirikan Province

### **Yellow Zones**

1. Bangkok
  - (1) Nom Chit shopping area, Lad Prao
  - (2) Pata Pin Klao shopping area
  - (3) Fortune shopping area
  - (4) Taladmai Don Muang shopping area
  - (5) Tawanna shopping area
  - (6) Pratunam shopping area
  - (7) Jae Leng shopping area
  - (8) Kao San Road shopping area
  - (9) Sapan Bhud shopping area
2. Patumtani Province
3. Nonthaburi Province
4. Nakornrachasrima Province
5. Konkan Province
6. Ratchaburi Province

IIPA views the signing of the MOU as a favorable event, and looks forward to being able to report in the future about the results arising from it in the fight against piracy in Thailand.

### **Optical Disc Act Being Implemented Slowly, But Problems in the Statute Remain:**

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.<sup>39</sup> While the Act is by no means ideal legislation, 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, however the penalties for producing optical discs without notifying the authorities is a fine of not more than Baht 200,000 (US\$6,000) and/or a jail term of not more than one year.
- **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. However, it is noted that under the Thai Import & Export Law a permit is required from the Ministry of Commerce before one is authorized to import optical disc machinery.

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<sup>39</sup> Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).



- **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 should provide for this.
- **Criminal Penalties Strengthened, But Still No Mandatory Minimums:** The Act contains no mandatory minimum fines and no mandatory imprisonment.
- **“Copyright Code” May Inadvertently Create Burden on Right Holders: Unclear Whether Identification Code Must be Applied to Stampers/Masters:** The Optical Disc Act requires three types of Codes to be engraved or affixed on every disc produced in optical disc plants. They are 1) SID Code (mold code), 2) Mastering Code or LBR Code; and 3) Copyright Owner’s code. The first two codes are applied by optical disc factories. The Copyright Owner’s Code is problematic for some industry members. It requires copyright owners, if they wish to produce their copyrighted work in an OD format, to apply for the copyright owner’s code prior to the production. For some industry members this creates an onerous burden 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 could create a formality that may run afoul of Thailand’s international obligations.<sup>40</sup>

**Free Trade Agreement and Copyright Act Revisions:** Negotiations toward a possible free trade agreement between the U.S. and Thailand began in June 2004, but were stalled in 2006, especially after the coup d’état in September. Any FTA IP chapter would 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 would require many other strengthening amendments. For example, Article 32(6) of the law (which has been misinterpreted to allow photocopying of entire books under “fair use”) would certainly need to be amended as part of the FTA process. The Optical Disc Act also falls short in important respects of what an FTA would aim to achieve.

IIPA understands that the Royal Thai government was working on a new copyright law (or at least a comprehensive set of amendments) in 2004 and 2005; however, this stalled largely due to the coup d’état (the government is focused and committed to deal with the Thai Constitution first). The latest draft copyright amendments have not been made available for public comment, but we understand they are in many respects similar to the draft released in 2003.<sup>41</sup> We note that, to meet the requirements generally called for in FTAs with the United States, the Royal Thai government, 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,<sup>42</sup> and went into force in early 2000, but the National

<sup>40</sup> This kind of copyright owners’ code application process is a flaw that could, if it was used in a way to interfere with the exercise of copyright, might call into question compliance with the Berne Convention’s “no formality” clause. At least some industries find the code burdensome and problematic and call for its deletion from the law.

<sup>41</sup> Please see IIPA’s analysis of that draft in IIPA’s 2005 Special 301 report, at <http://www.iipa.com/rbc/2005/2005SPEC301THAILAND.pdf>

<sup>42</sup> 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 six 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.

**Revision of the Customs Code:** In order to be in line with the TRIPS Agreement, Royal Thai Customs must revise the Customs Code. Proposed revisions would make intellectual property infringing product subject to seizure and destruction on an *ex officio* basis, and not subject to release back into the stream of commerce. The Customs officer should be able to inspect products contained in transshipments if there are reasonable grounds to believe that the products contained in the transshipment infringe others' intellectual property rights. The infringing products found would be destroyed, sent back to the original port, or disposed of in any manner in which they cannot be released back into commerce. There was a public hearing on the new Customs Code on April 28, 2006, but IIPA is aware of no further progress toward passage of these amendments.

**Motion Picture-Specific Legislation:** The Motion picture industry is very interested in formulating anti-camcording legislation. In addition, a law dealing with cable piracy would be a welcome addition to the anti-piracy laws.<sup>43</sup>

## **MARKET ACCESS**

Thailand currently imposes some restrictions on market entry that, in addition to piracy, form barriers to entry of legitimate business and unduly prejudice foreign right holders. The Royal Thai government should take steps in 2007 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

**Proposed Screen Quota:** IIPA has become aware of proposed amendments to the Film Act involving the possible imposition of a screen quota on foreign films distributed in Thailand. While such a move would cause concern for IIPA and the motion picture industry, we understand that further movement on these amendments in 2007 is unlikely, given the government's stated intention to focus its primary efforts on revisions to the Thai Constitution.

**Investment Bans in Broadcasting:** Foreign investment in terrestrial broadcast networks is prohibited. A draft broadcasting law ("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.

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<sup>43</sup> 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.

In addition, advertising is prohibited on pay television systems under the 1992 amendments to the Radio Communications Act of 1955. The draft broadcasting law 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 Royal Thai government allowed original advertising carried on foreign satellite channels to 'pass through' on local pay-TV networks – a very positive sign.

**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 obtain approval and a "censorship code" for music videos and live performances is lengthy – ranging from 2 to 30 days. In addition, strict censorship guidelines in home video products have an adverse effect on the importation of DVDs, due to the costly nature of having to delete 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 2005, \$3.6 billion in Thailand's exports to the United States benefited from the GSP program, accounting for 18.1% of its total exports to the U.S. During the first 11 months of 2006, \$3.9 billion worth of Thai goods (or 19% of Thailand's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

**APPENDIX A: List of Registered Plants in Thailand**

	<b>Name of Plant</b>	<b>Location of Plant</b>
1.	307 Group Co., Ltd.	Bangkok
2.	Bayer Thai Co., Ltd.	Muang Rayong Province
3.	C.D. Square Co., Ltd.	Nonthaburi Province
4.	Chai Rung Enterprise Co., Ltd.	Bangkok
5.	Crystal Disc Industries Co., Ltd.	Nonthaburi Province
6.	Cyber Planet Disk Co., Ltd.	Bangkok
7.	Delta Disc Co., Ltd.	Ayutthaya Province
8.	Diamond Mastering Disc Co., Ltd.	Nonthaburi Province
9.	Digital P.V. Co., Ltd.	Bangkok
10.	Disc Com Co., Ltd.	Nonthaburi province
11.	Dyntec Disc Production Co., Ltd.	Nakornpathom Province
12.	E.V.S. Entertainment Co., Ltd.	Samutsakorn Province
13.	General Record International Industry Co., Ltd.	Nonthaburi Province
14.	G.M. InterGroup Co.Ltd	Bangkok
15.	Inter Magnetics (Thailand) Co., Ltd.	Bangkok
16.	June Plaspac Co., Ltd.	Chacheungsao Province
17.	K. Master Co., Ltd.	Patoomthanee Province
18.	L.L.I. technology Co., Ltd.	Samutprakarn Province
19.	M.G.A. Co., Ltd.	Bangkok
20.	Micron Storage Media Co., Ltd.	Chonburi Province
21.	M.P.O Asia Co., Ltd.	Chacheangsao Province
22.	Nontakit Co., Ltd.	Nonthaburi Province
23.	Onpa Co., Ltd.	Bangkok
24.	Optical Disc Technology Co.,Ltd	Nakornnayok Province
25.	Pailin Laser Metal Co., Ltd.	Bangkok
26.	Plan Star Electronics Co., Ltd.	Samutsakorn Province
27.	Rota Group Co. Ltd.	Bangkok
28.	Siam Seiko Enterprise Ltd., Part.	Chachoengsao Province
29.	Supphaisan International Co Ltd	Nakornpathom Province
30.	T.L.(1992) Co., Ltd.	Bangkok
31.	Thai Media Industries Co., Ltd.	Bangkok
32.	Thai Polyscarbonate Co., Ltd.	Rayong Province
33.	T.T.N.M Co., Ltd.	Samutprakarn Province
34.	Two Dimension Manufacturing Co., Ltd.	Nonthaburi Province
35.	UD.Compact Disc.Co.Ltd	Nonthaburi Province
36.	Universal Mastering Co., Ltd.	Nakornpathom Province
37.	Van World International Group Co., Ltd.	Bangkok
38.	Verko (Thailand) Co., Ltd.	Nonthaburi Province

## Appendix B: Thailand Representative List of Industry Training in 2006

Topic	Date	Organized by	Participants/Purpose
OD Plant Visit of Judges on IP&IT Court	January 27, 2006	TECA	30 judges of the IP&IT Court visited an optical disc factory, MPO (Asia), in Chaeongsua Province, to learn about OD production.
Copyright Cultivation Campaign	February 3, 2006	DIP and private sector, including MPA, Thai Entertainment Content Trade Association (TECA), BSA and a local music group	Students in secondary schools countrywide. (around 5,000 students)
Forensic Testimony	February 15, 2006	MPA, IFPI and TECA	30 judges of the IP&IT Court.
"Don't buy, Don't sell Don't use pirate and fake products" campaign	February 21, 2006	Ministry of Commerce	Many copyright owners with their PR teams, singers and superstars marched along pirate areas, including Klong Thom, Fortune, Tawanna, and Mall-Bangkopi, and demanding the public not to support pirated products.
Plant Visit and CD Exemplar Collecting Program	February 28, 2006	IFPI & TECA, MPA	40 personals from the DIP, DSI, Police and the Office of Public Prosecutors for IP Litigation at the DIP.
Plant Visit and Exemplar Collection	March 9-20, 2006	IFPI, TECA, MPA, DIP	38 plants visited and exemplars collected from almost all the visited plants.
IP Enforcement Seminar	March 18-19, 2006	MPA	50 prosecutors from the CIPIT Litigation department. Subjects included "Internet piracy" and "Film piracy and Organized crime"
"Campaign to Create Public Awareness on Copyright"	May 3, 2006	Department of Intellectual Property and MPA	DIP and industry working alongside the Office of Basic Education.
Meeting with Governor of Chonburi province	May 17, 2006	The Prevention and Suppression of Intellectual Property Infringement Committee (PSIP) and MPA	Presentation to the Chonburi Governor to discuss challenges and strategies to fight piracy in Chonburi province
Internet Piracy Seminar	May 19, 2006	TECA	40 state-attorneys of the Department of Intellectual Property and International Trade Litigation.
Anti-Piracy Marching Campaign	June 1, 2006	Ministry of Commerce	The campaign was to raise public awareness as well as to urge the public not to buy and sell pirate products.
Seminar on the Obstacles of IP Cases Proceeding and Coordination as a Key to Success	June 2-3, 2006	The Department of Special Investigation (DSI).	Around 100 DSI Staff attended the seminar. Mr. Pisit Chiyasak spoke to the group on behalf of TECA.
IP Judicial Summit	June 2-3, 2006	Central Intellectual Property and International Trade Court and MPA	40 judges from the Supreme Court and CIPIT court attended this summit coordinated by MPA. MPA Thailand and regional staff provided presentations covering internet piracy, organized crime, forensic evidential procedures and outreach strategies.
VCD Give-away to IP/IT Court	June 15, 2006	TECA and MPO (Asia) (one of the optical disc plants)	1,000 VCDs on "Introduction to IP/IT Court" given away to IP&IT as requested by TECA.
Seminar on the Protection of IP and Suppression of Violations	June 21, 2006	Department of Intellectual Property and MPA	200 Inspectors from the Bangkok Metropolitan Police Bureau attended and provided with an update on current IPR legislation.
Destruction Ceremony	June 30, 2006	Ministry of Commerce, Customs Department, Royal Thai Police Bureau in cooperation with private sector "IP Protection and Infringement Suppression Committee"	Samutprakarn Province, in which more than one million infringing items worth around 100 million Baht were destroyed.
The Training for Effectiveness of Internet Piracy Investigation	July 7, 2006	MPA and TECA Representatives, and Economic and Technological Crime Suppression Division (ECO-TECH)	150 Royal Thai Police (to update them on the current Internet piracy situation).
Seminar on Prosecuting End-User Software Piracy Cases	July 2006	BSA	33 members of the IP&IT Court (including the Chief Justice).

## Appendix B: Thailand Representative List of Industry Training in 2006

Topic	Date	Organized by	Participants/Purpose
Forensic Equipment Handover Ceremony	August 7, 2006	IFPI, TECA and MPA	Forensic equipment handover ceremony between the US Embassy and the Royal Thai Police Office.
MOU Signing Ceremony	August 16, 2006	Ministry of Commerce	The Royal Thai Police, Bangkok Metropolitan Administration, DIP, DSI, IPR owners/representatives and leading malls signed MOU on the Prevention and Suppression of the Distribution of IPR Infringing Products.
Provincial Police, Region 7 Meeting	August 17, 2006	The Prevention and Suppression of Intellectual Property Infringement Committee (PSIP)	The PSIP which include MPA met the Commissioner of Provincial Police, Region 7 to discuss the current situation, problems and obstacles of copyright infringement.
Performer Right Seminar	August 25, 2006	Department of Intellectual Property	Over 100 performers attended/to provide a basic knowledge and understanding of performer's right as afforded by the copyright act and an understanding how industry can administer their rights more efficiently. MPA representative provide a presentation entitled "Standard Contract of Performer Right"
Seminar on Governmental and Private Sector Cooperation in the Suppression and Prevention of IP Infringement	September 13-14, 2006	DIP and International Trade Litigation (Office of The Attorney General) in cooperation with private sector "IP Protection and Infringement Suppression Committee"	50 Public Prosecutors attended (focused on tightening cooperation between public prosecutors and right owners, and included discussions on Internet piracy, and specifics in prosecuting IP cases). MPA provided a presentation.
Internet Anti-Piracy Training	September 20-22, 2006	IFPI Secretariat	Focused on situation of Internet piracy worldwide, how to collect evidence and other technical issues
WCT and WPPT meeting	November 16-17, 2006	Department of Intellectual Property	80 people attended/to improve and analyze the draft copyright amendment to be consistent with WCT and WPPT. MPA invited to join committee.
Symposium to Commemorate the 9th Anniversary of the CIP&IT court	November 30-December 1, 2006	Central Intellectual Property and International Trade Court	Approximately 100 persons attended to discuss update information concerning intellectual property and international trade law
IP Talks Seminar	December 15, 2006	the Intellectual Property Association of Thailand	35 attendees including lawyer, academy and Supreme Court Justice attended. MPA provided an overview of film piracy .

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### TURKEY

**Special 301 Recommendation:** We recommend that Turkey remain on the Priority Watch List.

#### **EXECUTIVE SUMMARY**

Turkey remains one of the world's worst pirate markets for published materials, with the situation worsening in 2006 (notwithstanding that raiding begun in 2005 was thought to have signaled at one point some progress). The business software industry suffers from significant losses due to hard-disk loading and unauthorized use of software in a business setting. At least some pirate optical disc production occurred in Turkey in 2006 – a disturbing trend – although one major plant raid hopefully will send a signal that such production will not be tolerated. The motion picture industry noted a dramatic up-tick in the sheer number of raids in 2005, and in 2006, they continued to achieve positive results in terms of raids and products seized. However, Turkey suffers from a serious repeat offender problem, which is largely due to the very long litigation period and appeal stage. While broadband penetration remained relatively low, rising Internet usage meant piracy in the online space increased in Turkey. The government began to take steps to correct this nascent problem, for example, by blocking access Pirate Bay (which has sizable amounts of pirate Turkish content), but much more will need to be done to avoid an onslaught of online piracy.

#### **PRIORITY ACTIONS REQUIRED IN 2007**

- **Sustain Raiding, Including Against Book Piracy, Optical Disc Pirate Production, Retail Piracy, Unauthorized Use of Software in a Business:** The positive raiding of street stalls in 2006 must be sustained in 2007, 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.
- **Defeat Recidivism Through Deterrent Sentencing and Improvements in Court Procedures:** Those engaged in commercial piracy activities must be given deterrent sentences, or already rampant recidivism will continue to plague the market in Turkey. Courts are backlogged, and while some cases moved through to successful conclusion in Turkey in 2005 and 2006, particularly some important criminal cases in 2005, 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.
- **Cancel Banderole System:** There were instances in 2005 of the use of fraudulent banderoles in the Turkish market on blatantly pirate materials, and in 2006, industry reports that the banderole system (holograms on books) is in a state of total disarray. This system should be abandoned forthwith and replaced with anti-piracy activities that are effective. The

Turkish authorities should in the least run market sweeps to clear the shelves of product with fraudulent banderoles if the credibility of this program is to be preserved. Otherwise, as right holders continue to find the program burdensome, it should be scrapped.

- **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 WIPO Internet Treaties, the WCT and WPPT. IIPA understands the EU Twinning Project is underway to harmonize Turkey's laws with those of the EU, so there is promise that some positive changes in legal infrastructure are to be considered in 2007.

For more details on Turkey's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>TURKEY</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Books</b>	20.0	NA	23.0	NA	23.0	NA	25.0	NA	25.0	NA
<b>Records &amp; Music</b>	20.0	80%	18.0	80%	15.0	70%	15.0	75%	18.0	75%
<b>Business Software<sup>2</sup></b>	203.0	66%	157.0	65%	107.0	66%	81.0	66%	38.5	58%
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>Motion Pictures<sup>3</sup></b>	NA	NA	29.0	NA	50.0	45%	50.0	45%	50.0	45%
<b>TOTALS</b>	<b>243.0</b>		<b>227.0</b>		<b>195.0</b>		<b>171.0</b>		<b>131.5</b>	

## PIRACY UPDATES IN TURKEY

**Book Piracy Worsened in 2006:** Book piracy worsened in 2006 and 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 make Turkey the region's worst book piracy market. Virtually all types of books are affected,

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Turkey under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Turkey, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.



including local fiction, non fiction and school books, as well as local and imported college texts and imported English language teaching (ELT) texts (the piracy rate for ELT (ESL) books is around 50%, while the academic/textbook piracy rate is around 65%). Pirates are well connected and highly organized. In 2005 and continuing into 2006, publishers redoubled their efforts to lead a new campaign in Turkey against book piracy, gathering intelligence, conducting raids, and seizing pirated books.<sup>4</sup> In 2006, publishers continued to get some help from the police. However, the court system simply is not working. The Turkish government has taken virtually no action to combat illegal uses of published materials on university campuses (raids on university campuses do take place but this is at the initiative of the publishers). In addition, publishers report an influx of pirated books from Iran. Publishers are also dismayed to see optical disc media bearing hundreds of titles for sale in the marketplace.

**Optical Disc Piracy:** There are essentially three forms of pirate optical disc found in the Turkey market today. First, there are locally produced factory discs. Second, there are imports of pirate optical discs produced elsewhere. Third, there remains some local burning of content onto recordable discs (CD-R or DVD-R).

Regarding local production, which has become by far the most serious concern, there are now 10 optical disc production plants in Turkey with a total of 21 production lines, with a capacity to produce an estimated 73.5 million discs per year (a conservative estimate).

Regarding imports, pirate CDs, CD-ROMs and DVDs are imported mainly from Russia, Malaysia, China, Bulgaria, and Ukraine and recent reports have discs coming into Turkey from Iran over the eastern borders. Most of these discs appear to be coming from individual couriers. 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 Malaysia and Bulgaria, while cartridge-based games continue to be imported from China.

Regarding local burning of pirate works onto recordable media, it should be noted that the significant decrease in the street sale of locally burnt discs has pushed piracy under-the-counter in retail shops where shop owners burn on order for trustworthy customers, especially in cities outside Istanbul and Ankara (such as Izmir and Antalya).<sup>5</sup>

**Internet Piracy Threat Emerging:** Growth in broadband connectivity in Turkey is truly remarkable. In the third quarter of 2006, Turkey was 10th in the world in terms of number of broadband lines added, adding almost 390,000 new subscribers (Turkey was 14th place during the second quarter).<sup>6</sup> From the third quarter of 2005 to the third quarter of 2006, Turkey was 8th in the world in terms of broadband growth, at 121% growth (and was 7th in the world from the

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<sup>4</sup> In 2005 and 2006, international publishers allied 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 were reluctant to act in a timely and vigorous manner. There were also some indications of leaks/collusion by police and the pirates in outside locales. There had some successes in the courts, including five prison sentences in 2005. One conviction against key Ankara pirate, Ince Mehmet, who received a sentence (for book piracy only) of four years imprisonment is a significant and positive sign that the court system can work and the authorities in Turkey are taking book piracy more seriously than before.

<sup>5</sup> 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%).

<sup>6</sup> Point Topic Ltd., *World Broadband Statistics Q3 2006*, December 2006 (on file with IIPA).

second to third quarters).<sup>7</sup> As a result of this remarkable change, Internet piracy increasingly has had a negative affect on the legitimate market. For example, as in 2005, CD/DVD sales were not as good as expected in 2006, mainly due to Internet piracy. The music market is particularly hard-hit by illegal downloading. In addition to downloading, the trading of hard goods through websites or in newsgroups also remain Internet piracy concerns. It is particularly disturbing that Turkish Telecom, in promoting broadband Internet connections, was advertising its services by pointing to how many songs or movies can be downloaded in a particular time frame with a particular speed connection. Unauthorized use of software in Internet cafés is also a growing concern for entertainment software publishers.

**Business Software Piracy:** 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 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 Turkish 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. Other problems affecting the business software sector include hard-disk loading, either pre-loaded, or the sale of “stripped PCs” that are later loaded with pirate software.

**Entertainment Software Piracy:** Videogame piracy did not improve in 2006, and may, according to entertainment software publishers, have gotten worse at least for pirated optical disc games. While there is some burned product in the market, the majority of pirated entertainment software in Turkey continues to be factory replicated optical discs, or imported from Bulgaria, Malaysia, or China. Pirated videogame software, though no longer available at larger retailers, continues to be widely available at flea markets and low end retailers. Though counterfeit cartridge-based games continue to enter the country (largely imported from China), piracy of *Nintendo* cartridge games appears to have decreased in 2006, due in part to support from the police. In 2006, there were over 30 police raids conducted on behalf of *Nintendo*, but unfortunately, no customs actions occurred in the entire year.

**Unauthorized Public Performances and Broadcast Piracy:** 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 theatres are frequently encountered in Turkey. The motion picture industry enforcement group in Turkey, AMPEC, has been very active sending cease and desist letters and organizing raids with the police. Broadcast/signal piracy of motion pictures also exists. Music broadcast piracy in Turkey is a concern, as only a small minority of over 1,500 radio and television broadcasters have 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.

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<sup>7</sup> *Id.* For example, Turkey had 1.1 million DSL subscribers as of the 3rd quarter of 2005, but had almost 2.5 million DSL subscribers as of the 3rd quarter of 2006 (while holding steady at 30,000 cable modem subscribers).

## **ENFORCEMENT UPDATES IN TURKEY**

Over the past couple of years, the Turkish authorities have reportedly been very active in sweeping out piracy from the streets of major cities. It is reported that the national Police have made efforts in enforcing intellectual and industrial property rights and in training their staff. Between 2000 and 2004, a reported 2.9 million pirated items were seized in police raids, but from March 12, 2004 (after the Police became authorized to run *ex officio* actions in public places) to June 2005, more than 3.5 million pirated items were seized,<sup>8</sup> and out of some 4,771 raids, 5,056 accused were referred to anti-piracy commissions and public prosecutors to be fined administratively or arraigned before the courts.

While IIPA members report generally good relations with Turkish Police, Prosecutors and specialized IP judges, the experience with the Ministry of Culture is less positive (for example, they claim to lack authority to enforce against hard-disk loading without authorization of software onto computers by computer retailers, leaving the problem to the Police who refuse to take *ex officio* actions against this form of piracy).<sup>9</sup> In addition, problems in court, including procedural problems and inefficiencies in court and overall lack of deterrence, result in widespread recidivism.<sup>10</sup> Finally, the enforcement infrastructure remains largely unable to deal with nascent Internet piracy.<sup>11</sup> This last concern must be addressed in the coming year to fend off what could otherwise become insurmountable losses to the copyright industries in Turkey.

**Enforcement Results in 2006:** The good news story in Turkey continues to be impressive copyright enforcement raid results. The Istanbul Security 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. By the end of the third quarter 2006, for example, AMPEC had conducted 1,500 investigations and 918 raids resulting in the seizure of 739,217 pirate CD-Rs, 9,866 pirate discs with DivX movies (DivX is a private company, but "DivX" has become generic for an MPEG-4 file format which is a compressed form of DVD), 78,534 pirate DVDs, 191,885 pirate DVD-Rs, 353 CD-burners, 278 DVD-burners, 38 duplicators, 95 PCs, 8,365 master CDs, 5,641,841 inlays and 9,368 blank CDs & DVDs.<sup>12</sup> AMPEC estimates that the anti-piracy initiatives were successful in temporarily driving down piracy levels (combined for street vendors, shops, warehouses, etc.) in big cities such as Istanbul, Ankara and Izmir by 85%, 70%, and 50%, respectively. The entertainment

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<sup>8</sup> Statistics reported by the Association of American Publishers.

<sup>9</sup> When software companies have tried to take self-help measures, computer resellers have resorted to selling stripped PCs (unloaded) to avoid detection.

<sup>10</sup> A key problem remaining in the market in Turkey is recidivism as a result of the slow pace of justice. As an example, the motion picture industry enforcement group (AMPEC) raided a pirate business *for the 18th time* on May 10, 2006, with the support of Security Officers against a notorious family engaged in piracy. The May raid against one of their shops in the Uskudar district resulted in the seizure of 1,450 pirate CD-Rs, 344 pirate DVDs and 75 pirate PlayStation2® CDs. The family, already subject to seventeen raids in the past against various family members and shops, employs bribery and threats as tactics and will resort to violence to escape from justice. For example, during a raid on another shop owned by the family in October 2005, AMPEC investigators were offered bribes before being threatened and one investigator was physically assaulted and required hospital treatment.

<sup>11</sup> 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.

<sup>12</sup> While the statistics are somewhat overlapping in dates, a nationwide enforcement initiative of AMPEC and authorities from October 2005 to June 2006 resulted in record seizures of 1,206,261 pirate optical discs and 795 optical discs burners, as well as the arrest of three suspected motion picture pirates. Law enforcement agencies conducted 1,100 raids in an effort to crack down on the availability of illegally pirated movies in retail shops and markets and from street vendors especially during the new theatrical seasons.

software industry as well as the business software industry received good support from the Turkish authorities.<sup>13</sup>

The business software industry conducted a number of successful criminal raids in 2006 against companies engaged in end-user software piracy. The right holders obtain search warrants from the courts and conduct the raids together with police and experts. In almost all raids copyright infringement was detected, and criminal proceedings were commenced against the authorized individuals of the companies involved.

The publishers continued to have some success with enforcement actions. In the 15 months from October 2005 to January 2007, 119 successful raids (out of a total of 163, or 73% success rate) were conducted, including 61 in Istanbul, 15 in Ankara, and 43 in other cities. While even more raids were planned, those raids could not be carried out since no search warrants could be obtained from the prosecutors or courts for various reasons. In addition, 72 raids were conducted in 24 cities solely against copy shops copying academic books on or around the university campuses, resulting in seizures of thousands of copies of 430+ different academic textbooks (a mix of Turkish & English). In those 72 raids, 50 photocopy machines were confiscated and 48 court cases have been opened. Unfortunately, the publishers also report a general lack of cooperation by the Public Prosecutors' Offices, resulting in a series of stymied raids and the disillusionment of the Police.

**Successful Court Actions Increased in 2005, But Bottlenecks Remain:** The favorable decisions in 2005 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.<sup>14</sup> For example, on July 6, 2005, a raid was run against the "Uçar CD" plant, 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 plant had three VCD/DVD lines (forensic analysis by IFPI of discs found on the local market confirmed that they matched exemplars collected during a visit to the plant in April 2005). The raid resulted in the seizure of 8,650 pirate VCDs, 4,700 pirate DVDs and 10 silkscreens ready for printing professional-looking labels.<sup>15</sup> The Ministry of

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<sup>13</sup> One entertainment software company reported 30 police actions and 7,958 pirate cartridge-based products.

<sup>14</sup> The motion picture industry oversaw initiation of 581 legal actions in 2005, almost all criminal, and nearly 50 court decisions have been obtained. For example, on December 8, 2004, a local warehouse owner was fined TL50 billion (US\$35,600) 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. 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. 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.

<sup>15</sup> The raid lasted a total of five-and-a-half hours, and the plant owner was temporarily detained for questioning. Seizures included pirate copies of *Sin City* (which had not yet been theatrically released in Turkey), *Batman Begins*, *Monster in Law*, and *Coach Carter*. 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. 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 missing DVD line and silkscreen printer were found on October 27, 2005 on the top floor of a two-story building in Umraniye. Three individuals were found on the premises, whose premises were also searched in July 2005 and that is believed to have been used for pirate disc production. When the raiding party entered the building, the three men were conducting test runs on the

Culture and Tourism subsequently revoked the license granted to the plant, and on January 17, 2006, the defendant owner of the plant was sentenced to a term of imprisonment of 5 years, 7 months and 15 days, and was also fined approximately US\$120,000.<sup>16</sup> This is the highest penalty ever imposed in a piracy case in Turkey. Although the defendant appealed to the Supreme Court (which could take a year to reach a final determination), his conviction and sentence sent a very important message to Turkey's pirate community.

Despite the recent relative successes, problems still remain in court adjudication in Turkey. Seeing criminal actions through the court process can often be cumbersome and expensive for injured parties under the current system.<sup>17</sup> The long, drawn-out process often leads to cases collapsing and, in addition, the government has been known to announce amnesties to clear dockets. Other specific problems include the following:

- First, very few cases lead to convictions and imposition of deterrent penalties. For example, for the publishers, 228 court cases involving piracy of published materials have been commenced since 2002, but only 15 cases resulted in convictions with penalties (with the rest collapsing or still continuing). In addition, several verdicts have been overturned on appeal by higher (non-specialized) courts.
- Second, search warrants for criminal raids are difficult to obtain, due to procedural rules requiring them to be obtained not from the specialized courts but from an ordinary criminal judge (in practice, the criminal judge is requiring far greater evidence than it is believed would be required from the specialized judge). Moreover, public prosecutors require special search warrants from judges to approve any action.
- Third, the courts' dockets remain seriously overloaded (leading to delays in adjudication of copyright cases), with too many files and too many actions to be dealt with by the only two civil courts and three criminal courts dealing with IP matters (for example, in Istanbul, an IP judge has to hear more than 2,000 cases per year). Courts take six months to two years to decide such cases and an additional eighteen months to decide appeals.<sup>18</sup> New courts with greater numbers of specialist judges should be established, in order to obtain justice in courts in other cities, which are not as familiar with copyright issues and copyright litigation.
- Fourth, the courts still do not provide presumptions of ownership to right holders, but instead impose burdensome documentary requirements on right holders to prove ownership.<sup>19</sup>

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DVD line. The raid also yielded 50 silkscreens, 39 DVDs, and 3 stampers, together with order documentation, files and contact lists.

<sup>16</sup> The court also ordered that the sentence be published in three newspapers having a circulation of over 100,000. 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.

<sup>17</sup> 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.

<sup>18</sup> Industry reports that, to date, no first instance judgment has been confirmed by the appeals courts. The entertainment software industry reports that it 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.

<sup>19</sup> 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

- Fifth, right holders find it difficult to obtain *ex parte* civil searches, as required by TRIPS.<sup>20</sup>
- Sixth, in order to ensure that pirate products are confiscated, private parties must file criminal complaints, and the public prosecutor must then approve a police raid followed by a criminal action.
- Seventh, right holders report that courts fail to award reasonable costs and fees in civil and administrative actions.

The Attorneyship Law remains problematic for right holders, as it forbids private entities from protecting third parties without having a local lawyer acting on behalf of the right holder as an intermediary.<sup>21</sup> The industries must therefore hire local attorneys to seek raid approval from public prosecutors. Following the raid and the public prosecutor presses criminal charges, the industry association's lawyer must immediately submit a petition of intervention to become a party to the case, or cases which are lost in court cannot be appealed.<sup>22</sup>

**Internet Enforcement:** In November 2006, the Chief Public Prosecutor granted AMPEC's application on behalf of local movie distributors to require Turkish Telecom to block access to the infamous pirate website [www.thepiratebay.org](http://www.thepiratebay.org). This was the first application of its kind under an administrative procedure. It was brought by AMPEC as a test case and relied on local Turkish titles which are heavily pirated on the Pirate Bay website. This positive first case must be replicated to ensure that Internet piracy does not take hold in Turkey.

**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 have in the past held unnecessarily large quantities of unused banderoles, which were not secured adequately. In the 2005 "Uçar CD" 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.<sup>23</sup> Book publishers also report fraudulent banderoles being used on unauthorized books in the market. IIPA believes that the experiment of employing banderoles as

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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).

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> Industry expertise is in fact important to success of these cases, since the accused can challenge right holders' rights, and prosecutors find it difficult (without involvement of an industry lawyer) to prove their cases because of a lack of access to right holders' documentation.

<sup>23</sup> 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 pirate seller had over 70,000 pirated products for which he was able to obtain banderoles, yet the Ministry refused to revoke the banderoles.

an anti-piracy device has failed, and that the system should be scrapped. If the government decides to keep the banderole system, it must take immediate steps to inspect the markets for false banderoles, and 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).

**Storage Problems:** Unfortunately, perhaps as a symptom of the Police's success over the past couple of years, all the Police and Istanbul Inspection Committee warehouses are filled with pirate materials. This situation is unfortunately impeding the Police's willingness to take more actions. This problem has been discussed with representatives of the Ministry of Culture and of the Ministry of Justice who promised to solve this problem by renting additional warehouses and by accelerating the destruction process as much as possible.

**Customs Law Imposes Undue Burdens on Right Holders:** IIPA has in the past raised concerns that Customs procedures are not working efficiently to interdict pirate shipments. 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 2006.

## **TRAINING/PUBLIC AWARENESS**

**Trainings in 2006:** Copyright owners continued organizing trainings (e.g., for Police and Customs) and participated in many more in Turkey in 2006. Both AMPEC (the motion picture industry enforcement group) and the Business Software Alliance (BSA) held trainings, the latter on software protection. For example:

- On September 5, AMPEC, with the support of the Istanbul Inspection Committee and Istanbul Governorship, hosted a day-long training seminar for local security forces. Around 200 Police Officers from 32 districts in Istanbul attended the seminar to learn about distinguishing pirate products from genuine movies, recorded music, software and games, as well as to learn about the applicable laws and recent amendments. The seminar began with a press conference attended by the Deputy Governor of Istanbul who made reference to the huge tax losses impacting on the local economy as a consequence of piracy. He declared support at the highest possible level to address piracy.
- On October 18, the World Customs Organization conducted a Seminar on Protection of IP Rights at the Border.
- On October 29, the Ministry of Culture, Turkish Patent Institute and General Directorate of the Police Department hosted a training seminar in Ankara to instruct various divisions of law enforcement on IP law and pirate product. The seminar covered the production of pirate and counterfeit products, and how to distinguish pirate and counterfeit goods from legitimate ones. Participants included key police officers from 81 provinces, Ministry of Culture officials, representatives from the Turkish Patent Institute, judges and prosecutors from IP Courts of Istanbul, Ankara and Izmir, and industry representatives.

Notwithstanding these training programs, the industry consensus is that there is still a considerable level of need for such trainings in Turkey, especially hands-on enforcement trainings.

**Turkish Government Publications and Circulars:** IIPA appreciates the attempts made by the Turkish government in 2006 to highlight the problem of piracy through publications and circulars made available to government officials.<sup>24</sup> For example, in September 2006, a publication entitled “Government’s Tax Losses Due to Intellectual Property Right Piracy and Counterfeited Goods” was issued by the Ministry of Justice. The circular is addressed to all public prosecutors and can be considered as both advice and an instruction for future action. IIPA hopes that circulars such as these can motivate both Prosecutors and Police to increase their efforts against piracy. These publications should signal to pirates that they can and will be prosecuted for tax evasion as result of their copyright infringements.

## **COPYRIGHT LAW AND RELATED ISSUES**

**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 (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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.

On December 28, 2006, Law No. 5571 introduced an amendment into the Copyright Law which stipulates financial awards for public officials who act to seizure illegal copies. The Law is subject to approval of the President. IIPA has not had an opportunity to review this amendment, although supports the notion of such meritorious awards in principle.

Two pending implementing regulations of the amended Copyright Law have been issued: (1) the Regulation on the Recordation and Registration of Intellectual and Artistic Works;<sup>25</sup> and (2) the Regulation on Principles and Procedures of the Use of Deductions Made From the Prices of Carrying Materials Containing Intellectual and Artistic Works and of Technical Devices Used for Reproduction of Such Works.

**New Regulation on “Certification of Businesses” Includes Some Key Components of Good Optical Disc Regulation:** The Ministry of Culture and Tourism (MOCT) issued the “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 discs), exhibiting,

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<sup>24</sup> For example, a circular issued on May 26, 2003 by the Istanbul Police Chief (Celalettin Cerrah) and addressed to the Istanbul Police Headquarters, to all District Police Departments, and to all branches of Police Departments, indicated “the sale of [pirated] works is a financial source of terrorist organizations.”

<sup>25</sup> 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.



and distributing copyright works to receive certificates from the MOCT. Almost immediately, the Turkish authorities worked with industry to inspect the plants to collect “exemplars” (samples of discs to do forensic tests). 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 (whether factory or commercial burning) must be certified, and failure to do so can lead to fines. Thus, it is expected that all the optical disc production facilities in Turkey (the 10 known plants and any more that come on line in the future) will have to apply for a certificate from the MOCT (including those that produce of blank recordable discs, see Article 5(a)). In addition, any premises engaging in “burning” of content onto recordable optical discs also must be certified.
- **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 mold 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.”

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. One category of operators having to be certified is those engaging in Internet distribution. We underscore that legitimate businesses with legitimate business models in the Internet environment will be burdened by this certification requirement; 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 them from simply 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 production without a certificate.

**EU Twinning Project:** The European Commission offers funding to enable countries close to being ready for membership of the European Union to enter into “twinning partnerships” with Member States. Twinning project funding is given to Member States to work with these countries on institution building (legislation, administration, and implementation). In respect of IPR, Turkey has entered into a twinning partnership with Greece. A committee has been established comprised of EU experts, representatives of Turkish Ministries (such as Ministry of Culture and Tourism, Ministry of Justice, Ministry of Internal Affairs), representatives of professional associations, representatives of the Turkish Patent Institute and other Turkish specialists. Industry views are also represented.<sup>26</sup> There are five key areas of work under the project: 1) computer programs and rental, lending and related rights; 2) satellite broadcasting and cable retransmissions; 3) terms of protection, resale rights; 4) Information Society Directive implementation;<sup>27</sup> and 5) enforcement of copyright. Other matters concern developing a training package for judges, and developing a public awareness campaign strategy to inform the general public on the importance of the protection of copyright.

IIPA is of course encouraged by the project, and notes that, as regards the legal framework for enforcement, in the least, full alignment with the EU Enforcement Directive should result, in particular as regards provisional and precautionary measures (and, while outside of the scope of the project, Turkey should also implement measures to adopt the Council on Europe Cybercrime Convention). This project is slated for conclusion by November 2007, with periodic meetings for each committee until then.

**Criminal Code Revision:** The new Turkish Penal Code was adopted on September 27, 2004 (effective June 1, 2005). The new Code was adopted subject to the European Union

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<sup>26</sup> Industry is represented by FI-YAP (film producers), SESAM (film producers and importers), AMPEC (film industry), MU-YAP (phonogram producers; very active), YAY-BIR (publishers), and BIYEM-YESAM (software owners), among others.

<sup>27</sup> IIPA notes that the following are among the things being raised as key issues:

- There are no appropriate provisions on technological protection measures. These should be added to fully implement the WCT and WPPT (and ensure harmony with the EU Information Society Directive).
- Reproduction right for sound recordings: As regards copyright, Article 22 of the current Copyright Law of Turkey is in harmony with the EU Directive, since it defines the concept of reproduction in accordance with Article 2 of the Directive. An issue has arisen with some of the local jurists as to whether the Article 22 concept of reproduction applies to related rights, since first, it is not expressly made so (unlike, e.g., the concept of “fixation” which is expressly made applicable to both copyright and related rights), and second, because in Article 80 (dealing with related rights), different elements of the concept of reproduction are mentioned (or not mentioned) for different related rights. The broad Article 22 definition of “reproduction” should be made clearly applicable to both copyright and related rights to resolve the potential ambiguity.
- Provisions on exceptions do not seem satisfactory to meet international standards. The government should include a provision on the three-step test to be applied for all exceptions and limitations, and other exceptions must be appropriately narrowed to meet international standards.

harmonization packages and aimed at bringing the Turkish justice system into line with European Union standards. New conforming amendments to the Copyright Law are now on the agenda of Ministry of Culture and Tourism (MOCT). Specifically, a working group has been preparing the draft amendment to harmonize the penalty provisions of the Copyright Law with the New Turkish Penal Code. Although the New Turkish Penal Code does contain some significant improvements, IIPA is deeply concerned that harmonization efforts will slow down the enforcement of criminal penalties in current cases, since the Turkish Appeals Court may return files to local courts without confirming their decisions in order for those files to be reviewed in light of the new amendments made in the Penal Code. Industry has expressed its views on the draft amendment and believes the amendment going forward will improve criminal penalties in the long term. However, it is imperative that cases proceeding move forward without delay.

**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 approved by the Parliament. Nonetheless, IIPA is monitoring this situation closely, and all steps should be taken to ensure that such a provision is never enacted in Turkey.

## **MARKET ACCESS**

**Tenders Act:** Turkey's Public Tenders Act (Law no. 4734), which came into force on January 1, 2003, applies to the audiovisual sector and created procedures that were far from business-friendly for companies selling films to Turkish Radio and Television (TRT) (Turkish public broadcasting).<sup>28</sup> On August 15, 2003, Turkey amended the Act to the effect that Turkey would no longer have to apply public tender rules and would be able to resort to “direct procurement” without the degree of red tape imposed by the initial version of the Act.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

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. The GSP case against Turkey remained pending for almost eight years.<sup>29</sup> Finally, in 2003, IIPA was notified formally that the GSP investigation was

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<sup>28</sup> Although the scope of the Public Tenders Act covers the purchase of films, TRT has dropped its plans to apply the Law to its purchase of TV programming.

<sup>29</sup> During that period, there were several developments. First, 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].” Second, competitive need waivers under the GSP program were granted back to Turkey in 2002.

closed in 2001. In 2005, \$1.1 billion worth of Turkey's exports to the United States benefited from the GSP program, accounting for 20.9% of its total exports to the U.S. During the first 11 months of 2006, \$1.0 billion worth of Turkish goods (or 20.3% of Turkey's total exports to the U.S. from January to November) entered the U.S. under GSP.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### UKRAINE

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

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

Although Ukraine has made significant improvements in its legal regime in recent years, there are still serious problems of piracy, especially the widespread sale of pirate optical disc material, and growing Internet piracy. In short, Ukraine needs to take several critical steps to improve enforcement. First, it has to address the serious marketplace piracy at such locations as Petrovka and Radioljubtel, by top-level pronouncements from the government that such piracy will not be tolerated and then by undertaking serious (that is, daily) effective criminal raids against those markets and the many warehouses that supply them. The occasional raids undertaken by the police, the failure to close down pirate selling points, and the absence of criminal convictions, are some of the reasons why these problems persist in Ukraine. Second, the Government of Ukraine must undertake criminal prosecutions and impose deterrent penalties against those involved in the market piracy and other types of commercial piracy – that is, against stall owners and operators, suppliers, and other large-scale distributors of pirate product. Unfortunately, in lieu of deterrent criminal sanctions, large-scale pirates and repeat offenders are being treated lightly by the courts and the Government of Ukraine has to date otherwise relied heavily on non-deterrent administrative penalties. In addition, the government must move effectively against the growing Internet piracy problem in Ukraine.

In 2005, Ukraine adopted significant improvements to its optical disc laws. At the same time, the Ukraine Government agreed to participate cooperatively with the copyright industries on enforcement — including the commencement of joint surprise plant inspections. The adoption of amendments to the optical disc law (effective August 2, 2005), was a crucial step toward Ukraine's implementation of the 2000 Joint Action Plan signed by the Governments of Ukraine and the United States. The production capacity of Ukrainian optical disc plants is still substantially higher than legitimate demand. As a result of optical disc regulations, illegal production has diminished from its peak of six years ago. However certain problems remain with the implementation of the licensing procedures and plant inspections. As a result, plants still have the ability to manufacture illegal material without detection. Further, large quantities of illegal optical disc material (most produced in Russia or at Ukrainian CD-R burning operations) are found throughout Ukraine and openly sold in the markets.

The 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 has allowed the wide-scale commercial piracy operations to

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<sup>1</sup> For more details on Ukraine's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

continue in Ukraine (and, in some cases, to combine forces with operations in neighboring countries, such as Russia). Effective criminal enforcement is necessary for Ukraine to fully comply with the TRIPS obligations of the World Trade Organization.

Another key concern is the lack of progress on the legalization of software by the Government of Ukraine. After taking steps in 2003 and 2004 to adopt legalization reforms, the implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. According to official information from the State Department of Intellectual Property (SDIP) ([www.sdip.gov.ua/ukr/help/statti/pcweek/](http://www.sdip.gov.ua/ukr/help/statti/pcweek/)), the current software piracy rate in state agencies exceeds 70% (noting that the rate is coming down at less than 5% a year). Illegal software usage by government agencies (including IPR enforcement entities) sends the wrong signal to the business community and Ukraine citizens about the value and protection of intellectual property. It also diminishes the efforts by rightholders to enforce and publicly educate Ukrainian society about intellectual property rights.

## **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 must act against retail piracy in markets and sales occurring in the streets — especially at big outdoor markets. In May 2005, in anticipation of a Eurovision event in Kiev, the government did effectively but only temporarily, crack down against street and kiosk piracy. This demonstrated that it can be accomplished when the proper political will and resources are allocated. But with the exception of that one instance, enforcement has failed to effectively and permanently stop the street and market piracy.

Second, the Government of Ukraine must: (a) continue to regularly inspect existing and new optical disc plants, including surprise inspections with copyright rightholder cooperation (also, during an inspection, when machinery is claimed to be temporarily inoperable, a subsequent surprise inspection must be undertaken to obtain exemplars from that plant); (b) disclose and open to rightholder inspection, the “evidence repository” of sample copies of all production runs of master stampers and finished disc produced in Ukraine, that the Ukraine Government alleges to have created (and which is an essential element of the optical disc regulatory scheme), and unconditionally permit rightholder access to exemplars and the database, as well as the detailed database of the equipment used in each plant; (c) close plants that have been found to be involved in illegal production (in breach of the licensing rules and/or the copyright law); (d) 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); (e) properly monitor the importation of raw materials (optical-grade polycarbonate) used in the production of optical disc media; and (f) 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. These SID codes should only be provided upon proper verification at the time of issuance (with comprehensive and in-depth follow-up inspections and maintenance of codes on all equipment, molds and mirror blocks). Plus, there needs to be monitoring of equipment used at the plants to make certain that the SID codes are in fact properly engraved on all molds, matrices, and other relevant equipment used for the production of optical discs (including reserve molds and equipment). Finally and perhaps most importantly, criminal trials and convictions against illegal plant operators and others involved in commercial piracy must, as a rule, follow plant inspections that have uncovered infringing activity.

Third, the Ukrainian Ministry of Science and Education has issued 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). However, this is not being fully and unconditionally implemented – plants must be fined and licenses withdrawn. IIPA recommends that any 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.

One positive step, which IIPA noted last year, 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). Rightholders report good cooperation from and with this unit. In another positive step, the General Prosecutor reconstituted economic crime status to criminal violations of author's and neighboring rights.

Fourth, the Government of Ukraine needs to properly implement the Customs Code amendments adopted in November 2006 (in force February 10, 2007) which provide customs officers with *ex officio* authority. The adoption of these provisions was a positive step. Now the government needs to expand the specialized intellectual property rights unit within the customs service with sufficient resources to effectively stop illegal material at the border (much of it coming, at present, from Russia by train, car, and courier). The Government of Ukraine must move away from relying on yet another bureaucratic entity at the central headquarters and instead devote more resources and willingness to effectively enforce intellectual property rights crimes at the border. These specialized customs units should 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.

Fifth, 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. Meetings in October 2006 between Ukraine Government and E.U. officials resulted in the enforcement of cease and desist orders against 35 ISPs. It showed that cooperative efforts, between ISPs, rightholders and the police, can be effective. In addition to downloading piracy another common type of Internet piracy is via mail order (with orders placed on-line and delivered by mail).

## **COPYRIGHT ENFORCEMENT**

The optical disc law amendments (in force, August 2, 2005) and related enforcement legislation included many critical elements to secure better enforcement of illegal product. These 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).

There are, at present, seven optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine – a total of 7 DVD and 10 CD lines. It is estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the current total production capacity of these plants is around 90 million units per year. The estimated demand for legitimate CDs in Ukraine is still less than one third of this total.

Complaints by rightholders against the Rostok plant and CD Master plant in 2004 and 2005 were mishandled by the Ukrainian authorities. The plants have been allowed to continue their operations despite detailed complaints from the recording industry (IFPI). Unfortunately, the relevant authorities in Ukraine, specifically the SDIP and its State Inspectors, failed to take meaningful and decisive action. The complaints reported large-scale illegal production. However, neither the plants nor their owners/managers have faced criminal investigation, let alone prosecution. However, pursuant to a Ukrainian forensic report which supported IFPI's findings of illegal production, SDIP fined 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. In the absence of any action against Rostok, the recording industry was forced to take civil (copyright infringement) action against this plant. The case is still before the court and the plant continues its operations unabated. An ongoing series of procedural hurdles and obstacles shows that civil infringement proceedings are not an alternative to criminal prosecution. The Government of Ukraine could have taken action under the pre-2005 optical disc regime but it failed to do so, nor has it 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.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide appropriate resources in Ukraine and thereby unable to assist the authorities with inspections. For example, pirated entertainment software (game) discs are manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners. In addition, 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 relevant agency. Rightholders' organizations should get access to production samples of optical discs either directly or via SDIP so that they can properly conduct anti-piracy investigations.

Although there is currently no evidence of large-scale industrial production of pirate optical discs in Ukraine (at least not of music and film material), other forms of optical disc piracy, involving CD-R and DVD material, in particular, have increased. Especially troubling is the CD-R production undertaken by organized criminal syndicates which is flourishing in the absence of a deterrent criminal enforcement regime.

In addition, Ukraine remains a major transshipment point and 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, as noted, are sold in markets, kiosks and street stalls. The Petrovka Market in Kiev, for example, has close to 300 stalls openly selling pirate material. (Other major pirate markets include: "Radio" in Kiev; "Mayk" in Donetsk; "Knizhka" and "7th Kilometer" in Odessa; "Yuzhny" in Lviv; and "Raiskiy Ugolok" in Kharkiv).

The June 2000 Joint Action Plan not only detailed plant licensing and inspection requirements, but also the adoption and implementation of criminal and administrative penalties, which are necessary to implement a modern copyright regime.



The IIPA and IFPI encourage the government to be more open with the forensic evidence that it acquires during inspections. The failure of the relevant state bodies to disclose to rightholders evidence obtained during raids and inspections has been a stumbling block to effective plant enforcement.

One misstep that has undercut effective enforcement was the adoption in 2000 of the Hologram Sticker law. The inconsistent and haphazard implementation of the Ukrainian hologram system (administered by the government) is seriously harming the interests of 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. Most often, the holograms are 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 and 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). The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$20 for DVDs, 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. The hologram law should either be revised and properly enforced, or be repealed.

Entertainment software companies, among others, continue to experience problems with the hologram stickering program. One Entertainment Software Association (ESA) member company reports that the stickering program remains highly ineffective, as pirates are able to obtain stickers to affix to their pirated products. Although the SDIP has apparently agreed to stop issuing stickers or “control marks” for games that have English titles or a direct translation of the title, it is still difficult to prevent stickers from being issued to pirates who adopt slight variations on the English titles. The same ESA member reports that although it only entered the market in 2005, over 70 labels/stickers had already been issued for its entertainment software products — all to pirates selling illegal versions of its games. The widespread use of false documents allows pirates to easily obtain hologram stickers; this legitimizes their pirated versions which in turn, allows them to distribute them pirate product through otherwise legitimate channels.

The Business Software Alliance (BSA) continues to report that the hologram stickering system acts as a hurdle to legitimate business and allows the pirates to continue their operations. 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 and 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 and/or distributed. Under the order, all software manufacturers/distributors can obtain a certificate to verify their registration. For a fee, the 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 are a large number of cable operators who transmit pirate and other product without authorization.

In recent years, BSA has reported on the troubling increase in Internet-based piracy. One common example involves the reselling of software in violation of licensing agreements (for example, software obtained using privileged licenses for a finite set of users which is then resold to the public on the Internet).

## **Ineffective Criminal and Border Enforcement**

In 2006, the total number of pirate product seizures (1.3 million total optical discs) and criminal investigations did increase from prior years. In addition, the total number of administrative actions rose. However, because of a combination of poor border and ineffective criminal enforcement (especially against criminal syndicates), the upsurge in seizures and investigations has not had a marked impact on the piracy problem in Ukraine. Also, pirate and counterfeit goods should not be put back into circulation; the Ukrainian courts should be instructed to confiscate and destroy obvious pirate and counterfeit materials, even when cases are dismissed on procedural grounds.

### **Criminal Enforcement**

The increased number of raids and seizures in 2006 was welcome, but unfortunately, not enough action has been directed at large-scale commercial piracy. In November 2006, there were a number of criminal verdicts of two and three-year suspended sentences. While verdicts of this “magnitude” were unheard of in 2005, they are not deterrent penalties because they are suspended and not served sentences. Many other cases were burdened by long delays. Also, although there were more administrative actions undertaken against stores, kiosks and other street piracy than in recent years, these actions were not frequent enough nor were they coupled with severe enough penalties to deter these crimes. As in years past, almost all of the actions 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, most cases in the past resulted in administrative actions. In February 2006 amendments to the Criminal Code Article 176, significantly lowered this threshold. It is hoped that this change will result in more cases being brought under criminal, rather than administrative proceedings. In addition, IPR-related offenses continue to be hampered by procedural problems such as the use of expert evidence. There needs to be 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. New criminal sanctions, also added in February 2006 (effective March 2006) created additional penalties (of up to 7 years imprisonment) for organized crime syndicates. These new sanctions must be utilized.

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. During 2006, more than 650 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions

applied against 3300 individuals. A total of 1 million optical discs and 100,000 VHS tapes were seized by the police in 2006. Almost all of the discs seized by the police in 2006 were copies without hologram stickers.

The IFPI reported that in 2006, the number of raids, especially by the Economic Crime Division continued a positive trend upward from 2005. These raids were carried out throughout the country, and included some underground CD burning operations as well as warehouses filled with pirate optical discs. The IFPI and MPA reported a total of 161 raids in the Kiev-area. At these raids they reported: 19,901 video cassettes seized; 224,823 DVDs seized; 12,245 DVD-Rs seized; 5,524 CD-Rs seized; 71 DVD-R/CD-R burners seized; 114,156 CDs seized; and a number VHS recorders, DVD players and other material (including 767,800 blank DVD-Rs and CD-Rs and 102,900 blank VHS tapes) seized.

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. The IFPI reports the following six examples of individuals involved in either large-scale piracy and/or repeat offenses, who received either a minimum fine or no conviction:

1. On October 5, 2005, an individual at the Petrovka market was caught with 607 illegal DVDs. Two other seizures of illegal material at the same market were undertaken against the same individual - 1499 DVDs seized on March 30, 2006 and 1450 DVDs on April 29. Although three separate criminal cases were opened and later joined, a year later only a single court hearing has taken place and no verdict has been rendered.

2. An individual at the Petrovka market was fined 1700 UAH (US\$337), in two administrative sanctions, in early 2006. On August 30, 2006, a criminal case was initiated in accordance with Article 203-1 of the Criminal Code after another seizure of pirated material was made against the same individual at the Petrovka Market (a total of 464 discs were seized plus 153 MP3s and 311 DVDs). An investigation is ongoing, but clearly the administrative sanctions were not a deterrent to the subsequent offenses.

3. On February 26, 2004, an individual was caught in Kiev with a warehouse full of illegal products (12,000 CD-Rs, 3 printers, 3 computers). On April 16 2005, another warehouse owned by the same individual was found with duplicators and 1500 recorded CD-Rs, 20,000 blank CD-Rs and other materials (the individual was duplicating and distributing music, videos and software on the CD-Rs). Two criminal cases were opened and resulted in fines, as well as the confiscation of discs and equipment, however, he has not received any jail time.

4. On October 7, 2005, an individual was caught in the Donetsk region with 452 pirate DVDs. On May 12, 2006, 231 pirate DVDs were seized from the same person. Although two criminal cases were opened, they resulted only in the confiscation of the discs and a meager fine of 1700 UAH (US\$337).

5. In the Lugansk region IFPI investigators received information that a website was offering large quantities of music CDs for sale, so a test purchase was made in September 2005. The discs (which arrived via airmail from Ukraine) were pirate CD-Rs, not CDs as advertised on the site. The website owner was located – offering 30,000 illegal music files/albums for sale on his site. A police raid found 2 color printers, thousands of inlays, 5 CD-R burners and 3,000 blank CD-Rs (computer records also revealed customers worldwide: in the U.S., Japan, U.K., Italy, Australia, Poland, Canada, Norway, Brazil, etc). During the raid another 3,000 pirate pre-recorded CD-Rs were seized – they had been packaged for shipment abroad.

On September 12, 2006 despite evidence of a large-scale operation, the court closed the case (per Article 7 of the Criminal Procedure Code noting the defendant was not a public threat). All discs and equipment were returned to the defendant (including the IFPI's test purchase discs). Rightholders claimed at least 54,000 UAH (US\$10,700) in damages.

6. In May 2005 in Lugansk, a warehouse filled with illegal products was raided – including 90,000 pirate DVDs, CDs and CD-Rs, as well as computers and other equipment. Evidence seized indicated that the warehouse owner was importing illegal material (music, video, software) from Russia, with a wide distribution to shops in Lugansk. A criminal case was initiated under Article 176(2) of the Criminal Code. On November 10, 2005, the case was closed per the Amnesty Act and all illegal products and equipment were returned to the defendant along with a (meaningless) order instructing him not to sell discs that had “signs of counterfeiting.”

## **Border Enforcement**

Ukraine has also failed to properly police its borders, which has resulted in wide-scale shipment from and transshipment of pirated 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 several years, but cooperation has been spotty and activity has not been nearly enough to stem the flow.

Some of the copyright industries report customs cooperation the border. 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, continues to report that piracy persists a result of poor border enforcement allowing an influx of pirated DVDs from Russia.

Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code in 2004, and further amendments in 2006). 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 (for example, under Article 203-1 of the Criminal Code to act against optical discs offered without hologram stickers). But, in practice they still depend on rightholder complaints to commence investigations — this needs to be corrected. Without proper implementation of this authority (by 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 rightholders to file complaints in each instance given the widespread scope of the illegal activity is a recipe for failure.

## 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 rightholders to file complaints before the police can initiate criminal actions.

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). The late-2006 actions against ISPs, with cease and desist letters, showed that it is possible to act against Internet piracy. In fact, it resulted in three of the largest infringing sites being taken down, at least temporarily. However, the police noted a procedural problem undertaking these operations, namely, that unless an individual files a claim for damages for Internet piracy, they would not initiate further criminal action. This appears to be contrary to government claims that *ex officio* police authority exists at present.

In 2006, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels at around 55% to 60% for international repertoire, and losses estimated at \$30 million (including losses from Internet piracy and mobile phone piracy in Ukraine).

Pirate films continue to appear in Ukrainian kiosks within weeks of their U.S. theatrical release. Video retail stores stock pirate product, including pre-release material that is available within days of U.S. theatrical release. Recent seizures of pirate product and market monitoring reveal a disturbing increase in the number of pirate DVDs containing up to twenty film titles each. This type of piracy is not limited to Kiev, but is found nationwide. As a result, legitimate distributors are struggling to survive.

Pirated entertainment software products continue to be exported from and through Ukraine (from Russia). ESA member companies report that production of pirated entertainment software is occurring at factories in the country for both local consumption and export. Ukraine-sourced pirated video games also bear the “marks” or “logos” of the pirate operation producing and distributing the pirated games. Also of increasing concern is piracy at unlicensed Internet game rooms or cafés, where pirated and unlicensed versions of video game software is in wide use.

The Ukraine law enforcement officials reported the following: in 2006, there was a total of 820 criminal IPR cases opened (compared with 483 in 2005, 455 in 2004, and 374 cases in 2003). Of these, 300 cases were Article 176 cases (37%, down from 52% last year). The figures for 2005 and 2004 were 298 and 311 cases, respectively. There were 500 Article 203-1 cases involving the illegal circulation of optical discs; there were 115 of these cases in 2005 (the first year the provisions were adopted). These involved music, video and software games. In the first 11 months of 2006, the government further reported that 293 cases were transferred to the criminal courts (up from 138 in 2005). Of these, there were 40 verdicts -- 60% received a fine (generally, 3400 UAH, US\$674); 30% imprisonment, with suspended sentences, 10% (4 cases) received correctional labor. In the first 11 months of 2006, the administrative courts handled 2,300 cases (down from 3,800 last year); of these 1,530 individuals were fined, 160 cases were closed (timed out), and 210 dismissed on other grounds.

Further, the SDIP reported the Government of Ukraine seized a total of 1.3 million items in 2006, up from 850,000 items in 2005, 600,000 in 2004, and 300,000 in 2003. A total of

90,000 items were destroyed in 2006, down from 100,000 in 2005, and compared with 70,000 and 80,000 respectively in 2004 and 2003. There were 3,700 administrative cases undertaken in 2006, compared with 5,100 in 2005, 4,300 in 2004, and 2,000 in 2003.

The Tax Police did not report seizure totals in 2006. In 2005, they seized a total of 280,000 items (including 60,000 discs); 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 only 9,000 discs were seized in 2006 but that was only reporting for four months. By comparison, for the full year of 2005, 350,000 discs were seized; in 2004, it was 100,000; in 2003, it was just 34,411. The State Inspectors (in all 16 regions) reported 250,000 discs and tapes seized in 2006, compared with 400,000 in 2005. They did not report totals of the number of discs destroyed or any similar disposition. In 2005, they reported 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. Last, the Security Service Units reported 55,000 discs seized, compared with 120,000 in 2005.

Against software piracy, the IIPA and BSA continue to urge the police to broaden their focus from CD piracy actions to include actions against PC manufacturers and corporate end-users. In addition, the police need to act not only against small resellers and end-users but against organized crime operations.

## 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 and the U.S. Government suspended Ukraine's GSP benefits on August 24, 2001 after hearings and extensive review.

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. In the first 11 months of 2006, \$20.2 million worth of Ukrainian goods benefited from the GSP program.

## 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 to give the police proper authority to commence investigations *ex officio*; (2) amendments to the Customs Code (which was revised in November 2006 to give clear *ex officio* authority) to repeal the restrictive "commercial purpose" threshold and 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 has, for the past several years, considered major copyright law reform. Unfortunately, a draft bill in 2006 which contained a number of highly objectionable provisions was presented to the Council of Ministers for submission to the RADA with little or no rightholder input; we strongly recommend that the drafters continue to work with rightholders and U.S. Government experts at an early stage of drafting, to ensure that any new law is compatible with international norms and business practices. The latest draft bill, prepared for Inter-Ministerial review, over-regulates the collective management of rights and includes unwarranted government intervention in the exploitation of copyrights (among two of its many shortcomings).

**Criminal Code and Criminal Procedure Code:** The criminal code was completely revised in 2001, 2003, and again in February 2006 (effective March 2, 2006). The 2006 amendments lowered the threshold for criminal responsibility under Article 176 to one-tenth their former level. This is a very positive step. Article 176 now provides sanctions including fines ranging from 200 to 1000 minimum tax-free incomes, approximately US\$640 to US\$3,200, 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 4000 UAH (US\$793) – that is, “substantial material damage.” The sanctions provide an increase for repeat offenders and cases where the material damage equals or exceeds 200 minimum tax-free incomes (i.e., “large material damage”). In these instances, fines can reach up to 1,000 to 2,000 times the minimum tax-free incomes (previously it was 500 to 1,000 times), which is the equivalent of US\$3,200 to \$6,400, with a term of imprisonment ranging from two up to five years. Additionally, the 2006 amendments added even more severe penalties for actions against organized crime groups where the material damage equals or exceeds 1000 minimum tax free-incomes (i.e., “very large material damage”), as well as for officials abusing their official positions. In those cases, fines can reach up to 2,000 to 3,000 times the minimum tax-free incomes and a term of imprisonment ranging from three to six years. The criminal code provisions sanction both copyright and neighboring rights violations.

Another missing element in the criminal code (or copyright law) is a provision that makes possession for a 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 rightholders to file complaints to initiate actions. This acts as a bottleneck to successful enforcement. The Criminal 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. In 2006, amendments were considered but never adopted; the amendments were drafted without any input from rightholders, which is unfortunate, because there were several glaring deficiencies. Given the stake in effective enforcement that rightholders have, the Government of Ukraine should work with rightholders on any future copyright amendments and, at an early stage in the drafting process (certainly before submission to the Verkhkhovna RADA).

**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 as to enact criminal penalties. The proper remedies do now exist, but they 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. Further amendments have been proposed, but never adopted, to increase the maximum fines from the current US\$500 to close to US\$1000 – IIPA urges the passage of this law to create stiffer administrative penalties. Another provision that needs amendment is the two-month deadline for administrative cases to be processed or terminated (Article 38); a more realistic and extended deadline should be provided, or the deadline eliminated altogether. Administrative courts should be able to hear infringement cases even in the absence of the infringer – such delays, and the deadlines, lead to many unnecessary case dismissals.

**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 was again amended in November 2006 (effective March 2, 2007). It provides clear *ex officio* authority (Art. 257) to customs officials to seize suspected illegal material at the border. The threshold remains at about US\$260 (Art. 250(1), part 2; Art. 252 (1), part 2). For optical discs, a maximum of 20 discs can be imported or exported for personal use under the Optical Disc Law. The 2004 Customs Code narrowed the applicable sanctions to acts meeting a “commercial purpose” threshold; this limits the effectiveness of the 2004 code. The 2006 amendments introduced new criteria



replacing the “commercial purpose” criteria; the sanctions now apply to “goods destined for manufacturing or other business activity.” In addition, the notification and registration requirements, and the fees, were not repealed by the 2006 amendments. They were, however, amended: the current fee is US\$400 for the first application; US\$200 for all others; and per Art. 256, it is no longer necessary to register specific items and titles, rather record labels and/or trademarks may be registered in lieu. This is an improvement, but the abolishment of the registration system altogether with its unnecessary maze of regulations would be an even better improvement as it interferes with effective border enforcement.

**Civil Code:** Effective January 1, 2004, a new Civil Code came into force. Chapter IV of the Civil Code (Intellectual Property Rights) contains 90 articles in total -- 15 pertaining to copyright, and 8 pertaining to neighboring rights. Most of the copyright and neighboring rights provisions duplicate provisions in the Copyright Law of 2001 which ultimately may confuse judges who have to rule on IPR enforcement matters (IIPA had urged that civil code reform exclude anything but passing reference to copyright and neighboring rights to avoid this outcome). Ukrainian officials have assured U.S. Government and IIPA members that the Civil Code will not weaken implementation or enforcement of the copyright law. In this regard, 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:** On January 16, 2006, a new law (Cabinet of Ministries #20) was adopted that calls for mandatory dubbing in Ukrainian for films shown in cinemas, on television, or via home video. The law requires that 20% of the films shown in cinemas, television, or on home video to be mandatorily dubbed; and those figures increased to 50% on January 1, 2007, and will further increase to 70% on July 1, 2007. This market barrier will have a significant negative impact on audiovisual market development, particularly for MPA member companies and other foreign companies in Ukraine.

**Government Software Asset Management:** In 2003, the Cabinet of Ministers of the Ukrainian Government passed a regulation establishing procedures for the use of software in government agencies. It provided for government institutions to use properly licensed and legally held software, and prohibited public servants from installing, using, or copying software without prior consultation with a responsible system administrator. In 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. Unfortunately, the Government of Ukraine has been slow to enact this program.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### VENEZUELA

**Special 301 Recommendation:** IIPA recommends that Venezuela remain on the Special 301 Priority Watch List in 2007.

#### **EXECUTIVE SUMMARY**

The Venezuelan government seems to be fostering piracy by its unwillingness to enforce copyright law and stop the sale of pirate products. The streets of Caracas are plagued with pirated music, movies, games and software and the copyright industries' ability to engage in commercial distribution and conduct anti-piracy campaigns safely and effectively has been limited. Enforcement, both on the streets and at the borders, by Venezuelan authorities remains ineffective. The Venezuelan tax authorities (SENIAT) have been very vocal about combating piracy (its goal is to increase tax revenues) but local industries have seen no effective actions. The few border operations and raids have had little effect on the high piracy levels easily found in the main cities of Venezuela. Objectionable copyright legislation proposed two years ago by the government has fallen off the legislative docket, and should not be reintroduced. Comprehensive copyright law reform in alignment with international standards (such as the WIPO Internet Treaties) is what is needed in Venezuela.

#### **PRIORITY ACTIONS IN 2007**

##### **Legislation**

- Complete the deposit and ratification of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Stop any reintroduction of the government's proposed copyright "reform" bill (as drafted in 2004) because its provisions would undermine Venezuela's TRIPS obligations as well as its bilateral copyright obligations to the U.S.
- 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.

##### **Enforcement**

- Instruct the Venezuelan 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 to intercept and seize infringing copyright products.
- Provide IPR training to both prosecutors and judges.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN VENEZUELA**

The lack of adequate criminal and border enforcement has contributed to a situation where copyright piracy is widespread in Venezuela. Enforcement activities and copyright protection have deteriorated in a climate in which the government does not count intellectual property protection as a priority.

For 2006, the business software industry reports that the most harmful form of piracy is the widespread availability of pirated and counterfeit software programs, both burned and pressed, found on the streets throughout the country. In addition, the use of infringing or unlicensed software by legitimate businesses and government agencies is another major problem which undercuts the development of a legitimate market. The Business Software Alliance (BSA) also reports that internet piracy, including websites for both download and for hard-goods sales, is on the rise in Venezuela, and there are no actions being taken by Venezuelan enforcement officials to address internet crimes. BSA reports that it continues to work with SENIAT on joint public awareness projects as well as trainings. During 2006, BSA held nine workshops and seminars for enforcement authorities, training more than 410 officials.

The Motion Picture Association (MPA) reports that during 2006, optical disc piracy continued to grow via street sales in Caracas and in other urban centers. Demand for pirated DVD films has grown with the availability of low-cost DVD players on the local market. In addition, video store piracy remains pervasive in Venezuela, supplied by large scale laboratories with national distribution systems. Counterfeit packaging is common. Pirate videos are typically available before the local home-video release window has commenced. Regional broadcast television stations often transmit unauthorized U.S. motion picture product before their video release, adversely impacting both the theatrical and home video markets in Venezuela. Finally, although Internet piracy is currently not a major issue in Venezuela, with the increased availability of broadband both in homes and Internet cafes, illegal Internet downloads and Internet-based hard good sales of CD-R and DVD-R are expected to become more of a threat to legitimate sales and distribution.

The Association of American Publishers (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. Pirated videogames remain widespread, with most imported from Taiwan, Hong Kong and China, and transshipped through Paraguay. The piracy situation for the industry worsened in 2006, in part due to the difficulty of pursuing criminal actions given the rather poor state of the country's courts.

The recording industry reports that music piracy continues to grow unchecked. The streets of Caracas like most major cities around the country are inundated with vendors offering national and international artist albums and compilations. In fact, at Plaza Caracas, in front of the building of the Copyright Office (SAPI), dozens of vendors sell thousands of burned CD-Rs with pirate music. The international recording industry (IFPI) withdrew its anti-piracy group from Venezuela in 2003 because it was not able to carry out any type of campaign. The local trade group received (through informal channels) notification that the government would not take actions against street vendors or their suppliers because of the important political base of support they represented. As a result, over the last five years two-thirds of the Venezuelan market for recorded music has been lost to piracy.

**VENEZUELA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006<sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>2</sup>	124.0	84%	95.0	82%	39.0	79%	33.0	72%	27.1	52%
Sound Recordings & Musical Compositions <sup>3</sup>	50.6	80%	33.0	83%	31.0	80%	29.0	80%	29.3	75%
Motion Pictures <sup>4</sup>	NA	NA	30.0	63%	25.0	NA	25.0	50%	25.0	65%
Books	NA	NA	NA	NA	NA	NA	NA	NA	18.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>174.6</b>		<b>158.0</b>		<b>95.0</b>		<b>87.0</b>		<b>99.1</b>	

**Major enforcement challenges continue:** Enforcement of the copyright law by Venezuelan government authorities remains very weak. During 2006, there were not enough effective actions taken against the widespread street piracy. Both prosecutors and judges should be provided with additional training on IPR crimes so that sentences, when eventually meted out, are actually deterrent.

BSA reports that the authorities to 10 *ex officio* actions, and there were 7 administrative actions. BSA reports good cooperation with SENIAT, the police and prosecutors, and participates in a SENIAT committee on IPR issues.

Other agencies are ineffective. 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. No change in focus toward copyright was reported in 2006. Few cases make it through the system, and for those that do, the courts continue to issue non-deterrent penalties and inadequate damages.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Venezuela under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Venezuela, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> Estimated trade losses for the recording industry in 2002 reflect the impact of significant devaluation that year.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

## **COPYRIGHT LAW AND RELATED REFORMS 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.

**Stop any reintroduction of the objectionable copyright bill:** For the last two years, the copyright industries have objected to a bill introduced in 2004 which purported to amend the copyright law. 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.<sup>5</sup> 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. 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,<sup>6</sup> the Berne Convention, and the WTO TRIPS Agreement. In essence, these provisions would severely hamper any ability of national or international right holders to create or exploit their works in Venezuela.

The industries appreciate all efforts by those within the Venezuelan government to discourage the passage of this bill and encourage the passage of more robust and comprehensive legislation in accord with international standards. During 2006, the bill’s legislative progress was slow, in part due to the opposition of SENIAT (the Tax and Customs Superintendent, *Servicio Nacional Integrado de Administración Aduanera y Tributaria*), which views the measures in the bill as unfavorable to the fight against piracy. In addition, Congressional elections in late 2006 mean

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<sup>5</sup> As IIPA described in both our 2005 and 2006 Special 301 reports on Venezuela, 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, for example: (1) deleting all rights for phonogram producers and broadcasters (violation of TRIPS, the WPPT, the Rome Convention and Andean Community Decision No. 351); (2) requiring mandatory registration for works and performances; (3) lowering the term of protection from 60 to 50 years; (4) removing presumptions of ownership in favor of movies and software producers; (5) lowering criminal penalties from 1–4 years to 1–2 years; (6) making it very difficult to assign or transfer works; (7) removing all *ex parte* injunctions and actions; (8) requiring a mandatory royalty in favor of natural authors of 50% of all earnings from commercialization of work; (9) 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; (10) providing very broad and expansive exceptions to protection; (11) providing an unclear making available right; (12) not covering point-to-point transmission, ISP liability, or providing notice and takedown provisions; (13) not establishing an importation right, and not providing statutory civil damages and criminal penalties for unauthorized parallel imports of copyrighted materials; (14) not providing civil or criminal remedies against the alteration of electronic rights management information (ERMI) or against circumvention of technological protection measures (TPMs); (15) not providing effective border measures; (16) 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 (17) eliminating work-for-hire provisions.

<sup>6</sup> 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 2006, \$630 million worth of Venezuelan goods entered the U.S. under the duty-free GSP code. 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/2007SPEC301HISTORICALSUMMARY.pdf>).

that this legislation will have to be reintroduced in 2007, if the government wants to continue pressing for its adoption. The copyright industries would oppose such reintroduction.

**Customs Regulations (2005):** In October 2005, SENIAT 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.

**Film Law Amendments (2005):** In September 2005, the Venezuelan 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. The objectionable provisions 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.

**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 SENIAT. The copyright industries continue to hope that this law will actually be implemented in practice, but had no reports in 2006 of any anti-piracy actions being taken under this law.

# **WATCH LIST**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### BANGLADESH

**Special 301 Recommendation:** Bangladesh should be placed on the Watch List.

## **EXECUTIVE SUMMARY**

In 2004, when the Pakistani government began addressing the problem of massive over-production of optical discs (for domestic consumption and export) by closing several of the plants, and cutting off the supply of key components of optical discs (including by controlling the importation of optical disc polycarbonate), optical disc plants began migrating to Bangladesh. Recent reports confirm that there are currently six optical disc plants in Bangladesh. The capacity for over-production (which is apparently already being manifested in exports to India and perhaps Europe, as well as saturation of the local market with pirate product) requires a response, which should include 1) an optical disc regulation to license and inspect the plants; and 2) rapid-fire and unannounced inspections, with any plants found to be pirating subject to closure and with its owners subject to prosecution. Other piracy problems abound, including unchecked book piracy in the form of print piracy and illegal commercial photocopying, stolen theatrical motion picture prints which are illegally contracted for exhibition in Bangladesh, and broadcast/cable piracy (i.e., unauthorized showing of international and Hindi movies on channels without authorization), which should be addressed as well. CD-R "burning" piracy remains a problem, from large-scale "burning" in the plants to small-scale 'mom-n-pop' burning. However, the use of pirate music cassettes continues to dominate the music market in Bangladesh and the music cassette piracy rate is 90% for domestic, Indian and international repertoire.

The harm from piracy in Bangladesh is not only to U.S. and other foreign right holders but is felt keenly by Bangladeshi nationals.<sup>1</sup> Recently, Bangladeshi record/music producers have taken it upon themselves to seek to enforce their own rights, calling it "a matter of life and death" for their local Bangladeshi companies.<sup>2</sup> The government of Bangladesh response has been inadequate, both in terms of the results from enforcement actions taken, as well as from the standpoint of publicizing results of actions in order to create necessary deterrence.<sup>3</sup>

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<sup>1</sup> 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. The music industry of Bangladesh is at the same time undergoing steady growth in terms of new music production companies in the sector. These companies aspire to create quality music and have no intention to engage in piracy, so protecting their interests should be paramount to the Bangladeshi government. As to broadcast piracy, the local television industry has also expanded with four new channels coming into operation, Channel One, Bangla Vision, Baisakhi, and STV.

<sup>2</sup> See *Bangladesh Music Producers Take Law Into Own Hands To Fight Piracy*, August 17, 2006, at <http://www.channelnewsasia.com/stories/entertainment/view/225343/1/html> (describing a record producer-launched "Movement Against Piracy" campaign, raiding shops in the capital Dhaka and the southeastern port city of Chittagong to catch traders selling pirated CDs and cassettes, and quoting senior campaign member, and CEO of G-Series, Nazmul Haq, as saying, "[w]e had no choice but to take the law into our own hands as piracy has almost sent our business to the graveyard. It's (a) matter of life and death for us"). Raids run by local industry revealed 99% piracy. Haq was further quoted as saying, "[i]n the last four years alone, as many as 10 big and respected companies have had to close because of piracy."

<sup>3</sup> In Bangladesh's Trade Policy Review at the World Trade Organization in September 2006 (minutes released in November 2006), the government of Bangladesh essentially indicated that it does not keep regular copyright



## **PRIORITY ACTIONS REQUESTED IN 2007**

- Inspect Optical Disc Plants, Closing Down Those Found to be Engaged in Piracy and Prosecuting Owners of Pirate Plants
- Pass and Implement an Effective Optical Disc Regulation, With Plant Visits/Mandatory Exemplars and Mandatory Use of SID Mater (LBR) and Mold Code, Among Other Things
- Establish an Anti-Piracy Force and Take Actions (Including *Ex Officio*) Against CD-R “Burning,” Book Piracy (Photocopy Shops and Print Piracy), Theft of Theatrical Prints, Stolen Theatrical Motion Picture Prints, and Broadcast/Cable Piracy
- Establish IPR Cell Within Bangladesh Customs

For more details on Bangladesh’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

<b>BANGLADESH</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2005-2006<sup>4</sup></b>				
INDUSTRY	2006		2005	
	Loss	Level	Loss	Level
Motion Pictures	NA	NA	NA	NA
Records & Music	40.0	70%	NA	NA
Business Software	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA
Books	8.0	NA	6.0	NA
<b>TOTALS</b>	<b>48.0</b>		<b>6.0</b>	

## **PIRACY AND ENFORCEMENT IN BANGLADESH**

**Optical Disc Production in Bangladesh:** There are currently six optical disc plants in Bangladesh (lines for the sixth plant have recently been imported from Singapore but it is

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enforcement statistics, but that “efforts are being made for collecting such data,” that the records/data in relation to seizure or confiscation are maintained by Bangladeshi Customs manually in a register, but that there are other enforcement agencies like BDR (Bangladesh Rifles), Coast Guard and Police who are also responsible for enforcement of copyright regulations within their respective jurisdictions, and can supply such information “when available and [when] a request is received.” In addition, the government noted that “since several agencies are involved in enforcement of copyright, no consolidated information [on raids, prosecutions, convictions, etc.] is available right now.” With respect to optical disc plants and piracy, the government indicated that it took note of the concerns expressed in the report regarding optical disc manufacture in Bangladesh and would place the matter “under investigation.” See World Trade Organization, Trade Policy Review Body, 13 and 15 September 2006, WT/TPR/M/168/Add.1 (published November 10, 2006).

<sup>4</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Thailand under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

unclear whether this plant is operational yet). With a total of at least 14 production lines (including four dedicated DVD lines),<sup>5</sup> and a production capacity of 49 million discs, and four mastering facilities (i.e., the ability to use a “clean room” and produce the glass master that is then converted into the metal stamper used on the mold), the optical disc production problem must be addressed with immediacy. It is confirmed that at least some of these plants are owned by Pakistani nationals who ran plants in Pakistan prior to that government’s crackdown over the past two years.

All of these plants are involved in large-scale piracy operations, and at least four of the six are engaged in production of pirate international music, software, and U.S. movies. The main market for these pirate products is Bangladesh,<sup>6</sup> although some of the pirated discs are being smuggled into India and Europe. Relatively small shipments of 900 to 1,000 discs are apparently being “smuggled” out of the country via parcel shipments using the main post office in Dhaka. Apparently the export shipments are focusing on the Indian and European market, but also to countries like Sri Lanka. However, industry has few details regarding the content and exact quantities of pirate exports. As an example of the efficiency and modernization of these plants, one plant with three lines is known to be able to deliver orders in as little as seven days and can produce about 40,000-50,000 discs per day (all formats). Industry knows where these plants are located and has informed the government of Bangladesh. The massive pirate production has destroyed any domestic market (even local music, for example, is 85% pirate while international or Indian repertoire is virtually 100% pirate). Industry has met with government representatives about the OD piracy and other problems.<sup>7</sup>

**“Burning” on Recordable Discs:** The problem of CD-R burning of content onto recordable discs is becoming increasingly severe in Bangladesh. It is estimated that the Bangle market for audio and video CDs is catered by the CD-R facilities and that there are as many as 60 CD-R duplicating facilities operational in Bangladesh. They range from sophisticated European standalone duplicators to PC workstation duplicators. It has also been confirmed by different sources that Bangladesh is importing approximately one million blank CD-Rs from China and Taiwan per month. The price of a blank CD-R is US\$0.10.

**Importation of Pirate Optical Discs:** It appears there is some pirate importation of optical discs (indications are that discs are coming in from Malaysia), but the Bangladesh Board of Film Censors is working with industry to investigate suspected rights verification documents proffered by questionable importers.

**Book Piracy:** The book publishing industry continues to face unchecked piracy in the form of illegal commercial photocopying and print piracy. Any book having the potential to sell

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<sup>5</sup> Four of the plants are in Dhaka (including one in Uttara and one in Kodamtali), one of the plants is in Konobari, Gazipur, and one is in the Kajpur area. There are four dedicated DVD lines (three DVD-9 and one DVD-5 line). In addition, there are as many as 10 CD lines. In some of the plants, it is confirmed that the best technology available is being used. For example, molding and finishing lines from one plant are a combination of Swedish and Dutch technology, under the banner of TOOLEX and ODME respectively, while printing is done using German technology, KAMMANN Machines.

<sup>6</sup> The overall piracy situation in Bangladesh has worsened with the increase of sales of pirate CDs and DVDs in urban cities and especially Dhaka. CD and DVD players are becoming increasingly popular and cheap and demand for pirate CDs, VCDs and DVDs has increased as a result. The growing usage of computers in households is also contributing to consumer purchases of pirate CD-ROMs and other optical discs.

<sup>7</sup> For example, in February 2006, record industry representatives met with officials from the National Board of Revenue, Dhaka, Commissioner of Customs, Dhaka Airport, and U.S. officials. Through the meetings, the members of Customs welcomed support and assistance from industry and indicated limitations in the detection process of pirated products and shortage of equipment to detect pirated products.

more than 100 copies is subject to nearly 100% piracy. This especially affects the university textbook and English language teaching book markets. Bangladeshi government-funded libraries openly buy and stock pirated books, with the active or tacit approval of authorities. Medical books and other professional titles are also pirated, as are computer books, trade fiction, dictionaries, and the like. 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.

**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 often unaware of the presence of these pirated theatrical prints until they are notified 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 LAW AND RELATED ISSUES**

Copyright protection is afforded under the Copyright Act, 2000,<sup>8</sup> as amended in 2005.<sup>9</sup> The law prior to amendment was adequate for basic anti-piracy purposes, although it did not implement the WIPO “Internet” Treaties.<sup>10</sup> We are still ascertaining the effect of the changes from the 2005 amendments (which we have not been provided for review), but we understand that the Bangladesh government is well aware of the TRIPS issues involved, although claims the 2013 transition period,<sup>11</sup> and there was concern that pirate producers lobbied the government for exceptions that would have the effect of permitting pirate exports to neighboring markets such as India. Notwithstanding the 2013 transition, we note that Bangladesh is a member of the Berne Convention (since May 4, 1999) and thus must adhere to the rules and principles set forth in that Convention, including abiding by the three-part test for exceptions. IIPA looks forward to reviewing the amendments and providing comments.

In Bangladesh’s recent WTO review, the government was called upon to explain the various protections and remedies available under the current law. While this may not comport with actual practice on the ground for right holders, it is useful that the government’s

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<sup>8</sup> 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.

<sup>9</sup> The Bangladeshi government, in a recent WTO review, indicated that the Copyright Amendment, 2005 is currently only in Bengali, but is being translated into English. See *supra* note 3. In the WTO review, the government of Bangladesh reported that it had amended its Copyrights Act (2000) in May 2005 to reduce piracy “in the domains of computer software, motion pictures, pharmaceutical products, CDs/DVDs, and audio- and videocassettes.” The government indicated it had publicized the law widely throughout Bangladesh, sending it “to all district offices and requested them to take necessary measures to enforce the law,” and noted, “[t]he Government has also taken initiatives to amend the Copyright Rules, 1967 to make it consistent with the Copyright Act, 2005.”

<sup>10</sup> See *id.*, in which the government of Bangladesh indicated “Bangladesh has not yet made any decision about joining WIPO Internet treaties.”

<sup>11</sup> See *id.* The WTO Secretariat Report noted that work was under way to bring Bangladesh intellectual property rights laws into line with the WTO TRIPS Agreement, and noted that “Bangladesh benefits from an extended time limit (until July 2013) for the full implementation of the Agreement.” The government of Bangladesh indicated that “considering the extended transition period to implement TRIPS Agreement until 1 July 2013 the Government of Bangladesh is examining the whole gamut of issues relating to patent, trademark and copyright protection.”

explanations of civil,<sup>12</sup> administrative/border,<sup>13</sup> criminal,<sup>14</sup> and provisional<sup>15</sup> remedies have been set out in writing.

## **GENERALIZED SYSTEM OF PREFERENCES**

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 2005, \$21.4 million worth of goods from Bangladesh entered the United States under the GSP duty-free code, accounting for 0.8% of its total exports to the U.S. During the first 11 months of 2006, \$19.1 million worth of goods from Bangladesh (or 0.6% of Bangladesh’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

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<sup>12</sup> See *id.* The government indicated the following as to civil remedies under the current law:

Civil suits provide remedy for claiming compensation for infringement of copyright and loss of profits as well. The owner of the copyright can bring civil action in which relief’s such as Search order injunction, Accounts and damages can be sought. A suit or other civil proceedings relating to infringement of copyright is to be filed in the court of district judge within whose jurisdiction the plaintiff resides or carries on business or where the cause of action arose irrespective of the place of residence or place of business of the defendant.

The government also said the following about compensatory damages:

The court determines the types and extent of compensatory damages considering the claims of the complainant and the circumstances. The existing laws on trade marks and patents give the authority to the court to determine the types and extent of compensatory damages, while the Copyright Act, 2000 gives the same authority to the court as well as copyright Board constituted there under.

<sup>13</sup> See *id.* The government indicated the following about administrative/border measures:

Administrative remedies consists of moving to the Registrar of copyright to ban the import of infringing copies into Bangladesh, when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright. ... [T]hey can destroy counterfeit/pirated goods, if the act of infringement is proved by the court of Law.

<sup>14</sup> See *id.* The government indicated the following as to criminal remedies under the current law:

Criminal remedies provides for the imprisonment of the accused or imposition of fine or both, seizure of infringing copies. Criminal proceedings are available in order to punish the persons who have violated the copyright law. The infringement of copyright is a cognizable offence and is punishable with imprisonment for a period extending from six months to four years and a fine ranging from TK 50,000 (US\$725) to TK 200,000 (US\$2900). The Act also provides for seizure of infringing copies and confiscation of all duplicating equipments used for manufacturing counterfeit copies. However if the court is satisfies that infringement is committed without having an intention for profit or non-commercial purpose the court may give lesser punishment which may be imprisonment for less than 6 months and fine for less than TK 50,000. However, in case of piracy of computer programs the amount of fine is extended by an amendment to the Copyright Act, which is now minimum TK 100,000 (US\$1450) and maximum TK 400,000 (US\$5800) if it is committed for commercial purpose. In case of mere use of infringing copy or if the court is satisfied that it is committed for non-commercial purpose, the court may impose lesser punishment and lesser fine as well... For a second conviction of infringement, imprisonment could extend to three years, with or without a fine; and for copyrights imprisonment may extend to a maximum of four years (up to five years for the film sector) with a fine of TK 200,000 (TK 100,000 to TK 500,000 for films).

Helpfully, the government clarified the following regarding the criminal threshold for prosecutions:

A case is initiated after taking into cognizance by the court on receipt of a written complaint from an aggrieved party in case of willful trademark counterfeit/copyright piracy on a commercial scale. There is no pre-determined threshold to initiate a criminal action against someone who makes or sells counterfeit/pirated goods.

<sup>15</sup> See *id.* The government indicated the following as to provisional measures under the current law:

As a temporary measure, court can issue injunction prohibiting sale, distribution and marketing of the goods on which an order has been sought. The court can also issue an order for seizure and temporary restraint. The court can also seize counterfeit/pirated goods before litigation in order to preserve evidence. Decision on infringed goods is taken by the court, and it differs from case to case.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### BELARUS

**Special 301 Recommendation:** 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 2006, the U.S. Trade Representative retained Belarus on the Watch List noting that “[c]oncerns continue about overdue implementation of Belarus’ intellectual property regime, including adherence to commitments under the [1993] U.S.-Belarus Trade Agreement.” Further, USTR noted that Belarus had “made no significant progress” the year before and that “IPR enforcement in Belarus remained weak...[and]...piracy levels remain high.” There were no reports of either legal reforms or enforcement successes in Belarus in 2006. 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). The long delay (until 2002) in joining 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 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). No further amendments have been adopted.

## Legal Reform Deficiencies

The 1998 amendments to the Copyright Law 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 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\$5,646).
- 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 “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. Three years ago, 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), but there have been no further reports of any activity by this committee. 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. IIPA continues 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.

In 2005, the last year when music piracy statistics were calculated, the music industry estimated piracy levels at about 70% (and trade losses that year 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 2006, 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. In the past few years there have been reports of criminal cases initiated but the sentences imposed in those cases, if any, were almost all either conditional or suspended. This has little deterrent effect. There were no statistics provided by the government (or industry) in 2006 of the number of border seizures or investigations.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### BRAZIL

**Special 301 Recommendation:** IIPA recommends, for the second year in a row, that Brazil be removed from the Priority Watch List and placed on the Special 301 Watch List in 2007.

#### **EXECUTIVE SUMMARY**

The copyright industries' overarching goals in Brazil, one of the largest commercial markets for copyrighted materials, 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. Notwithstanding greatly enhanced government efforts, piracy for U.S. copyright materials remains very serious in Brazil, and the problems of successfully prosecuting and concluding criminal copyright infringement cases remains difficult. Despite the laudable progress made by the Government of Brazil in organizing itself to fight piracy nationally, as well as the significant number of raids and seizures of pirated product, the fact remains that piracy for most industries is not being reduced (the recording industry has seen a reduction in physical piracy but a significant increase in Internet piracy) and commercial interests of both Brazilian and U.S. companies continue to be injured.

#### **PRIORITY ACTIONS IN 2007**

##### **Enforcement**

- Achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process, including: (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 implement the 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.
- Establish more IP task forces, both at the state level and via the CNCP.
- Conduct *ex officio* actions on facilities that knowingly offer public access to unauthorized peer-to-peer programs and in particular with respect to those locations that facilitate or enable unauthorized transactions by providing the materials required for downloads—e.g. blank CD-Rs.
- 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.
- Improve cooperation between the states and the municipalities on anti-piracy actions.
- Continue CNCP efforts to instigate and support raids and seizures of piratical goods at the borders.
- Encourage authorities to take more prosecutions, including and especially, against recidivists.
- Create specialized IPR courts with copyright jurisdiction.
- Establish a reference price for imported blank media.
- Establish a national program to train judges, prosecutors and police officers on IPR.



## Legislation

- Support pending legislation (Bill 3.965/2004) to amend the Software Law (Law No. 9.609/98) to extend the minimal prison punishment for two years since nowadays the minimal penalty (one year) gives the judge the option to issue suspensions instead of jail terms.
- Support pending legislation (Bill No. 3.964/2004) to amend penalties in the criminal code to increase penalties for piracy to remove alternative and lower sanctions, such as community service.
- Support the initiative drafted by CNCP and supported by copyright industries (and approved by Minister of Justice in November 2006) that will be presented by Government to the Congress in the first half of 2007, containing the following points:
  - Allow criminal judges to appoint private sector experts.
  - Allow the destruction of infringing products before a final decision.
  - Facilitate forensic review of suspected infringing products seized so as to permit sampling instead of reviewing each copy seized.
- Halt legislative efforts to amend the copyright law that would grant overbroad privileges to university students.
- Remove market access barriers, including taxes placed on computer and entertainment software, and impose no new barriers (such as a theatrical window or onerous video quotas) on films.
- Work with the State of São Paulo University to reverse its administrative rule which allows widespread reprographic copying of portions of books by commercial, for-profit copy centers.

<b>BRAZIL</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Music Compositions	176.5	40%	334.5	52%	343.5	52%	338.7	52%	320.4	53%
Business Software <sup>2</sup>	497.0	62%	383.0	64%	359.0	64%	309.0	61%	260.8	55%
Motion Pictures <sup>3</sup>	NA	NA	101.0	22%	120.0	30%	120.0	30%	120.0	35%
Entertainment Software <sup>4</sup>	159.3	88%	120.8	77%	120.4	74%	125.7	56%	NA	NA
Books	18.0	NA	18.0	NA	18.0	NA	14.0	NA	14.0	NA
TOTALS	850.8		957.3		960.9		907.4		715.2	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Brazil under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Brazil, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> 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 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 System of Preferences (GSP).<sup>5</sup> That 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. USTR's decision to end the GSP IPR investigation 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 (see discussion below).<sup>6</sup>

## **COPYRIGHT INITIATIVES 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. The year 2005 was a turning point in a positive direction, where the government showed major shifts in energizing political willingness and taking large-scale anti-piracy actions. These two shifts continued in 2006, even though there were some delays in actions, likely due to the elections. With new leadership in the CNCP, the industries hope that continued progress will be made in 2007.

IIPA and its member associations in the recording, music, film, computer software, entertainment software, and book publishing industries salute the progress made in Brazil, especially regarding the cooperation between the copyright private sector groups and the National Council to Combat Piracy and Intellectual Property Crimes (CNCP). The CNCP resulted from a two year legislative process,<sup>7</sup> 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 comprehensive, multi-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 categories.

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. In fact, over the years, IIPA has identified a series of specific goals that largely overlap with and refine the bilateral goals.<sup>8</sup> To

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<sup>5</sup> 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).

<sup>6</sup> In 2005, \$3.6 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 2006, \$3.5 billion worth of Brazilian goods (or 14.2% 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 3.4% increase over the same period in 2005.

<sup>7</sup> 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, policy and legislative recommendations, and the lack of national leadership and coordination. 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, and its official launch was in March 2005.

<sup>8</sup> For example, IIPA and its members' specific action plans have been outlined in prior IIPA 301 submissions on Brazil.

this end, IIPA and its members have added our comments to the seven BCM measures on copyright and enforcement below:

**(1) Increase anti-piracy raids in well-known marketplaces;**

- IIPA and its members have shared (and published in prior 301 reports) lists of locations of well-known marketplaces, all of which require no investigation by the authorities. In fact, a national list with specific locations has been established and raids are conducted regularly, at least in São Paulo. The problem is authorities have to identify recidivist violators and find a way to shut them down, either by using municipal codes against piracy or following the tax evasion route. Street or "blankets" hawkers are not arrested; the only other way to discourage them is to take away all the components of their trade, for example, their stands, speakers and other accessories that may attract buyers. The police currently do not do this, at least not in São Paulo or Rio.
- Raids should be done more frequently, on weekends and between the hours of 5:00-7:00 pm daily, when the pedestrian traffic increases in the pirate markets.
- The underground metro in São Paulo over the past year has become a more attractive selling point since police rarely disturb the pirates at these locations.
- The Military Police should be involved in anti-piracy operations/ patrols. Right now you can walk through São Paulo and see pirates selling their goods, with military policemen just ten to twenty feet away and oblivious to the violations taking place right in front of them. There is no known mandate from the Military Police Hierarchy for the street patrolman to disband or chase away pirates.
- Target major markets also known as "Camelodromos" outside São Paulo City such as in Campinas, Riberao Preto and Pinheiros.
- Expand the campaign to cover the growing internet piracy problem affecting the recording and audio-visual industries. This part of the campaigns should address illegal downloads by individuals, websites and cybercafés.

**(2) Encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces which focus on priority locations;**

- The industries are not aware of any visibly active IPR task forces that include state and locals. In contrast, the federal authorities do work together with La Receita, the National Federal police and the Federal highway patrol.
- The federal authorities are hesitant to exchange information with state and local enforcement officials.

Several copyright sectors met with the Executive Secretary of the Anti-piracy Commission for the State of São Paulo to discuss the establishment of these task forces. He stated that nothing would happen on this level until after the elections in October 2006, and to date, there are no updates to report on this initiative.

**(3) Take enforcement actions at the Brazil-Paraguay border;**

- Several raids have taken place but more focus is needed on the *sacoli* traffic getting around the Federal Highway Police dragnet by utilizing state roads off the interstate BR-277.
- La Receita has become more aggressive but they lack sufficient personnel in contentious areas such as Foz de Igauçu. This same observation applies to the Federal Police in Foz.
- Dry land crossing between Paraguay and Brazil needs 7 day/24 hours-a-day coverage.
- There is a need to establish links between Financiers in major cities and *sacoli* networks in order to dismantle the organized crime behind the smuggling organizations.
- The "dirty money" from the banking institutions and money exchange houses in the tri-border area needs to be tracked. The Brazilian Federal Police and La Receita have this capability.
- There is a need to conduct river operations involving at least sufficient boats and personnel to discourage smuggling across the Parana River.

**(4) Enhance deterrence through criminal prosecutions and the application of deterrent penalties;**

- More long term investigations are needed utilizing the "Quadrilla" concept of prosecution for major crime organizations by utilizing collateral statutes such as tax evasion, money laundering, fraud and customs violations.
- Pursue major recidivists establishing a Priority Prosecution List or Priority Targeting list.

**(5) Continue work to complete the action items in the national plan developed by the National Council to Combat Piracy and Intellectual Property Crimes (CNCP);**

- Added to this list of action items should be "that the Brazilian Federal Police take the lead in multi-jurisdictional IPR investigations."

**(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;**

- The copyright industries have participated and supported this public awareness effort.
- Include education on intellectual property and the harms that intellectual property crimes causes authors and other creators in school curricula, particularly for younger school-aged children.

**(7) Continue working with the industry through the CNCP.**

- The copyright industries believe that strong leadership of the CNCP is necessary in order to continue, and improve, on concerted and concrete actions which are aimed at deterring piracy in Brazil.
- CNCP should establish timetables for implementation of different actions under the action plan, as well as specific objectives to measure the impact and effectiveness of these actions on the level of piracy.

## **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. The recording industry is extremely pleased to report, for the first time in many years, the piracy rate for recorded music has dropped below 50%. Unfortunately, a tremendous increase in the availability of unauthorized recordings on the internet has meant that this decrease in the physical piracy rate has not resulted in increased legitimate sales. This disconnect highlights the fact that in addition to more traditional forms of piracy which the industries have been fighting for decades, piracy involving the Internet and other digital media present more enforcement challenges that need to be addressed in order to expand opportunities for creators, whether Brazilian or foreign.

**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. In addition to a large amount of pirate material, millions of blank media (CD-Rs and DVD-Rs) enter Brazil each year, either from the border with Paraguay (one conservative estimate is more than 300 million units in 2006) or from the main ports like Santos, Paranagua, Vitoria, Itajai and others. Paraguay continues to be a major concern for the recording industry in Brazil not only due to the massive importation of blank media manufactured in southeast Asia and entering via the free border area but also because the increased manufacturing capacity of this country. The Minister of Industry and Commerce in Paraguay recently authorized four new industrial CD-Rs and DVD-Rs plants with an output capacity of 100 million per year.

Reports indicate that Brazil has as many as 13 optical disc plants, with 84 production lines and an output capacity of close to 300 million units. 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. Unfortunately, many of these smaller facilities have been emboldened by the fact that, even when the authorities have caught large-scale replication facilities in the act of pirating content on optical discs, there have been no meaningful prosecutions or actions.<sup>9</sup> 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. Information indicates that the tri-border area with Paraguay and Argentina is controlled by Arab and Chinese gangs, where the first control the distribution of piracy and the latter the imports of blank media. Also in São Paulo, several raids point to Chinese groups in connection with piracy activities.

**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.

In 2006, Brazilian recording industry continued its efforts to combat Internet Piracy which is damaging the new business development in the sector and keeping consumers out of the record stores. A market survey conducted by IPSOS revealed that in 2006 an estimate of over one billion songs were illegally downloaded from the Internet, using personal computers or public access on Internet cafes and other public facilities. The campaign conducted by the local anti piracy association (APDIF DO BRASIL) produced the following results: A total of 10.802 illegal web pages were removed by notice and take down procedures, including 239 pages with pre-release content. 937 virtual auction users were removed, including 135 virtual auctions of illegal master tones. On October 16, authorities executed the largest operation against web piracy in Brazil. The operation named “I-commerce” with the participation of 350 federal police officers, conducted 79 search warrants in 14 different locations around the country and shut down 81 web sites dedicated to offer CD-Rs and DVD-Rs compilations for home delivery. As a result of the operation 43 individuals were arrested and 5 were accused. More than 24,000 recorded CD-Rs and DVD-Rs were seized, along with 152 CD-Rs and DVD-Rs burners.

Also, in 2006, the Brazilian recording industry participated in the “Hubcap” litigation campaign against P2P users filing 20 civil actions with an average per user of 3,600 illegal music files. Although these cases are still been processed in the judicial system, the industry is planning to bring more high profile litigation cases in the near future. Unfortunately, the head of the CNCP has expressed publicly his disagreement with the campaign, which has had a detrimental effect on judges evaluating the cases and diluted the needed deterrent effect that the announcement might have had on the general public.

Finally, eight operations against “Cyber Cafes” were conducted in São Paulo and Rio, as part of the regional campaign to combat the illegal downloading of music and audiovisual files on this type of commercial places. As a result of this raid, four individuals were indicted for copyright piracy.

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 2006, 264 websites and some 28,841 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 have resulted in a decrease in the monthly volume of auction listings of pirated games.

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<sup>9</sup> For example, in April 2005, a factory located in the state of São Paulo was raided by the police and found to be engaged in the pirate replication of entertainment software and music products, with a significant number of pirated products seized. Since that time, there has been no meaningful progress in the prosecution of the owner/operator of this facility.

**Piracy of sound recordings and musical compositions:** Piracy of music and sound recordings represents 40% of all CD sales in Brazil. The latest piracy survey shows a total number of 32 million pirate CDs being duplicated, which translates to trade losses that exceed \$176.5 million. Despite a decrease in the number of physical pirate goods being sold, the legitimate market suffered a significant decrease during 2006 of 24.8 percent in units and 25.5 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 that are estimated to exceed one billion tracks. 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.

**Entertainment software piracy:** The entertainment software industry reported no change in the state of piracy of its products during 2006. Pirated game product in Brazil continues to arrive from a multitude of sources. Despite increased focus on border enforcement, there is still Asian-manufactured product flowing into Brazil from abroad, particularly Nintendo cartridges and high-end counterfeit game discs. In fact, Nintendo of America, Inc. reports that counterfeit cartridge games continue to flood the Brazilian market but, in contrast, no Customs seizures occurred in all of 2006. Local sources include a multitude of small disc-burning operations that source their “masters” (from which they burn copies) either from the aforementioned counterfeit imports or more frequently downloads of pirate game versions from the Internet. These labs are then plugged into distribution networks that channel the illegal product into the major shopping centers and the street vendors that populate many of the major cities in Brazil. The frustration is that despite the enforcement actions that are taken against retail hot spots in São Paulo and Rio de Janeiro, the level of piracy in these locations continues unabated, primarily because vendors do not fear any material consequence from their illegal activities other than the seizure or loss of their illegal products, which has simply become a potential cost of doing business in these venues. The World Wide Web and online auction sites are increasingly becoming a source of local product for consumers, especially as broadband penetration in Brazil continues to grow. Internet cafés are also of concern, as of the 2,000 cafés in the country, only 20% are licensed to offer entertainment software products. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Brazilian marketplace was \$159.3 million in 2006, with a 88% piracy rate.

**Unauthorized photocopying and book piracy:** The publishing industry reports that very little about the book piracy situation in Brazil changed in 2006. 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 \$18 million in 2006, 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.

Among the most disturbing developments in 2006 was the issuance and implementation of Resolution No. 5213/2005, an administrative rule by the State of São Paulo University (USP). This rule allows (1) reprographic copying of portions of books by commercial, for profit copy centers; and (2) copying of foreign works (or perhaps all works not in Portuguese) that are “not available in the Brazilian market” without a license. The latter provision applies even to copying of 100% of a work. This ruling presents several problems under international norms and must be revoked. For-profit entities should not be given carte blanche to copy works outside the normal bounds of international fair use.

Furthermore, “not available in the Brazilian market” has not been defined, and industry reports that in practice this provision is being used to copy en masse *all* foreign works. State and national authorities (including the Ministry of Education) should step in to revoke this rule, or at a minimum revise it to comport with Brazil’s international obligations under TRIPs and Berne.

Even apart from the USP situation, illegal copying flourishes in commercial establishments adjacent to most institutions of higher learning. Illegal photocopying of academic materials costs both domestic and foreign publishers millions of dollars and costs 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 enforcement actions and plan for future endeavors. AAP will be monitoring closely the degree of cooperation the ABDR receives from authorities.

**Business software piracy:** The Business Software Alliance (BSA) reports no significant improvement in the business software piracy situation in Brazil. Piracy continues to include 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) against end users promoted by the local industry association, ABES. BSA, however, brought only civil actions in 2006, where police are generally not needed, rather than criminal actions. ABES did pursue some criminal actions against distributors, but not end users. Court appoints experts who search premises and seize eventual illegal material. Authorities are taking *ex officio* actions through the CNCP. BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Parana, São Paulo, Rio de Janeiro, Minas Gerais, Espirito Santo, Bahia, Pernambuco, Ceara, Goias, Mato Grosso do Sul, and the Federal District of Brasilia. BSA reports that preliminary estimated trade losses due to software piracy have risen to \$497 million, while the estimated piracy rate dropped slightly to 62%.

**Audiovisual piracy:** The Brazilian home entertainment market is reaching maturity and the theatrical market has suffered more and more with piracy. MPA and its member companies report several forms of piracy harming its commercial businesses in Brazil: (1) optical disc piracy, (2) Internet piracy, (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. Internet hard goods sales of pirate optical discs are increasing more rapidly than any other form of digital piracy in Brazil. With the rapid increase of broadband access, illegal download sites are also beginning to appear. MPA has tracked a steady increase in the incidence of Internet sites for hard goods sales. Auction websites have been particularly helpful in dismissing the pirate offers. There are more offers of downloads, hard goods and even subtitles and dubbing through relationships with groups such as ORKUT (a social online network). Retail video store piracy continues to be of concern because of the continuing importance of video store revenue for local home entertainment operations. Video rental stores are struggling to survive due to the expressive growth of street vendors with pirate DVDs. Every day MPA, MPA member companies, the local Home Video Association (UBV) or the

Union of Video clubs (SINDEMVIDEO) receive calls or emails of videoclubs complaining about a street vendor in front of his door with titles recently released in the U.S. The ability of pirates to supply the market with theatrical releases that are not yet available for legal rental in DVD format is extremely disturbing, and can undermine the entire distribution plans for legislative release of that file. New releases (and not only blockbusters movies) can be found in the streets, in the fanciest areas such as Avenida Paulista or Faria Lima in São Paulo, day and day with the U.S. theatrical release dates, and again before local theatrical release.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

The copyright industries note that tangible progress on improving copyright enforcement was made in 2006. 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. Police raids have been moderately successful (depending on the jurisdiction), but these result in few prosecutions and fewer criminal convictions. While raiding continued to be significant, the major criminal enforcement problem continues to be the failure of Brazilian authorities to emphasize serious prosecution and deterrent sentencing. Meanwhile, the civil system has offered some relief in some cases involving computer software.

At the federal level, cooperation with the CNCP is excellent. Industry groups also maintain good contacts with the Federal Police Cyber Crime division. In addition, the special anti-piracy units in São Paulo and Rio are quite good, even though they have limited resources for all their activities. The relationships with State civil and military police vary. For example, in São Paulo State, the military police offers very weak support for enforcement activities. Customs at the border with Paraguay has played a very important role in the past two years. Finally, a broader observation must be made and that is the problem of corruption, especially as piracy becomes more entrenched with organized crime. This shows up particularly in leaks of information, low levels of law enforcement support, and the continuing lack of intelligence gathered on major pirate groups and importers/smugglers of blank media.

**Actions at the State and local levels:** The level of governmental anti-piracy attention varies throughout Brazil. 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. Unfortunately, the participation of DEIC in the combat of piracy has been far below the level expected by the industries, particularly in the second half of 2006, when this office’s willingness to pursue enforcement actions against vendors in local retail hot spots in São Paulo dropped to almost zero. As the



state of São Paulo represents about 50% of the Brazilian market for most of IIPA members' products, the inactivity of this office has spurred a rise in the level of piracy throughout the state.

- 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).

The recording industry continues to work with Brazilian authorities on anti-piracy actions. For example, in gearing up for the end-of-2006 holidays, an investigation into a “*sacoli* network” specializing in computer and technology-related products was busted when its delivery of pirate-related products to a secluded warehouse outside Fox de Iguazu was detected. In mid-December 2006, a co-called “tourist bus” was seized near the “BOM JESUS” control point outside the city of Santa Elena. This bus contained 220 CD-R burners, 310 DVD-R burners, 300,000 labels, 24 printers, 35,000 recorded DVD-Rs and 25,000 recorded CD-Rs, 110,000 blank DVD-RS and 195,000 blank CD-Rs. Twelve people were arrested and the bus was seized; the investigation to identify the financial backers of these goods and this operation remains underway. Also, on January 24, 2007, the Specialized Anti-Piracy Unit of the State of Rio de Janeiro (DRCPIN) conducted a major operation in an open-air market (a camelodromo) the city of Campos de Goytacazes, located about 200 kilometers from Rio de Janeiro. Campos is the fourth largest city in the state and considered a major distribution point for pirate product in the state. Authorities seized over half a million units of optical discs (303,627 recorded CD-Rs and 229,226 recorded DVD-Rs), 68 burners, 18,000 videogames, and 14 computers. More than 200 police officers were deployed and 80 individuals were arrested. On February 2, 2007, Brazilian police in Rondonia state in northern Brazil arrested 14 people in “Parallel 5 Operation,” which resulted in the seizure of 20,000 pirated CDs, DVDs and computer hardware. The authorities said that this gang would buy blank CDs and DVDs in Bolivia and burn copyrighted content in Brazil.

The motion picture industry reports that its best case in 2006 involved an e-commerce action conducted by the Federal Police. Even though there is not yet a formal Cyber Crime division in the Federal Police, MPA and other IPR industries, have seek support from the federal police to conduct important investigations against intellectual property theft in the net. After a six-month investigation, “Operation I-commerce” resulted in 79 search warrants issued in 17 States and the arrests of 20 people, in the largest ever operation of that kind in Brazil. The case was largely publicized in the local media. Furthermore, MPA highlights the improvement in the Brazilian customs work at the border with Paraguay. Finally, in the Northeast there has been growing support from State Prosecutors there.

The local software anti-piracy organization, ABES, established an important partnership with the CNCP in 2006 and more enforcement effort is expected in 2007. BSA and 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. In 2005, 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. Data for 2006 were not available at the time this report was filed.

ESA and its partner association ABES undertook a number of efforts in 2006 to support the work of local enforcement authorities in going after game software piracy in Brazil. Most of these efforts have been focused on major shopping centers in São Paulo and Rio de Janeiro, as well as the burning labs and storehouses that are sources of supply for such shopping centers. For example, from January—September 2006, ESA reports numerous actions involving entertainment software, including: (a) eight actions against labs in Osasco City, Bras de Pina, Brasília, Criciúma, Ribeirão Preto and Dois Córregos; (b) five actions against storehouses in São Paulo, Santo Amaro, and Madureira; (c) 11 actions against major shopping centers in São Paulo, Brasília, Rio de Janeiro; (d) continuous actions against street vendors in São Paulo and Rio de Janeiro; and (e) numerous seizures of products from smugglers in the State of Parana. These actions resulted in the seizures of approximately 575,000 game software products, including PC games, Nintendo cartridges and Game Cube games (though not many of the latter), PlayStation2 games and Xbox games. Despite all of this enforcement activity, none of these enforcement actions have resulted in any prosecution of those found to be engaging in the infringing activity involving pirate video game software products. As a result, sales of pirate software persist in many sectors, including major shopping centers. A prominent example of the problem in Brazil is the case of a factory outside São Paulo (as noted above).

<b>BRAZIL</b> <b>COMPILATION OF CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS</b> <b>AS REPORTED BY THE MEMBERS OF THE</b> <b>INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)</b> <b>2002 – 2006</b>				
<b>ACTIONS</b>	<b>RECORDING</b> <b>INDUSTRY</b> -2002- *2003* 2004 (2005) -2006-	<b>MOTION PICTURE</b> <b>INDUSTRY</b> -2002- *2003* 2004 (2005) -2006-	<b>BUSINESS SOFTWARE</b> <b>&amp; GAME SOFTWARE</b> <b>INDUSTRIES</b> -2002- *2003* 2004 (2005) -2006-	<b>TOTAL</b> -2002- *2003* 2004 (2005) -2006-
<b>NUMBER OF COMPLAINTS FILED WITH POLICE</b>	-206- *190* 113 (86) -279-	-1,825- *2,995* 3,361 (3,045) -NA-	-253- *351* 668 (656) -NA-	-2,284- *3,536* 4,142 (3,787) -NA-
<b>NUMBER OF RAIDS CONDUCTED</b>	-870- *1,018* 936 ( 1,457 ) -2,257-	-1,640- *2,995* 1,829 (2,552) -NA-	-253- *175* 626 (656) -NA-	-2,763- *4,188* 3,391 (4,665) -INCOMPLETE-

<b>NUMBER OF PIRATE COPIES OR MATERIALS SEIZED</b>	-3.78 million- *5,686,253* 5.6 million CD-R/CD; 11.4 million blank CD-R (6 million CDRs/DVDRs 31.7 million blank CD-Rs and DVD-Rs) -6.1 million recorded CD-Rs, 2.7 million recorded DVD-Rs 23.7 million blank CD-Rs, 14.7 million 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) -NA-	-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) -NA-	-4.4 million- *7.5 million* 28.0 million ( 58.7 million) -NA-
<b>NUMBER OF CASES SUSPENDED OR DISMISSED</b>	-40- *29* 96 (5) -5-	-144- *23* 766 (1,259) -NA-	-0- *0* 15 (NA) -NA-	-184- *52* 862 (+ 1,264) -NA-
<b>NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)</b>	-11- *8* 17 (21) -100-	-13- *14* 15 (14) -NA-	-0- *0* 1 (NA) -NA-	-24- *22* 32 (+ 35) -NA-
<b>CRIMINAL SENTENCE ISSUED</b>	-Ranging from: 1-year community service; 2 years community service and fines; 2 years in jail plus small fine; 6 years in jail plus 20 days' fine- *Minimal fines* Minimal fines (Community Service and minimal fines ) -community service and criminal fines- -NA-	-Community service, probation- *Minimum 1-year, maximum 18-months, all suspended* Minimum 1 year, maximum 18 months, all suspended (Ranging from 1 year of community services to 2 years of community services plus 10 to 20 days' fine) -NA-	-None- *None* Commuted sentences (NA) -NA-	-Minimal- *Minimal* Minimal (Minimal) -NA-
<b>RATIO OF CONVICTIONS TO THE NUMBER OF RAIDS CONDUCTED</b>	-1.26%- *0.79%* 1.82% (1.4%) -NA-	-0.79%- *0.47%* 0.8% (0.54%) -NA-	-0%- *0%* 0% (NA) -NA-	-0.87%- *0.53%* 0.9% (~ 0.7 %) -NA-
<b>ACTIONS</b>	<b>RECORDING INDUSTRY</b> -2002- *2003* 2004 (2005) -2006-	<b>MOTION PICTURE INDUSTRY</b> -2002- *2003* 2004 (2005) -2006-	<b>BUSINESS SOFTWARE &amp; GAME SOFTWARE INDUSTRIES</b> -2002- *2003* 2004 (2005) -2006-	<b>TOTAL</b> -2002- *2003* 2004 (2005) -2006-

Note about this chart: 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

**Brazilian prosecutors pursued very few criminal cases.** Prosecutorial attention to copyright offenses is inconsistent, especially in the provinces. There copyright prosecution actions tend to concentrate in Rio de Janeiro and São Paulo, where there are specialized IP units. However, the real problem is in the entire judicial system. Between 2002-2005, the ratio of convictions for copyright infringement to the number of raids run each year have never exceeded 1% (see chart, below; full 2006 data is not yet available). 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 that 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. The recording industry obtained a significant increase in the number of convictions in 2006 (from 21 to 100). The number of suspensions has been decreasing since 2005, mainly because judges and prosecutors are better enforcing the 2003 reform. However, all of the defendants are getting benefits such as community services and minor fines and no effective jail-time convictions were issued. Furthermore, the Brazilian authorities have not placed any attention on key cases involving organized reproduction and distribution, nor on cases involving recidivists. MPA reports there are about 350 recidivist cases still pending.

**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, and no improvement was noted in 2006. 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 major problem has been the lack of manpower and resources in the police expert facilities that must examine the illegal products seized in raids and verify the illegality of the seized product before the case can advance. As most pirated products in Brazil are low-quality copies, the process of identifying and verifying the vast majority of these seized products as illegal is not difficult and does not require highly trained experts. Thus, a fairly low cost solution in increasing the manpower of these facilities would do much to clear out this bottleneck. Delays in criminal copyright infringement cases can extend as long as two to three years in the courts of first instance, and usually longer. (The April 2005 factory case referred to previously on page 5 is a classic example of the lack of progress on infringement cases, even against a major pirate.) As a result, there is a tremendous backlog of cases in the Brazilian courts. MPA reports that it has currently more than 8,200 pending cases of audiovisual copyright piracy in Brazil. One solution often proposed to address the problem of delays has been the creation of a specialized court for copyright matters (see discussion, below). The recording industry has more than a thousand police "inqueritos" pending for prosecution. In one of the most important criminal cases, followed against two industrial CD plants, the inquerito policial (police investigation file) has been delayed by the Police "delegacia" for more than five years with no prosecution at all. One major problem in the anti-piracy actions in Brazil is that police authorities have no term and/or dateline to finish their investigations and deliver the file to the prosecutor. The result is that police "Delegacias" can retain complex files for years.

BSA reports that the Brazilian Government has recently enacted three pieces of legislation since the broader judicial reform project was approved in December 2004. It is hoped that these new efforts will help make the judicial process more efficient. The three changes included: (1) Binding Superior Decisions (*Súmula Vinculante*) – the Supreme Federal Court will organize the activity and put an end to thousands of identical actions. Courts will no longer discuss issues that were previously and repeatedly examined and decided; (2) Extraordinary appeals (*recursos extraordinários*) will be filtered in order to allow only cases which are considered important to the development of the country. The system currently has approximately 100,000 extraordinary appeals per year, causing a huge backlog of cases for the Supreme Federal Court to analyze; and (3) Electronic courts – bureaucracy is a big bottleneck in Brazilian litigation. The target is to abolish paper and physical files, which should be available for consultation by all interested parties. It is still early to see if this trio of systemic reforms will reduce the courts' backlog.

**Enforcement Statistics:** Brazilian authorities seized 47.4 million pirated music CDs, video DVDs and CD recorders in 2006, up 57% from the prior year. There were 29.9 million CDs and 17.4 million DVDs seized, along with 43,900 CD-recorders. Local authorities conducted 1,890 ant-piracy operations in 2006, and about 100 people were sentenced for piracy. Southern Parana state had the largest number seized piratical items, followed by Santa Catarina, southeastern São Paulo, central-western Mato Grosso and southeastern Rio de Janeiro. Below is the chart IIPA members and local associates have been using to track their specific actions. The recording industry confirms that 100 convictions were issued in piracy cases in 2006.

**Border Enforcement:** During 2006, 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. 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. Estimates from some commercial agencies show that over 400 million units of blank media entered Brazil in 2006. The main port of entry was Vitoria. As noted previously, Nintendo did not see much improvement at the Customs level; counterfeit cartridge games continue to flood the country, yet no border seizures occurred in 2006.

- 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. The recording industry reports that at least 44 buses were confiscated during 2006 and approximately (a) 900,000 recorded CD-Rs and DVD-Rs, (b) 2.1 million blank CD-Rs and DVD-Rs and (c) 4,000 burners seized as part of this program
- 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, with reports received from the enforcement authorities in Parana of large volume seizures in 2006. Unfortunately, these seizures alone have failed to stem the flow of illegal game product across the border as the operators of these smuggling operations have continued to escape without suffering any threat of criminal sanction.
- The recording industry reports some successful border actions in November 2006 which involved cooperation of industry with both Brazilian and Paraguayan officials. Industry investigators identified a large shipment of blank optical media being moved by a local distributor in Ciudad del Este, Paraguay. Along the route the delivery personnel added boxes of suspected burners to the existing shipment. With the vehicle heading for Brazil over the "Friendship Bridge" the investigators notified Brazilian Customs of the situation. Based on that information, authorities seized the shipment several miles inside the border city of Foz de Iguaçu. The shipment contained 475,000 blank CD-Rs/DVD-Rs, 20,000 recorded CD-Rs, 35,000 MP3 / CD-Rs, 38,000 film DVD-Rs, 10 printers, 250 CD Burners, 300 DVD burners and more than 100,000 Inlay cards. Investigations continue in Paraguay.

**Civil Damages, Delays and High Bonds:** The Brazilian copyright law contains a pre-established damage provision which is among the highest in the Americas. In recent years, the level of damages awarded in these software cases is unprecedented worldwide with respect to software copyright infringement suits. In 2006, the business software industry continued to bring civil search and seizure actions, usually followed up with the filing of civil damages suits. BSA's program in Brazil includes sending cease and desist letters and bringing civil actions only. In 2006, 2,774 such letters were sent, generating US\$8.6 million in legal software purchases. BSA did not receive significant damages in civil judgments in 2006.

The civil court system in Brazil, like the criminal system, is inefficient and slow. Cases usually take from 18 months to 4 years to come to trial. Due in large part to these unacceptable delays and the lack of attention of judges to copyright protection, BSA currently reports that more than 250 civil cases are awaiting judgment. Some ESA companies also undertake civil actions rather than criminal actions in Brazil. However, these civil cases remain unresolved for long periods of time. For example, Nintendo of America is awaiting resolution of some cases that have been pending for at least five years.

Finally, Brazilian courts also continue to require extremely high expert fees and bond requirements. In some BSA cases bonds of US\$50,000 to US\$100,000 have been 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. This situation has remained unchanged since 2005.

## **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.<sup>10</sup> 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-established statutory

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<sup>10</sup> 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.

damages. Brazil already affords a term of life plus 70 years for works and 70 years following first publication for sound recordings and audiovisual works.

**Copyright bill regarding student copying:** Bill No. 131/06 was presented in the Senate and would establish that a copy of any work by a student has to be limited to 25% of that work. It is currently under review by the Constitutional Commission of the Senate. Separately, Bill No. 5046/2005 would modify Article 46 of the copyright law. This bill, which 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, is currently under review by the Constitutional Commission of the House of Representatives. Brazil should stop the progress of these bills, as their passage would no doubt place Brazil in violation of international copyright mandates.

**Criminal Code amendments 2003 and mixed results:** 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.<sup>11</sup> The maximum penalty of four 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 provide judges the 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.<sup>12</sup> However, effectiveness of the amendment in practice has been diluted because defendants always gets alternative sanctions such as community service and minor fines instead of jail-time convictions. This is mainly due to a lack of attention from prosecutors and criminal judges to the piracy problem.

The business and entertainment software industries remain very 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 remained unchanged, criminal infringement cases brought by the software industry will still be subject to automatic suspension under Law 9099.95. Hence there is a need for a legislative fix (see Bill Number 3.965, below).

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<sup>11</sup> 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\$114) 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.

<sup>12</sup> 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 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.

**Pending anti-piracy legislation:** There are several anti-piracy bills pending in the Congress, all of which are important to the copyright industries.

- **Increase penalties for copyright piracy:** Bill Number 3964/2004 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 impossible 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 since then it has been in the Constitutionality Commission. Recently, the commission released its report for this bill, and it is expected this bill will be filed with the new legislative in early 2007.
- **Increase penalties for software infringement:** Bill Number 3.965/2004 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 was before the Committee of Constitution and Justice, the first sub-committee of the Brazilian House of Representatives.
- **Private sector experts:** Support pending legislation which would allow judges to appoint private sector experts.
- **Destruction of infringing materials:** Support pending legislation which would allow the destruction of infringing products before a final decision.
- **Forensic review:** Support pending legislation which would ease forensic review of all suspected infringing products seized so as to permit sampling.
- **A comprehensive package with CNCP support:** In early 2006, the CNCP's Legislative Working Group was preparing a new substitution bill that will gather all ongoing anti-piracy bills (such as those listed above) and new legislative amendments in order to enhance intellectual property protection in Brazil. Unfortunately, it appeared that provisions on anti-camcording and protection against the circumvention of technological protection measures were not included in this package, at the request of representatives from the Ministry of Culture. This package will likely be presented by the Government to the Congress in the first half of 2007.

**Tax Evasion:** A "fiscal crime" provision was inserted, with the approval of the software industry, in the 1998 Software Law. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independently of BSA's civil actions against software piracy. 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 2006. It seems clear that the Receita Federal and the respective state tax authorities are dedicating no resources to pursuing these tax evasion cases.

## **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 has been made in 2006. 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 Inc. (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, and thereby be able to compete against pirates. The high tariffs and taxes have contributed to the slow entry of console manufacturers into the market, and also contribute to the flood of grey market, pre-modified consoles and pirated software into Brazil. This matter needs to be adequately addressed by the Brazilian Government so that the purveyors of pirated products do not continue to thrive at the expense of legitimate businesses.

**Possible “theatrical window”:** ANCINE, the Brazilian National Film Agency, has stated that it is likely to issue regulations on release windows, specifically on the period of time between theatrical and home entertainment release. MPA strongly opposes this measure which, if implemented, would limit the ability of audiovisual businesses, including MPA member companies, to make business decisions based on market conditions. In general, MPA 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.

**Possible regulation of the already existing video quota:** A video quota was initially passed in January 1992 and is now part of the current Film Law (TM 2228-1/01). This quota dictates that distributors of home entertainment product must release a percentage of national titles. This law was published in 2001 and has never been implemented. However, ANCINE has been in contact with home entertainment distributors asking for their suggestions on the quota level to be set. Although MPA is undertaking efforts to avoid imposition of the quota, the video quota is expected to be regulated in 2007.

**Digital TV:** In 2006, Brazil chose the ISDB-T standard for the Brazilian digital terrestrial TV system. However, Brazil has not yet announced which system will adopt to protect digital TV content. MPA calls the attention to the need to select a method of protection against unauthorized re-distribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

## **IPR TRAINING AND PUBLIC AWARENESS**

There have been extensive copyright- and enforcement-related trainings in Brazil. The copyright industries (primarily the film, music and recording, business software, entertainment software and book publishing groups), on their own initiative as well as working with the CNCP and other business groups, conduct numerous trainings, seminars and workshops with Brazilian enforcement officials, at the national, regional and state levels. During 2006, U.S. Government agencies supported a series of Training Events in Brazil. There was a three-day event, which for the first time, was targeted for plural law enforcement audiences, and managed to create synergy and cooperation from law enforcement from different States and units. The first Event was held in Brasilia (March 2006) followed by Porto Alegre (May 2006), Recife (July 2006) and Belo Horizonte (September 2006). In each training session there were representatives of Federal, Civil and Military police, customs, municipal authorities, and prosecutors, among others. Also MPA had other smaller local training sessions in several cities, in conjunction with other IPR Industries, primarily music and software. ESA and its local partner ABES were also active on the training front, and as noted, joined with MPA on some of those trainings. Additional training by ESA-ABES was also conducted in São Paulo, Rio de Janeiro, Curitiba, Santos and Campinas. The recording industry reports two training sessions with the state police and highway patrol in Riberão Preto (São Paulo State) and one seminar for the cyber crimes units of the Federal Police.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### BULGARIA

**Special 301 Recommendation:** IIPA recommends that Bulgaria remain on the Watch List for 2007.

## **EXECUTIVE SUMMARY**

During 2006, internet piracy in Bulgaria became an alarming issue, no longer a distant second to the longstanding problem of physical (hard goods) piracy. In addition to Internet and mobile piracy, the massive burning of copyrighted materials on CD- and DVD-Rs remains a key element of a landscape still dominated by piracy. Indeed, these illegal discs are still easily available in all major cities, and the influence of organized crime elements remains notorious. One of the main reasons for continued high levels of piracy, however, are the prosecutors and the courts, who in practice consistently fail to treat copyright offences as serious crimes. Unjustified delays permeate the process, and the whole system lacks transparency. Only recently have senior Bulgarian prosecutors shown a welcomed willingness to improve this situation. During 2006 the interagency council on IPR met regularly and provided a platform for the private sector and the authorities to work together and achieve progress in addressing Bulgaria's various anti-piracy enforcement issues. The Ministry of Culture has been increasingly active in supporting the copyright sector in its fight against piracy.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Take more actions against Internet piracy, especially ISPs and LANs facilitating illegal traffic in copyright materials in the online environment. Increase resources for the Cyber-Crime Unit.
- Ensure the Optical Disc Law provides that manufacturing of discs infringing copyright/neighbouring rights automatically leads to a revocation of the license, and step-up regular plant inspections.
- Increase *ex officio* enforcement actions against retail piracy, and in support of local decrees banning street sales of copyrighted products especially in Black Sea and other tourist resorts.
- Continue to strengthen the judiciary, continue training prosecutors, including investigative magistrates and judges on IPR and 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.
- Continue to improve border enforcement to halt the importation and exportation of piratical products.
- Give tax authorities the power to seize infringing copyrighted products and impose administrative sanctions (fines).
- Take administrative action against all users of recorded music that fail to pay royalties.
- Support country-wide pro-copyright education and anti-piracy awareness campaigns.

## Legislation

- Adopt a new Law on border measures for protection of IPRs to replace the Council of Ministers' Ordinance thus providing a law which would directly implement EC Regulation 1383/2003. At present, the current Bulgarian regulation is not fully enforceable.
- Ban street sales of cultural and copyrighted products nationwide, and enforce these bans.
- Introduce legal protection for artists' names against unauthorized use by mobile and Internet operators.

<b>BULGARIA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>2</sup>	7.0	75%	7.0	80%	6.5	75%	7.0	80%	7.2	83%
Business Software <sup>3</sup>	24.0	69%	21.0	71%	18.0	71%	16.0	71%	6.2	68%
Entertainment Software <sup>4</sup>	NA	NA	21.0	81%	NA	50%	NA	NA	21.9	91%
Motion Pictures <sup>5</sup>	NA	NA	8.0	NA	4.0	35%	4.0	25%	3.0	20%
Books	NA	NA	NA	NA	NA	NA	0.3	NA	0.3	NA
<b>TOTALS</b>	<b>31.0</b>		<b>57.0</b>		<b>28.5</b>		<b>27.3</b>		<b>38.6</b>	

On January 1, 2007, Bulgaria joined the European Union. Judicial issues and IPR issues were part of its accession negotiations. When the Commission confirmed Bulgaria's accession, it noted progress on key issues, which included Bulgaria's fight against corruption, improving judicial reform and prosecuting organized crime.<sup>6</sup> As part of the U.S.-Bulgaria engagement over the last

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Bulgaria under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> The recording industry reports that physical piracy has decreased. However, Internet and mobile piracy have increased dramatically. As a result, the consolidated percentage figure is down slightly, but losses, due to a weaker US\$, the relatively substantial impact of Internet and mobile piracy and a contracted legitimate market have kept the estimated loss figure at the same level as in 2005.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bulgaria, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> 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.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>6</sup> Press Release IP/06/1257 of the European Commission, 26 September 2006, "Commission confirms Bulgaria's and Romania's EU accession on 1 January 2007, completed by a rigorous package of accompanying measures," link at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1257&format=HTML&aged=0&language=EN&guiLanguage=en>.

decade, several trade tools have contained IPR components, such as Special 301<sup>7</sup> and the Generalized System of Preferences (GSP)<sup>8</sup> trade program (as an EU member, Bulgaria has been graduated from the GSP program). Bulgaria also has three bilateral agreements with the U.S. which contain IPR obligations.<sup>9</sup>

## **COPYRIGHT PIRACY IN BULGARIA**

**Internet Piracy:** The introduction of high-speed cable Internet resulted in a favorable environment for a substantial increase in illegal online distribution and use of computer programs, music, films, and entertainment software. This increasing piracy, from large Internet exchange sites that are well-recognized worldwide, to local private networks that use SMS messaging for commercial payment of unauthorized downloads, threaten the legal film market. These pirate products are accessed via Internet clubs and cafés (the number of Internet cafes has noticeably decreased but there are no reliable data available on the current number), as well as through more than 200 so-called local area networks (LANs) in neighborhoods across the country. LAN members pay a monthly subscription free for access to a local server storing unlicensed software and other information resources. 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, perhaps more, which often serve as centers for consumers to rip and copy DVDs and CDs, and trade files of copyrighted materials.

The 2006 trend in Internet piracy has been a massive migration from offering access to illegal content in the free hosting area towards peer-to-peer file sharing. Copyrighted material can still be downloaded from certain sites hosted on servers managed or controlled by some of the local ISPs, but torrent trackers prevail in the illegal Internet distribution. In such an environment the role of the “warez” sites has significantly diminished and the majority of such sites appear to be hosted on servers located abroad.

Despite some encouraging signs from certain Government bodies, a consistent enforcement approach against all forms of Internet and mobile piracy has not yet materialized. For example, the Cyber-Crime Unit needs the full support of the Chief Prosecutor and the Minister of Justice in order to effectively proceed against increasing Internet piracy. Some important steps were taken in 2006 to overcome the growing problem of Internet piracy. For example:

- In 2006 a major structural reform took place in the Ministry of Interior. As a result, the former National Services to Combat Organized Crime were renamed to General Directorate to Combat Organized Crime (GDCOC) and the former sector Intellectual property rights, trade marks,

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<sup>7</sup> 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/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. Previous IIPA Special 301 filings on Bulgaria are posted at <http://www.iipa.com/countryreports.html>.

<sup>8</sup> During the first 11 months of 2006, \$55.9 million worth of Bulgarian goods (or 13.2% 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 22.9% increase over the same period in 2005.

<sup>9</sup> 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. Second, in 1994, a Bilateral Investment Treaty (BIT) between the U.S. and Bulgaria took effect; the BIT contains 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.

computer crimes and hazard was renamed to Cyber Crime Unit and restructured to address all computer related crimes including Internet piracy.

- Throughout the year the chief officers of the Unit went through a consistent training program on the investigation of cyber crimes. Nevertheless the administrative capacity of the Unit is still insufficient and its officers need further training. In order to increase the efficiency of the Unit's work adequate technical equipment should be provided and sufficient budget to outsource technical assistance and expertise must be ensured.
- In terms of methodological guidance in investigating cyber crimes a series of trainings in association with the ABA/CEELI and the private sector were conducted and completed with the publication of the "Investigation of Computer Crimes" manual to serve as a desk book for police officers and police investigators.
- Within the IPR industries' Internet Strategy launched in 2005 a number of meetings between the industries, the Cyber Crime Unit of the GDCOC and the major local ISPs were conducted and agreements for exchange of information and assistance – reached.<sup>10</sup>
- The Internet piracy issue was the top priority subject of discussions at sessions of the Ministry of Culture's Council for Protection of IPRs with the participation of the enforcement agencies, representatives of the judiciary, the Bulgarian Telecommunication Agency and the industries.
- In order to ensure the full support of the Chief Prosecutor, to effectively proceed against the increasing Internet piracy, the issue was raised and discussed in all meetings with the Chief Prosecutor and his team at the Supreme Cassation Prosecutor's Office. A Deputy Chief prosecutor in charge of IPR was appointed and experts were allocated to closely monitor the respective cases.
- Last but not least, some major Internet raids were conducted against infringers who illegally made available over the Internet a huge volume of copyrighted material – music, films and software. Criminal investigations against the offenders were initiated.

Taking into consideration the above positive developments, what is still needed to improve the Internet piracy situation in Bulgaria is consistent and intensive enforcement and prosecution of all types of Internet offenses. Some 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. Right now the public still has a complete sense of impunity, especially when up-loading and down-loading illegal music files on the Internet.

The BSA reports that the business software industry has been conducting an intense local Notice-and-Take-Down Letter program successfully requesting the ISPs to delete illegal content hosted on their servers.

**Optical Disc Piracy in Bulgaria:** OD piracy is really focused on burning. 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 does continue in underground workshops. OD piracy of business software has decreased in the recent years, largely due to the increase of Internet-based piracy. Still pirate ODs of business software – primarily burned CD-Rs – can be obtained on the local market.

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<sup>10</sup> The GDCOC Cyber Crime Unit 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 GDCOC 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.

Bulgaria's OD plant licensing system is not watertight. The legitimacy, in particular, of foreign orders for OD manufacturing is not properly verified by the authorities. The main priority at this stage is to ensure that infringement of copyright and neighboring rights is, as such, regarded as a breach of the licensing rules under the optical disc licensing law and automatically leads to a withdrawal of the manufacturing license, even when the discs carry the SID Code. Such a measure should be urgently introduced. The relevant law enforcement authorities should carry out regular surprise inspections at all plants and report back to, amongst others, the Ministry of Culture and interested rightholders groups.

**Local plant capacity:** Bulgaria has nine optical disc plants with thirteen lines, for a capacity of 45.5 million discs per year. 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 legitimate demand for optical discs in Bulgaria (all formats) is far below 10 million copies per year. A significant part of the orders come from abroad. "Media Systems," for example, manufactured 14 million DVDs during 2006. However, as indicated before, foreign orders are not properly verified by the authorities when licenses are granted. This seriously increases the risk of illegal production for export.

**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, prostitution, contraband and drugs). This is especially the case at the Black Sea resorts and the mountain ski resorts. The undeniable fact that organized crime elements are involved in piracy makes it very dangerous for the private sector to take anti-piracy actions in those areas. 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 "Sunny Beach" at the Black Sea. 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.

**Music and Sound Recordings:** The piracy of U.S. sound recordings and music remains high in Bulgaria; the overall level of music piracy is estimated over 60%, and the piracy of foreign repertoire albeit lower than in 2005 thanks to a much improved effort by the Government and certain authorities, still stands at an unacceptably high 75%. The pirate business in 2006 was dominated by illegal music burnt on CD-Rs and massive Internet and mobile piracy. Like in many other economic sectors in Bulgaria, part of the pirate trade is run by organized criminal syndicates. Streets and markets, especially at the seaside resorts, are full of pirated music CD-Rs. Estimated trade losses to U.S. companies due to physical and digital music piracy in Bulgaria is estimated at \$7.0 million in 2006.

**Entertainment Software:** The Entertainment Software Association (ESA) reports that piracy affecting its member companies remained a major problem in 2006. Pirated entertainment software products are openly sold on the streets, even in Sofia and other large cities such as Plovdiv and Varna, and also remain readily available at flea markets and via the Internet. While factory-replicated pirated discs continue to enter the country from Russia, Turkey and Asia, the pirate market for optical disc products is now predominantly burned product. Piracy of cartridge-based entertainment software products is also of concern with pirate and counterfeit product still being shipped into Bulgaria, and also widely available at informal retail outlets. The entertainment software industry reports a continuing problem of piracy at Internet cafés, of the 3,000–4,000 cafés, only 50% are licensed by

entertainment software publishers. There has been a significant growth in Internet piracy, particularly for downloading pirated game software.

**Business Software Piracy:** Piracy of business software remains widespread. BSA's 2006 preliminary estimates show the piracy rate for business software at 69%, inflicting losses to U.S. companies estimated at \$24.0 million. Efforts by the criminal enforcement agencies are undercut 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), especially in small and medium enterprises. The illegal practice by computer system builders of distributing pre-installed unlicensed software (Hard-disk Loading or HDL piracy) continues to be a problem in 2006. The software industry has seen a change in HDL tactics: in order to avoid liability, system builders offer installation of unlicensed software outside the premises where the purchase is made (e.g. at the customer's home), or customers are required to sign false declarations that the software installed on the PCs belongs to them and the system builder has performed the mere technical act of installation without any criminal intent. 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 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.

**Audiovisual Piracy:** The Motion Picture Association (MPA) reports that Internet piracy has become a major threat to the legitimate film market in Bulgaria. Although law enforcement officials, such as the Cyber-Crime Unit of the Organized Crime Division, are willing to take action, the lack of upper-level government support for enforcement may indicate that local political interests are involved. In addition, 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. BullACT, the local motion picture anti-piracy operation (of which MPA is a member) reports 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. MPA's local licensees believe their business is significantly down.

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

## **COPYRIGHT ENFORCEMENT IN BULGARIA**

**Overview:** Cooperation between right holder organizations and police authorities is at a satisfactory level, and for some industries, has continued to improve throughout 2006. For example, all police stations have received instructions to act against piracy – though a lack of human resources and competing priorities do not always permit such action. In 2006, a change to Article 172a of the Criminal Code finally covered the possession of pirated materials. The main reason for continued high levels of piracy, however, are the judiciary and the courts, who in practice consistently fail to treat copyright offenses as serious crimes. In particular, Investigating Magistrates are lacking



initiative and constitute an endemic delaying factor in the criminal investigation and prosecution process. In addition, unjustified delays continue to permeate the process. Very few of the cases that eventually 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, continue to typify the obstacles to effective judicial enforcement of copyright.

During 2006 -- especially after the election of the new chief prosecutor -- significant progress was made on improving relations with prosecutors. In October 2006, the Chief Prosecutor to the National Police distributed to all regional police stations guidelines on the criminal prosecution of IPR crimes under Article 172a of the Criminal Code. The Minister of Justice is more sensitive to this problem, and the CyberCrime Unit is better funded. All police stations have received instructions from the Minister of Justice to act against piracy, but human resources and competing priorities do not always allow such action.

In late 2005, the Bulgarian Government established a new inter-agency council on IPR to include deputy ministers. Including more senior officials in this council is important because the prior inter-agency body was not very effective.<sup>11</sup> During 2006 the Council met regularly and, under the leadership of Deputy Minister Kileva, has provided a welcome platform for the private sector and the authorities to work together in achieving progress in addressing Bulgaria's various anti-piracy enforcement issues. For the first time in Bulgaria, an inter-agency body has managed to address specific problems and produce tangible results.

**Internet enforcement:** The Cybercrime Unit of the GDCOC has begun taking actions. In addition, a joint initiative of the local groups of the IP industries (IFPI, MPA and BSA) together with GDCOC is under way with an aim is to work out a comprehensive database of the torrent trackers, the companies behind them, the ISPs they use, as well as any other information that might be helpful to the investigation. The data thus collected will be analyzed and a file will be prepared and sent to the Chief Prosecutor (Supreme Cassation Prosecutor's Office) for an opinion and instructions for further action.

Here are a few examples of Internet actions in 2006. In February 2006, the Cybercrime Unit of the GDCOC conducted operations in the towns of Veliko Tarnovo, Gorna Oriahovica and Liaskovec. These led to the discovery of the largest two servers in Northern Bulgaria that were making protected material available for download to an unlimited number of users. The servers contained five terabytes of pirate music, movies and software - content equal to 7,000 compact discs. Charges were pressed against a 26-year old individual from Liaskovec.

In April 2006, the first raid against P2P file sharing was conducted. Three of the most active uploaders of illegal software, music and movies in Bulgaria were arrested by the Cybercrime Unit of the GDCOC. They had allegedly uploaded and made available to the public 22 terabytes of infringing files over the past year. A computer with a 500 gigabyte hard drive and discs containing more than 15 terabytes of illegal content were found and seized during a house search. Charges have been brought against these three suspects.

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<sup>11</sup> 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.

In May 2006, officers of the Cybercrime Unit of the GDCOC and Sofia Investigation Services arrested another two individuals – an administrator and a system operator of an illegal website. A computer system with a 500 gigabyte hard drive, a router computer system, laptop, three hard discs and over 200 recorded CD-Rs were seized from their homes, which had been turned into a control center for the biggest illegal file exchange in Bulgaria. These two people were arrested and charged. A bail of EUR 5,000 was set for the three defendants. In this particular case the defendants were using a high-speed optical internet service which enabled them to download from foreign sites materials that require large amounts of bandwidth, such as business software applications and the latest films and music, and distribute them to Bulgarian Internet users. It was ascertained that one suspect alone had uploaded over 112TB of suspected infringing content. Criminal investigations against all of the above offenders were initiated for Internet piracy under Article 172a of the Penal Code. The investigations are still ongoing, and none have yet reached the courts.

In addition, administrative cases and some small police raids mainly against Internet clubs and cyber cafes or street pirate OD resellers were initiated and conducted *ex officio* either by the Ministry of Culture's Copyright Office Inspectorate, the tax authorities or economic police. 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).

**Street piracy in tourist areas:** Interestingly, widespread Internet piracy has affected street pirates who dealt in piratical hard goods. Street piracy remains prevalent, particularly in the tourist resorts. One possibility of addressing this problem would be to introduce local regulations banning streets sales of copyrighted products. .

**Police cooperation is good, but significant problems remain.** The motion picture industry reports that in 2006, BullACT continued to work numerous cases and enjoyed excellent cooperation from the law enforcement authorities. Through the third quarter of 2006, BullACT conducted 49 raids on street vendors, 29 raids on labs/distributors, and 34 actions against internet sites. Over 35,200 pirate optical discs and 71 burners were seized. Police did not take any *ex officio* actions, all actions required rightsholders' involvement. 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.

The recording industry reports that on 20 and 21 January 2006, 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 totalled 13,000 DVDs, DVD-Rs, CDs and CD-Rs, 4 computer configurations, 5 printers, 22 burners and a scanner. Five preliminary investigations were instituted. The Tax Administration made reports on the discovered infringements and the seized materials. However, one year later, the private sector still has no information concerning the results of the police investigation, possible indictments or sanctions issued by the Tax Administration. Enforcement actions of this nature will only have lasting effect if they are followed by tough and swift prosecution/sentencing, which has not been happening and remains the main problem in Bulgaria today.

During 2006, BAMP took part in 61 raids, 59 of which were successful. During these raids enforcement authorities seized 51,653 units of CD-R and DVD-R with music, movies, entertainment and business software; 35 computer systems with 28 burners, 20 servers, used in the course of Internet piracy, 12 printers and 2 scanners. The recording industry understands that 15 cases have been handled by the national investigation agency. In addition, BAMP reported for 2006 about 4 preliminary investigations, 38 examinations carried out by the police, 2 indictments under Article

172a of the Penal Code, 9 statements of infringement drawn up by the Tax Administration. However, the recording industry has not received concrete information about penalties handed down and imposed against persons convicted of intellectual property crimes in Bulgaria in 2006.

BSA conducts an intensive enforcement program in Bulgaria. BSA makes every effort to assist the investigation, speed up the process and appeal adverse decisions by investigators, prosecutors and judges. BSA stresses that effective enforcement is impossible without direct, unimpeded cooperation between the state authorities and the right holders. In this respect, BSA is making every effort to establish good working relations with the Ministry of Interior and its specialized agencies, with the Ministry of Culture and its Copyright and Neighboring Rights Directorate, and with the bodies within the Prosecutor's Office and the judiciary. 2006 marked some very positive developments in these relationships which created a favorable environment for improving IPR enforcement. Over the long term, however, Bulgarian authorities must implement the law consistently in order to realize a noticeable drop in piracy.

BSA enjoys good cooperation with the police and investigation services, especially with the Cybercrime Unit of the General Directorate to Combat Organized Crime (GDCOC) which has resulted in steady and intensive police enforcement against all types of software crime throughout the years. However the police enforcement agencies still lack the administrative capacity, qualified and trained personnel and adequate technical equipment and support that are necessary to investigate IPR-related crimes – especially cybercrimes. Another obstacle that hinders more active and efficient work on behalf of the police is the shortage of funds for outsourcing specialized technical assistance and forensic expertise.

In addition, the Ministry of Interior launched a program in 2002 in which the police started issuing protocols of warning to legal entities suspected of using unlicensed software. This program has produced notable results in raising awareness; many companies have legalized their software assets. In 2006 alone, BSA sent some 642 notifications to the police for issuance of warning and instruction. 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. Due to the delay in the structural reforms within the Ministry of Interior, this initiative was not launched in 2006 as initially scheduled, and is now postponed until some time in 2007.

**Prosecutions, court procedures and judicial sentencing remain ineffective.** Again in 2006, the bottleneck in prosecutions (few investigations completed and brought to court, 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:** The recording industry reports that the predominant delay factor it has experienced involves the investigative magistrates. Prosecutors are now more interested and slightly more pro-active in certain cases. However, investigative magistrates are and continue to be the bottleneck. In fact, the European Union has called for an urgent reform of this highly counter-productive system involving the investigative magistrates.

Generally speaking, unwarranted delays dominate criminal enforcement actions, in large part because of the time it takes to move a case from the police, through the police 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 the custody of the investigation bodies or in their original condition) and caseloads can become unmanageable.

**Difficulties in pursuing prosecutions:** Most prosecutors and particularly judges still fail to appreciate the seriousness of IP crimes. Recently, senior Bulgarian prosecutors have shown a welcome and much-needed willingness to improve this situation. But it will take much longer before the general approach and practices reflect this new attitude on a regional level.

The IP industries were the driving force for setting up a working group with experts from the Supreme Cassation Prosecutor's Office for developing unified procedural practices for prosecutors in the investigation and prosecution of IPR-related crimes. The methodology is to be circulated among the regional prosecutors' offices as mandatory instructions aimed at avoiding in the future contradictory practices and motions which are observed currently. This project is expected to be completed in the first half of 2007. Along the same lines, throughout 2006 prosecutors from the Supreme Cassation Prosecutor's Office and the regional offices were intensively involved in a training program on investigation and prosecution of IPR crimes organized by the U.S. Justice Department resident in Sofia and assisted by the local IP industries. This program continues in 2007 and is expected to bring about change of attitude, unification of the practices and overall improvement of the judicial enforcement of IPR. Another positive development is the fact that a Deputy-Chief Prosecutor in charge of IPR was appointed to supervise the work of the regional prosecutors and address complaints against wrongful prosecutors' motions.

Despite the positive developments it is observed that regional prosecutors are still refusing to prosecute software crimes and consider them serious offences. Prosecutors have returned critical evidence to defendants, such as seized computers and hard-drives, or have refused to allow such items into evidence even though it has been properly seized. In a number of cases, prosecutions have been abandoned altogether without cause. Still 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. Frequently, those prosecutors who have 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.

BSA reports that the work of the Bulgarian judiciary remains a problem. Despite the positive developments within the Supreme Cassation Prosecutor's Office in 2006, the new management's approach has not yet reached the regional level where the IPR crimes are actually investigated and prosecuted. There are still prosecutors offices and regional courts which (i) are not willing to address and pursue software crimes; (ii) lack uniform procedural practices; (iii) lack knowledge and experience in copyright infringements resulting in dropping cases without valid grounds, slow and overly formalized procedures and inadequate and non-deterrent judgments.

BSA reports that it was very difficult to maintain proper and comprehensive statistic charts on enforcement as until recently Bulgarian enforcement agencies, prosecutors and courts did not provide feedback to the right owners on the development of the software cases. With the latest

amendments to the Penal Procedure Code of April 29, 2006, however, the investigative bodies were obliged to furnish the investigation materials to the injured party before sending them to the prosecutor, thus giving the right holders the opportunity to keep better track of cases including those initiated *ex officio*. Relatively good track is kept on the police and border enforcement as those actions are usually conducted with the substantial assistance of the BSA or upon a BSA notification or lead. In 2006, BSA initiated or assisted in conducting 5 end-user raids, 7 hard-disc-loader raids, 2 OD reseller raids and 13 Internet raids amounting to a total of 27 police enforcement actions upon which criminal investigations were initiated against 30 alleged offenders.

Upon completion of the preliminary investigation of the criminal trial the case is brought to court where at the first court hearing the injured party (the right holder) is entitled to file for consideration a civil claim for compensation of damages. Unfortunately no more than 20% of such attempted claims are allowed by the court, thus precluding the right holder from supporting the indictment and tracking the further development of the case as a party. Despite this obstacle, BSA can report that four cases have been completed with verdicts in 2006 (one final, one appealed and two plea bargains). Unfortunately neither the number of verdicts, nor the punishment (low fines) can produce deterrence and prevention.

**Burdensome expert reports:** A longstanding issue which continued in 2006 involved the 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.

**Non-deterrent sentencing:** Bulgarian courts fail to impose deterrent penalties in criminal cases. 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 2006, only four cases were completed with a verdict. Compared with the size of the damages to the right holders, the low fines imposed on the offenders are clearly not deterrent sanctions.

**Border measures need strengthening.** Border controls must be significantly improved in particular now that Bulgaria has become part of the external borders of the EU Common Market .The Bulgarian market, albeit to a lesser extent than before, is still facing ongoing pirate imports from Russia, and Ukraine, 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. .

# **COPYRIGHT LAW AND RELATED ISSUES IN BULGARIA**

**Law on Copyright and Neighboring Rights (1993, as amended):** The copyright industries were generally pleased with the refinements made in 2005 (in effect as of January 2006) to the existing Copyright Law. To review, Bulgaria's Law on Copyright and Neighboring Rights entered into force on August 1, 1993. Further amendments to the copyright law were made in 1994, 1998, 2000, 2002 and 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. The 2005 amendments aimed at fixing existing shortcomings in advance of EU accession. Overall, 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:

**Optical Disc Law of 2005:** The Bulgarian Parliament adopted the Law on Administrative Control for the Manufacture and Distribution of Optical Discs in September 2005 (this law replaced the Title Verification Decree under which the OD plants had been licensed.) Before and at the time of its passage, the copyright industries identified several shortcomings in the OD Law.<sup>12</sup>

The key concern remains the effective and improved enforcement of the current law. The OD law should remain in place (albeit with the clarification about license revocation) and its enforcement should be improved. Specifically, clarification is needed to the effect that manufacturing of discs infringing copyright and neighboring rights automatically leads to a revocation of the license. Such infringement should be regarded as a breach of the licensing rules and should lead to a withdrawal of the manufacturing license, even when the discs carry the SID Code. If the Bulgarian Optical Disc Law does not foresee such a measure, it should be urgently introduced.

Simply put, the Bulgarian Government must enforce the OD 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. The recording industry notes that that currently there is no evidence of illegal CD production of pirate music and the OD system seems to be effective enough to keep the existing OD plants from producing music discs. However, this situation may be different for movies on DVD and videogames. One plant in particular seems to be "untouchable" from OD enforcement and reportedly churns out millions of DVDs and exports huge quantities.

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<sup>12</sup> Unfortunately, the law failed to introduce effective enforcement rules which industry believed to be essential to ensure compliance. For example: (1) The law does not require the control bodies to conduct inspections on a regular basis and upon receiving complaint from right holders; (2) 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; (3) The law omits a reference to the participation of experts during inspections conducted by the control bodies. (4) 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.

**Criminal Code:** In August 2006, the Bulgarian Parliament adopted substantial changes to Article 172a.<sup>13</sup> Industries indicate it is fair to say that many of the copyright sector's recommendations, including criminalization of possession of infringing goods and minimum penalties, were adopted. However, this change does not cover the requested formal basis for participation by right holders in criminal trials in the capacity of "injured party."

**Criminal Procedure Code:** Although a new Criminal Procedure Code was adopted, we reiterate that further reforms are needed 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.

## **IPR TRAINING AND PUBLIC AWARENESS**

Several trainings are held every year, often in coordination with other industries and some in coordination with the U.S. Embassy. For example, on October 16-17, 2006, a seminar sponsored by USAID and the Bulgarian National Institute of Justice was held in Sofia, and attended by judges, prosecutors and police officers.

On behalf of the film industry, 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.

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. BSA organized or participated in the following training events: (1) In early June 2006 a training seminar for public prosecutors took place which in early

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<sup>13</sup> Article 172a of the Criminal Code now reads:

(1) Any person who records, reproduces, distributes, broadcasts or transmits or otherwise uses another person's subject matter of copyright or neighboring rights, or copies thereof, without the consent of the right owner required by law, shall be punished by imprisonment up to five years and a fine up to five thousand leva.

(2) Any person who without the consent required by law, holds in possession physical copies containing other person's subject matter of copyright or neighboring rights amounting to a value in large size, or holds in possession matrices for replication of such physical copies, shall be punished by imprisonment from two to five years and a fine from two thousand to five thousand leva.

(3) In case the offense under paragraph (1) and (2) is repeated or considerable damage has been incurred, the punishment shall be imprisonment from one to six years and a fine from three thousand to ten thousand leva.

(4) *(New)* In case the offence under paragraph (2) is in particularly large scale, the punishment shall be imprisonment from two to eight years and a fine from ten thousand to fifty thousand leva.

(5) *(Former paragraph 4)* For minor cases the perpetrator shall be punished under the administrative procedure in compliance with the Copyright and Neighboring Rights Act.

(6) *(Former paragraph 5)* The object of the crime shall be forfeited in favor of the state, notwithstanding whose property it is and shall be destroyed.

November was followed by the first module (covering the Plovdiv appellate prosecutors' office region) of follow-up events on a regional scale. Additional 4 modules to cover the remaining o appellate regions are envisaged to take place in the first half of 2007. (2) At the end of June 2006, a U.S. Justice Department-funded IPR enforcement training for police and investigators was organized in cooperation with U.S. Federal Bureau of Investigation (FBI) and BSA, and was held in Sofia at the Academy of the Ministry of Interior. (3) Another training event on the investigation and prosecution of IPR crimes involving prosecutors and judges was included in the agenda of the National Institute for Justice (the magistrate training center) and held in cooperation with BSA in mid-October in Sofia. (4) In mid-November 2006, BSA participated in a training conference organized by the International Development Law Organization (IDLO) dedicated to the protection of copyright and neighboring rights, including computer software.

The recording industry reports that in 2006 there were a series of training activities with the support and financial aid of the U.S. Embassy. In June 2006, a seminar on criminal prosecution of IPR crimes took place with participation of representatives of the Prosecutor's Office, the Patent Department, the Culture Ministry and representatives of the District Police Agency. The U.S. Embassy has financed five similar seminars in which the participants are from the Appeal Prosecutor's offices. These seminars show a growing interest of the prosecutors in IPR crimes and lead to a useful dialogue with the judiciary.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### COLOMBIA

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2007.

#### **EXECUTIVE SUMMARY**

The copyright industries report that no significant improvement to halt widespread copyright piracy in Colombia occurred in 2006. Legitimate copyright markets remain threatened by widespread piracy. Optical disc piracy is on the rise and street piracy remains uncontained. Piracy at Internet cafés also has grown in the last year, and anti-piracy actions are being taken. Government agencies have yet to enforce software legalization program, or stop illegal photocopying on university campuses. More police actions and administrative investigations are needed, prosecutors must pursue piracy cases, and judges should impose the deterrent-level sentences afforded in the amended criminal code. Border control remains weak. IIPA supports the Free Trade Agreement process and urges U.S. Congressional ratification of the U.S.-Colombia Trade Promotion Agreement.

#### **PRIORITY ACTIONS IN 2007**

##### **Enforcement**

- 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 brought 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 copyright law by pursuing 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;
- Encourage courts' application, in appropriate cases, of higher penalties adopted in the recent criminal code amendments;
- 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);

- 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;

### **Legislation**

- Develop and promote legislation which will address the higher standards of copyright protection and enforcement which will be expected after the Trade Promotion Agreement is ratified.
- Eliminate trade barriers already existing in Colombian law, such as: the broadcast TV quota, screen quota and box office tax.

<b>COLOMBIA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006 <sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Composition	62.5	71%	47.7	71%	51.6	71%	49.4	70%	56.3	65%
Business Software <sup>2</sup>	48.0	56%	45.0	57%	46.0	55%	37.0	53%	21.7	51%
Motion Pictures <sup>3</sup>	NA	NA	41.0	75%	40.0	75%	40.0	75%	40.0	90%
Entertainment Software <sup>4</sup>	NA	35%	NA	NA	NA	NA	NA	NA	NA	NA
Books	6.0	NA	6.0	NA	6.0	NA	5.4	NA	5.3	NA
<b>TOTALS</b>	<b>116.5</b>		<b>139.7</b>		<b>143.6</b>		<b>131.8</b>		<b>123.3</b>	

Free Trade Agreement negotiations with Colombia and other Andean nations began in May 2004. On February 27, 2006, Colombia and the U.S. concluded negotiations, and on August 24, 2006, President Bush notified the Congress of his intent to enter into a TPA with Colombia. On November 22, 2006, the U.S. and Colombia signed the U.S.-Colombia Trade Promotion Agreement. The TPA offers a vital tool for encouraging compliance with other evolving international

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Colombia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Colombia, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> ESA's estimated piracy rates for Hungary in 2006 reflect on the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in country. 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.

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.<sup>5</sup> Colombia also 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).<sup>6</sup> Once the TPA is in force, these trade benefits for Colombia will end.

## **COPYRIGHT PIRACY IN COLOMBIA**

**Record and music piracy:** The recorded music market in Colombia decreased by 3.6% in local currency year-to-date through November 2006. Other than a slight improvement in 2005, the market has declined four out of the last five years and now represents only 56% of its 2001 local currency level. This decline is taking place despite an expanding economy that has spurred greater consumer spending. With many releases of successful local and international artists, it is clear that only piracy is holding the market back. Estimated losses due to music and recording piracy in Colombia jumped to \$62.5 million in 2006, with 71% piracy levels. It is practically impossible to maintain a viable, legitimate market. The Colombian Congress has taken some steps to facilitate the anti-piracy campaign by passing a law that increases criminal penalties and criminalizes circumvention of technological protection measures, a necessary step to protect the digital market. Unfortunately, the scope and frequency of raids is not sufficient to create a deterrent effect. In addition, more border measures are necessary to curb the high levels of blank media importations. The industry estimates that over 150 million blank CD-Rs came to Colombia mostly from Panama, and this importation exacerbates the piracy situation. Most of the pirate product is still being distributed through hundreds of stalls in open and covered flea markets known as “San Andrecitos.”

**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 due to a Ministry of Education initiated anti-piracy campaign. Unfortunately, this campaign has not yet resulted in significantly 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.

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<sup>5</sup> The final text of the U.S.-Colombia TPA IPR Chapter is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html). Colombia also signed five IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

<sup>6</sup> See IIPA's March 28, 2006 Comments to the U.S. International Trade Commission regarding the Peru Trade Promotion Agreement at [http://www.iipa.com/pdf/IIPA\\_PeruFTA\\_Letter\\_to\\_USITC\\_032806.pdf](http://www.iipa.com/pdf/IIPA_PeruFTA_Letter_to_USITC_032806.pdf). In terms of trade benefits Colombia has received, during the first 11 months of 2006, \$170.1 million worth of Colombian goods (or 2% of Colombia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, and \$4.5 billion worth of Colombian goods entered the U.S. under the ATPA program for the same period,

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. Preliminary 2006 estimated losses due to business software piracy rose slightly to \$48.0 million, while the piracy level dropped one point to 56%. Although Colombia has one of the lower software piracy rates in Latin America, piracy continues to cause commercial harm to the business software industry.

**Audiovisual piracy:** Optical disc piracy of film entertainment product is becoming embedded in the distribution chain. As in all Latin American markets, the Colombian home entertainment market has switched from rental VHS to sell-through DVDs, and black markets such as San Andrecitos, are becoming the main distribution chain for pirate movies. Much of the pirate product is burned in small- and medium-sized facilities, sometimes close to the pirate markets itself. Major cities like Medellin and Cali are infected with pirated products. In addition, the growth of the internet continues and more cyber cafés are involved in piratical activities. Importation of blank media and pirated audiovisual products from Panama, Ecuador and Venezuela.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that piracy of entertainment software (across all platforms) continues to be of concern, with counterfeit video game cartridges imported from Southeast Asia remaining prevalent in informal markets.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

**National Anti-Piracy Campaign needs reinvigoration and operational authority:** The Colombian government has not taken significant steps to develop a national anti-piracy campaign and policy. In 1995, the National Anti-Piracy Campaign, an interagency group supported by both government agencies and the private sector, was first established. During 2006, members of the campaign continue to meet to improve public awareness, trainings, and similar educational efforts. While IIPA and its members support those efforts, we have noted before that this National Campaign is not an operational entity that the industries view as having an immediate impact on strengthening on-the-ground enforcement efforts to deter piracy throughout the country. That kind of high-level political will and coordination continues to be missing in Colombia.

**Police run raids 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. Some good news last year is that actions have been commenced by the authorities, working with the affected industries, on combating piracy at internet cafés.

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

During 2006, the recording industry and the motion picture industry combined their forces for joint anti-piracy operations, continuing an effort started in mid-2005. Paramilitary groups and narco-traffickers controlling the pirate sale of CDs in some flea markets in Bogotá remain a major concern. Moreover, the results for 2006 are significantly lower than last year - six million units of recorded and blank media seized the past year compared to 10.3 million in 2005 - all of which is contributing to greater market instability. Unfortunately, all these raiding efforts have had no effect on reducing piracy. The industry reports ten convictions in 2006, but no one was incarcerated for piracy.

Last year also reflected a major anti-piracy effort against Internet cafés by the recording industry. In September 2006, anti-piracy groups across Latin America carried out a coordinated campaign to combat illegal music downloading at Internet cafes. The operation, named "Cyber Shutdown," took place in cities in Brazil, Mexico, Costa Rica, El Salvador, Colombia, Chile and Argentina, with the support of more than 2,000 law enforcement officers. IFPI reports that the strategy behind this campaign was based on intelligence developed through local research that indicated internet cafés were becoming a significant factor in the growth of digital and physical music piracy. In Colombia, 22 people were arrested following in-depth investigations by authorities and the recording industry. Also, the raids targeted 417 different locations where over 1,900 computers were inspected containing over 4 million pirate files.

In another initiative, the recording industry reports that in April 2006, the Colombian National Police Cyber crimes units (*Grupo de Delitos Informaticos*) in conjunction with the Attorney General's office concluded a six-month multi-jurisdictional internet investigation involving the so-called "home delivery" market of illicit music, films, games and software in Colombia. This unit had only been in existence for six months at the time of this action. These websites were taking orders online, for mostly music and films "custom" CD's, and using messengers to deliver the products to the buyer's home. The investigation focused on seven websites in the cities of Bogotá, Cali, Medellín and Manizales. Seven search warrants were executed. The investigation resulted in the arrest of seven people, and the seizure of 9 computers, 23 burners, 4,324 music CD-Rs and 3,318 film DVDs. In addition, authorities seized accounting ledgers, customer lists, receipts and banking records and the websites were taken down. Although these websites were acting independently, their volume of activity represented a significant amount of music, game and film pirate products found online in Colombia. This campaign produced eight convictions and set up the stage to continue attacking other centers being used to download and burn illegal files.

**Colombian courts fail to issue deterrent criminal sentences.** Even with all the criminal raids, the Colombian legal system does not result in deterrent penalties or criminal sentences. Even if defendants are found guilty, judges will suspend the sentence or fine, so infringers have no incentive to cooperate and resolve their cases. 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 but efforts by the authorities are improving.** 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 150 million blank CD-Rs were officially imported during 2006. Many of them are priced below market for purposes of importation at 3 cents per unit. 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.

There are several solutions to this problem, which IIPA and the industries have suggested in prior filings. It is critical for any effective anti-piracy campaign that custom authorities begin to implement measures to track entry of blank CD-Rs. One 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).

The recording industry (IFPI) reports, on a positive note, that there have been some big seizures at the border. During August 2006, the Customs Police (*Policía Fiscal Aduanera*) seized a total 4.5 million units of blank optical media and 2.9 million jewel boxes from two importers that utilized the Port of Buenaventura as their base of operation. This investigation started based on a Memorandum of Understanding (MOU) signed with Panamanian Customs in 2005 in which IFPI Latin America and Panamanian Customs officials agreed to exchange information on suspect blank optical media shipments transiting through the Panama Canal Zone destined to neighboring countries in Latin America. IFPI provided Colombian customs officials with information that identified these blank media importers as having imported over 125 million units of blank media at an average unit price of \$.01 per unit in 2004-05. Investigation into these importing companies revealed that they utilized a group of "front" principals to form these companies and assume all fiscal and legal responsibilities. The investigation is continuing, and more arrest and seizures are expected. There were at least another three companies involved in the importation of approximately 250 million under-valued blank optical units over a two-year period. The prosecutor will be charging the individuals behind these companies with a host of violations that include tax evasion, illicit enrichment, presentation of false documents and fraud. One of the companies mentioned above will be pursued under the Organized Crime statute and will have their assets seized by the authorities.

Also, in view of the significant volume of blank media coming into Colombia, Customs authorities, with support from the industry's anti-piracy group, began to take some preventive actions mentioned above during 2006. As the major source of blank optical discs coming to Colombia, Panama was negatively impacted by these measures and decided to file a dispute resolution request with the World Trade Organization. Unfortunately, Colombian authorities decided to suspend the program until they reach some type of accommodation with Panama. The recorded music industry would like to encourage Colombian Customs to reinstate a program that would sensibly discourage the importation of blank media that exceeds normal, legitimate uses and are channeled to piracy.

**Civil actions, *ex parte* search orders, delays and high bonds.** 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.

**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 was written 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.

## **COPYRIGHT LAW AND RELATED ISSUES IN COLOMBIA**

**Copyright Law of 1982, as amended:** Colombia’s 1982 copyright law (as amended in 1993 and 1997, and including a 1989 decree on computer programs) is relatively modern. 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).

Given the higher standards of copyright obligations and enforcement measures contemplated in the TPA, however, Colombia will have to make additional reforms to its copyright law and enforcement law in order to fully comply (taking note that the TPA does contain transitional periods), with issues such as: refining copyright rights on distribution, making available, rental, and importation; affording statutory damages; clearly protecting temporary copies; and affording ISP liability along with notice and takedown procedures.

**Criminal Code (2001) and 2006 amendments:** 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, but these violations are only punished by fines. Unfortunately, the 2001 criminal code allows home arrests or bail during the process, and sentences of up to three years can be suspended. In practical terms, that scenario translated into no jail terms for defendants.

In July 2006, amendments to the Criminal Code, supported by the copyright industries, entered into effect and the legal landscape looks much brighter. First, there was an increase in the maximum prison term, from five to eight years, and a corresponding rise in the minimum term, from two to four years. With the new guidelines, judges will be able to keep accused individuals in custody for the duration of their trial and also impose effective jail time as part of their sentences. Second, criminal penalties were developed for the circumvention of technological protection measures in accordance with WIPO Treaties. Previously, these violations were punishable only by fines. Third, the amended code now imposes criminal penalties for those who provide fraudulent information used for distribution of public performance or broadcasting fees to copyright owners.

**Criminal Procedure Code (2005):** Judges need to be encouraged to implement these recent amendments. 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 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**

The motion picture industry reports that Colombia, through different laws, adopted a series of discriminatory and protectionist measures to defend the national audiovisual sector, such as:

- 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.

## **IPR TRAINING AND PUBLIC AWARENESS**

The recording industry reports that its trade group and anti-piracy team participated in over 14 training sessions for personnel from local and federal police, customs, prosecutors and Copyright Office. The sessions reached more the 600 people involved in enforcement or intellectual property affairs.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ECUADOR

**Special 301 Recommendation:** IIPA recommends that Ecuador remain on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

IIPA has recommended for years that it is essential that Ecuador take immediate steps to improve its ineffective record on enforcement and reducing piracy levels. Those copyright sectors who remain in the Ecuador market indicate that 2006 was a difficult year to obtain effective criminal and civil enforcement. In fact, the software industry pursued only administrative remedies last year. The administrative authority, IEPI, rarely focuses actions outside of Quito and its resources are strained. Border controls remain weak. While IIPA supports the Free Trade Agreement process, negotiations between the U.S. and Ecuador were suspended in May 2006.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Make copyright protection and enforcement a matter of national policy and improve public awareness.
- Encourage police and administrative authorities to use their *ex officio* authority to investigate and take action against copyright infringers.
- Create special police anti-piracy task forces in Quito, Guayaquil and Cuenca to take anti-piracy enforcement actions against pirate street vendors, distributors and manufacturers.
- Improve border enforcement, especially to track importation of optical media.
- Provide IEPI with the necessary budget and national plan to combat piracy effectively.
- Instruct prosecutors to pursue criminal copyright cases.
- Have the National Judiciary Council appoint specialized judges for intellectual property matters, including criminal cases.
- Educate judges on intellectual property issues until the specialized IPR courts (which would have only civil jurisdiction) are created (the creation of such courts was required under the 1998 Intellectual Property Law).
- Implement and execute the tools and remedies provided in the 1998 copyright law and regulations, such that petitions for *ex parte* civil orders are excluded from the random assignment process.

### **Legislation**

- 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.
- Develop and 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.).

<b>ECUADOR</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2004-2006 <sup>1</sup></b>						
INDUSTRY	2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	33.0	98%	26.3	90%	20.0	95%
Business Software <sup>2</sup>	16.0	68%	9.0	69%	7.0	70%
Motion Pictures <sup>3</sup>	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.5	NA	2.5	NA
<b>TOTALS</b>	<b>51.0</b>		<b>37.8</b>		<b>29.5</b>	

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)—both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners.<sup>4</sup> In addition, the FTA negotiation process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil, and customs systems.

## **COPYRIGHT PIRACY IN ECUADOR**

The recording industry reports that in 2006, burned CD-Rs remained the preferred format for most pirate products containing sound recordings and music. Music piracy is so widely spread in the country that burned CDs are manufactured and sold not only on streets and flea markets but also in shopping malls in Quito and Guayaquil. No *ex officio* actions are conducted by the police authorities on a regular basis. Guayaquil, the second largest city in the

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Ecuador under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Ecuador, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> 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, 2006 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20final%2006082006.pdf>. In terms of trade benefits Ecuador has received, during the first 11 months of 2006, \$65.4 million worth of Ecuadorian goods entered the U.S. under the duty-free GSP code, and \$4.7 billion entered under the ATPA.

country, lost its last standing legitimate music point of sale, becoming a city of almost 100% pirate products. Piracy represents more than 90% of the market in Ecuador, with no signs of improvement. In contrast, the official music market for Ecuador in 2006 was calculated at 400,000 units which represents a decrease of 21% compared to 2005. 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. 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 amount of blank CD-Rs and DVD-Rs entering the country every year exceed 80 million units and a similar amount enters as contraband.

The Business Software Alliance (BSA) reports that 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) continued to be the major source of software affecting its industry during 2006. End-user piracy rates remain high among Ecuadorian businesses of all sizes, from small family businesses to large financial institutions.

The major form of piracy afflicting the U.S. book publishing industry in the region continues to be commercial photocopying. Photocopy shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported.

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.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

**IEPI's anti-piracy enforcement efforts for the software industry:** 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 its relationships with IEPI continued to improve during 2006. BSA representatives maintain regular contact with both IEPI and the district attorney in charge of investigations of IP violations. BSA supported efforts by the IEPI to elevate the protection of intellectual property at the national policy level.

BSA reports that in 2006 it successfully conducted five administrative 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. IEPI has no resources and personnel to conduct raids in high traffic areas in Quito and Guayaquil. Due to the magnitude and complexity of the music piracy problem IEPI has

become ineffective. A coordinated action between police, prosecutors, IEPI and municipalities could make a real difference in the situation but there is a lack of political will to combat piracy.

**Criminal actions:** Efforts developed in 2005, between the recording industry and police authorities, came to a stall in 2006 due to the lack of action from prosecutors and IEPI. The Specialized IPR office conducted only one major raid in Quito against music and audiovisual piracy during the whole year with no significant results and no criminal prosecutions against responsible individuals. Despite the exchange of information between local industry representatives, IEPI and the IPR prosecutor's office on the links between importers or blank media and pirate goods manufacturers/sellers, no investigations were opened in this regard. Finally, no criminal actions were filed in view of the lack of prosecution.

The creation of special anti-piracy task forces in Quito, Guayaquil and Cuenca will improve controls on the 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. So far, no task forces have yet been created.

**Need for specialized IP courts:** The National Judiciary Council has not yet created specialized courts for intellectual property matters. Delays in the creation of specialized IP courts (which have only civil jurisdiction) continue despite a requirement in the 1998 Intellectual Property 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.

**No civil cases:** BSA reports that in 2006, it did not use the Ecuadorian civil system, preferring instead to use administrative remedies with IEPI. Back in 2003, BSA reported significant difficulty in obtaining effective civil remedies then and as a result, their campaign in recent years has not included civil litigation. Problems involved the regular rejection by judges of BSA requests for precautionary measures (such as search and seizure) and high bonds being required to be posted before such measures could be issued.

## **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 copyright, trademark, patent, as well as semiconductor 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 basically 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; it has never received a response.

**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.

## **IPR TRAINING AND PUBLIC AWARENESS**

The lack of public awareness about the importance of copyright protection and enforcement in the general public carries over to many law enforcement officials, many of whom view piracy as a social problem, not as an economic crime. BSA provides workshops, seminars, and training programs to different audiences, such as businessmen, universities, and others.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### GREECE

**Special 301 Recommendation:** IIPA recommends that Greece be placed on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

During 2006, the level of copyright piracy in Greece remained among the worst of western European countries. Nevertheless, certain industries report very good cooperation with the police, and have obtained numerous seizures. These industries also note excellent cooperation from the Hellenic Copyright Office (OPI) and the Ministry of Foreign Affairs (MFA). Other industries have had much more difficulty. The lack of deterrent sentences continues to frustrate rightsholders and ineffective operation of the Greek judiciary frustrates both criminal and civil efforts to enforce the law in any meaningful manner.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Announce a national anti-piracy campaign, aimed at creating specific and measurable results (including more raids, more prosecutions, more criminal (and non-suspended) sentencing and at deterrent levels, more public awareness).
- Direct prosecutors to bring cases more swiftly and argue for deterrent, non-suspended penalties.
- Instruct all courts (including appeals 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).
- Continue good cooperation with the police on inspections, raids and other anti-piracy activities; encourage greater cooperation from the Immigration and Municipal police.
- Initiate greater involvement by the tax police (YPEE) in anti-piracy actions affecting all copyright sectors, expanding on the good work they are doing in the software sector. (1) It is important that YPEE continues the software sector project that has begun by sending direct mails (letters) to all Greek companies with more than 50 employees. (2) YPEE should impose administrative fines for both sellers and buyers of pirate music and other pirated copyright products. (3) YPEE should continue its software audits when it does tax inspections and publicize any enforcement actions that result from such audits. In addition, YPEE should make music and sound recordings audits when inspecting commercial enterprises such as bars and restaurants.
- Give law enforcement authorities the mandate and full competence to pursue investigations on university campuses where Internet and hard goods piracy is rampant. (Police do not have jurisdiction to pursue IPR cases on university campuses based on the outdated academic asylum rule.)
- 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.
- Encourage Government ministries and agencies to proceed to legalize business software usage in public agencies.

- Institutionalize a new Special Operational Department for IPR issues within YPEE.
- Judges serving on the new special IP (civil) courts in Athens and Piraeus should be directed to work only on IPR cases and be relieved of their duties dealing with other non-IPR civil and commercial cases. In addition, such IP courts should be established in Thessaloniki and Patras. Also, the scope of these courts' work should be expanded to deal with criminal copyright cases.
- Improve IPR training and education for police, prosecutors, judges, and customs officials.
- Fill the vacant position of Director for the Hellenic Copyright Office without delay.

### **Legislation**

- Adopt legislation to amend the copyright law to implement the EU Directives, which includes administrative fines.
- Develop legislation to provide Municipal Police throughout the country with the authority to arrest and prosecute street vendors for intellectual property infringements.
- Adopt amendments allowing YPEE to impose administrative sanctions.
- Support development of amending legislation to permit ISPs to reveal identities of users suspected of copyright infringement.
- Revise the 1988 law which places an administrative tax on theatrical box office revenues.
- Support legislation which might be supported by the Ministry of Foreign Affairs whereby immigrant street vendors engaged in any copyright violation will be deported.

<b>GREECE</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2005-2006 <sup>1</sup></b>				
INDUSTRY	2006		2005	
	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	30.0	60%	26.0	60%
Business Software <sup>2</sup>	106.0	65%	88.0	64%
Motion Pictures <sup>3</sup>	NA	NA	72.0	NA
Entertainment Software <sup>4</sup>	30.2	68%	NA	NA
Books	NA	NA	NA	NA
<b>TOTALS</b>	<b>166.2</b>		<b>186.0</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Greece under Special 301, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Greece, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> 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 GREECE**

The piracy situation in Greece remained grim in 2006 despite excellent cooperation from the police. Hard goods piracy remains engrained in cities throughout the country, and appears to present the biggest enforcement challenge. Internet piracy is still in its early stages; 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 infringing subscribers. So far, rightsholders have asked the Cybercrime Division of the Greek Police to obtain such orders. The software industry recently has asked the Hellenic Copyright Office (OPI) to take the initiative to support an amendment to the law on this point. For year-end 2006, copyright industry sources indicated there are 11 operating optical disc plants in Greece, with 31 production lines, with a capacity of 108.5 million units/year.

**Music and record piracy:** The recording industry reports that physical piracy in Greece grown tremendously and the music industry is suffering from the continuous drop of sales, and that situation did not improve in 2006. Physical piracy rates have increased during the last five years: 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. Meanwhile, Internet piracy has worsened considerably. Piracy of sound recordings and music in Greece represents 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. It appears that the majority of people involved in most of the infringing actions are African immigrants, and especially Nigerians. The Nigerians have gradually taken control of the whole piracy chain, starting with duplication and wholesale distribution and ending retail sale (this is similar to the situation in Spain). These criminal networks continue to flourish because the Greek Government does not strongly apply its immigration laws and the judicial system does not effectively deal with copyright offenses.

**Audiovisual piracy:** The Motion Picture Association (MPA) and its local anti-piracy organization, EPOE, report that the main piracy problem for the film industry in Greece concerns DVD-Rs, mainly by street vendors and mini home labs, along with retail shops. Internet piracy is still relatively insignificant as broadband penetration is still very low. After a period of relatively "stable" piracy levels, audiovisual piracy has again been exacerbated likely due to the importation of pre-release titles into Greece – one or two factory pressed copies – which are then copied into hundreds with Greek subtitles added. 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 elements, but it has been impossible to collect credible information. A number of nationalities, such as Greek-Russians, Bulgarians and Poles, are involved in importing and subtitling DVDs, but they cater solely to their own compatriots, and the outlets are few and isolated to those areas where there is the heaviest concentration of those nationalities. In sum, Greece is a very fragmented market for the duplication, distribution and sale of pirate DVD-Rs, usually by foreigners seeking political asylum.

**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, while CD-R burning continues to be prevalent (for optical disc based video games, market is reportedly now 100% burn-to-order, with retail shops dedicated to serving this activity. While the level of cooperation from the Greek customs authorities has generally been good, it is essential that border authorities be adequately trained and enforcement capabilities be further strengthened to adequately address continued importation of pirated cartridge-based 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. Similar to the experience of the movie industry, Internet piracy is not yet a major concern for entertainment software publishers as, unlike much of Europe, Internet and P2P piracy in Greece is not yet prevalent.

**Book piracy:** Illegal commercial-scale photocopying of academic textbooks continues in Greece, causing damage to higher education textbook publishers. Photocopy shops near university and college campuses regularly process orders for entire classes of students. 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.<sup>5</sup>

**Business software piracy:** End-user piracy in Greece remains the biggest piracy threat to the business software industry. In addition, 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) reports that its preliminary estimates that the 2006 business software piracy rate in Greece was 65%, well above the EU average of 34% and the highest of all countries in the enlarged EU region, including the countries in Eastern Europe. BSA's preliminary estimated 2006 losses due to piracy rose to \$108 million in 2006. Due to a lack of consistent enforcement activities, the level of piracy experienced by the business software industry remains at an unacceptably high level in both the private and public sectors, and even within the Public Administration. Meaningful progress can be expected only if the National Police and the Tax Police (YPEE, formerly SDOE) energize their enforcement activity. Such activity on the part of YPEE began in earnest in 2006. YPEE sent direct mail to all enterprises in Greece that employ more than 50 employees advising them that they are subject to audits of the software in use in their businesses. 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 performing software audits; it appears, however, that this hotline was not used by YPEE.

## **COPYRIGHT ENFORCEMENT IN GREECE**

There have been several positive notes regarding enforcement in Greece over the past year. Due to continuing cooperation between industry sources and police officials, numerous raids have been conducted resulting in significant seizures. Special IP courts have been established in Athens and Piraeus (to hear only civil IP cases); industry will continue efforts to expand such courts to Thessaloniki and Patras, and to incorporate special IP sections that will deal with the criminal aspect of IP violations in three or four major cities rather than all over Greece. Intellectual property courses have become part of the required curriculum in schools for judges. An unofficial

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<sup>5</sup> The publishing industry has also recently received a rather disturbing report of possible unauthorized use of material by the Ministry of Education itself. Certainly, the Greek Government should take all steps to ensure that its ministries use only content for which the copyright holders have granted permission.

task force was formed in Northern Greece which was organized by the U.S. Consul General to Thessaloniki, and includes representatives from the police, customs, and Coast Guard; its work has resulted in significant increase in *ex officio* actions. Agencies that attended the last OPI-led organized meeting of the yet-official task force included: Public Order, Finance, Foreign Affairs, Education, Economic Crimes, Internet Crimes, Municipal Police, Immigration, Trade, Copyright Office, and White Collar Crime and Justice. They were joined by industry representatives from EPOE/MPA, BSA, TMEye Hellas and IFPI.

**Good cooperation with police and numerous raids:** MPA reports that the relationship between the local anti-piracy organization for films (EPOE) and local law enforcement authorities has been excellent and is constantly improving. In 2006, *ex officio* actions in audiovisual cases increased by 168 percent. In 2006, EPOE conducted 662 investigations, 164 raids, and initiated 83 criminal actions. The Economic Crimes Divisions of the Greek Police and YPEE (the Tax Fraud Units) have increased their *ex officio* actions substantially. In cases of *ex officio* actions, EPOE is usually called upon to identify the confiscated DVDs or DVD-Rs. Because the arrested person has to be taken to a prosecutor's office for arraignment within 24 hours of the alleged offense, significant travel throughout Greece is required.

The recording industry reports only half-year statistics for 2006, which show 985 raids and 892 offenders caught in the first six months of 2006. There has been good cooperation with the police. The main problem is the lack of prosecutors – only four on duty for the greater Athens area at any point in time, so it is very difficult to mobilize them for a series of raids as they are stretched very thin. The other problem is with Greek courts, especially their wholly inadequate sentencing practices. In 2005, the Greek Police arrested 2,045 suspects of copyright infringement in a total of 1,953 raids. IFPI's Greek 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's Greek 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 two to three years.

On the criminal front, in 2006 BSA executed five criminal raids, sent 57 warning letters and 38 follow up letters. BSA also filed three civil actions filed, obtained three court decisions, and agreed to three settlements.

**Few prosecutions:** 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 serious bottlenecks in criminal prosecutions and logjams in the Greek courts hinder effective deterrence. The situation appears to be improving for certain industries but not others. In some instances, misdemeanor sentences have increased over the past year because the Courts have begun to apply minimum sentences (no less than one year). In certain other instances, sentencing in felony cases has also increased with sentences up to six and seven years and fines ranging from 7,000-15,000 Euros (US\$9,675-\$19,350). Additionally, some Courts, especially in

Athens and Pireaus, are no longer suspending fines – even when they find mitigating circumstances. This is a significant departure from 2005. The situation could be further improved if the Immigration Service and the Municipal Police, which appear either to be busy with other cases or to lack the legislative mandate to act, could be directed to assist in anti-piracy actions.

EPOE believes that the Greek police are working hard and making arrests. Unfortunately, the vendors, typically immigrants, usually walk free the very same day with a meager three month jail sentence that is suspended pending appeal (usually filed immediately). In Greece, there is no record of prior convictions as prior records listings are updated only after a criminal Court sentence has become irrevocable. Consequently, street vendors often times have many unlisted previous convictions and are let go with light, suspended sentences. They never pay a fine, nor spend a day in custody or jail. Reports suggest that the Greek police are similarly frustrated with this result. EPOE also suggested that if the street vendors – who never show up for their appeals – were required to pay bail pending the hearing before the appellate Court, we might see some significant results. The industries understand that the Ministry of Foreign Affairs intends to introduce legislation whereby immigrant street vendors engaged in any copyright violation will be deported and that Greek Embassies worldwide will be notified so that new visa requests by copyright violators will be denied.

The recording industry believes that the judicial system is broken. Despite close to 12,000 raids and the confiscation of millions of pirated discs since the beginning of 2000, African infringers are still dealt with as poor immigrants fighting their way to survival by “merely selling some CDs and not committing serious crimes.” As a result, the one-year imprisonment sentence provided by law usually becomes three to four months imprisonment, but suspended for three years, and the €3000 fine is simply stricken entirely. In the rare occasions of more severe penalties, the defendants make an appeal, managing to put their sentence on hold. Also, the defendants often do not appear in court on the day of their scheduled hearing. The industry is seeing similar tactics in the felony courts which deal with major cases (duplication and distribution). The hearings are set two to three years after the arrest, and in the meantime, the defendants are not kept in prison awaiting their trial. This manipulation of the judicial system is in practice translated to lack of punishment and the only problem for the infringers is the loss of their confiscated discs and the time they spend in the court.

BSA reports that, for the first time, severe penalties were imposed on two pirates. One case resulted in five years imprisonment and the other in seven years imprisonment, and neither case was suspended.

**The lack of prosecutions and deterrent penalties:** The most pressing problems are 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 particularly 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 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 the 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 two to three or even five to ten times, and have returned to their music piracy business.

Penalties continue to be too low to seriously deter piracy, 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 there are more convictions and fewer acquittals.

**Circulars from the Supreme Court:** The recording industry worked with the Supreme Court to issue a judicial circular to assist in disseminating the Court's view on the importance of IPR protection. Below are excerpts from circulars issued by the Greek Supreme Court which were addressed to all the judges nationwide, calling them to apply properly the copyright law:

"...although it is a right (intellectual property) deserving judicial protection, more than the material property, we still observe a tolerance of people who are by the way not deserving our sympathy at all. These people are shamelessly breaking the law (civil and penal), to their own benefit and by profession and they offend the international treaties that provide civil damages and punishments for the crack on every kind of piracy and for the effective protection of the rights of the rightsholders. In this way not only the protection of the rightsholders but also creativity itself is harmed, meaning the very source of culture and our country which has taken the responsibility to apply international treaties is laid to censure and is treated like a field of unhindered criminal activities of those preying the intellectual property rights..."

"...We remind you the... circular of the Chairman of the Supreme Court, referring to the demanding need of more effective protection of intellectual property, with more reliable and severe application of the provisions of the law 2121/1993 (copyright law) and we call you to comply, given that the piracy phenomenon has taken tremendous dimensions, for which a share of responsibility belongs to the observed lenient penal treatment from the side of the Courts addressed to people participating in the pirate network and especially the street vendors..."

**Good cooperation with the Copyright Office and MFA in 2006:** Additionally, MPA reports that both the Hellenic Copyright Organization (OPI) and the Ministry of Foreign Affairs (MFA) have been very responsive to the audiovisual industry's (EPOE) requests and have also taken initiatives on their own which tend to strengthen the ability to combat piracy. OPI is relatively cooperative, but its operations have not been working as smoothly as they might since it has been without a director since July 2006. The MFA, even though well intentioned, has not been very effective.

For example, the Hellenic Copyright Office (OPI) supported EPOE's public outreach initiatives and the pre-holiday anti-piracy "Blitz" in short notice. OPI has also worked with EPOE to successfully introduce intellectual property subjects into the Judges' Academy curriculum as a mandatory subject. Upon EPOE's request, the Office has already taken steps to meet with other Greek Government officials on intelligence sharing and succeeded in getting an institutionalized Task Force off the ground. OPI has begun to coordinate with EPOE, BSA and IFPI on the strategy and plans for 2007's Intellectual Property Day in Greece. OPI has also taken steps to address the

piracy problem on university campuses by preparing anti-piracy posters to be displayed at university campuses and requesting that the Deans assume responsibility. And finally, OPI is planning seminars for judges and prosecutors with the first in a series to be held in Thessaloniki, at the Judges' Academy, in April 2007.

The Ministry of Foreign Affairs (MFA) has also been fairly supportive of efforts of rightsholders groups. For example, it has been collaborating on the establishment of a permanent anti-piracy Task Force (in parallel with another Task Force to be established at the Hellenic Copyright Office). MFA has expressed its intention to introduce legislation whereby street vendors engaged in any copyright violation will be deported and Greek Embassies will be notified of such actions so that new visa requests by copyright violators will be denied. MFA has begun consulting with rightsholders groups on anti-piracy issues and has expressed its willingness to liaise with the Parliament and the Cabinet to advance their shared anti-piracy objectives. The MFA is also initiating a Press Outreach Program to sensitize reporters to intellectual property issues and is working with rightsholders to introduce intellectual property issues and training into the Police Academies. Finally, MFA has indicated its support for increased funding exclusively for anti-piracy matters.

**Civil copyright infringement actions:** BSA notes that YPEE (Tax Police) is not conducting 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 actions:** BSA reports continued good cooperation with YPEE during 2006. YPEE launched a project by which audit letters regarding illegal software use will be sent to all Greek companies and this action will be followed by audits. To start, only companies that employ more than 50 employees received this letter. 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 and financial penalties on companies found to be using unlicensed software; the full Parliament still has to vote on this amendment.

It is important that YPEE continues the project that it has begun, by sending letters regarding software legalization to all Greek companies. The project has several steps, all of which need to be done on time, in order to make the whole project effective. So far, letters have been sent to companies with more than 50 employees, and follow-up letters also have been mailed to those companies which did not reply to the first letter. Next, raids should be taken against those targets identified as high risk. The next round of letters were to have been sent to those companies with less than 50 employees in the January 2007 timeframe.

**Tax police and music actions:** In contrast, however, the recording industry reports that in 2006, 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.)

**Border Enforcement:** An ESA member company reports that the Greek market continues to be flooded with imports of counterfeit cartridge-based games. In the past year, no seizures appear to have been made by the customs authorities. Border enforcement authorities should receive additional training so that the problem of counterfeit imports is adequately addressed in practice.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

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 in its Copyright Law of 1993 (Law No. 2121/93, as amended). Several copyright- and enforcement-related legislative proposals are under consideration in Greece.

**Implementation of the EU Enforcement Directive:** During 2005, the Hellenic Intellectual Property Organization prepared the draft legislation to implement the EU Enforcement Directive. This amendment, aimed at harmonizing the Greek legislation with EU Directives 2001/84 and 2004/48, was filed in the Parliament during November 2006. On December 12, 2006, this bill was discussed by the competent Commission of Educational Affairs of the Parliament. It needs to be voted by the Parliament in order to be enacted.

One of the proposals in this legislative package will give copyright infringers the option of paying an administrative fine in lieu of criminal prosecution. This amendment, if ratified, will operate as follows: street vendors caught in possession of up to 500 music CDs and up to 50 DVD-Rs will be given the opportunity to pay an administrative fine of 20 euros for each music CD and 50 euros for each DVD-R, but the total administrative fine will be not less than € 1,000. Considering the local film industry's concerns that an administrative fine system would in fact exacerbate the level of piracy in Greece (as this system could not be restricted to first-time offenders and as the availability of the accused's antecedents (including any administrative fines) to a later court were complicated by general administrative and legal difficulties relating to the availability in Greece of offender information).

MPA lobbied for the complete removal of audiovisual products from the proposed law, and MPA's amendments to that effect were approved by the Parliament's Culture Committee on 12 December 2006. The bill continues to apply to other copyrighted materials, with the support of those industries. For example, BSA believes that the new Article 65A in this bill is particularly important. It contains an administrative penalty provision (new article 65A). BSA believes that the administrative penalty provision will make the whole procedure faster and above all, it will motivate the authorities, especially YPEE, to execute raids, because they will create direct income for the government by imposing the administrative penalty. If this can be combined with a new Department within YPEE which would be competent for, and specialized in, IPR cases and thus illegal software audits would be included in YPEE's daily plan, then software piracy rates may be notably reduced. The music and recording industry also supports this administrative fine proposal. However, it should be noted that this is now a somewhat strange hybrid piece of legislation. At the end of the day, it might turn out to be too complicated and bureaucratic to work in any efficient manner; it is premature to say. It may turn out that a ban on street sales might be a better solution.

**Administrative remedies regarding YPEE:** 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.

**Enforcement authority against street vendors:** The recording industry favors a general ban on street sales of audio, audiovisual and software products. (For example, Romania introduced a general ban that had a very positive result, where pirate street sales almost completely disappeared. Such legislation should be developed to provide Municipal Police throughout the country with the authority to arrest and prosecute street vendors for selling without a license. Others feel that seeking a new ban on selling infringing products will yield little as it is already illegal to sell infringing material—there is no need for another law or regulation prohibiting what is already prohibited.

**Government software legalization:** BSA reports no progress on government legalization efforts in 2006. 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.

**Obtaining personal identities from ISPs:** Current law prohibits ISPs to provide personal data of suspects who commit intellectual property offences via the internet. The business software community has sent a letter to OPI asking the agency to take the initiative to amend Article 4 of Law 2225/1994. Several discussions have taken place with OPI, yet no action has been realized for the moment.

**Box Office Administrative Tax:** MPA urges the revision of Law No. 1597 (implemented in February 1988) which includes a box office admission tax ranging from 4%-12% of net ticket prices, with the actual percentage determined by the size of the city in which the cinema is located. (Cinemas benefit from certain tax rebates when screening Greek films.) The tax revenues are the source of government subsidies offered to produce and promote Greek films. According to local MPA member company representatives, this tax has continued to seriously affect box office admissions due to the resulting increase in ticket prices.

## **IPR TRAINING AND PUBLIC AWARENESS**

The copyright industries continue to offer numerous IPR-related training sessions to Greek enforcement officials. BSA has provided training and technical assistance to YPEE. Some entertainment software publishers are in the process of scheduling training for the Customs authorities in 2007. MPAA reports that EPOE in 2006 has conducted a series of Seminars for police, customs and White Collar Crime agents at the U.S. Consulate General in Thessaloniki in conjunction with the IFPI, and it is currently planning a seminar at the Ministry of Culture with the assistance of the Hellenic Copyright Office. EPOE's training efforts have resulted in increased *ex officio* raids although the side effect is that the requirement for court appearances was increased substantially as EPOE is called upon to identify the items seized in *ex officio* raids and sign all identification reports and seizure documents, a fact which places a requirement upon the investigators to appear in court as witnesses.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### HUNGARY

**Special 301 Recommendation:** IIPA recommends that Hungary remain on the Watch List in 2007.

#### **EXECUTIVE SUMMARY**

The copyright industries have identified several significant enforcement problems in Hungary over the years: the police are under-resourced and under-equipped to tackle Internet piracy; prosecutors and judges are reluctant to treat copyright infringements as serious crimes; there is a lack of deterrent sentencing; cumbersome and unnecessary requirements to prove ownership of rights remains embedded in the system; requests for expert opinions on all goods seized impose a major strain on the police's limited resources; and there is a paucity of experienced and well trained experts. There also exists a perceived (not actual) conflict between constitutional rights (privacy, data protection) and intellectual property enforcement.

#### **PRIORITY ACTIONS IN 2007**

##### **Enforcement**

- Allocate more resources to police forces to fight increasing Internet piracy.
- Put into force the new amendments which implement the EU Enforcement Directive.
- 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.
- Develop IPR training program for the judges and prosecutors.
- Impose stiffer penalties and sentences to deter copyright pirates.
- The Hungarian National Information Infrastructure Development (NIIF) Program should be closely monitored to prevent copyright infringements on its networks.
- Develop a national action plan against piracy through the Inter-Ministerial IP Task Force.
- Take action against piracy in workplaces and educational institutions.
- Initiate APEH (tax authority) procedures in online piracy cases.
- Put an end to the passive stance of ISPs with respect to internet piracy.
- Develop, with the copyright industries, a joint IPR enforcement public awareness campaign, including instructions on the detrimental effects of Internet piracy, CD-R/DVD-R burning and commercial scale photocopying of books by/in educational institutions (schools, colleges, universities).

##### **Legislation**

- Introduce legislation to ban street sales of copyrighted products.
- Adopt optical media regulations to combat and control optical media production and distribution and to combat pirate CD production.
- Find an appropriate legislative means to specify that the private copy exception does not apply to illegal sources.
- Revise the expert opinion system to allow for sampling methodologies, and increase resources allocated to fund the requisite expert opinions.



**HUNGARY**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006<sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>2</sup>	67.0	44%	55.0	42%	65.0	44%	55.0	42%	32.8	45%
Motion Pictures <sup>3</sup>	NA	NA	102.0	73%	20.0	35%	20.0	30%	18.0	30%
Sound Recordings & Musical Compositions	20.0	35%	12.0	30%	11.5	38%	8.0	30%	6.0	30%
Entertainment Software <sup>4</sup>	NA	40%	NA	30%	21.5	59%	NA	NA	NA	NA
Books	NA	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
<b>TOTALS</b>	<b>87.0</b>		<b>173.0</b>		<b>122.0</b>		<b>87.0</b>		<b>60.8</b>	

## **COPYRIGHT PIRACY IN HUNGARY**

**Internet piracy and P2P:** Internet piracy in Hungary is increasingly becoming the top piracy issue, as Internet household penetration has increased over the past year (now at 27%, up from 22% last year – and 55% are broadband users). The Internet is often 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, and simple uploading of files to private web pages.

Peer-to-peer (P2P) piracy is a serious issue in Hungary, with approximately 600,000 P2P users out of the total 2.8 million Internet users. Locally-based web sites linked to File Transfer Protocol (FTP) servers that offer downloads for money (typically via highly priced Small Messaging System, i.e. text messaging) is re-gaining in popularity. According to the local motion picture anti-piracy organization (ASVA), there are an estimated 100 public FTP servers and an estimated 900 web sites offering pay-per-download capabilities. Private and community-driven FTP servers with strict membership rules remain a concern, and ASVA estimates the number of such FTP servers to

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Hungary under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Hungary, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> ESA's estimated piracy rates for Hungary in 2006 reflect on the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in country. 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.

be 20 (but only 5 with over 5 TB of capacity). Another difficult problem in Hungary is the complex interrelationships between various online providers (ISPs, webspace providers, server farms, etc.).<sup>5</sup>

The National Information Infrastructure Development (NIIF) Program promoted by the Ministries of Education, Information and Telecommunications should be closely monitored to prevent network IP violations (the NIIF serves as a framework for the development and operation of the research network in Hungary; the Program covers the entire academic, research, and public collection community by providing them with an integrated computer networking infrastructure.

**Optical media:** According to local industries, there are currently four optical disc plants (all using SID codes), in Hungary, with a total of 14 lines in all the plants. There are no known dedicated DVD plants, but one of plants has three DVD lines. The total plant capacity is estimated to be as high as 49 million discs per year; the capacity being basically unchanged as compared to 2005. Manufacturing is also done for the local Hungarian market but probably mainly for other countries such as Serbia, Montenegro, and Romania. It is unclear how many of the plants are operational, or how many, if any, are engaged in illegal activity (undetectable unauthorized production or overproduction). 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. The Anti-Piracy Coalition of the Music, Film and Software Industry sent an extensive paper to the Hungarian Government in 2006 stressing the existing problems and need for action and including a list of key elements of an effective optical media law.

**Domestic “burning” and street/stadium piracy:** All the industries report problems with locally mass-produced CD-R and DVD-R pirate materials—these materials predominate in Hungary because of the relatively low local prices of CD and DVD-R 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.

Thanks to constant raids, vendors offering burned musical CD-Rs at the flea market in Petőfi Hall have decreased in number. Unfortunately, there are still some offering copied albums, in some cases of good quality. The largest market for illegal movie DVD-Rs is the market at Verseny street, where as many as 20 vendors may be found each weekend, selling illegal movie copies. It is increasingly common to find musical albums stored in the mp3 format on DVD, thus as many as 10-20 albums, even an artist’s complete discography can be obtained on one DVD. The economic damage inflicted by such concentrated mass piracy is huge.

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<sup>5</sup> Unfortunately this problem remained troubling in 2006. 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. 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. 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.

The sale of locally burned pirate DVD-Rs at flea markets and in video retail shops remains a great concern. In Budapest's largest weekend flea market (Petőfi 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 also increasingly found at other flea markets across Budapest (including, for example, at the Józsefváros and Verseny-street markets).

**Imports of pirate OD products:** Hungary remains a major destination for illegal copies of CDs, and especially, in the case of entertainment software, factory-produced CDs and DVDs as well as 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. For example, preliminary examinations of pirated discs seized in secondhand shops indicate that these discs are most probably produced in Russia. To compare, the motion picture industry reports that, for their products, this problem has improved and they do not experience this kind of import problem.

**Piracy of sound recordings and musical compositions:** 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. Although the number of available warez sites has not increased, the operating ones are increasingly harder to find, working in an increasingly sophisticated fashion. Among P2P networks, BitTorrent types are becoming increasingly common, operating under a closed, invitation-only system. In 2006 the number of users on P2P network DC++ has decreased somewhat. This is due partly to the criminal cases initiated by ProArt against some of their major hubs, but also to the spreading of more modern P2P systems. As a positive point, it should be mentioned that the ringtone market is becoming more transparent.

However, traditional forms of piracy, i.e. pirate optical discs at flea markets (e.g. Petőfi Hall, Verseny-street market, Gyáli-street market, Veresegyház market), 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. The recording industry estimates the level of music piracy in Hungary in 2006 was 35% of the market, with estimated trade losses for the U.S. share placed at \$20 million.

MAHASZ reports that it has managed to involve customs officers more actively in off-line cases and that Customs has even ventured into the on-line field. Other positive news is that one of MAHASZ's five DC-hub cases has now finally gone from the police to prosecution, meaning that there is a good chance it will finally reach court.

**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. BSA reports that its preliminary estimated trade losses due to business software piracy in 2006 rose to \$67.0 million, with the rate also increasing slightly to 44%.

**Audiovisual piracy:** The motion picture industry is harmed by the widespread internet and optical disc piracy problems, described above. In particular, the sale of locally burned pirate DVD-Rs at flea markets, by street vendors, in video retail shops and in corporate offices also remains a concern. In Budapest alone, there are six flea markets where customers can consult lists or inlay catalogues of available titles and then place orders for pirate product (Petőfi Hall, Verseny street, Józsefváros, Békásmegyer, Káposztásmegyer and Fáy street). According to ASVA, the local anti-piracy organization, there are an estimated 50 markets throughout the country (with about 500 traders) where customers can purchase pirate products. The industry continues to report problems with local television and cable piracy. Stations broadcast or retransmit films that they have no rights to or, in some cases, use pirate videocassettes for broadcast (especially by small cable providers in small villages, and often owned by the local authorities). ASVA reports the conduct of 40 investigations into cable piracy in 2006. MPA does not have 2006 piracy estimates available; for 2005, MPA reported 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:** Members report that there has been some improvement in the levels of game software piracy since last year. Retail channels for pirated optical disk game software are predominantly limited to street vendors, flea markets and websites. Counterfeit and 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. Pirated products on optical media are now predominantly of the burn-to-order variety (domestically produced) though a small amount of factory replicated product continues to enter the market from Ukraine and Asia. In addition to optical disc and cartridge-based video game piracy, there has been a substantial growth in Internet piracy of entertainment software, through P2P networks and websites using SMS payment systems. ESA reports an estimated piracy level of for entertainment software handheld products in Hungary at 40%.

**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, in and around university campuses.

## **COPYRIGHT ENFORCEMENT IN HUNGARY**

**Cooperation Agreements between industry and law enforcement:** 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. In addition, 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. During 2006, the industries continued to search for alternative ways to fight piracy, for example by involving APEH. For 2007, getting the tax authorities involved remains an objective, however, the control department of the tax authorities is currently subject to a complete restructuring, the results of which are expected to be in place by mid-March 2007.

**Inter-Ministerial Task Force:** With cooperation from the U.S. Embassy, in June 2006, a local Anti-Piracy Coalition of the software, music and film was formed. The Anti-Piracy Coalition identified a list of priority actions which was ultimately submitted to the Government. On January 17,

2007 at a U.S. Embassy-organized workshop, agreement was reached to establish an Inter-Ministerial Task Force composed of government and industry representatives. This Task Force, which will be established under the Ministry of Justice and Internal Affairs and coordinated by the Hungarian Patent Office, will develop a National Action Plan to combat piracy.

**Criminal enforcement and working with the police:** 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. Deficiencies in prosecution remain a big and worrying problem. Again in 2006, 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 Petőfi Hall). Cooperation between the police and the local copyright anti-piracy groups continued during 2006, but not without some glitches.

- On a positive note, the film industry reports several positive actions in 2006. "B-52", a Topsite FTP-server utilized by international release groups, was seized on January 11, following an investigation initiated by MPA in coordination with IFPI, and officers from the Economic-Protection Department of the Budapest Police. The servers contained multiple terabytes of movie, music, software, game and TV title files. B-52 was one of the best-established Topsites in Eastern Europe and served and fueled other local Topsites like MTX TSP, TWS, HWK and RNK that subsequently went down due to the raid. Customs (IPOD) and Tax Office (Rapid Groups) continued to take *ex officio* actions.
- The entertainment software industry (ESA) reports that some of its members have a positive relationship with law enforcement authorities. The local police make an effort to keep the markets and retail shops clean of pirated products and take *ex officio* actions against vendors of pirated product. For the most part, the targets are typically small-scale operations that source their product from Internet downloads which are then burned onto optical discs. Such targets generally have little pirate inventory on hand and generally have no financial assets.

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. The authorities are taking *ex officio* actions, especially in the flea markets. ProArt initiated 1,644 notice and takedown procedures in 2006. In 99.6% of the cases, operators made the infringing content unavailable within the deadline stated by law. Police and customs have seized over 75,000 optical discs, 43 PCs, 97 hard drives, 34 CD/DVD burners and 16 servers with the help of ProArt. Customs seized an FTP pay-server in November (this was the first online case for Customs). ProArt cooperated very closely in the preliminary stage. ProArt is also trying to involve the internal revenue service (based on lack of receipts, etc., against those offering music and films privately via the Internet).

**Prosecutorial bottlenecks:** The biggest enforcement bottleneck in Hungary continues to reside with prosecutors and judges. One unfortunate practice of prosecutors is to dismiss criminal copyright cases. The industries are working hard to change the current practice by training prosecutors and holding judicial conferences.

An illustrative example of the existing deficiencies is the case related to the DIABLO hub. In the beginning of 2005, ProArt lodged a complaint against the DIABLO hub, which enabled several thousands of users to illegally share copyrighted content at the same time. The authorities failed to take any steps so ProArt lodged a second complaint some months later containing evidence in the

form of a forensic report showing that – at a random moment in time – 5,543 users had been connected. Each user had to make a share of at least 10 GB of data available to the others. The police then seized the server running the hub, but one week later the hub was up and running again. However, following a request to pursue this matter, the investigating authority stated that it was not in a position to use ProArt's earlier submissions in the matter (and made references to formal deficiencies of representation and inquired about the commission of the forensic consultant) and that "considering the difficulties of evidence referred to above it is not possible to instigate criminal proceedings against the individual users." ProArt challenged the decision, supplied answers to the questions of the authority and submitted another opinion detailing the process of entering the hub and performing a search there. There was also another enclosure, a declaration of ARTISJUS, the Hungarian Bureau for the Protection of Authors' rights stating that apart from ProArt no other person or institution had applied for or been granted an exploitation licence for making publicly available any copyright-protected content online. To date, ProArt has still not received an answer. The decree of the district attorney on the discontinuation of the investigation was dated March 27, 2006, and said: "...based on the data supplied by the investigation it could not be corroborated that an infringement had been committed and no further results are expected from the prolongation of the investigation." ProArt lodged a complaint against the decree but it was refused by the Municipal Office of the Director of Public Prosecutions (Fővárosi Főügyészség) on June 19, 2006. As far as ProArt is concerned, all forms of appeal are exhausted. ARTISJUS, the organisation representing the authors, instituted an action as a substitute private prosecutor (pótmagánvádló); the procedure is still in progress.

Furthermore, the recording industry reports that on many occasions, the expert opinions given to the police by registered experts of intellectual property are imperfect at best. There are a number of experts in the Organization of Intellectual Property Experts (which operates under the Hungarian Patent Office) who work with industry and are well versed in the nature of piracy, 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, rightholders can only act as consultants in criminal cases. In order to try to solve previous problems with expert opinions, ProArt organized a one day, hands-on training for legal experts, involving presenters from IFPI. The training took place in the oldest Hungarian CD-factory (VTCD), along with a plant visit.

**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, Hungarian prosecutors and judges remain reluctant to treat copyright infringements as serious crimes. 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.

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 the hoped-for degree of deterrence.

**Border enforcement:** Border enforcement is a longstanding concern, especially because of Hungary's proximity to Ukraine, Slovak Republic, and Russia, which remain the primary producers and exporters of optical disc materials in the region. The IPED (Intellectual Property Enforcement Department within Customs) consists of one dedicated IP customs officer in each of the six customs regions. While the members of these units appear enthusiastic and cooperative, these units have only been in operation for two years. ASVA reports that Customs (IPED) and Tax Office (Rapid Groups) have increased the number of *ex officio* actions.

ProArt was only notified twice by customs when music albums were to cross the border. In one instance, this involved several cases of CD's to be taken out of the country (on a truck heading from Yugoslavia to the UK), and upon checking the load, they turned out to be genuine products. Because of a change in their jurisdiction, ProArt initiated contact with the chief investigator of the customs authority, and included case reports in presentations given to educate investigators. It was partly due to this that the customs authority held an IP-conference, where both the copyright industries and representatives of industrial patents took part. Unfortunately, this process has been slowed down, because customs officers have been assigned to new tasks (i.e. bankruptcy criminal cases) by the police, thus they are concentrating mainly on these matters.

## **COPYRIGHT LAW AND REFORM IN HUNGARY**

**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. Implementation of the EU Resale Right (via Act CIII of 2005) was effective January 1, 2006.

**EU Enforcement Directive:** The Hungarian Parliament approved a law (Act CLXV of 2005) on December 19, 2005 to implement the EU Enforcement Directive (2004/48/EC); this entered into force on April 1, 2006. 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 civil enforcement cases. 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.

**Criminal Code:** A new criminal procedure code passed in July 2006 gives authority to Customs to deal with IP infringements. Before this code was enacted, if customs experienced copyright infringements (i.e. flea market routine checks), it would seize the infringing products and hand them over to the local police department along with the entire case. The police department would then without much enthusiasm take over the case. Since July 1, 2006, the customs authority has been carrying the entire case through so that the mobile control group seizes the products and the investigators take the case. The other change is that economic crimes are also being investigated by customs officers, who have had no previous expertise in this area. Consequently, the change is quite difficult, especially with customs having to take over some earlier cases, along with a few police officers. MAHASZ has not seen any improvement in practice, but has organized

several meetings with customs officers. More training is needed to bring customs up to speed on their new responsibilities.

**Optical Media Regulations:** No progress was made during 2006 in developing optical media regulations. At a meeting held in the U.S. Embassy, Hungarian government representatives did not seem to support the idea of introduction an optical media regulation. They said that these sort of regulations are not in place in most of the EU countries and it will disadvantage local CD plants. Currently there are only three plants in Hungary. ASVA will continue to press this issue in 2007. Hungarian Government should craft and issue optical media regulations to better regulate the manufacture of optical disc products. 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.

**Needed Reform:** In addition to optical media legislation (above), proper legislative vehicles should be found to ban the street sale of copyrighted products. In addition, it should be made clear by appropriate legislative means that the private copying exception does not extend to reproduction from illegal sources.

## **MARKET ACCESS**

**Fair Compensation:** Hungary imposes a levy on audio and video carriers and allocates collections among audiovisual right holders, including authors (scriptwriters), directors and producers. Claims by U.S. scriptwriters were, through 2004, accepted and remunerated via ARTISJUS; claims of U.S. directors and producers, however, fell to a collection society FILMJUS, which refuses to recognize U.S. producer claims, even with respect to claims for author-director remuneration. FILMJUS has refused to engage with U.S. producer requests to negotiate agreements whereby U.S. producers might receive author and producer levies payable for U.S. audiovisual works. In addition, FILMJUS has so far not remitted any levy collections to U.S. directors. Hungarian legislation has empowered FILMJUS to collect all shares of levies payable for scriptwriter, as well as director and producer remuneration rights; thus, U.S. right holders anticipate a complete breakdown in copyright protection via remuneration for loss of reproduction rights. Producer society AGICOA has asserted claims against FILMJUS for cable retransmission royalties collected in Hungary on account of retransmission of the audiovisual works of international producers (including U.S. producers). AGICOA claims were met with similar resistance from FILMJUS. Efforts of U.S. producers and directors and of AGICOA to engage FILMJUS are ongoing.

**Foreign Ownership Restrictions on Broadcasting:** Section 122 of Act 1 of the new Media Law requires that a joint stock company ("a company limited by shares") licensed to provide national broadcasting services must be such that 26% of its shares (or voting rights) are held by Hungarian citizens residing in Hungary or legal entities having a registered seat in Hungary. Neither a Hungarian nor a foreign enterprise, however, may hold shares in excess of 49% of the joint stock company's total shares. Foreign investment restrictions are discriminatory, limit competition and inhibit the potential growth of the television industry.



## **IPR TRAINING AND PUBLIC AWARENESS**

In cooperation with BSA and Pro-Art, ASVA organized a cross-industry press conference on April 26, 2006, to raise awareness on the economic importance of IP business in Hungary and on the local damages resulting from piracy. The chairman was the famous Hungaro-American producer Andy Vajna. In September 2006, ASVA, BSA and ProArt organized cross-industry training seminar for Judges during the opening of the brand new Judges Academy. The Seminar, which was very successful, was opened by the former President of the Hungarian Supreme Court and addressed various aspects of copyright infringement, including file-sharing, DRM and the European *acquis*. The seminar was attended by 23 judges from different courts whose participation was on a voluntary basis. At the conclusion of the conference, the attending judges proposed that an on-going training/education program be established. ASVA is liaising with the Judicial Academy to repeat the seminar next year. On October 17, 2006, ASVA, BSA and ProArt organized the first-ever, cross-industry training seminar for 45 prosecutors in Budapest. Topics discussed included the significance of intellectual property in the national economy and its losses due to piracy, Internet piracy, P2P and liability. ASVA is liaising with the Director of Education at the Prosecutor's office to repeat the seminar next year. Finally, ASVA also continued its training sessions to regional police officers in the form of road-shows, and to Customs offices.

In cooperation with the Ministry of Education, ASVA developed an educational program for secondary school students which is available on the Ministry's network, "SuliNet". Also, in cooperation with the local music industry, ASVA developed interactive educational comic material about copyrights targeting high school students (age between 14 and 18 years old). ASVA is searching for alternative ways to fight piracy, for example by involving the Tax and Financial Control Administration (APEH).

On the 2006 World Intellectual Property Day, ProArt held a joint press conference with BSA and the local MPA organization, and ProArt also plans this for 2007. ProArt also held "Autogram Day" for the second time in April, 2006, under the "Together for Music" campaign, where the most popular local artists raised their voices against piracy, signed autographs and talked to their fans. Apart from educating judges and prosecutors, ProArt held a training seminar for legal experts, and also plans to continue with this in 2007. After the TFM campaign, the comic strip produced in association with the local MPA organization (ASVA) was the major PR event in the fall of 2006. In October, ProArt initiated its new campaign for secondary school students: on "Open days" and other special events, ProArt members personally visit schools, along with a popular local artist, and during an interactive session, inform pupils about basic legal, economical and ethical aspects of using musical products.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### INDONESIA

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Watch List. However, we recommend that USTR conduct an out-of-cycle review (OCR) (to be concluded by September 2007) to ensure that the Indonesian government sustains the progress made to date in combating optical disc piracy, follows up with deterrent arrests and successful prosecutions of the main perpetrators of these piracy operations (i.e., plant managers and owners, not mere employees), and improves enforcement against photocopy piracy (mainly on and near university campuses), print piracy, and unauthorized translations, end-user software piracy (where piracy levels are among the worst in the world), and signal theft piracy, among other piracy concerns.

## **EXECUTIVE SUMMARY**

In recognition of the government of Indonesia's efforts to combat optical disc piracy, IIPA recommended, in an OCR conducted in September 2006, and USTR agreed in November 2006, to lower Indonesia from the Priority Watch List to the Watch List.<sup>1</sup> The efforts over the past two years include large seizures of pirated goods as well as machinery (including large-scale optical disc factories and CD-R burning operations) used to make them. IIPA commends the government of Indonesia for its cooperation and initiative in this regard. The job remains unfinished, both with respect to successful prosecutions of key piracy offenders, and in dealing with other forms of piracy which, left unchecked, will continue to result in Indonesia having among the highest piracy levels in the world and causing significant losses to U.S. copyright owners. It is too early to declare victory in the fight against piracy in Indonesia and meaningful follow-up activity is required.

U.S. industry lost well more than US\$205.2 million due to copyright piracy in Indonesia, and piracy rates in Indonesia remain among the highest within Asia and in the world.

## **PRIORITY ACTIONS REQUESTED IN 2007**

- **Prosecute Pirate Optical Disc Plant Owners, Financiers, and Managers, with Imposition of Deterrent Sentences:** In 2006, the Indonesian National Police ran a series of unprecedented raids against pirate optical disc plants. In 2007, prosecutors should swiftly prosecute in order to render those raids deterrent against further pirate OD production in Indonesia, and to make piracy an unwelcome activity in Indonesia.

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<sup>1</sup> On April 28, 2006, USTR chose to maintain Indonesia on the Priority Watch List and conduct an Out-of-Cycle Review (OCR). Specifically, USTR indicated that the OCR would be conducted "to monitor Indonesia's progress on IPR issues," in particular, to

assess Indonesia's progress on ... enforcing its IPR laws effectively and in a deterrent manner against piracy and counterfeiting, including through raids on pirate optical disc factories; by conducting seizures of pirated goods and the machinery used to make them; by arresting and prosecuting IPR infringers; and by ensuring that courts impose jail sentences for IPR crimes and that offenders actually serve such sentences.

- **Take Earnest Action Against Book Pirate Operations:** Piracy of published materials (both local and foreign content) runs rampant in Indonesia, including illegal photocopying (mainly on and around university campuses), print piracy, and unauthorized translations. The Indonesian government should include such piracy operations in its ambit of raids and work with right holder groups such as IKAPI to tackle this problem effectively. The Indonesian government should also implement an approach to legitimize use of published materials at schools and universities, including directives to ensure legal adoption of textbooks.
- **Prosecute End-User Software Piracy Cases and Publicize Results:** Indonesia remains one of the world's worst software markets in terms of end-user piracy of business software, with a piracy rate of 85%. The Indonesian government added a provision to its Copyright Law criminalizing end-user piracy, and began carrying out a few raids in 2006. The government also continued bringing retail software piracy cases in 2006, with some significant criminal convictions. However, the piracy rate remains the same. Thus, the government should seek more significant convictions (and public announcements of such) as part of an overall campaign to eradicate this form of piracy. In addition, more should be done to improve the Indonesian government's software asset management.
- **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 (back 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 Indonesian government should lift various stifling market access restrictions.
- **Curb Pirate Exports:** The Directorate General of Customs & Excise has not gotten sufficiently involved in 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.

For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006<sup>2</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Business Software<sup>3</sup></b>	156.0	85%	153.0	87%	100.0	87%	94.0	88%	109.6	89%
<b>Books</b>	32.0	NA	32.0	NA	32.0	NA	30.0	NA	30.0	NA
<b>Records &amp; Music</b>	17.2	91%	13.8	88%	27.6	80%	44.5	87%	92.3	89%
<b>Motion Pictures<sup>4</sup></b>	NA	NA	NA	87%	32.0	92%	29.0	92%	28.0	90%
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>205.2</b>		<b>209.5</b>		<b>191.6</b>		<b>197.5</b>		<b>259.9</b>	

## PIRACY UPDATES IN INDONESIA

**Book Publishing Industry:** Piracy of published materials runs rampant in Indonesia, including photocopying (mainly on and near university campuses), print piracy, and unauthorized translations, and in 2006, there was little good news from Indonesia regarding the fight against these forms of piracy. Most universities in Java actively or tacitly condone students' photocopying activities. Photocopy kiosks litter the areas around major universities such as Bandung Technology Institute, Parahyangan University and Padjajaran University. Book piracy is completely out of control in Bandung, and photocopied books are not only flooding the market in Bandung but coming into Jakarta. Most copy centers provide catalogs to facilitate the very open business of copying academic texts for students. The industry reports the presence of multiple photocopy centers inside the campuses. Illegal operations are also taking orders from students on campus and distributing their wares there, even in cases where they are not actually making the copies on campus. Teachers are aware of the problem but to date have taken no action to encourage use of legitimate materials in their classrooms. Educational authorities, enforcement authorities, and university and school administrations must work together to bring attention to, and action against, this growing problem.

In addition to the university-oriented 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.

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Indonesia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Indonesia, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

Unlike the response to optical disc piracy, publishers report that authorities have not shown willingness to partner with book publishing groups to effectively raid pirate booksellers, photocopy shops and offset printing facilities, and to take an active approach to legitimizing use of published materials at schools and universities.

**Optical Disc Piracy, Both Factory-Produced and “Burned”:** There remain 28 registered optical disc plants, and we know of two unregistered plants. Data supplied by Departamen Perindustrian (Department of Industry) and industry reveal that there are as many as 145 licensed replicating machines operated by registered OD plants.<sup>5</sup> Total annual disc manufacturing capacity conservatively estimated at 10,000 discs per machine per day, gives an approximate production capacity of 500 million discs per annum. Efficient operation of these machines would give a potential capacity of 1 billion discs per annum. Industry estimates the size of the legitimate market to be less than 15 million discs per year.

There are at least three registered plants in Indonesia with manufacturing facilities for the “stampers” and masters (key production parts needed to mass-produce optical discs that contains the copyright content and therefore must be covered in the optical disc regulations, and must be subject to the SID Code requirement and seizure). It is believed that three stamper manufacturing machines have been imported to Indonesia during 2005/2006, but not all of those machines have been registered by the regulatory authority and their whereabouts is unknown. 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 2006 in Australia, New Zealand, the Philippines, the United Kingdom and elsewhere in Europe. In 2005, the EU reported that 10% of all IP cases arising from pirate imports of copyright products involved imports from Indonesia.<sup>6</sup> Local “burning” of pirate product onto recordable discs is also becoming a major problem.

Notwithstanding the stark figures suggesting massive over-capacity in Indonesia, in 2006, the scope of motion picture piracy seems to have leveled, or perhaps even declined to some extent compared with previous years. While industrially replicated product used to be the norm, the motion picture industry now sees a mix of both factory product and burned product.

**Business Software End-User Piracy and Government Legalization:** The willful use of unlicensed or pirate software in the workplace continues to be the greatest source of losses to business software companies. The software piracy rate remained unacceptably high at 85% in 2006; only Vietnam in the Asia Pacific region had a higher piracy rate. Piracy in Indonesia has seriously compromised the business of resellers and distributors of genuine software. The piracy rate in 2006 actually represents a slight decline from the previous year, and despite the seemingly insignificant percentage change, it reveals that there is some law enforcement occurring in Indonesia, with some illegal merchants being sentenced by the courts in recent years. The software industry local representatives continue to work with the Indonesian government on the use of legal software within government ministries. On January 13, 2006, the Indonesian Ministry of Communication and Information (MOCI) and Microsoft signed a Memorandum of Understanding (MOU) to legalize government use of its products on government computers.<sup>7</sup> Implementation of the MOU will strengthen the Government and its law enforcement’s credibility when conducting IP education and enforcement efforts.

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<sup>5</sup> The government indicates that there are 143 production lines; but industry has information that there may be as many as 145.

<sup>6</sup> DG TAXUD European Commission.

<sup>7</sup> See Phelim Kyne, *Microsoft Indonesia Ink Anti-Piracy Price Deal*, February 23, 2006, Dow Jones International News.

**Signal Theft/Pay TV Piracy:** In the 2006 Special 301 report, IIPA noted that the cable and satellite television industry in Indonesia remains in its infancy in part due to significant levels of piracy,<sup>8</sup> and that while both the Broadcast Law and the Copyright Law of 2002 provide a degree of protection for broadcast signals, enforcement to date has been virtually non-existent. Unfortunately, there is little good news out of Indonesia on addressing signal theft piracy. There were reports that the Indonesian Broadcasting Commission (KPI) was considering the initiation of anti-piracy programs and enforcement actions in this area, but, to IIPA's knowledge, no enforcement actions have been taken thus far.

**Unauthorized Public Performance (Exhibition) of Motion Pictures:** IIPA is also concerned about the growth of outlets engaged in unauthorized public performance of motion pictures. Some of the outlets have expanded into franchise operations, with some even advertising themselves in national entertainment publications. IIPA encourages the Indonesian authorities to take actions against such outlets as they have a damaging effect on the market for theatrical exhibition in Indonesia.

**Unauthorized "Preloading" of Mobile Devices:** The unauthorized preloading of mobile devices is a growing problem for the recording industry. Sound recordings/musical works are being directly loaded to handheld phones, flash drives and recordable media. In the Roxy Mas retail mall, where the majority of shops sell handheld phones and handheld phone accessories, more than 80 such stalls that engage in such uploading were recently counted in the public areas. Apparently not linked to the shops in the mall, operators draw power from the mall supply and use stand-alone desktop computers to download the recordings/musical works by USB transfer. Similar setups are seen in many shopping malls including Mangga Dua Square, and ITC Mall Kuningan.

## **ENFORCEMENT UPDATES FOR INDONESIA**

**Retail Raids Continued, While End-User Software Raids Commenced:** IIPA commends the Indonesian government for the raids run in late 2005 and 2006 against retail piracy. These concerted actions led to a decline in blatant retail piracy in some chief piracy locations in Indonesia. The Indonesian authorities have been more willing to publicize such raids, for example, through press conferences. In June 2006, a set of large-scale retail and street raids occurred once pirates attempted to retake to the streets (i.e. after a hiatus between the early 2006 raiding). The June raids resulted in large numbers of discs being seized, which indicates an increasing and welcome resolve among Indonesian authorities to go after the "big fish" pirate operators, including the major retail malls, but also unfortunately indicates the large scope of the piracy problem in Indonesia. While the authorities are to be commended for their largely sustained enforcement actions in 2006, it is of concern that key malls such as Ratu Plaza, Mangga Dua and more recently Ambassador Mall remain relatively immune to follow-up prosecutions, and as a result, these malls are often partially or fully open within days of being raided.

Industry estimates that in 2006, (including a three-month-long anti-piracy campaign), the Indonesian authorities have, through concerted raid efforts, netted seizures of well over 8 million

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<sup>8</sup> 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.



pirate optical discs and almost 600 optical disc burners capable of producing millions more.<sup>9</sup> As in late 2005, raids included multiple actions being carried out on Ratu Plaza.<sup>10</sup> IIPA is very encouraged that the Indonesian authorities have taken *ex officio* actions in several cities in Indonesia, such as in Bali and Jakarta. One Jakarta raid in November 2006 was conducted by the Cybercrime Unit based in Indonesia Police. Another raid was conducted by the same Unit in December. Relations with the Economic Crimes Division of the Jakarta Metropolitan Police have also improved. Regarding end-user piracy of business software, the Business Software Alliance worked with the Indonesian Police to conduct four end-user raids in 2006, three in Jakarta and one in Surabaya.

**Progress Made in Fight Against Unauthorized Optical Disc Production:** As with retail raids and raids on CD-R or DVD-R “burning” facilities, the Indonesian Government appears to have gotten serious about addressing the optical disc piracy problem in 2006. IIPA commends the government for raids in February and August 2006. In these raids, a total of 19 optical disc production lines were sealed on site, and 6 replicating machines were seized.<sup>11</sup> The raid pictures below speak volumes about the organized nature of the operation (shared courtesy of IFPI).<sup>12</sup>



*DVD line sealed by Police*



*Hidden doorway to illegal plant*

<sup>9</sup> For example, from January through December 2006, the motion picture industry conducted 661 investigations and participated in more than 600 raids, resulting in the seizure of 171,600 VCDs, 5,944,084 DVDs, 1,565,200 CD-Rs, 831,371 DVD-Rs, and 589 DVD-R burners.

<sup>10</sup> Ratu Plaza recently reopened after a lengthy closure prompted by the seizure in a raid late last year of hundreds of thousands of pirated optical discs, and on June 23 Krimsus officers responded to the return of pirate traders with a raid that netted 410,000 pirate DVDs, a record for seizures of pirated discs from a single retail location in Indonesia.

<sup>11</sup> Of the sealed machines, 12 were in a factory that was raided twice during the year in the district outside of Jakarta. In the second raid on that factory, police seized 20 bags of polycarbonate, 30 stampers and 74,000 pirated DVDs, VCDs and CDs and arrested 16 suspects. In the first raid in February, Jakarta Regional Police raided an optical disc factory in the Jakarta suburb of Kapuk, sealing seven VCD/CD replicating lines (as only four were licensed), and seizing 54,000 pirated optical discs, around 70 percent of which were infringing U.S. motion picture titles. Production records showed these machines had been producing 100,000 optical discs per day. Two other raids against licensed facilities resulted in the sealing of a replicating machine in one facility and the seizure of a replicating machine from the other. In the August raid, officers from the Special Economic Crimes Division (Krimsus) of the Jakarta Metropolitan Police conducted an *ex officio* operation and raided a warehouse and factory in the Tangerang area of Jakarta, arresting five men and seizing five factory production lines, nineteen 750-kilogram sacks of optical grade polycarbonate, a DVD bonding machine and around 750,000 optical discs in various stages of production.

<sup>12</sup> John McGuire, IFPI's regional investigator who attended the scene to assist the local officers, said: "From an examination of the facility it is very evident this was a sophisticated and large scale illegal replication facility that had been established to produce very significant quantities of pirate optical discs. The presence of a concealed escape hatch inside a nondescript cupboard indicates the plant owners were fully aware and prepared for raid action by the authorities"

IIPA has learned that in November 2006, the Ministry of Industry determined that it would run inspections of 26 registered plants in Indonesia, albeit they warned the plant owners in a letter. The results of those visits are still in the reporting stage. IIPA is heartened by news of these actions against optical disc plants, but notes that they lacked the element of surprise.<sup>13</sup> As a result, we understand that nearly all plants were running below capacity or were idle during the inspections, although intelligence gathered during the operation does point to widespread pirate production. It is premature to conclude whether these recent visits will have the desired effect of driving down optical disc pirate production in Indonesia.

**Some Prosecutions Against Retail Pirates:** Notwithstanding the successful raiding, it remains to be seen whether raids in Indonesia will have longstanding deterrent effects, both as to the specific defendants whose piracy businesses were subject to the raids, or to society at large. One factor in judging the success is the extent to which raid targets are prosecuted criminally with resulting deterrent sentences. Finally, in 2006, reports from industry indicate the Indonesian government's intent to prosecute arrested persons for copyright piracy. IIPA now has statistics on some significant prosecutions and criminal convictions, especially in the area of retail piracy. For example, at least 14 criminal retail software piracy cases have been concluded successfully, with some cases resulting in prison sentences without probation (others have resulted in fines and some with probation in lieu of prison sentences).<sup>14</sup> The time lag between a retail raid against pirate software and the case appearing in court is now only a few months (whereas in the past cases dragged on for years without resolution). As an example of shorter time frames, shops raided in Mall Ambassador in March 2006 were in the District Court by June. The motion picture industry reports that a total of 115 new criminal prosecutions were initiated. However, to date, none of those cases have led to successful convictions.

<sup>13</sup> See, e.g., *Four Optical Disc Producers May be Imposed with Sanctions*, *Bisnis Indonesia*, September 15, 2006. The article quotes Abdul Bari Azed, Secretary of the National Team for Intellectual Property Rights Violation, as indicating at least four CD/VCD/DVD production plants are suspected of violating the optical disc production regulations. The article lists the four plants as PT Medialine (Jakarta), PT Winer Starindo (Cikande), PT Panggung Elektronika (Surabaya), and a plant in Surabaya (which has no production code and whose machines are not registered). PT Medialine is reported to have no licenses, while all the products of PT Winer Starindo are noted to be pirated. PT Panggung Elektronika is cited as having no content review certificates or licenses from copyright owners.

<sup>14</sup> For example, the following sentences resulted from the cases listed (initials used to denote each defendant):

- Defendant J.R.: three years imprisonment without probation and an order to destroy seized products.
- R.S.: three years imprisonment (trial court had initially imposed sentence of one year imprisonment, suspended for two years probation, destruction of the pirated product (2,708 CDs), and expenses of Rp. 1,000–(US\$11), but on appeal the court increased the sentence).
- Defendant E.: one year imprisonment, suspended for a probation period of two years. The defendant did not appeal.
- M.K.: three years imprisonment and a fine of Rp. 10 million (approximately US\$1,105) or an additional sentence commuted to three months imprisonment in lieu of the fine.
- J.B.: one year imprisonment without probation and a fine of Rp. 3 million (approximately US\$332) (and an additional month in prison in case the fine is not paid).
- E.L.: two years imprisonment without probation.
- N.S.: one year and seven months imprisonment without probation. The defendant did not appeal.
- L.M.: two years imprisonment without probation. The defendant did not appeal.
- H.T.H.: two sentences, one in 2005, for ten months imprisonment without probation (on appeal). And one in 2006, for eight months imprisonment without probation.
- W.L.: one year and three months imprisonment without probation and a fine of Rp. 10 million (approximately US\$1,105). The defendant did not appeal.
- E.A.: two years and six months imprisonment.
- B.S.: two years imprisonment without probation.
- D.: two years imprisonment and a fine of Rp. 3 million (approximately US\$332).



**Some Problems Remain in Raids and Seeking Prosecutions:** There remain some problems with raids. For example, there have been some suspected tip offs before retail raids. In addition, some industry representatives report problems seeking prosecutions in piracy cases. For example, in relation to the *ex officio* actions in Bali regarding piracy of software, it appears the case was dropped by police/prosecutors notwithstanding overwhelming evidence of a copyright violation. Unfortunately, an end-user software piracy raid in 2005 (based on an earlier raid) has not resulted in a prosecution since the prosecutor has refused to accept the case (we believe this refusal was due more to a lack of knowledge on the part of the prosecutor of IP cases than to a lack of evidence).<sup>15</sup> The overall bureaucratic nature of the process toward a prosecutor taking a case results, from a practical point of view, in unnecessary delays in preparing dossiers and increased costs.

Industry maintains that even more key prosecutions must commence against the owners of pirate facilities and distributors, as well as owners and managers of high profile malls that continue to harbor pirate outlets. There are several key owners of piracy operations who remain untouched.<sup>16</sup> Without tackling key piracy operations, it will be difficult for the piracy rate (or losses) to decrease for any industry.

**IP Task Force Decree Signed:** In March 2006, President Susilo Bambang Yudhoyono finally issued the decree establishing the “National Task Force for IPR Violation Prevention.”<sup>17</sup> According to the Decree, the Task Force’s aims are to:

- Formulate a national policy to prevent IPR infractions;
- Determine national efforts needed to prevent IPR violations;
- Assess and determine measures for resolving strategic problems concerning IPR infractions, including prevention and law enforcement activities in accordance with the main duties of participating agencies;
- Educate and socialize related government institutions and society about IPR matters through various activities; and
- Improve bilateral, regional and multilateral cooperation to prevent IPR violations.

The Task Force is responsible directly to the President, and must “report in writing” to the President at least every six months or when needed. IIPA understands that the first meeting of the Task Force occurred in June 2006, however we do not know if the Task Force addressed these issues or indeed what, if anything, it did decide to do. One outstanding issue is funding for the Task Force and its activities. According to the Decree, all costs associated with IPR Task

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<sup>15</sup> The business software industry reports that there is no common understanding of the concept of end-user piracy among public prosecutors and police, notwithstanding industry efforts to explain the concept at numerous trainings. In particular, public prosecutors are insisting on proof of end-users’ intent to infringe and are imposing a very high proof requirement in that regard.

<sup>16</sup> Two known large suppliers of pirate software products in Indonesia, several owners of illegal facilities producing pirated VCDs and DVDs and software, and several of the large distributors with outlets in Glodok and Harco Mangga Dua remain untouched by enforcement efforts in Indonesia.

<sup>17</sup> Presidential Decree No.4/2006, March 27, 2006, On: Establishment of the National Task Force for IPR Infraction Prevention.

Force activities are to be levied on the Ministry of Justice and Human Rights budget, however, it does not appear the Task Force has an independent budget at this stage.

With the establishment of the National IP Task Force, the software industry has devised a proposed three-year plan and IIPA agrees that many of the following tasks, at a minimum, should be accomplished by this group:

- a. Establish and implement a 3-year Intellectual Property Protection and Awareness Roadmap or Blueprint that consists of short term and long term strategies
- b. In the short term, the National IP Task Force should immediately launch a Nationwide educational and enforcement campaign. Two proposals for short term action are:
  - i. The National IP Task Force to declare 2007 an “IP Action Year” and work with the industry to coordinate awareness and enforcement activities across the country
  - ii. The National IP Task Force to consider making it mandatory for new computers to be loaded with only genuine software
- c. In the long term, the National IP Task Force may wish to consider the following goals:
  - i. Education: Reach businesses, schools and the general public to promote respect for IP
  - ii. Legislation: Review and enhance IP legislations periodically
  - iii. Enforcement: Conduct sustained enforcement efforts to tackle both retail and business software end-user piracy

## **TRAINING**

In 2006 as in previous years, the copyright industries conducted and participated in various training and public awareness activities in Indonesia:

- ASEAN-ECAP/II-USPTO Workshop on Intellectual Property Protection and Enforcement in the Digital Environment, December 7-8, 2006 (BSA).
- The International Federation of Phonographic Industries conducted four training programs in 2006 (and a further two training programs were funded by USAID in February 2006).
- The motion picture industry has undertaken a total of five training sessions in Indonesia between January 1 – October 31, 2006
- The Business Software Alliance has been very active in training the relevant authorities (such as police officers) in relation to software piracy in Indonesia. In 2006, BSA conducted several training programs in Indonesia, including the following:
  - “Management of Copyright Infringement Cases Involving Optical Disk Media and Software Infringement by the Corporate End User,” in Bali, November 24-26, 2005, hosted by the Police Criminal Investigation Department of Indonesia. The trainees were the heads of economic units for each of the provincial police departments;

- Training program for Police on software product identification, in Megamendung, on February 27, 2006;
- “Training on Corporate End-User Piracy,” October 9, 2006, Jakarta. The trainees were officers of the Indonesian Police’s Industry and Trade Unit;
- “Training on Corporate End-User Piracy,” October 10, 2006, Jakarta. The trainees were officers of the Cybercrime Unit of the Indonesian Police.

## **MARKET ACCESS BARRIERS**

There is no good news out of Indonesia on market access issues, and the country remains one of the most closed markets in the world to legitimate U.S. copyright businesses. Problems remaining include the following.

**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. IIPA understands that the Law overrides the Presidential Decree. It is believed the draft Film Law also contains a 20% foreign ownership cap.

**Broadcast Law:** The “Broadcast Law”<sup>18</sup> bans the broadcast of most foreign programming in Indonesia.<sup>19</sup> The Independent Regulatory Commission (KPI) created by the new Broadcast Law has now been installed and 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.<sup>20</sup> Support

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<sup>18</sup> Law of the Republic of Indonesia, No. 32 Year 2002, Regarding Broadcasting (into force February 2003).

<sup>19</sup> 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.

<sup>20</sup> 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).

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 2006, but at the time of writing, their status was unclear.

**Film Law:** Separate draft Film Laws were submitted to Parliament for consideration in December 2006 by the Ministry of Tourism and the government advisory board on Film Issues, BP2N. Industry has only recently obtained translations of these drafts and has not had the chance to fully review them at the time of this report. It is hoped that earlier plans to impose screen quotas and limits on foreign participation in the film industry, among many other market access restrictions of real concern, do not come to pass.<sup>21</sup> Again, it is also highly unfortunate that neither the Ministry nor BP2N considered the views of foreign film producers or related associations' views in their discussions. It is suspected that these drafts will follow the Broadcast Law and limit foreign participation in the industry. There have also been some suggestions that consideration is being given to scrapping the Film Law entirely.

## **COPYRIGHT LAW AND RELATED ISSUES**

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

**Copyright Law Implementing Regulations Still Missing:** IIPA has commented on the improvements in the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) (effective July 29, 2003) and has recommended further changes that should be made to that law.<sup>22</sup> IIPA understands that regulations dealing with "rights

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had to be used). Art 24(6) requires foreign advertising to be replaced by domestic advertising, and cross-media and foreign ownership restrictions.

<sup>21</sup> 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.

<sup>22</sup> 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).
- Delete Article 18(1) which appears to amount to 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 deterrent effect.

management information” (RMI) were finalized in 2005,<sup>23</sup> but implementing regulations regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law) are still missing and are needed to fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>24</sup>

Meanwhile, the press reports IP Director General Ansori Sinungan at the Justice and Human Rights Ministry as indicating the 2002 Copyright Law will be amended, in particular to provide an additional chapter establishing a collective management society.<sup>25</sup> IIPA encourages the government to take the opportunity, if indeed the law is being amended, to make the changes advocated in the past to produce in Indonesia a truly modern copyright statute. IIPA also encourages the Indonesian Government to ensure that any proposed changes are open for public consultation and comment. We note our concern at reports in early 2007 that the Ministry was considering some controversial amendments, including the reduction of the maximum penalties available for criminal copyright infringements. Amendments such as these would be steps backwards from the positive progress Indonesia has made in recent years in enforcing intellectual property rights, and IIPA strongly urges that such amendments not be enacted.

In addition to the issues previously discussed in IIPA submissions, one issue which should be addressed in any amendment to the Copyright Law is landlord liability for copyright infringement carried out by tenants (of a retail mall, for example). The issue of landlord liability for copyright infringement (committed by tenants) remains unclear in Indonesia, and is a growing concern for industry and the enforcement authorities in Indonesia.<sup>26</sup> Another issue is the lack of a specialized IP court with judges that have been adequately trained to deal with IP cases.<sup>27</sup> A third issue is the need to confirm that end-user piracy of software is criminalized (at present, Article 72(3) provides a criminal remedy against one who illegally reproduces software with “a commercial purpose”). The courts and prosecutors in Indonesia remain unclear as to whether this includes end-user software piracy. This should be confirmed or the law should be amended to confirm it.

**New Border Measures Enacted:** Law No. 17 of 2006 amended Law No. 10 of 1995 on border and customs measures. While IIPA has not reviewed the legislation as passed, the provisions apparently represent an improvement compared with the 1995 law (the 1995 Customs Law established a judicial seizure system and allowed for *ex officio* action, but no

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<sup>23</sup> 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.”

<sup>24</sup> An April 2003 Report issued by the Indonesian government 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.

<sup>25</sup> Ridwan Max Sijabat, *Govt Revising Law on Intellectual Property Rights*, Jakarta Post, November 23, 2006, at 9.

<sup>26</sup> It should be confirmed that it is illegal in Indonesia to induce, facilitate or aid and abet infringement, including by distributing or providing a facility, program, device, or technology to members of the public with the object of facilitating, promoting or encouraging its use to infringe copyright.

<sup>27</sup> Both civil and criminal IP cases are currently heard in the commercial courts.

implementing regulations ever followed passage of the law).<sup>28</sup> According to industry, the term "District Court" was replaced with "Commercial Court" to take into account the IP Law's shift in court jurisdiction. The issue of the "District Court" being listed in the 1995 law was a major block to the government issuing implementing regulations for customs enforcement. It is hoped that implementing regulations will be forthcoming soon in 2007.

**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.<sup>29</sup> In the absence of a statute dealing with cybercrime, industry has to resort to general principles of criminal or civil law in dealing with cases involving Internet piracy or cybercrime.

**OD Regulations Remain Deficient on Their Face:** 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 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:

- There is no centralized licensing of prerecorded or blank optical discs.
- The Regulations require imported pre-recorded discs to be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications.
- The Regulations do not adequately cover stampers and masters, e.g., it is not clearly stated that penalties specifically apply against illegal stampers or moulds alone.
- The Regulations do not expressly cover exports of discs, equipment and raw materials.
- The Regulations do not expressly prohibit unlawful uses/manipulation of identification code.

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<sup>28</sup> In practice, seizures are occasionally made on the basis of an incorrect declaration or under-declaration.

<sup>29</sup> 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."

- The Regulations do not expressly authorize forcible entry in an inspection.
- The Regulations do not require the government to keep records of “permits” and raids run.
- The Regulations do not provide for plant closure (although IIPA understands that since business licenses can be revoked, technically, factories cannot operate without the license).
- The Regulations do 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,<sup>30</sup> and another on reporting by registered producers.<sup>31</sup> 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 2005, \$1.6 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 13.4% of its total exports to the U.S. During the first 11 months of 2006, \$1.8 billion worth of Indonesian goods (or 14.6% of Indonesia’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code. Indonesia needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to continue to receive favorable treatment under the GSP program.

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<sup>30</sup> 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.

<sup>31</sup> 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ITALY

**Special 301 Recommendation:** Italy should remain on the Special 301 Watch List.

## **EXECUTIVE SUMMARY**

Italy continued to have one of the highest overall piracy rates in Western Europe in 2006. Estimated trade losses due to copyright piracy in Italy in 2006 were conservatively estimated to be at least \$1.4 billion. In recent years, the nature of piracy has changed in Italy: organized criminal syndicates are assuming more importance; CD-R and DVD-R burning is a major problem; manufacturing and distribution are migrating to smaller, harder-to-detect forms; Internet piracy is significantly increasing; and commercial photocopying of books and journals has remained steady, if not worsened. Furthermore, over the past two years, three general legislative developments in the criminal law have had a tremendous adverse impact on enforcement: the first is the recent Pardon Law (2006) which granted amnesty for all prison sentences of 3 years or less; the second is the “Cirelli Law” (2005) which reduced the statute of limitations causing many pending piracy cases to be dismissed; and the third is the “Pecorella Law” (2006) which eliminated the right of the Public Prosecutor and the offended party to appeal against acquittal sentences issued at the trial level (Fortunately the Pecorella Law has recently been judged partially unconstitutional by the Constitutional Court). These three laws have had an extremely negative impact on anti-piracy activities. It is clear that the Italian Government’s decriminalization policy, which has cross-party support for varied reasons, has severely damaged proper enforcement against piracy in Italy.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Continue to implement the Anti-Piracy Law and other recent enforcement improvements with increased raids, prosecutions, and in particular the development of effective codes of conducts between ISPs and right holders.
- 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 commercial scale piracy controlled by organized criminal syndicates, appropriately covers all types of Internet piracy, and also includes unauthorized commercial photocopying of academic materials.
- Foster sustained coordination between the DNA (National Anti-Mafia Direction), the local DIAs (Direzione Investigativa Anti-Mafia) in order to provide updated information on the existing links between counterfeit/pirate products and organized crime, with special reference to the Camorra.
- Have the Government develop positive messaging on the value and importance of copyright, including in the on-line environment, and of intellectual property as a whole.
- Institute overall judicial reform to speed up criminal and civil proceedings.



## Legislation

- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law.
- Eliminate the stickering requirement on software by revising the copyright law to state that all software programs containing less than 50% of audio or video materials are not to be marked or declared to SIAE.
- Correct deficiencies in implementing amendments to the EU E-Commerce Directive, and ensure participation of the copyright sectors in those discussions.

<b>ITALY</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	48.0	27%	40.0	20%	45.0	23%	42.0	22%	42.0	23%
Business Software <sup>2</sup>	716.0	50%	812.0	53%	779.0	50%	642.0	49%	363.4	47%
Entertainment Software <sup>3</sup>	647.7	40%	639.2	30%	NA	34%	168.5	47%	215.4	55%
Books	20.0	NA	20.0	NA	23.0	NA	23.0	NA	23.0	NA
Motion Pictures <sup>4</sup>	NA	NA	161.0	22%	160.0	15%	140.0	20%	140.0	20%
TOTALS	1,431.7		1,672.2		1,007.0		1,015.5		783.8	

## COPYRIGHT PIRACY IN ITALY

Organized crime: Organized criminal groups (mainly in southern Italy) continued in 2006 to dominate the optical disc piracy market, from production to distribution, using illegal immigrant networks to sell their products. The organized criminal syndicates belonging to the so-called “Alleanza di Secondigliano” have full control over counterfeiting and piracy in the Campania Region. This information collected and analyzed by the DNA (National Anti-mafia Direction) is supported by the outcome of some important trials involving the Camorra families, such as the Contini-Licciardi

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Italy under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. 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.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Italy, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> 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.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

and other organized groups linked to the Camorra. In addition to the production centers managed directly by the Camorra, such criminal groups created a vast network of local poor families that run small private duplication facilities that manufacture limited quantities of pirate products. The products are 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:** Internet piracy (of music, sound recordings, movies, entertainment and business software and books) particularly as a means to deal in hard goods and circumvention devices continued to be a major problem in 2006. As broadband penetration expanded, so too did Internet downloading, including via peer-to-peer filesharing systems, of pirated materials.<sup>5</sup> Internet piracy, particularly as a means to deal in hard goods and circumvention devices, is also increasing. Particularly worrying is the situation of Internet downloading of pirate copyrighted products, especially via peer-to-peer systems. This continued growth is fostered by the lack of cooperation by Internet service providers who take advantage of a loophole in the implementation of the E-Commerce Directive (see below, under Challenges with civil Internet cases). One of the major challenges in Italy is addressing a wide-spread perception that illegal downloading is not harmful to the creative community and educating politicians on the need and value of protecting copyright on the Internet.

In December 2006, the President of the Culture Commission of the Chamber of Deputies announced the development of a survey (*indagine conoscitiva*) on “Internet, the net, IT and copyright”, which will produce a White Paper with the conclusions of the Chamber drawn from a set of hearings. The paper should serve as the basis for a bill to go forward from the Government for Parliamentary approval. Because of ambiguous messages from various Government and Opposition representatives on the need to ‘reconcile copyright and new technologies’, this proposal will be followed closely by the right holder community. Criminal actions against Internet piracy are moving forward (see enforcement discussion, below), but additional resources must be given to the criminal authorities to combat online infringements. Problems remain, however, with respect to civil actions against Internet piracy (see civil enforcement discussion, below).

**Business software piracy:** The Business Software Alliance (BSA) reports there was no major change in the nature of piracy in Italy during 2006. 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, this industry also faces the challenges associated with Internet piracy, the distribution of pirated CD-Rs of software and local “burning” of software onto optical media. The sale of counterfeit software products by street vendors continues, often involving people coming from Arab nations who are exploited by criminal organizations to market such illegal products); reports also indicated that more people of Chinese nationality are involved in this distribution process. Preliminary estimated losses in Italy due to business software piracy in 2006 dropped to \$716 million, with the piracy levels also dropping to 50%.

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<sup>5</sup> For instance, the Entertainment Software Association reports that Italy, along with Spain and France, are consistently among the top five countries in Internet piracy (particularly through P2P networks). In addition, the ISPs in Italy are generally non-responsive to the notices of infringement sent to them by the ESA.

**Entertainment software:** Entertainment software publishers report that pirated video game products continue to be widely available at flea market type venues and through street vendors. There is, however, very little enforcement action taken against street vendors trafficking in pirated video game products. For instance, Nintendo of America, Inc. reports that there were no police or customs seizures of counterfeit cartridges in 2006. Growing online piracy, due to increasing broadband penetration, is becoming a significant threat to the entertainment software industry. Italy, along with Spain and France, is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. In addition, the ISPs in Italy are generally non-responsive to the notices of infringement sent to them by the ESA. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Italian marketplace for 2006 is \$647.7 million, with a 40% piracy rate.

**Piracy of sound recordings and musical works:** The recording industry reports that CD-R burning is still a serious problem, but that piracy of records and music over the Internet is now worse. The level of traditional piracy remains at 25 % where online (P2P) piracy accounts for 26% of the market (source: Luigi Einaudi Foundation 2006). Large illegal burning centers are active all over Italy (especially in the South) and consolidated street vendor networks run the distribution network for pirate products. Italy has one of the highest rates for the piracy of sound recordings and music in Western Europe. Estimated 2006 losses due to record and music piracy in Italy rose to \$48 million with a 27% piracy rate.

**Book piracy:** Wide-scale photocopying continued to be a serious problem in Italy during 2006. In 2000, the publishing community sought and received in the new Anti-Piracy 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 arrangements were made for both educational institutions and copy shops. Industry reports that, while the arrangements are being implemented with some success as to educational institutions (namely libraries), it is not being applied to copy shops, which continue unauthorized activities unabated. 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. Copy facilities are reportedly using increasingly sophisticated digital equipment in undertaking their activities—a growing trend that will make copying harder and harder to detect and prosecute (as files are stored for printing on demand, stockpiles will cease to exist). Authorities should work to enforce payment under the Anti-Piracy Law, and to promote use of legitimate materials on university and school campuses. Estimated losses due to book piracy in Italy were \$20 million in 2006.

**Audiovisual piracy:** The Motion Picture Association also reports no major improvements in the overall piracy situation in Italy during 2006. The problem of Internet downloads and sale of pirate DVD-Rs continues. Theft of audio tracks from films being exhibited in theatres is a major problem; the Italian soundtrack is added to illegal copies downloaded from the Internet and distributed through P2P networks as well as through street vendors. Unauthorized public performances and local signal theft are prevalent, albeit on a decreasing scale and predominantly in the Campania region. Satellite signal theft and smart card piracy remains at low levels, due to the new Seca 2<sup>®</sup> encryption system.

## **COPYRIGHT ENFORCEMENT IN ITALY**

Passage of the Anti-Piracy Law amendments to the Copyright Law in 2000,<sup>6</sup> 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. During 2006, hundreds of criminal anti-piracy raids were conducted, resulting in the seizure of numerous pirated products and the initiation of more prosecutions. 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. Finally, the industries believe that the passage and application of both the 2005 "Cirelli Law," the 2006 "Pecorella Law" and the Pardon Law will severely undermine the possibility of any effective deterrence in the Italian system as well as challenge the viability of the role of the Court of Cassation in copyright cases (discussed further, below).

**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) during 2006, in actions involving hard goods as well as the Internet.

The recording industry, as represented by its local anti-piracy organization FIM, reports that coordination with Italian enforcement agencies continued on a positive basis. There have been several major actions in recent months. First, from January 18 to 22, 2007, 30 suspected counterfeiters were arrested by police in Naples after a two-year investigation. Officers from the Guardia di Finanza (GdF) acted on arrest warrants issued by the public prosecutor. The suspects were identified as alleged members of a major criminal network involving the production and distribution of pirate music and films. A total of 550 CD burners have been seized over the course of the investigation in addition to 120,000 pirate CDs and DVDs. The police have collected evidence that suggests the group made an annual illegal turnover of income amounting to €75 million (US\$97.5 million). Second, in November 2006, seven people of Chinese nationality were arrested during police raids against eight Internet cafes in Tuscany that were involved in a massive piracy case. The cafés were used to reproduce, store and distribute millions of files of copyright works through file-sharing networks. The users of the service were allowed to upload and download music, films and business software after the payment of a fee. The operation, carried out by the GdF of Prato (a town near Florence) led to the raids on eight cafes and a total of 462 computers containing more than one million music tracks, movies, videogames and computer programs. The arrests of the Internet cafe owners were ordered by the Public Prosecutor of Prato and the raids were conducted with the assistance of music, movie and software anti-piracy associations, FPM, FAPAV and BSA as well as the Italian authors' society SIAE. An additional 23 people were indicted for the violation of several administrative laws and for illegal immigration.

Third, during the summer of 2006, the GdF from Udine, assisted by industry's anti-piracy body FPM as well as FAPAV, executed several search warrants in a nationwide operation against the online sales of pirate CDs and DVDs on eBay. During the operation, the police seized music and

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<sup>6</sup> The Anti-Piracy 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.

video compilations offered by illegal traders. Twenty individuals were indicted for copyright infringement and are facing up to four-year prison sentences as well as administrative fines of millions of Euros. Equipment including computers, burners and printers were also seized. During the investigation, aimed at stopping a major ring of online vendors, the police and the anti-piracy federations received cooperation from the anti-fraud office of eBay. Most of the vendors were found with dozens of packages ready for shipment and some of them were discovered downloading music and movies from file sharing networks. Bank accounts have been seized by the GdF and an investigation into the customers of the illicit traffic is underway.

The motion picture industry anti-piracy group, FAPAV, reports that in the first half of 2006, police authorities report seizures of 8,560,732 DVDs and 3,489 audiovisual burner equipment. FAPAV was involved in 59 raids and undertook civil add-ins for eight criminal cases in 2006 (claim for damages, parallel to prosecution). Full-year data is not available at this time. Italian judges continue to be 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 business software industry continues to report positive developments with its cooperation and results achieved with the Italian authorities. As far as criminal proceedings are concerned, BSA directly supported with its technical experts more than 170 raids carried out by GdF in 2006 and 75% had positive results. It is also the growing attitude of the GdF to proceed *ex officio*. The BSA continues to work with the agencies and offered eight training courses to the GdF and Polizia Postale last year.

**Problems with prosecutions and the courts:** There are numerous 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, many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where a large corporation owns the copyright. The situation has been seriously aggravated by the passage in July 2006 of the "Pardon Law" which has resulted in the dismissal of a large number of piracy-related cases

In another example of the lack of judicial support for anti-piracy efforts, the Court of Cassation by Sentence No. 1872 of January 9, 2007, ruled that the unauthorized downloading of copyrighted movies, music and video games is not a crime if the downloader does not obtain a financial gain from the action. As background, in April 2002, the Court of Turin sentenced two men to respectively four and five years in jail and fined them several hundred euros for using a computer (FTP) server at the Turin Polytechnic Institute to store and distribute copies of video games, films and CDs in 1999. The jail time was cut to three months on appeal. But last month, a Supreme Court judge overturned the sentence completely, saying the act was not criminal because the duo saw no financial gain. This ruling was distorted in certain press accounts, adding to the already problematic misconception of the public that unauthorized downloading and filesharing is not illegal. In a public statement, FIMI, the music industry's trade group, downplayed the Supreme Court decision, saying it would have little impact on the anti-piracy law as the two men were charged under an older, weaker law, not on the grounds of Law 128/2004, which contains stiff penalties for copyright infringement. The heads of the

entertainment associations (Anica, Univideo, Agis, members of FAPAV) as well as the author's society SIAE also issued public statements against the misinterpretation of the ruling by the press. All Italian anti-piracy associations are continuing to develop strategies to address this problem, including TV interviews and national press advertising.

**Challenges with civil Internet cases:** 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. (In comparison, right holders may, however, be able to secure such information through the police or the courts in criminal actions.) Article 16 let. (b) of Legislative Decree No. 70 of 9 April 2003, implementing the E-Commerce Directive, requires take-down procedures to be subject to a prior notice by the "relevant authorities." This referral to the intervention of an undefined judicial or administrative authority is contrary to the E-commerce Directive and prejudicial to cross-industry agreements on take-down procedures. As a result, the industries believe that the Italian provisions of Legislative Decree # 70 of 2003 are inconsistent with Article 14 of the EU Directive 2000/31/CE where it requires a decision of the administrative or judicial authorities in order to remove the illicit contents or disable the access to them. EU legislation requires only the knowledge by the ISPs of an existing infringement committed by any third party to oblige the former to act expeditiously so to remove/disable the access to such illicit information. The anti-piracy associations will seek any opportunity to address and amend this deficiency in the law.

**Civil searches and litigation:** With respect to request for civil *ex parte* searches, BSA reports that this procedure works quite well in Italy. BSA's experience in 2006 was positive, and all its petitions were granted by the civil courts. Unfortunately, the overall situation with actual civil infringement litigation did not improve noticeably in 2006. Although the 2002 amendments to the Civil Procedure Code did establish strict time limits on civil litigation, civil cases continue to be too slow. Furthermore, many Italian Courts continue to award civil damages based on the amount of a "reasonable royalty" or "license fee" but this criterion lacks any deterrent effect.

**Specialized IPR courts:** In late 2002, a law was adopted which would create 12 specialized IPR civil courts. To date, the designated courts still have to also handle non-IP cases while also assuming responsibility for IP matters without any allocation of new resources. As a consequence, IP proceedings (including urgent measures) have become in some cases very slow, especially before some more loaded Courts. For instance, urgent measures may now take up to eight to ten months (when the infringement needs the completion of a Court Expert report and the plaintiff requests an injunction or similar remedies; while search orders proceedings still remain rather quick).

## **COPYRIGHT LAW AND RELATED DEVELOPMENTS IN ITALY**

**Trouble for criminal enforcement in the courts:** Three recent laws, combined in effect, will severely undermine even the possibility of effective deterrence and criminal copyright infringement. The operation of these bills will also worsen an already ineffective judicial system.

**The 2005 "Cirelli Law" and shortening the statute of limitations:** Following the decriminalization policy of the previous 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 Pardon Law of 2006:** In July 2006, a "Pardon Law" (aka 'Indulto', Law No. 241 of 2006) was issued. This is a general law providing an amnesty of all imprisonment sentences of three years or less. In other words, all those who had been sentenced to a jail term of three years or less before May 2, 2006, for almost all kind of crimes (including copyright piracy), were set free. Taking into account that IPR crimes have a maximum level of imprisonment sanctions of up to three to four years (which is furthermore rarely reached), the "Pardon Law" has nullified virtually all anti-piracy criminal sentences imposed in the last few years. According to the Supreme Council of Italian Magistrates (CSM), 80% of trials between 2006 and 2010 dealing with crimes committed before May 2006 will be, or have already been, dismissed due to this law. The number of piracy cases dismissed will be around 100% since most involve a potential final sentence between six months and three years. This bill was extremely controversial but passed with a clear majority because of cross-party agreement.

The impact of this law goes also beyond the simple ending of trials and freeing of criminals. The pardon law decreases the perceived probability of punishment for future crimes and thereby reduces the incentive not to commit crimes. This law sadly reinforces the general perception in Italy that the probability of being actually punished for a crime is relatively low.

**The 2006 "Pecorella" Law:** The Pecorella Law establishes that if a defendant is found not guilty or is acquitted (e.g. due to expiration of the statute of limitations), the public prosecutor and the offended party cannot appeal the sentence but can only take the case to the Supreme Court. However, a defendant who has been found guilty retains the right to appeal and if the appeal fails, to then appeal to the Supreme Court. The industry believes that this limitation on the power of the prosecutor and the offended party is a grave violation of the Italian Constitution. Finally, this law would allow the Supreme Court to review the "merits" of the case (e.g. retry the case), not just review matters of law.

In sum, the Pecorella Law may have the following effect: (1) it will turn upside-down the role of the Supreme Court; (2) it will increase the length of time it takes for the Supreme Court to render its judgment (which is already very long); (3) it will multiply the tools available to the defendant on appeal and cause further delays to the sole benefit of the defendant, and (4) it will make the Supreme Court even more unmanageable than it already is.

The recording industry reports that this new law is already having its predicted undesirable impact. In two cases in Naples, two major gang members involved in piracy cases were found not guilty in first instance decisions because of procedural errors by the Public Prosecutor, although the defendants were blatantly infringing the copyright law. The public prosecutor and the industry (as plaintiff) will be unable to appeal and restore the trial courts decision of guilty on the merits.

It should be noted, however, that the Constitutional Court has recently declared the Pecorella Law partially in violation of the Italian Constitution, which has restored to the Public Prosecutor certain powers to appeal acquittals.

**The EU Copyright Directive:** Legislative Decree of 9 April 2003 No. 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. That decision cast doubt on Italy's implementation of the

prohibition against trafficking in circumvention devices required by this Directive and the WIPO Treaties. In the same proceeding, there have been recent additional rulings with contradictory elements, so that the doubts as to the implementation of the Directive have been further deepened.

**The EU E-Commerce Directive:** In contrast to its implementation of the Copyright Directive, however, Italy's implementation of the E-Commerce Directive 2000/31/CE in Legislative Decree No. 70 of 2003 was deficient, violated Article 14 of the Directive, and risks hampering online enforcement efforts by requiring a court order before a takedown can occur. This requirement is contrary to that Directive and prejudicial to cross-industry agreements on take-down procedures. EU legislation requires only that the ISP know of the infringement to be obligated to takedown the infringing content. A proper notice and takedown procedure remains to be developed in Italy. (See civil internet cases above)

**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 the infringement is committed through 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 filesharers. 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 the fall of 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 (US\$2,685). 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 penalty, 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 171, 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 (US\$19,500) 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 provisions troublesome 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.



Unfortunately, there still has not been any concrete guidance from the Government on the ISP code of conduct process, i.e. the Sanremo Pact launched by the Innovations Ministry in cooperation with the Culture and the Communications Ministries in 2005.<sup>7</sup> The only outcome so far has been a unilateral publication of a self-regulatory code by the ISP groups, which almost totally ignores the concerns of rightsholders.

**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."

Article 181*bis* of the Copyright Law providing for the stickering duty conflicts with some basic principles of the EU Treaty (such as the "free flow of goods") as well as Directives 98/34 and 98/48, the TRIPS Agreement<sup>8</sup> and Italian Constitution. As a consequence, BSA urges that Article 181*bis* be revised to expressly state that all software programs containing less than 50% of audio or video materials are not to be marked or declared to SIAE. The criminal provision for software products (Article 171*bis* of the Copyright Law) was amended by Law 248/2000 to take into account the stickering duty. That rule may now be construed as applicable to original manufacturer, for the mere absence of the SIAE sticker on the products, even if such products are original. As a consequence, it is necessary to amend the provision eliminating the reference to the SIAE sticker.

**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.

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<sup>7</sup> 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."

<sup>8</sup> 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. 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.

Euros (US\$13,000), or €3,333 (US\$4,335) if paid within 60 days. Some local administrations already apply this law in order to fight the sale 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.

**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. In March 2006, the Italian Government issued the first anti-camcording legislation in Europe (incorporated into implementation of Enforcement Directive, Legislative Decree No. 140/2006). The law adds a provision to Decree No. 733 of 18 June 1931 (law on public safety), prohibiting the use of recording equipment in a place of public entertainment. Violations are punishable with up to 3 months' imprisonment or a small fine.

## **IPR TRAINING AND PUBLIC AWARENESS**

The local motion picture (FAPAV), recording (FPM) and business software (BSA) industries together held various training courses for Guardia di Finanza and Polizia officers. During these trainings new IP laws and the most updated methods to conduct investigations against criminal organizations, which are more and more updated under a technical point of view, are presented and illustrated to the officers. It is important to continue to generating awareness of IPR to be able to obtain the major support both from criminal and civil enforcement authorities. It remains an unfortunate cultural fact that common people and in many cases also judges believe that piracy is not a serious offense.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### KAZAKHSTAN

IIPA recommends that Kazakhstan be placed on the Watch List in 2007 for failing to enact the necessary legal reforms and undertake proper enforcement adequate to address its IPR piracy problems.

In 2006, the U.S. Trade Representative noted that Kazakhstan had made “progress” by improving its enforcement regime. But, Kazakhstan has still not met all of its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). In particular, several deficiencies remain in its legal regime and overall enforcement, especially criminal enforcement, is particularly weak. There are very few convictions reported and only minimal penalties assessed according to official statistics issued by the government. Poor enforcement has resulted, in part, due to a high burden of proof in criminal cases combined with a lack of adequate resources.

Kazakhstan did improve its IPR enforcement laws, especially in 2005, with the adoption of a package of IPR reforms, but it has not undertaken enough actual enforcement to date, especially against organized crime syndicates to stem its high piracy levels. Development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. The software and recording industries, for example, consider Kazakhstan the most promising marketplace of the C.I.S. region, behind only Russia and Ukraine.

The Copyright Law was amended in 1996, and further amended in 2004 and 2005. The 2004 amendments provided the long-sought 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, it joined the two WIPO digital treaties, the WCT and WPPT, effective in 2004.

### Legal Reform Deficiencies

The 2004 amendments to the Copyright Law of 1996 provide a flat 50-year window of pre-existing protection for foreign works and sound recordings. Thus, pre-1954 works and sound recordings remain in the public domain. It took over 10 years to adopt these amendments which allowed a lot of (now illegal) back-catalog material into the marketplace. This remains a major enforcement problem that Kazakhstan needs to address. Other changes made in 2004 include laws to facilitate electronic commerce and Internet technology, and to at least partially, implement the WIPO digital treaties, as well as E.U. directives.

In 2005, (effective November 26, 2005), additional amendments to the Copyright Law of 1996 were adopted, as well as amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, and the Administrative Code. Perhaps the key amendment in 2005 was the change to Article 184 of the Criminal Code, which repealed the previously 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). The 2005 amendments also repealed the

requirement that there be proof of “financial gain” for criminal charges to rest, another major improvement. Also in 2005, changes were made in commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores, which was another positive step.

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), as amended in 2005, lowers 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 2004 and again in 2005, IIPA provided 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 these enforcement revisions in 2007.

The Customs Code was completely revised, effective in 2003. However, those changes did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement. This needs to be corrected. The 2003 amendments also added a complicated registration system for copyright right holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend 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 in recent years 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 2006 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 that in recent years “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, unlicensed discs of BSA-member products, which used to be easily found in the marketplace, are now more difficult to find. 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. Still piracy levels for software remain very high – 86% according to preliminary figures.

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, in recent years, including against software pirates. A special IPR Department was created within the Finance Police (with national authority), but problems interpreting the law, in particular the threshold for criminal and administrative action have hampered their enforcement activities. In recent years, the copyright industries signed memoranda of understanding with the Government of Kazakhstan; there have also been training programs conducted throughout the country. The government has pledged to the copyright industries that it would 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 copyright industries report in recent years that even though there were some cases brought to courts, the majority of pirates were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, and an overall ineffective judicial system. Further they report, that even when cases do go to trial, there is no consistency in the sanctions that result (especially in the few criminal cases).

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan (for example, \$61 million by the software industry alone according to preliminary 2006 figures), the country received GSP trade benefits of over \$473.1 million in the first 11 months of 2006 (a 154.6% increase from 2005, when it received \$185.8 million). In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded its GSP review. IIPA asks the U.S. Government to continue to closely monitor Kazakhstan's GSP obligations vis-à-vis its IPR legal and enforcement regime.

IIPA suggests that police and administrative activity can, if used correctly, be a very positive first step. IIPA recommends 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.

There are two known optical disc production facilities reported in Kazakhstan at present (the latter opened in August 2005). Each of the two plants has a single production line; the total plant capacity of the two plants is 11.6 million discs per year. 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. 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, are an invitation for plants and organized crime syndicates to move their operations 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, when it was last estimated in 2005, was at about 66%; trade losses that year 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### KUWAIT

**Special 301 Recommendation:** IIPA recommends that Kuwait remain on the Watch List.

## **EXECUTIVE SUMMARY**

Over the past two years, copyright protection in Kuwait has improved for most copyright industries due to increased cooperation with the Kuwaiti Ministry of Information and the Kuwaiti Police. The key issues remaining are the law, which still fails to fully meet the requirements of the TRIPS Agreement and, for example, contains a totally non-deterrent criminal remedy on the books, as well as the failure to provide focused and swift prosecutorial follow-up and to impose strict penalties against those raided, which results in high rates of recidivism. In addition to increasing criminal penalties on the books, the Kuwaitis need to begin prosecuting key commercial pirates (including imposition of deterrent fines and prison sentences against egregious offenders), legalizing use of copyright materials in businesses, and continuing the work begun by Kuwaiti Customs to provide a choke point to pirate imports.

## **PRIORITY ACTIONS REQUESTED IN 2007**

- **Prosecute Piracy Cases in the Courts with Imposition of Deterrent Sentences (Including Imprisonment in Appropriate Cases) to Avoid Recidivism:** Piracy rates will not drop substantially until the courts in Kuwait impose deterrent sentences. Indeed, without the threat of criminal prosecution for copyright piracy, pirates will be emboldened to repeat-infringe and view raids as a mere nuisance or cost of doing business. In addition, until the copyright law is amended to strengthen criminal penalties, courts should impose maximum copyright sentences allowable under the law (including imprisonment), and prosecutors should seek alternative charges in order to maximize sentences.
- **Amend the Copyright Law to Significantly Strengthen Criminal Penalties:** The criminal penalties in the current copyright law are non-deterrent on their face, and therefore cannot meet the TRIPS requirement to provide criminal remedies that constitute a deterrent to further infringement. The maximum penalty ordered to date for copyright infringement was KD 300 (US\$1,042) (the maximum according to the law is KD 500, or US\$1,738). There have been no prison sentences or shop closures as a result of raids carried out. Given the brazen nature with which pirates have operated in Kuwait, and 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 seizure, forfeiture and destruction of pirate goods, as well as tools and implements used in pirating, shop closure, revocation of business licenses, and double penalties for recidivists.

- **Sustain Raiding, and Involve the Police IP Unit Systematically in Fight Against IPR Violations:** IIPA commends the Kuwaiti Government for taking significant numbers of raids in 2005 and again in 2006 against most forms of piracy. Further sustained raids are needed, including raids which are publicized and which are followed by swift and deterrent prosecutions. 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. The Kuwaiti Police can best employ their abilities, training, and resources by being empowered to investigate and take action against the various sources of piracy in Kuwait.
- **Shorten Procedural Delays:** When a raid is conducted by the Ministry of Information, the report is sent to the Public Prosecutor who will later transfer the case to the court. Unfortunately, it usually takes a very long time to transfer the case from the Ministry to the Public Prosecutor. Also, the Public Prosecutor takes an unduly long time before reaching a decision as to the transfer of the case to the criminal court. This process needs to be accelerated.
- **Continue Increased Seizures of Pirate Imports in 2007:** While the authorities in Kuwait showed excellent levels of activity in 2006, the same cannot be said for Kuwaiti Customs. A majority of pirate optical discs in Kuwait are imported from Southeast Asia. Kuwaiti Customs must become more active in 2006 in monitoring shipments, including large-scale shipments, courier packages, and personal baggage, to keep 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 online environment. Kuwait should join the Berne Convention and the WIPO "Internet" Treaties.
- **Apply Censorship Rules Fairly:** The Kuwaiti government should review censorship rules for sound recordings and their enforcement, and should refrain from using these rules arbitrarily to randomly block the release of recordings that objectively qualify and/or have been approved in the past.

For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



**KUWAIT**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006<sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music</b>	9.0	70%	8.5	70%	8.0	65%	3.0	55%	3.4	64%
<b>Business Software<sup>2</sup></b>	49.0	71%	35.0	66%	26.0	68%	24.0	68%	4.7	73%
<b>Motion Pictures<sup>3</sup></b>	NA	NA	1.3	82%	12.0	95%	12.0	95%	10.0	95%
<b>Entertainment Software</b>	NA	NA	NA	91%	NA	NA	NA	95%	NA	NA
<b>Books</b>	0.5	NA	0.5	NA	1.0	NA	2.5	NA	2.5	NA
<b>TOTALS</b>	<b>58.5</b>		<b>45.3</b>		<b>47.0</b>		<b>41.5</b>		<b>20.6</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN KUWAIT**

**Sustained Raiding Again in 2006; Rehab and Hawally Remain Havens for Entertainment Software Piracy:** Kuwaiti authorities carried out, on an *ex officio* basis, more than 300 enforcement actions in 2005 and many actions in 2006 in Kuwait against most tiers of piracy, including retail outlets (movies, games, computer resellers, and the like),<sup>4</sup> street vendors, distribution centers of pirate product (movies and interactive games, as well as optical disc storage areas), duplication sites of pirate product (VHS replication, DVD-R labs, and the like), and pirate cable operations (head end receiving locations in residences). IIPA is pleased that most actions in 2006 resulted in criminal charges being filed and cases transferred to the public prosecutor for criminal action. Moreover, 2006 saw the first raid coordinated by the newly established IPR Committee.<sup>5</sup> This follows on a very active year of enforcement in 2005.<sup>6</sup>

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Kuwait under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Kuwait, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> Factory-produced DVDs and CDs with pre-release music and motion picture titles, entertainment software, and business software continue to be sold at markets. Entertainment software products are also widely available at *souks*, flea markets, and retail stores, and have been known to be transshipped through Lebanon from Asia. We also note an increased trend of "burn-at-home" or "mom and pop" store piracy, in which pirate content is burned while the customer waits. The lack of deterrent penalties allows these operations to flourish.

<sup>5</sup> On June 3, 2006, police officers, Ministry of Culture representatives, customs officers, and the industry group Arabian Anti-piracy Alliance (AAA) carried out a successful raid against two locations believed to be operating storage sires supplying a local video shop. The storage units were located on the first floor and basement areas of residential premises. Seizures totaled; 1,300 burned pirate DVDs, 3,180 pirate VHS tapes, 5 VCRs, a computer, a DVD duplicator, a DVD player, 12 catalogues, plus hundreds of cover inserts.

<sup>6</sup> In 2005, the offenses involved movie piracy (79 separate actions), pay television signal theft (33 separate actions), business software piracy (32 separate actions), music piracy, and entertainment software piracy (e.g., 101 cases involved Playstation® console-based games). The authorities also took aggressive action against cable pirates with raids on pirate cable operations, including the seizure of supporting dishes, decoder boxes, and cables.

The Business Software Alliance and its members initiated and conducted 36 criminal raids in Kuwait in the course of 2006. They all targeted pirate resellers and were conducted through the Ministry of Information. The process of initiating and conducting the raids was very smooth and the relationship with the local enforcement authorities was generally improved in 2006. Other industries are less sanguine. In January 2006, eight video retail outlets were raided, in which pirate entertainment software was targeted, but at least for the entertainment software industry, there were no further raids in 2006. The entertainment software industry continues to be troubled by the piracy in the shops/outlets in the Rehab Center and the Hawally area, and the apparent lack of government action at these two notorious sources of pirated entertainment software products. Given the lack of deterrent fines or criminal sentencing, the rate of recidivism at these centers remains high. The Kuwaiti government must take concerted efforts to focus on Rehab and Hawally, which house hundreds of pirate retailers and remains the primary source of pirated entertainment software in the country.<sup>7</sup>

**Raids Not Resulting in Criminal Prosecutions with Imposition of Deterrent Sentences:** Unfortunately, raids are not leading to many criminal prosecutions, and no cases resulting in deterrent penalties being meted out. The courts are largely ignoring the copyright law and fail to mete out prison sentences, even in egregious cases, and fines serve only as a cost of doing business for the pirates. In 2007, IIPA looks to the Kuwaiti government to focus on the outcomes of these cases arising out of the numerous raids, to ensure that piracy is being deterred. 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.

There is also an incredible lag time between raids and forwarding cases to the prosecutor, due to the fact that prosecutors are not, to IIPA's knowledge, initiating raids themselves, but are instead referring raid targets to the Ministry of Information officials, who run the raid and forward the results back to the prosecutor. Public prosecutors in Kuwait need to exercise their rights to initiate raids with the police to solve this problem.

**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, 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.

**Signal Theft (Cable and Satellite Piracy):** Signal piracy (which can involve altering set-top boxes to illegally receive broadcasts, or the unauthorized decryption and/or retransmission of pay television through a pirate signal to home and business "subscribers") remains a problem in Kuwait, but it is important to note that cooperation with the Kuwaiti government is improving significantly. The Ministry of Information has been very aggressive against the cable pirates and has raided targets that have been furnished, though piracy remains significant in the absence of stronger deterrent penalties.

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<sup>7</sup> In 2005, IIPA provided to the Kuwaiti and U.S. governments a list of targets in Kuwait suspected to be engaged in pirate activities. While we understand the provision of this list was helpful in spurring the Kuwaitis on to action, it should be noted that, since there are literally hundreds of retailers in these areas, providing a list of only several targets can capture only one part of the piracy picture in Kuwait. Indeed, some companies report that many of the previously identified targets are back in business (and were back in business within days of the last raid), because the raids are isolated and continuous pressure has not been directed at these pirate retailers. Thus, a sustained crackdown at the Rehab Center and the Hawally area is what is required.

**University Practices Help Keep Book Piracy Low:** Kuwait retains its position as a leader in regulating book “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 2006. Other countries should learn from this approach by the government of Kuwait.

## **TRAININGS, CAMPAIGNS, AND BILATERAL ENGAGEMENT**

Industry training efforts continued in 2006. The Business Software Alliance conducted regular trainings and seminars in 2006, including judicial round tables, training for airport officials, training for the Intellectual Property Rights Committee officials and a third training for Kuwaiti Customs officials. In one such training that occurred in May 2006, the BSA organized a Judicial Roundtable in Kuwait, in association with the Ministry of Information. More than twenty judges attended the event. The program included a presentation by a representative from the Ministry of Information and a presentation on behalf of BSA on software issues, including the definition of the various types of software piracy, an overview of the main principles in the Kuwaiti copyright law and the developments and legal challenges in copyright law and enforcement in the Arab world. The roundtable was concluded with case scenarios that were discussed by the judges in an interactive manner.

In October 2006, Kuwaiti authorities, in association with the BSA, announced they would step up their campaign against software piracy through a series of seminars, trainings and conferences targeted at IT resellers, public and private sector organizations, the student community and the public at large.<sup>8</sup>

The Kuwaitis wish to make progress with the U.S. bilaterally through the Trade and Investment Framework Agreement (TIFA) discussions, and we understand they remain interested in a free trade agreement, so it is hoped that the TIFA talks can remain one point of leverage to seek positive changes in Kuwait’s copyright law and enforcement system.<sup>9</sup>

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in Kuwait is governed by Decree No. 66 (1999, effective February 9, 2000). IIPA has noted on many occasions that the 1999 law has never been interpreted through implementing regulations, nor has it been updated. As IIPA has also noted, the law fails to comply with TRIPS in certain respects and contains other problems/ambiguities.

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<sup>8</sup> *Kuwait clamps down on software piracy*, DPM, October 16, 2006 (indicating “the campaigns will highlight the adverse effects of software piracy on the national economy – in terms of reduced IT investments and employment opportunities – and also stress on the disadvantages of using pirated software, such as poor PC performance, non-availability of vital technical support and rampant virus attacks”).

<sup>9</sup> The latest meeting was held in September, between Assistant U.S. Trade Representative Shaun Donnelly and Kuwait’s Trade Minister, Falah al-Hajiri.

In 2004, the Kuwaiti government released a new draft copyright law. IIPA's conclusion, which has been shared with the Kuwaiti and U.S. governments, is that the draft law would resolve many but not all of the TRIPS deficiencies in the current law. The draft law would also partially implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) but would not implement all aspects of these treaties adequately. For example, the draft law would insufficiently protect against the unlawful circumvention of technological protection measures.<sup>10</sup> In addition, although the draft law would result in an increase in criminal penalties, there would remain no mandatory minimum prison sentences (even in cases of recidivism), and the penalties and fines, while above the levels in the 1999 Decree, would remain non-deterrent

IIPA understands from the Kuwaiti government that it has revisited the draft and made changes intended to comply with all related international conventions and treaties, including TRIPS, the WCT and the WPPT. To date, neither the U.S. government nor industry has been provided with an opportunity to review the draft. IIPA supports passage of a new copyright law in Kuwait, with necessary changes to ensure compliance with international norms, and to implement the WIPO Internet Treaties.

The following is a non-exhaustive list of key substantive and enforcement issues IIPA has noted in commenting on the 2004 draft (hereinafter Draft Law):<sup>11</sup>

### Key Concerns Regarding Substantive Provisions

- **Reproduction right:** Temporary copies must be protected to fully comply with the major copyright treaties and to effectuate protection for the digital age.<sup>12</sup> Unfortunately, nowhere in the Draft Law is “reproduction” properly defined, so the reproduction right found in Article 5(a) of the Draft Law, while setting out the kinds of fixations that are covered, is technology-specific and fails to provide expressly for protection of temporary copies. Defining reproduction as “the direct or indirect, temporary or permanent reproduction, by any means and in any form, in whole or in part, of a work, sound recording or performance fixed in a sound recording including any permanent or temporary storage of the work in electronic form” would resolve the problem.
- **Treatment of sound recordings (exclusive right of communication to the public/making available/broadcast):** Article 38 of the Draft Law includes a WPPT-compatible exclusive right of “making available” for producers of sound recordings, but producers of sound recordings are not given exclusive rights with respect to the

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<sup>10</sup> 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). Generally, such TIFAs can be a prelude to strengthening of trade ties including possibilities for a free trade agreement. If Kuwait is interested in an FTA with the U.S., it should be noted that any 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.

<sup>11</sup> For the complete IIPA analysis of the draft law, please see IIPA's 205 Special 301 Report on Kuwait, at <http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf>.

<sup>12</sup> As WIPO has explained, this agreed statement states the obvious: the concept of reproduction, under Article 9(1) of the Berne Convention extends to reproduction “in any manner or form”; therefore, a reproduction may not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor may it be excluded from the concept of reproduction just because it is of a temporary or transient nature.

broadcasting and communication to the public of sound recordings. Producers of sound recordings should be granted exclusive rights to control the dissemination of their products over the Internet, including an exclusive broadcast and communication to the public right including all forms of wire and wireless transmissions.

- **Circumvention of technological protection measures:** The Draft Law provides some protection (both criminal and civil) against the act [Article 51 (d)] of circumvention of, and the trafficking in devices that circumvent [Article 51(c)], technological protection measures. Unfortunately, the Draft Law does not provide WCT- or WPPT-compatible protection. It should be amended to provide for full WIPO Treaties implementation.<sup>13</sup>
- **Retransmission right:** The Draft Law does not expressly provide in Article 5(c) for retransmission rights. The Kuwaiti government should confirm that retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet shall be unlawful without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal.
- **Exceptions to protection:** The Draft Law (Chapter 6 as to works, and Article 41 as to related rights) contains many exceptions to protection, some of which may not comport with TRIPS/Berne Convention standards.<sup>14</sup> The well-established Berne three-step test (or its

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<sup>13</sup> For example:

- Protection should extend to technological protection measures that control access to works, as well as those that control the exercise of exclusive rights subject to copyright protection. The Draft Law apparently limits the TPMs covered to those “used to prevent infringement on copyright or neighboring rights.” This deficiency could be cured by adding the phrase “used to control access to a work or object of neighboring rights, or ...” before the phrase “... used to prevent infringement on copyright or neighboring rights.”
- Protection should extend to circumvention services in addition to devices in Article 51(c).
- Coverage should extend to component parts of circumvention devices (at present the Draft Law only covers “equipment, method, specially made or designed tool”).
- There is no definition of technological protection measures (we propose that technological protection measures be defined as “any technology, device, or component that, in the normal course of its operation, controls access to a protected work or sound recording, or protects any copyright or neighboring rights”).
- The Draft Law imposes a knowledge requirement as to the trafficking in devices, and a “bad intent” requirement as to acts of circumvention, which result in inadequate coverage. This should be removed, and as to devices/services, objective criteria should be set forth for determining whether a device or service has an improper purpose.
- The Draft Law does not, but should, provide that it shall not be required “that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications or computing product provide for a response to any particular technological measure,” so long as such product does not otherwise violate the anti-circumvention provisions.

<sup>14</sup> For example:

- Article 24 provides for a broad private copy exception. Such an exception, to survive scrutiny under the three-step test, and in light of technological developments, should be limited to copies derived from a legal source, made by the person (not a third party) availing him or herself of the exception, limited to analog form, made strictly for private and personal uses, and limited to uses not resulting in profit or other financial gain.
- Article 25 provides for an exception for certain temporary reproductions. This exception appears to be too broad to pass muster under the Berne three-part test and must be narrowed
- Article 30 appears to impinge on the exclusive “communication” right in Article 5 as to the works concerned.
- Article 31, Clause 2 appears to violate the three-step. It is a software-specific exception that states,

It is permitted and without permission or compensation to the author for the legitimate owner of a copy of a computer program to make ... A single copy of the program if derived, adapted, upgraded, or translated into another computer language, if it was necessary to ensure its compatibility with a certain computer employed for private use of the owner of the original copy.

variants in Article 13 of TRIPS, Article 10 of the WCT and Article 16 of the WPPT) should be adopted expressly for all exceptions in the Draft Law (Chapter 6 as to works, and Article 41 as to producers of sound recordings and performances).<sup>15</sup>

- **Term extension (Articles 30 and 31):** The Draft Law retains term of protection that is life of the author (or last surviving joint author) plus 50 years for most works (audiovisual works are protected 50 years from publication or completion if not published within 50 years of completion), and 50 years from publication for sound recordings (or from fixation if not published within 50 years of fixation). Kuwait should follow the modern trend (more than 80 countries have or have committed to greater than TRIPS minimum terms), which is to protect works for “life plus 70” for works of natural authors, and 95 years from publication for audiovisual works and sound recordings (the government of Oman has agreed, in the U.S.-Oman Free Trade Agreement, to extend term to life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings).

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We believe the Kuwaitis have attempted here an approximation of a limitation which exists in U.S. law, namely, Section 117(a)(1), which provides that it is not an infringement of copyright for the owner of a computer program to copy or adapt a computer program if “such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.” The purpose of the Kuwaiti provision seems to be the same as 117(a)(1), namely, to ensure that someone who is the lawful owner of a computer program may use it on a particular machine, and to allow adaptation or copying when such adaptation or copying is an “essential step” to use the program on that machine. The Kuwaiti provision, however, goes well beyond what is required to use the program on a particular machine, exempting such activities as “deriv[ing]” or “upgrad[ing]” the program or even “translat[ing]” the program “into another computer language.” Such activities take the Kuwaiti provision outside the scope of what the three-step test as enumerated in the FTA would allow. One possible way to resolve the issue would be to amend Article 26(b) as follows:

It is permitted and without permission or compensation to the author for the legitimate owner of a copy of a computer program to make ... A single copy or to adapt a ~~of the program if derived, adapted, upgraded, or translated into another computer language,~~ if it was necessary to ensure its use compatibility on with a certain computer employed for private use ~~only in that manner by~~ of the owner of the original copy.

- Article 32 would impinge on the exclusive public performance right (cf. Berne Convention Article 11 as to dramatic and musical works) and is Berne- and TRIPS-incompatible (e.g., it would permit performances of a play without permission and without compensation to the right holder, even if an admission fee is charged).
- Article 33 provides what we believe may be a faulty translation of the Berne Article 11bis(3) “ephemeral recordings” exception. This should be clarified and confirmed. The provision appears to be broader than that permitted by the Berne Convention since it does not seem to include the two conditions prescribed in Berne Article 11bis(3) for the archival exception: neither of “official archives,” nor of “exceptional documentary character.”
- The Article 34 and 35 compulsory licenses are Berne- and TRIPS-incompatible, and Article 34 also fails to satisfy the Berne Appendix with regard to reproductions and translations.
- Article 41 would allow, without authorization or payment to the relevant right holders, the “copy[ing] for the purposes of scientific research” any performance, sound recording, or broadcast. This blanket exemption is overly broad, goes well beyond what would be permissible under the Berne three-step test.
- Article 54 is TRIPS-incompatible and must be revised prior to passage. Perhaps inadvertently, the article would as currently formulated permit acts regarding importation of infringing and pirated copies of copyrighted materials. Any exception as to importation of personal copies should be limited to the physical person bringing a single copy of any work/sound recording/broadcast for strictly personal and non-commercial purposes. In addition, and more importantly, no exception of this sort should be provided unless an exclusive importation right is afforded to copyright owners in works and sound recordings. Otherwise, these exceptions are unacceptably broad.

<sup>15</sup> Thus, a chapeau should be added preceding Article 24, namely, “The limitations or exceptions to exclusive rights set forth in Articles 24 through 35 shall be confined to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” In addition, a proviso should be added to Article 41 after the phrase “without the permission of the right holder” as follows: “provided, such activities are confined to certain special cases that do not conflict with a normal exploitation of the performance or sound recording and do not unreasonably prejudice the legitimate interests of the performer or the producer of sound recordings.”

- **Co-authorship, authorship in collective works, audiovisual works:** Provisions on co-authorship, authorship in collective works, and provisions on rights in audiovisual works stemming from the 1999 Decree are unduly complicated and confusing, and fail to take into account the most efficient business practices and distribution models that help copyright owners to fully enjoy their rights.
- **Point of attachment for non-natural author copyright owners:** Since the Draft Law defines “author” as a natural person, Article 68 (international application) needs to be amended to provide point of attachment for other right holders.
- **National treatment:** Kuwait must protect all WTO members’ works/performances/sound recordings in accordance with the principal of national treatment (i.e., must protect WTO members’ works on a par with the level of protection afforded to Kuwaiti works/performances/sound recordings). Given that the 1999 Decree contained material reciprocity in both the law and explanatory notes, this is an issue of concern that must be resolved in the Draft Law to ensure that Kuwait complies with TRIPS.
- **Government legalization of software and other copyright works/sound recordings:** Nothing in the Draft Law addresses the need to provide that all government agencies must use legitimate software and adequately manage government software usage. IIPA is interested to know if such implementation exists in other laws, regulations or decrees; otherwise, provisions should be added to the Draft Law to address this need.
- **Protection of encrypted program-carrying satellite signals:** The Draft Law does not, but should, make it a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal; or willfully to receive or further distribute an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.

### Key Concerns Regarding Enforcement Provisions

- **Criminal penalties, while improved over 1999 Decree, are still too low:** Article 51 provides for some improvements over the 1999 Decree, for example:
  - The Draft Law provides for minimum fines and/or prison sentences (minimum KD 500, or US\$1,738 and/or three months in prison).
  - The maximum fines and prison sentences for first-time offenders are doubled from the 1999 Decree (maximum KD 2,000, or US\$6,952 and/or one year in prison).
  - Both minimum and maximum fines and prison terms are doubled for recidivists (up to KD4,000, or US\$13,904 fine and two years in prison).
- **Seizure, forfeiture, destruction in criminal cases and ex officio action in criminal cases:** The Draft Law should ensure that judges may order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offense, any assets traceable to the infringing activity, and any

documentary evidence relevant to the offense. The Draft Law should also ensure that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order. In addition, judges must be able to order the forfeiture of any assets traceable to the infringing activity and, except in exceptional cases, order the forfeiture and destruction of all counterfeit or pirated goods, and, at least with respect to willful copyright or related rights piracy, materials and implements that have been used in the creation of the infringing goods. The Draft Law should ensure that such forfeiture and destruction shall occur without compensation of any kind to the defendant. Finally, the Draft Law should ensure that authorities (including the Police, Customs, or the MOI) may initiate legal action *ex officio*, without the need for a formal complaint by a private party or right holder.

- **Criminalizing end-user piracy of software or other copyright materials:** While Article 51 does not expressly criminalize the unauthorized use of software or other copyrighted materials in a business setting, the Kuwaiti government has indicated that Article 51 criminalizes “any/all forms of unauthorized use of any copyrighted material in a business or commercial scale, including unauthorized use of software.” IIPA is pleased that, in the Kuwaiti government’s view, end-user piracy is criminalized in Kuwait, and hopes that the Draft Law would confirm this expressly.
- **Civil remedies not adequately spelled out – compensatory damages and statutory damages, etc.:**<sup>16</sup> Article 51 provides, “The right holder whose right, as specified by the Law, was subjected to infringement has the right to ask for adequate compensation.” This general provision on compensatory damages may not be enough to satisfy TRIPS.
- **Provision allowing “custodian” to “re-publish, exhibit, manufacture or derive copies of the work” after a provisional order has been carried out must be deleted:** Article 46, Clause 2, would allow a custodian to “re-publish, exhibit, manufacture or derive copies of the work” pending agreement of “all the parties” to a provisional order.<sup>17</sup> This provision unfortunately not only impinges on several exclusive rights of the copyright owner, in violation of international treaties, but also is subject to abuse since it appears to permit an infringer to hold up an administrative order, while allowing the infringing goods to be sold off or otherwise used in violation of copyright, by such “custodian.” This provision must be deleted.
- **Border measures – goods in transit and parallel imports:** Article 54 should be amended to ensure that pirated goods are covered, even when in transit (consistent with the EC Customs Regulation). In addition, the third clause should confirm that the exception to the application of border measures should only apply when the goods in question were imported into Kuwait with the authorization of the right holder to further distribute them in Kuwait.
- **Presumptions of ownership and subsistence of copyright:** The Berne Convention requires a presumption as to authorship of works [Berne Article 15(1)], which is provided for in Article 6(2) of the Draft Law [but the Draft Law does not contain a Berne-compatible presumption with respect to cinematographic works; see Berne Article 15(2)]. The Draft Law

<sup>16</sup> The Kuwaiti government has indicated that compensatory damages are regulated under the general principles of the Kuwaiti civil law and are not detailed in the draft law.

<sup>17</sup> The Kuwaiti government asserts that the “purpose behind appointing a custodian who will be allowed to republish, exhibit, manufacture or derive copies of the work is to protect and benefit from such works and guarantee its continuance.”



should provide for presumptions as to ownership and subsistence of copyright for works, performances and sound recordings.<sup>18</sup>

- **Information on those connected with infringement:** The Draft Law should include the proviso that, in civil judicial proceedings, the judicial authorities may order the infringer to provide any information that the infringer possesses regarding any person(s) or entities involved in any aspect of the infringement and regarding the means of production or the distribution channel of such products, including the identification of third parties that are involved in the production and distribution of the infringing goods or services and their channels of distribution, and to provide this information to the right holder.
- **Criminalization of piracy for “no direct or indirect motivation of financial gain”:** Article 61 of the TRIPS Agreement requires the criminalization of copyright piracy on a commercial scale. Since piratical acts (such as those occurring over the Internet) can cause devastating commercial harm regardless of any profit motive, it is recognized that criminalization even of acts that may not have a motive of financial gain is of the utmost importance. Kuwait should therefore provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain is criminalized in Kuwait.
- **Service provider liability:** The Draft Law contains no provisions governing the key issue of the liability of service providers that are involved in the hosting and transmission of infringing material over their facilities. If Kuwait is to consider this issue, it could include provisions that establish the basic functional equivalent of the concepts and provisions embodied in U.S. law. Ensuring that secondary liability will apply to service providers involved in the hosting and transmission of infringing material over their facilities will provide the proper incentive for cooperation among service providers that is essential to making the Internet safe for the transmission of protected copyright products. An effective “notice and takedown” system modeled after the statutory system contained in the U.S. law is an essential element of any such set of provisions.

## The Need for Deterrent Penalties in Kuwait

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 roughly \$1,700 fine. There are no pre-established (statutory) damage awards possible in Kuwait. 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 required to reduce piracy in Kuwait.

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<sup>18</sup> The Draft Law should include the presumption that, in the absence of proof to the contrary, the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or phonogram in the usual manner, is the designated right holder in such work, performance or phonogram, and that, in the absence of proof to the contrary, the copyright or neighboring right subsists in such subject matter.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### LEBANON

**Special 301 Recommendation:** Lebanon should be lowered to the Watch List in recognition of progress made by the Lebanese government in combating piracy for certain sectors in 2006.

## **EXECUTIVE SUMMARY**

Lebanon has slowly emerged from the conflict between the Israeli Defense Forces and Hezbollah fighters,<sup>1</sup> but faces many daunting challenges, including rebuilding infrastructure, a government reform effort, and increasing political opposition from Hezbollah (most recently including violent conflict). IIPA acknowledges that, as a result, copyright issues cannot take on the importance they have in Lebanon in previous years. Even in the face of these other priorities, Lebanon has made some progress in combating piracy. In addition to the on-the-ground improvements for some copyright sectors, we note that on November 30, 2006, the United States and Lebanon signed a Trade and Investment Framework Agreement (TIFA),<sup>2</sup> which sets the stage for regularized discussions on many trade matters, including intellectual property. IIPA hopes that copyright concerns will be a permanent fixture in the TIFA agenda going forward.

## **KEY COPYRIGHT ISSUES FOR 2007**

- **Cable Piracy:** Cable piracy has long been the major piracy problem for the motion picture industry in Lebanon. The pay television market in Lebanon has been nearly 100% pirate for years, with hundreds of small cable systems retransmitting broadcast programming without authorization and charging customers for these “pirate” pay television services. The Minister of Telecommunications has taken an interest in the fight against cable piracy. In a meeting held with representatives of the major motion picture studios in May 2006, the Minister requested and was presented with a draft decree that would allow him to regulate the cable market (this occurred during World Cup season, and the Minister pressured the cable operators to pay a license fee to the owners of the World Cup 2006 events, but the outbreak of violence halted progress on this issue).
- **Optical Disc Plant:** The Lebanese Government should continue to monitor the one known optical disc plant in the country for illegal activity.
- **Pirate Imports and Exports:** In 2005 and into 2006, much pirate product in Lebanon was produced inside the country (factory-produced, “burned” to order, photocopied, printed, etc.). Despite the present political tensions, pirated CDs and DVDs imported from Asia are

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<sup>1</sup> The violence ended in August 2006 after United Nations Resolution 1701 asked both parties to end the fighting and mandated an enlarged and strengthened international peacekeeping force in southern Lebanon and supervision of Lebanon’s seacoast and border with Syria to prevent the rearming of Hezbollah.

<sup>2</sup> *United States and Lebanon Sign Trade and Investment Framework Agreement*, November 30, 2006, at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2006/November/United\\_States\\_Lebanon\\_Sign\\_Trade\\_Investment\\_Framework\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Lebanon_Sign_Trade_Investment_Framework_Agreement.html) (Assistant U.S. Trade Representative for Europe and the Middle East Shaun Donnelly and Lebanese Minister of Economy and Trade Sami Haddad signed in Beirut a Trade and Investment Framework Agreement which will provide a forum for expanding and strengthening bilateral trade and investment relations between the United States and Lebanon).

flooding the Lebanese market. Most such products enter Lebanon via Syria or Hariri International Airport. In addition, Lebanon is one of the few countries in the world where pirate offset prints of books were being produced for export, flooding countries in the Middle East with pirate editions. Customs authorities are reportedly seizing more pirate product than in the past, but should step up *ex officio* actions to interdict and seize pirate product entering the country or destined for export.

- **Prosecutions with 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 copyright 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.
- **Copyright Law and Implementing Key Treaties:** The Lebanese copyright law remains incompatible with major copyright international instruments (for example, the law is incompatible with the WTO TRIPS Agreement). The law should be amended to fix these deficiencies, as well as to protect copyright in the online, digital and wireless environments consistent with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

For more details on Lebanon's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>LEBANON</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>3</sup></b>										
	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music</b>	2.6	60%	3.2	75%	3.0	70%	2.5	70%	2.0	65%
<b>Business Software<sup>4</sup></b>	20.0	72%	20.0	73%	15.0	75%	14.0	74%	3.5	74%
<b>Books</b>	NA	NA	4.0	NA	3.0	NA	2.0	NA	2.0	NA
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	75%	NA	80%	NA	NA
<b>Motion Pictures<sup>5</sup></b>	NA	NA	1.0	1%	10.0	80%	10.0	80%	8.0	80%
<b>TOTALS</b>	<b>22.6</b>		<b>28.2</b>		<b>31.0</b>		<b>28.5</b>		<b>15.5</b>	

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Lebanon under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>4</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Lebanon, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

## **PIRACY AND ENFORCEMENT UPDATES IN LEBANON**

**Special IPR Unit Made Operational in 2006:** In September 2005, the government of Lebanon finally established a Special IPR Police Unit, which came into operation in March 2006. The unit consists of five ranking police officers and twenty junior police officers. The Unit shows promise, responding eagerly to requests for action (they act on the basis of telephone tips, subject to confirmation that the industry group will file the formal complaint later). In its first three months of operation (March 2006 to June 2006), the Unit seized a total of 95,227 pirate CDs/DVDs, four duplicating machines, two computers, and 750 sleeves on behalf of the motion picture industry. Other industry groups have worked with this Unit, including the record industry and the business software industry. The IPR Unit has also conducted its own investigations, and has requested specialized software to assist in their investigations.

In 2006, the Cyber Crime and IPR Bureau carried out 500 raids on behalf of the recording industry, resulting in seizures of 30,000 pirated music cassettes, 50,000 pirate audio CDs/CDRs, 80 CD-R burners, and resulting in the arrest of ten suspects. Despite all the political problems, the Cyber Crime & IPR Bureau have kept up raiding shops and seizing pirated products. The cooperation between right holders and the Cyber Crime Bureau is very good and the government has responded rapidly to industry requests. During the first operational week, the officers of the new bureau seized about one third of the total number of optical discs seized during the whole of 2005. In total about 10,000 optical discs and cassettes were confiscated during raids on hypermarkets and the Sunday-market.

While *ex officio* actions are not accepted as a matter of course in Lebanon, (i.e., the police need to be instructed by the prosecutors' office in order to take action), because of the improved relationship with the above-mentioned special police unit, copyright owners have been able to request raids even prior to filing a formal complaint.

**Cable Piracy:** There remain between 600 and 700 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 videocassettes or DVDs to broadcast directly to their subscribers, including the broadcasting of recent popular movies and television 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. Motion pictures are frequently retransmitted by these pirate cable operators prior to their theatrical release or legitimate broadcast by television stations in Lebanon. As a result, local broadcast television stations have cancelled long-standing licenses with copyright owners because they cannot compete with the pirates. A survey on the economic impact of cable piracy in 2000 estimated that the Lebanese government was losing approximately US\$38 million a year due to cable piracy. One legitimate cable operator, Econet, has even had a bankruptcy lawsuit filed against it because it cannot compete with pirate operators.

Many lawsuits have been brought over the years against various cable operators. However, there has been little deterrence against either the specific cable operator targeted or the pirate cable community. 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 against four cable television pirates for the

unauthorized transmission of certain titles owned by U.S. motion picture companies.<sup>6</sup> Without severe fines and without imprisonment in commercial piracy cases, there will never be a deterrent in Lebanon against this sort of piracy. No new decisions regarding cable piracy were handed down in 2006. Two criminal complaints were filed in February 2005. However, due to the assassination of Prime Minister Hariri, the investigation of that complaint was cancelled.<sup>7</sup> In December 2005, a new complaint was filed with the Ministry of Economy and Trade requesting it to inspect the operations of ten pirate cable operators in Beirut. No further action has been taken in regard to this complaint.

**Book Piracy Including Pirate Books Produced in Lebanon for Export:** Book piracy remains a major problem in Lebanon. Offset print pirate editions hurt not only the domestic market, but are being produced for export. These pirated books, especially prevalent in the scientific, technical and medical sectors, flow out of Lebanon into Jordan, Saudi Arabia, and the United Arab Emirates, among other countries. The export of pirate books makes this problem in Lebanon a particularly harmful one for both local and international publishers.

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. This growing sector of infringing activity takes place primarily in commercial establishments near university campuses, as major commercial photocopying enterprises are situated to serve students and lecturers who wish to copy books. Most universities have taken little or no action to discourage use of photocopied materials on campus.<sup>8</sup> Enforcement and education officials should work together to target the massive illegal photocopying taking place in and around these institutions.

**Retail Piracy:** Retail piracy in Lebanon remains serious, running at around 60 to 80% depending on the industry sector. Although the actions of the aforementioned Cybercrime and IPR Bureau have had an impact on the availability of pirated materials in street stalls and shops, retail piracy in brick-and-mortar shops remains a problem. Retail piracy involves optical discs (predominantly “burned” CD-Rs) of sound recordings, movies,<sup>9</sup> entertainment and business software. Some of the “burned” CD-Rs are sourced back to Syria<sup>10</sup> 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, the 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

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<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> An illustrative list of institutions for which enforcement is overdue includes: Notre Dame University, Haigazian University, Balamand University and Lebanese University.

<sup>9</sup> Pre-theatrical and pre-video release piracy sourced from camcorder copies and from pirate and parallel imported optical discs have been a widespread problem in Lebanon. Illegal copies of new U.S. cinema releases are on the market within days.

<sup>10</sup> Syria has been used in the past as a major “transit country” for shipments of pirated discs into Lebanon from Malaysia. The pirated goods were mostly smuggled into Lebanon via “military roads” between Syria and Lebanon. There have been no real Customs checkpoints at these roads.

location is not enough.<sup>11</sup> Syria remains a major transit country for pirated optical discs smuggled into Lebanon.

**Business Software Piracy:** The business software industry continues to suffer 72% piracy 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.<sup>12</sup>

**Entertainment Software Piracy:** Entertainment software publishers report that the piracy situation has worsened over the last year. Nearly all the product in the market is factory replicated pirated optical disc product, with very little CD-R burning or online piracy affecting the industry, although the Internet continues to serve as a medium for advertising pirated products. Pirated products are sold in retail shops and through street vendors. Lebanon is also believed to be a transshipment point of pirated video game products into Kuwait (and other countries in the region).

**Optical Disc Plant:** There was one known optical disc production factory in Beirut, Lebanon (Skyline) that had been producing over 150,000 discs per month. While the plant is still in operation, the record industry reports that it has been able to visit the plant in 2006, as part of the "IFPI plant visit program" and reports that the plant owner fully cooperated. Lebanon should consider regulations to facilitate monitoring of this plant, and any others that might migrate to Lebanon.

**Internet Piracy:** Notwithstanding the high cost of telecommunications and the absence of broadband Internet,<sup>13</sup> Internet piracy is on the rise in Lebanon. It consists primarily of offers to sell hard goods (computer software, music CDs, and DVDs, and, e.g., 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. The availability of illegal mobile download services for music is on the rise.

**Courts Have Failed to Deter or Adequately Compensate for Piracy:** U.S. copyright industry representatives have 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.<sup>14</sup> The Lebanese Government must encourage judicial authorities to adjudicate promptly all intellectual property cases and to impose the maximum penalties allowed under

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<sup>11</sup> In the past, some raids resulted in the police leaving computers with copyshops after the raid. 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.

<sup>12</sup> The MOET sympathize with shop owners that sell pirated products, and lack technical expertise which would boost their confidence when performing raids.

<sup>13</sup> 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>.

<sup>14</sup> 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.

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.

## **TRAINING, PUBLIC AWARENESS AND SPECIAL PROGRAMS**

The copyright industries provided various trainings once again in 2006. Training has focused on the new Special IPR Unit both in late 2005 and in 2006. In November 2006, the Head of the Special IPR Unit spent a day at UK FACT in London during which he learned the methods used by pirates and the means to investigate them. The record industry also conducted a special “Product Identification” training for 15 staff members of the Cyber Crime & Intellectual Property Rights Bureau. BSA, IFPI and MPA provided training on identifying pirate product as well as computer forensic training. These three groups also provided hardware (PCs, printers, etc.) worth US\$15,000, and arranged for advanced computer forensic training in the United Kingdom for two officers of the IPR Unit

Publishers worked with the MOET in late 2005 (and continuing as possible into 2006) to raise awareness of the importance of copyright on university campuses. The Ministry 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 agreed to work with the Ministry to organize educational seminars and ask university presidents to get involved by sending letters to their deans and department heads about illegal photocopying. IIPA believes that progress on this initiative has slowed or stalled, likely due to the current political situation. We will continue to monitor this partnership in 2007 and would like to encourage the Lebanon government to lend its full support to these endeavors.

## **MARKET ACCESS**

**Censorship:** The censorship rules in place in Lebanon are still a barrier to full market access for the recording industry. Although their enforcement has become more flexible over the last year, there are still numerous recordings that fail to qualify under the opaque criteria. These censorship rules should be applied with great restraint, on a non-discriminatory basis and according to transparent criteria.

## **COPYRIGHT LAW AND RELATED ISSUES**

The Copyright Law of Lebanon (effective June 14, 1999) provides, on its face, a sound basis to enforce against piracy of works and sound recordings,<sup>15</sup> 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

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<sup>15</sup> 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.



receive such broadcasting”).<sup>16</sup> 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).<sup>17</sup> The Lebanese government 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,<sup>18</sup> including:

- 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.

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<sup>16</sup> While elements within the Lebanese government have proposed the drafting of a Cable Regulation Law, it would be more important to ensure strong public enforcement action against cable pirates through the strong provisions against cable piracy in the existing copyright law.

<sup>17</sup> 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.

<sup>18</sup> A detailed discussion of 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.



Each of the issues noted would arise in context of Lebanon's bid to join the WTO, and Lebanon must take measures to address these deficiencies.

## **GENERALIZED SYSTEM OF PREFERENCES**

On September 3, 2003, the United States Trade Representative "accepted for review" a Petition filed by the IIPA with the U.S. government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many 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. IIPA recommends withholding a decision at this time on the Petition to review Lebanon's IPR protection under the GSP program. During 2005, Lebanon imported \$32.7 million worth of products into the United States duty-free, or 37.8% of its total imports into the U.S. In the first 11 months of 2006, Lebanon imported \$30.4 million worth of products into the United States duty-free, or 38.1% of its total imports into the U.S.<sup>19</sup>

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<sup>19</sup> 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### LITHUANIA

**Special 301 Recommendation:** Lithuania should remain on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

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). Internet piracy is also a serious issue in Lithuania, and the government needs to take action to halt this infringing activity.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Take action to combat internet piracy, including shutting down websites that engage in peer-to-peer file-sharing.
- The IPR Division in the Criminal Police Investigation Bureau should be instructed to allocate substantially more time to fighting piracy and all other relevant enforcement agencies also should be instructed to increase their engagement on anti-piracy actions.
- Customs officers, in particular the Customs Criminal Service, should commence actions, including *ex officio* actions, to intercept pirate product smuggled into the country.
- The prosecutors should follow up with prompt prosecutions.
- Administrative sanctions, which are not now occurring, should be imposed (for example, withdrawing business licenses from infringing kiosks).
- Ever increasingly 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 are now virtually non-existent among enforcement authorities as well as with rightholders' organizations. This needs to change in 2007.
- The Lithuanian Government should make a political commitment to eradicate copyright piracy and instruct all authorities to make anti-piracy enforcement a priority.

### **Legislation**

- 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.
- Consider adopting optical media regulations to properly license and enforce the production, distribution, import and export of optical media.

**LITHUANIA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006 <sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Business Software <sup>2</sup></b>	<b>20.0</b>	<b>59%</b>	14.0	57%	11.0	58%	10.0	58%	4.6	53%
<b>Sound Recordings &amp; Musical Compositions <sup>3</sup></b>	<b>13.0</b>	<b>85%</b>	12.0	85%	15.0	80%	13.5	85%	12.0	85%
<b>Entertainment Software <sup>4</sup></b>	<b>NA</b>	<b>NA</b>	1.7	88%	NA	85%	NA	90%	NA	80%
<b>Motion Pictures <sup>5</sup></b>	<b>NA</b>	<b>NA</b>	NA	NA	1.5	65%	NA	NA	NA	90%
<b>Books</b>	<b>NA</b>	<b>NA</b>	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>33.0</b>		<b>27.7</b>		<b>27.5</b>		<b>23.5</b>		<b>16.6</b>	

Lithuania has 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.<sup>6</sup>

## **COPYRIGHT PIRACY AND ENFORCEMENT**

Piracy in Lithuania during 2006 involved growing internet piracy, continued high level of hard goods piracy (especially involving pirated optical discs) and weak enforcement at the borders. The three bodies responsible for IPR enforcement are the Special Internet Crime Investigation Unit (formerly the Economic Police), the IPR Division within the Criminal Police Investigation Bureau, and Customs.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Lithuania under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Lithuania, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> The music industry figures represent the piracy level of international repertoire. The losses figure increased due to the increase of consumer demand and the decrease of the U.S. dollar value.

<sup>4</sup> 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.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>6</sup> 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/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. Also available are previous IIPA reports on Lithuania at <http://www.iipa.com/countryreports.html>.

**Internet piracy:** During 2006, Lithuanian websites continued to contain advertising for the sale of infringing 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 known prosecutorial action to shut them down. There was no progress in 2006. The police target only physical persons offering unlicensed software on the Internet. Usually, police place an order by e-mail or by telephone, and conduct a trap purchase, followed by the search of premises. These cases are called “Internet” cases only because the “lead” (e.g. advertisement on a software offer) is found on the Internet. The trend now is to move these illegal websites to servers located outside Lithuania. There are amateur websites marketing pirate products and parallel imported DVDs.

In June 2006, the government reported that approximately 17,000 unauthorized copies of music recordings, films, computer games and other intellectual property were taken out of the market in Lithuania during the first five months of 2006, down from 37,000 in the prior year. News reports indicate that the Lithuanian Criminal Police Bureau inspected 93 companies and market places in the first five months of 2006, up from 77 in the same period the prior year.<sup>7</sup>

**Piracy at the borders:** Piracy at the borders remains a significant problem for the copyright industries. Given its pivotal geographical location (especially to Russia) and weak border enforcement, 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. Incidents of materials (hand-carried CDs and DVDs) seized by British customs suggests that this material is being shipped throughout Europe.

Six 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 those coming from EU countries.

**Optical media piracy:** There is one known CD manufacturing plant in Lithuania, producing for the local market as well as neighboring Latvia and Estonia. In 2006, this plant still had two lines with an estimated capacity of 7 million discs per year (including CD-R --blank disc-- replication).

**Music and recording piracy:** The recording industry reports that the music piracy situation in Lithuania is still unacceptably bad. The main form of physical piracy is the sale of factory-pressed CDs at market places, such as the one near the Pergale cinema theater, which is particularly bustling on weekends. Not only local consumers, but also many foreign visitors are buying pirated music at these markets. Law enforcement, such as the IPR Division seem to be oblivious of its existence. 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. Another form of pirate trade is the door-to-door hawking of distributors visiting public places or offices to sell pirated products. Although the overall level of piracy in Lithuania remained around 60% in 2006, the level of piracy for international repertoire was substantially higher, around 85%.

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<sup>7</sup> See *Baltic Business Weekly*, June 19, 2006.

The legitimate music industry in Lithuania has been struggling for years to survive. Organized criminal groups are still 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 \$13 million in 2006.

**Entertainment software:** The entertainment software industry reports that pirated products continue to enter the country from Russia, though in the last year, domestically burned products have become more readily available than replicated product. Pirated products continue to be available at flea market venues, through street vendors or via the Internet. As noted above, Internet piracy (including P2P piracy) has increased greatly, and while there continues to be a lot of advertising for burned pirated products, there has also been an enormous growth in downloading of pirated material. Piracy at Internet cafés remains problematic. Some ESA members continue to report serious problems in obtaining effective border enforcement (see discussion below).

**Business software piracy:** The Business Software Alliance (BSA) reports that internet piracy was a primary concern for its members last year. 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 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's preliminary 2006 estimated trade losses due to business software piracy rose to \$20.0 million, up from \$14 million the prior year. The estimated piracy rate also rose from 57% to 59%. 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.

**Audiovisual piracy:** 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. 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, and also by reducing prices significantly to compete with the ample pirate product in video or DVD, for sale or rent.

**Ineffective border enforcement:** 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 cannot, under current law, take actions inside the country, so internal investigations are left to the Economic Police.

Some ESA member companies began recording their trademarks with Lithuanian customs authorities in 2004 (and have subsequently renewed such registrations), but unfortunately, this has not resulted in any border actions, as border enforcement continues to be extremely weak. A particularly vexing case involves a 2005 customs seizure of 1,700 counterfeit Nintendo products, and although a criminal case was brought against the importer, the case has yet to be resolved.<sup>8</sup>

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<sup>8</sup> In June 2005, Lithuanian Customs seized approximately 1,700 counterfeit Nintendo products. The defendant challenged the seizure action, arguing that she had a right to bring the products into the country for "personal use" – the entire 1,700

**Continuing problems with “expert opinions”:** Problems associated with required expert opinions did not diminish in 2006. 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 (~461,200 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. In addition, reports continued that the 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 to apply a presumption of ownership for seized copyright material (such as sound recordings), which results in a burdensome evidentiary hurdle.<sup>9</sup> 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 confirms again that in 2006, 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. 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

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shipment of products. Due to the sizable amount of the products seized, the Customs authorities referred the case to the police for prosecution. A criminal case was subsequently initiated but remains suspended as the prosecutor was unable to identify what was clearly infringing product. Given the suspension, the Customs authorities had no choice but to release the shipment of pirated games. Nintendo of America, Inc. was thus left with no choice but to file a civil suit against the importer, requesting that the goods be destroyed and damages be awarded to the company. The defendant, however, has not responded to the writ, and the court will apparently not proceed until it receives confirmation that the defendant is aware of the case against her.

<sup>9</sup> 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. Expert statements in software cases by private experts pertaining to the nature of each pirated software copy have been accepted as sufficient evidence in criminal and administrative cases. BSA therefore believes that the law is satisfactory, although not ideal (because of the continued need of detailed expert reports, albeit by private, not public, experts).

that expert reports prepared by the software industry are accepted, while those prepared by the recording industry are not. Industry reports reflect that the previous official translation requirement has been removed, but apparently several new and burdensome formalities have been added.

## **COPYRIGHT LAW AND RELATED ISSUES IN LITHUANIA**

**Copyright law:** Lithuania has enacted a number of significant copyright law reforms since adopting its 1999 copyright law (Act No. VIII-1185). Additional revisions to that law were accomplished in March 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 elements 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.<sup>10</sup>

As part of Lithuania's accession to the European Union, additional revisions to its laws were initiated in 2005. These included amendments to implement both the EU Resale Right Directive and the EU Enforcement Directive. There were also proposals to increase sanctions in the Criminal Code, and amendments to the Criminal Procedure Code and Law on Operative Actions to classify intellectual property crimes as more serious crimes and apply operative measures. IIPA's members do not have current information on those bills, though several were expected to be adopted in the spring of 2006.

**Government software legalization issues:** There have been three Lithuanian government orders issued (in 2001, 2003 and 2004) to compel the state institutions to buy and use only licensed software programs. 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. 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.

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<sup>10</sup> For more details about Lithuanian copyright law reform through 2003, refer to IIPA's 2006 Special 301 country report on Lithuania, available at <http://www.iipa.com/rbc/2006/2006SPEC301LITHUANIA.pdf>.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### MALAYSIA

**Special 301 Recommendation:** Malaysia should remain on the Watch List.

#### **EXECUTIVE SUMMARY**

The government of Malaysia has taken some significant steps in the fight against major piratical activities in Malaysia over the past several years. Specifically, after a spate of raids and inspections in previous years, in 2006, many optical disc plants folded their tents. While recognizing the danger that these plants will simply move to more hospitable territories, this movement or closure of at least eleven plants out of Malaysia (our current numbers have 32 registered plants in the country, compared with 43 last year) signifies the commendable efforts of the Malaysian government to tackle the optical disc over-production problem that plagued it for years. In addition, continued sustained efforts against pirate retail outlets have largely driven retail piracy underground,<sup>1</sup> leaving the domestic market for pirate optical discs dominated by street stalls instead.

Notwithstanding the progress made, some problems remain in terms of piracy and lack of adequate enforcement in Malaysia.<sup>2</sup> Pirate entertainment software production for export continues to be a major concern. While optical disc plants should continue to be monitored for pirate production, Customs authorities also need to continue to enhance monitoring of exports of entertainment software, and take measures to address problems of false documentation, a regular occurrence in exports originating from Malaysia. Book piracy in the form of massive illegal photocopying in and around university campuses remains an issue of concern, and the authorities, while cooperative, have not succeeded in lowering piracy levels there. End-user piracy of business software remains a major source of losses for the business software industry. Finally, prosecutors, while taking greater numbers of cases than before, sometimes do not succeed with cases due to lack of experience, procedural hurdles, or problems and delays experienced at court.

The government of Malaysia is presently engaged with the U.S. negotiating a free trade agreement (the proposed USMFTA) (the 5th round of which just concluded in Sabah, Malaysian Borneo). The USMFTA will hopefully be concluded in 2007 with strong commitments on intellectual property, including improvements to the copyright system, and other normative changes, e.g., a commitment to accede to and fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). It is hoped that the various changes in Malaysia signal in part the recognition by the government of

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<sup>1</sup> See, e.g., *Software and Games Worth RM23m Seized*, New Straits Times, January 30, 2007 (noting a raid of the Endah Parade in Seri Petaling outside of the city center of Kuala Lumpur, in which MDTCA confiscated about 225,000 DVDs and CDs containing pirated computer games and other software worth RM23 million from three shops located on the second floor of the Endah Parade shopping complex). The article notes that the raid lasted seven hours, that the premises had been raided three times last year, that the owners had tried to hide their business by operating inside a hair salon, and that as a result of the raid, three workers were detained.

<sup>2</sup> For example, there has been a reduction in the number and size of legitimate music retailers by about 20% nationwide. The larger record companies are trying to sell music in other formats, such as through kiosk boxes, whereby consumers may download music of their choice at music stores, rather than purchasing entire albums.



the importance of copyright to the local economy (at an ASEAN seminar in March 2006 in Tokyo, the Malaysian representative noted the increase in local films produced from seven in 2000 to twenty-two in 2004).

## **PRIORITY ACTIONS REQUESTED IN 2007**

- **Continue Monitoring Optical Disc Plants for Piratical Activity, and Inspecting Plants, Seizing Discs and Equipment**
- **Increase Seizures of Pirate Exports at the Border, Focusing on Entertainment Software**
- **Tackle Internet-Based Piracy and “Mobile” Piracy**
- **Conduct Raids Against Illegal Photocopying Operations, Track Underground Operations**
- **Take Stronger Steps to Deter End-User Piracy of Business Software, Including More Inspections of Businesses Suspected of Using Unlicensed Software, and Implementing Software Asset Management**
- **Prosecute More Cases, Including Factory Cases:** 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.).
- **Confirm Liability for Landlords Leasing Space to Pirate Sellers:** IIPA would like to see the Malaysian government take actions to discourage landlords from renting to tenants engaged in piracy activities. The authorities should be given authority to seal premises of retail outlets for investigation purposes, which would have the effect of discouraging landlords from renting the premises to pirates.
- **Address Organized Crime/Use All Available Forensic Techniques**
- **Enact Anti-Camcorder Piracy Legislation:** The government of Malaysia should enact standalone legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture cinemas while a motion picture is being exhibited.
- **Amend/Modernize Copyright Law, Optical Disc Law (Prohibit “Gouging” of Discs, Allow Inspections Offsite, and at Any Time, Day or Night), Join WIPO “Internet” Treaties**

For more details on Malaysia's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

**MALAYSIA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2002-2006<sup>3</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	22.0	45%	38.8	49%	55.5	52%	40.0	45%	110.2	70%
Business Software <sup>4</sup>	NA	61%	82.0	60%	73.0	61%	77.0	63%	79.2	68%
Entertainment Software <sup>5</sup>	28.0	90%	23.4	91%	12.9	91%	NA	90%	NA	NA
Books	9.0	NA	10.0	NA	10.0	NA	9.0	NA	8.3	NA
Motion Pictures <sup>6</sup>	NA	NA	NA	91%	36.0	50%	38.0	50%	42.0	75%
<b>TOTALS</b>	<b>59.0</b>		<b>154.2</b>		<b>187.4</b>		<b>164.0</b>		<b>239.7</b>	

## **PIRACY UPDATES IN MALAYSIA**

**Some Pirate Production Continues in Licensed and Unlicensed Plants, Despite Government Efforts:** The number of licensed optical disc plants has been substantially reduced from 43 in year 2000 to 32 in year 2006.<sup>7</sup> There are well over 163 production lines, with a capacity to produce 570.5 million discs per year (a conservative estimate).

**Pirate Exports of Entertainment Software Still a Problem, Despite Decreased Exports/Increased Seizures for Other Industries:** The over-capacity to produce optical discs in Malaysia continues to present enormous challenges to the Malaysian government, both in terms of saturation of the domestic market by pirate product and exports, especially of entertainment software. Some industries have noted improvements in seizures of air shipments out of Malaysia (leaving trucks and trains as the latest modes of export to transport pirate products to Thailand).<sup>8</sup> Nonetheless, pirate entertainment software products continue to be exported out of Malaysia and found in seizures in Asia (Thailand, the Philippines and New

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Malaysia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>4</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Malaysia, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>5</sup> 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.

<sup>6</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>7</sup> A. Manisegaran, Director of Copyright, Malaysia Intellectual Property Corporation, gave the talk "APEC Anti-Counterfeiting and Piracy Initiative and New Trends in Copyright Related Cultural Industries" as the Country Paper at the ASEAN+3 Copyright Seminar held in Tokyo, March 1-3, 2006. In the report, he reported that the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs (MDTCA) had acted against 31 illegal (unlicensed) factories since 2000, and that actions had been taken against 38 licensed factories since that time for unauthorized production of optical discs. The report notes seizures of R86.2 million worth of optical disc production equipment.

<sup>8</sup> U.S. Customs statistics confirm that fewer pirate imports from Malaysia were seized at U.S. borders in 2006. See [http://www.cbp.gov/linkhandler/cgov/import/commercial\\_enforcement/ipr/seizure/trading/fy06\\_ipr\\_stat.ctt/fy06\\_ipr\\_stat.pdf](http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ipr/seizure/trading/fy06_ipr_stat.ctt/fy06_ipr_stat.pdf), at 3.

Zealand); Europe (Belgium and Germany); the Middle East; South Africa; Latin America;<sup>9</sup> and even the United States.

**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 Ministry of Domestic Trade and Consumer Affairs (MDTCA) officials, the problem has gone largely unchecked, especially at on-campus facilities.<sup>10</sup> 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 officials are 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 and which items to seize, especially contrivances (e.g., book binding machines, photocopying machines and such machines that are idle when raids commence), and on how to protect right holders. Other structural difficulties include the fact that there have been no *ex officio* actions taken to combat book piracy, and MDTCA has not, to date, conducted raids at night.

The universities and educational authorities (Ministry of Higher Education) must become more engaged, especially regarding practices of on-campus facilities. While universities have, to date, cooperated with right holders in distributing copyright protection posters and the like, industry would like to see them take a more active role in legitimizing practices on campuses. The Ministry of Higher Education should encourage universities to ensure campus-based copyshops are not engaging in infringing activity, and both the Ministry and university administrations should take measures to encourage lecturers and students to use legitimate materials.

Finally, publishers have noted a significant upswing in online piracy, with several sites offering scanned copies of books (in PDF form or similar) for download.

**Internet Piracy and “Mobile” Piracy:** In terms of Internet piracy, two disturbing developments in 2006 are worthy of note in Malaysia: the increasing focus on mobile music piracy in the form of over the counter sales (e.g., in shopping complexes and other fixed premises) and mobile downloads (both true tones and full tracks), and the emergence of more “hard goods” websites offering the distribution of pirated movies. In 2006, MDTCA together with Motion Picture Association representatives, were seizing on average 500 website-related packages per day at post offices.

Less clear is the extent to which peer-to-peer technologies are being widely employed for piracy in Malaysia. Malaysia boasts roughly 11 million Internet users, but broadband penetration, while having grown in 2005 faster than any other Southeast Asian market, remains

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<sup>9</sup> On March 2, 2006, there was a seizure of entertainment software transshipped through the U.S. from Malaysia and destined for Paraguay. There were over 18,000 discs in about 20 boxes. In November 2006, U.S. Customs intercepted five shipments of pirated entertainment software discs originating from Malaysia again bound for Paraguay. A total of 7,500 counterfeit and pirated copies of a top ten video game, released just a week earlier, were seized.

<sup>10</sup> 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.

relatively low.<sup>11</sup> Nonetheless, it is no surprise that Internet-based piracy is an increasing threat to legitimate copyright owners, including local Malay artists.<sup>12</sup> In 2004, 2,176 online software infringements were traced to Malaysian ISPs; this number skyrocketed to 10,169 in 2005 and declined only slightly to 9,676 in 2006. Internet-based piracy is beginning to affect other industries, with the book publishing industry noticing its first significant Internet piracy problems during 2006. Internet cafés are also known to facilitate illegal activities or use unlicensed software, including entertainment software. The MDTCA has been reluctant to run raids against such cafés and often asks that companies resolve such matters through private contracts/licensing.<sup>13</sup> The Malaysian government should take broader action to address Internet piracy, including expediting drafting/consideration of copyright law amendments to enhance and facilitate online enforcement.

### **Domestic Retail Piracy (Optical Disc) Curtailed, But Night Market Piracy Remains:**

While there has been some success in driving piracy out of shopping complexes and other fixed premises in some parts of the country, optical disc piracy of music, motion pictures, and other products still exists in large numbers through vendors at night markets.<sup>14</sup> The success in the shopping complexes has been due to sustained enforcement activity by the MDTCA as well as the filing of civil actions by industry against landlords and tenants of such premises. The record industry has submitted a memorandum to the Ministry of Local Government and Housing regarding night markets and holding landlords responsible. However, there has not yet been movement in this area by the Malaysian government.

**Camcorder Piracy:**<sup>15</sup> In 2006 13 pirate versions of Motion Picture Association member company titles distributed globally were forensically linked to illegal copies being made on camcorders in Malaysian cinemas. An essential element in the fight against camcorder piracy is

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<sup>11</sup> For example, 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, see Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. However, DSL still is the dominating access technology with over 98% of the market share. See Point Topic Ltd., *World Broadband Statistics Q3 2006*, December 2006, at <http://www.point-topic.com/contentDownload/dslanalysis/world%20broadband%20statistics%20q3%202006.pdf>.

<sup>12</sup> 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.

<sup>13</sup> MDTCA insists that “cease and desist” letters be sent before they even considering raiding Internet café premises. The letters are largely ignored by the café operators or result in alerting the café operator that follow-up raids are possibly forthcoming. The café operator then removes the offending pirated or unlicensed software from the computer workstations for a period of time and simply reinstalls the software when the operator believes that the likelihood of a raid has passed.

<sup>14</sup> But see note 7, in which the Malaysian government representative to the ASEAN+3 seminar in Tokyo in March 2006 claimed that the number of “open air” pirate vendors had been reduced from 2,386 to 512 since 2001.

<sup>15</sup> The vast majority of movies that are pirated 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 master recordings are sold to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale. As a result of camcorder piracy, many motion pictures also 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.

the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. The government of Malaysia claims its law already prohibits the making or possession of “contrivances” used to infringe copyright (Section 41(g)), and believes that this outlaws unauthorized camcording. However this provision only covers the one contrivance (i.e., the recording device) and the penalty for a violation of this provision is merely a fine of between US\$1,143 to \$11,430. Coverage through a specific law aimed at illegal camcording activity occurring in movie theaters is a far more effective way to combat this problem. 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. We also note that, to the extent theft of film prints is not covered in any law at present, such activity should also be prohibited in Malaysia.

## **ENFORCEMENT UPDATES IN MALAYSIA**

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006 MALAYSIA</b>		
<b>ACTIONS</b>	<b>BUSINESS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
NUMBER OF RAIDS CONDUCTED	23	117
NUMBER OF VCDs SEIZED	-	153,000
NUMBER OF DVDs SEIZED	-	20,965
NUMBER OF CD-Rs SEIZED	NA	
NUMBER OF INVESTIGATIONS	47	117
NUMBER OF VCD LAB/FACTORY RAIDS	-	9
NUMBER OF CASES COMMENCED	5	117
NUMBER OF INDICTMENTS	3	38
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	3	15
ACQUITTALS AND DISMISSALS	0	20
NUMBER OF CASES PENDING	10	83
NUMBER OF FACTORY CASES PENDING	-	31
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	-	7
SUSPENDED PRISON TERMS	-	
MAXIMUM 6 MONTHS		3
OVER 6 MONTHS		3
OVER 1 YEAR		1
TOTAL SUSPENDED PRISON TERMS		7
PRISON TERMS SERVED (NOT SUSPENDED)		
MAXIMUM 6 MONTHS		
OVER 6 MONTHS		
OVER 1 YEAR		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		
NUMBER OF CASES RESULTING IN CRIMINAL FINES	3	
UP TO \$1,000		13
\$1,000 TO \$5,000	1	6
OVER \$5,000	2	1
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	17,000	

**MDTCA Remains Actively Engaged in Fight Against Piracy, But Cannot Stop Proliferation of Night Vendors:** By the sheer number of raids, it would appear the Malaysian government has been very active in 2006. Statistics obtained from the MDTCA indicate that the Ministry has conducted approximately 24,735 copyright enforcement raids between January 1 and November 5, 2006. Most of these actions were initiated by the MDTCA *ex officio*, from their own information and from information supplied to them by the industry, and many of these were directed against retail stores.<sup>16</sup> A symptom of the successful efforts to weed out piracy in retail

<sup>16</sup> Out of these actions by MDTCA, the motion picture industry reports that between January 1 and October 31, 2006, its investigators undertook 312 investigations and participated in 2,019 raids, resulting in the seizure of 823,073 pirate

stores has been a proliferation of pirate night and street vendors. This increase is notwithstanding the government's (Cabinet) ban on open-air sales of all optical discs, and may be due in part to the uncertain jurisdiction as to policing and enforcing the laws at night markets. The licensing of night market vendors/stalls comes under the jurisdiction of the local authority, under the purview of the Ministry of Local Government and Housing (as opposed to the MDTCA). At the outset, IIPA noted that the local authorities should not be issuing licenses at all to vendors of optical disc products. Further, they have their own enforcement personnel who could be deployed to enforce the ban should there be any unlicensed vendors or vendors engaging in illegal activities.

Regarding business software end-user piracy, the Business Software Alliance, working with the MDTCA, was able to conduct a record twenty criminal end-user actions and three retail actions in 2006, leading to one criminal conviction against an end-user pirate.<sup>17</sup>

**Plant Numbers Decrease Due to Government and Industry Efforts, and in 2006, There was Increased Enforcement Against Pirate CD-R and DVD-R “Burning” Labs:** The government of Malaysia is to be commended once again for making further strides in 2006 tackling pirate optical disc production. In 2006 alone, there were as many as ten successful raids on licensed factories (and two raids on unlicensed facilities), in which Malaysian law enforcement authorities seized or sealed 14 DVD replicating machines and 11 VCD replicating machines that were suspected of having been used to manufacture pirated optical discs.<sup>18</sup> The

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VCDs, 1,952,694 pirate DVDs, 93,310 pirate “burned” CD-Rs, 50,460 pirate “burned” DVD-Rs, and 1,126 CD-R/DVD-R burners. A total of 546 new criminal prosecutions and 7 administrative actions were initiated, resulting in 1,271 favorable decisions and 50 administrative declarations.

<sup>17</sup> In March 2006, the press reported the first ever “on-the-spot” raid of an end-user software pirate, resulting in discovery of 125 copies of suspected infringing software worth an estimated RM173,000. See Chandra Devi, *Tougher Stance On Software Piracy*, New Straits Times, March 30, 2006 (the article also noted that 2005 *Ops Tulen* saw 17 raids of end-user software pirates with seizures amounting to RM370,000 worth of hardware and RM98.6 million worth of software). More raids were reported in May, see Malaysia *Seizes US\$92,000 Worth Pirated Software Copies in Surprise Raids*, Associated Press Newswires, May 3, 2006. In addition, 2005 saw the first-ever criminal end-user conviction in a contested case that went through a full trial. However, the conviction is now on appeal, a process that can take a year or more. Unlike cases for other industries, end-user software piracy cases are sourced and investigated by the Business Software Alliance before being brought to the MDTCA for enforcement action.

<sup>18</sup> Two large-scale raids, one in 2006, and one just several weeks ago, are representative of the kinds of serious actions taken against optical disc pirate production by the MDTCA.

- In the August 4, 2006 raid, Malaysian Ministry of Domestic Trade & Consumer Affairs (MDTCA) officers, accompanied by Motion Picture Association (MPA) representatives, raided a licensed optical disc production factory in Kuala Lumpur suspected of manufacturing pirated VCDs and DVDs, arresting seven men and impounding two DVD and one VCD factory production lines. Records seized in the raid showed the operation had manufactured 90 million pirated optical discs since 2000, generating illegal profits of US\$118 million. In addition to the seized replication equipment, the Kuala Lumpur raid netted an offset printer, three silk screen printers, 15 stampers and more than 10,000 pirated VCDs and DVDs, all of which were infringing MPA member company movie titles. All of the seized discs had either erased SID codes or no SID codes at all. MDTCA charged the company and the arrested workers with violations under Section 21 of Malaysia's Optical Disc Act, i.e. illegally obliterating Source Identification Codes (SID) on optical discs and manufacturing discs without SID codes.
- In the January 16, 2007 raid, Malaysian Police raided an unlicensed replicating facility in Klang, Selangor, arresting four men, aged 22 to 36, and seizing six VCD replicating lines, two printing machines, two metalizing and coating machines, and other ancillary machinery. The seized replicating machines were worth an estimated US\$1.7 million and were capable of producing 21 million pirate discs per year, generating potential revenue of US\$30 million. With the factory machinery, police seized 4,000 pirated VCDs, including just-released Motion Picture Association (MPA) member company films such as *Night at the Museum*. Also seized were popular Malaysian films such as *Tentang Bulan*. It is believed that the factory, which was hidden behind a plastics factory to avoid police detection, had been in operation for about two years.

25 replicating machines were capable of producing more than 87 million pirate discs in a year. Criminal charges under the Optical Discs Act of 2000 and Copyright Act of 1987 have been brought against the company and directors of two of these plants, Empayar Canggih Sdn Bhd and Universal Fitlink Sdn Bhd. Criminal action is proceeding in both cases. In October 2006, another optical disc plant was found to be pressing discs without SID Code during a routine inspection, and is now under further investigation. As a result of factory raids in which piratical activities are detected, the plants are generally “sealed” and equipment removed following such raids.

In addition to the plant/factory raids, there were some very significant raids in 2006 against groups engaged in massive “burning” of copyright content onto recordable discs.<sup>19</sup>

**Ensure Coverage of Blank or Recordable Discs Under Optical Disc Regime:** It is essential in 2007 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.<sup>20</sup>

**Exemplar Program:** In 2006, MDTCA engaged in two comprehensive exemplar collection rounds, with samples collected from licensed facilities (listed below), irrespective of format, and with industry representative participation. However, while Malaysia’s exemplar collection regime is now considered first rate, IIPA remains concerned that facilities licensed to press recordable only formats remain exempt under the law from mandatory SID Code. Given the instances of pirate production by recordable only factories, SID Code standardization is

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<sup>19</sup> The following recounts four major actions against CD-R and DVD-R “burning” piracy in 2006:

- In January 2006, enforcement officers raided another optical disc burning lab in Penang, seizing 224 CD-R burners and 160 DVD-R burners.
- On May 29, acting on a tip from an informant, a team of ten Malaysian Ministry of Domestic Trade and Consumer Affairs (MDTCA) enforcement officers, accompanied by Motion Picture Association representatives, raided a house in Penang that was being used as a burning lab for pirated optical discs. The raiding party arrested a 42-year-old man and seized 200 DVD-R burners and 83 CD-R burners, along with 15,800 blank DVD-Rs. The seized burners are estimated to have been capable of producing as many as 8,760,000 pirated DVD-Rs and 2,423,600 CD-Rs in one year, yielding revenues of RM102,141,600 (US\$29,244,058), assuming the burners were in operation eight-hours-a-day, seven-days-per-week.
- On July 4, acting on a tip to the Motion Picture Association (MPA), a team of 30 Malaysian Ministry of Domestic Trade and Consumer Affairs (MDTCA) enforcement officers, accompanied by MPA representatives, raided a facility in Kuala Lumpur that was being used as a burning lab for pirated optical discs. The raiding party arrested a 28-year-old man and a 25-year-old woman and seized 315 CD-R burners, along with 11,453 pirated VCDs, many of which were infringing MPA member company titles. The seized burners are estimated to have been capable of producing as many as 35,838,362 CD-Rs in one year, yielding revenues of RM179,191,810 (US\$47,784,482), assuming the burners were in operation eight-hours-a-day, seven-days-per-week. A second raid, on a warehouse associated with the burner lab, resulted in the seizure of 27,109 pirated VCDs, the majority of which were infringing MPA member company titles.
- On October 2, Malaysian Ministry of Domestic Trade & Consumer Affairs (MDTCA) officers, accompanied by Motion Picture Association (MPA) representatives, raided a clandestine printing factory in Sepang, Selangor, arresting three men and seizing three printing machines, 40 silk screens, 208 printing plates and 102,000 blank DVD-Rs and CD-Rs.

<sup>20</sup> For example, 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 pirate disc production.

considered the best practice. The following is the list of known plants from which exemplars were collected.

Optical Disc Production Plants and Locations in Malaysia (From Which Exemplars Have Been Collected as of February 2007)		
No.	Name of Plant	Location
1	Multimedia Manufacturing Sdn Bhd.	Selangor
2	Express Audio Industry Sdn Bhd.	Selangor
3	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
4	Digital Data Technologies Sdn Bhd.	Selangor
5	Discatech Multimedia Sdn. Bhd.	Cheras, Kuala Lumpur
6	Elite Digital Technologies Sdn Bhd.	Selangor
7	Jenama Evolusi Sdn Bhd.	Selangor
8	Polinta CD Manufacturer Sdn Bhd.	Selangor
9	Memory Tech Sdn. Bhd.	Selangor
10	Summit CD Manufacture (M) Sdn Bhd.	Cheras, Kuala Lumpur
11	Vintage Technology Sdn Bhd.	Johor
12	Pioneer Solution Sdn Bhd.	Selangor
13	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
14	BLG Edutainment (M) Sdn Bhd.	Selangor
15	Digital Data Technologies Sdn Bhd.	Selangor
16	Dragon Optical Media Technologies Sdn Bhd.	Selangor
17	IP SoftCom (M) Sdn Bhd.	Penang
18	Jenama Evolusi Sdn Bhd.	Selangor
19	The Phoenix Press Sdn Bhd.	Penang
20	Replitex CD industries Sdn Bhd.	Selangor
21	Union Triumph Sdn Bhd.	Johor
22	Tri-Commercial Sdn Bhd.	Selangor
23	Daxon Technology Sdn Bhd.	Pulau Pinang
24	Dragon Optical Media Technologies Sdn Bhd.	Kuala Lumpur

**Exports Decrease, Except for Entertainment Software:** Malaysia continues to be the country of origin for much of the factory replicated pirated entertainment software products on optical disc exported around the world. Improvements in seizures of pirated materials have occurred in air shipments out of Malaysia (leaving trucks and trains as the latest modes of export to transport pirate products to Thailand). The government claims that since 2002, its “Special Export Unit” has seized almost 1.3 million discs valued at R9.6 million.<sup>21</sup> Other measures taken by the Malaysian government in 2006 to decrease exports include the purchase and installation of scanners in all main ports and airports, to ensure that not only containers but also luggage and parcels sent by airmail or courier can be scanned. 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 the export of pirated entertainment software. Measures should also be taken to address the problem of false documentation, a regular occurrence in exports of pirate video games originating from Malaysia. It is important that the government of Malaysia adopt sanctions that can be imposed on persons who use false information on documents submitted to government authorities in relation to the movement of goods across Malaysia’s border or in-transit. Malaysia should have provisions in its criminal code that provides for penalties (for example, monetary fines and imprisonment) for those involved in commercial piracy/counterfeiting and the use of false information.

<sup>21</sup> For example, the Malaysian Government claimed that it doubled seizures of pirate product destined for export in 2005 (over 2004), to over 700,000 discs.



**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.<sup>22</sup> It has also been clear for years that anti-piracy work, either from the industry side or the government side, is fraught with danger.<sup>23</sup> Malaysian authorities must thoroughly investigate links between piracy and organized crime 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.<sup>24</sup>

A particularly vexing case involves a notorious pirate operation that is believed to span Malaysia, Thailand and Singapore. After extensive investigation and persistent urging by an Entertainment Software Association member company, in 2004, the MDTCA raided the retail store and warehouse of BASIC Electronics (M) Sdn. Bhd. where more than 880,000 pirated entertainment software discs were seized. This case languished for nearly two years, during which only one right holder was asked to verify a small subset of the infringing product seized. Charges were finally entered against the defendants in October 2006, only after much urging from the right holders and the U.S. government. Unfortunately, the charges were based on the less than 1,000 discs verified and do not accurately reflect the scope or nature of the infringing conduct or piracy operation involved. The ESA and its members are actively working with MDTCA to organized and provide manpower to inventory and verify the rest of the seizure (i.e. the remainder of the 880,000 products originally seized) in the hope that charges will be amended to reflect the true scope of the crime. Trial has been tentatively set for April 2007 but as of the writing of this report, a permanent prosecutor has yet to be assigned to this case.<sup>25</sup> Given the scale of this pirate operation, this case cannot be allowed to further languish or to result in non-deterrent penalties.

**Malaysian Government Must Use Forensics Available:** 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 September 2005 ever 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.<sup>26</sup> 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.

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<sup>22</sup> For example, the music and record industries have learned that some pirates being are involved in a syndicate of loan sharks (unlicensed money lenders).

<sup>23</sup> In a raid run recently on an Internet café by a representative for an entertainment software company in 2005, 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.

<sup>24</sup> The record and music industry understands that MDTCA officers have received training in respect of the Anti-Money Laundering Act 2001, however, to-date, IIPA has no knowledge of any criminal charges being brought against pirates under this Act.

<sup>25</sup> The U.S. government has on several occasions intervened in this matter, and it remains critical that the U.S. government continue to stress the importance of successfully concluding this case.

<sup>26</sup> See note 7, in which the Malaysian government representative to the ASEAN+3 seminar in Tokyo in March 2006 claimed that since 2003, 4,523 samples had been tested forensically (but only 41 discrete copyright cases were apparently involved).

**New Special Prosecutors Must Attack Organized Piracy Through Investigations and the Courts:** The MDTCA has set up a prosecution unit comprising officers who will be trained and equipped to deal with complex litigation from criminal actions brought. In December 2006, the prosecution team underwent a week long training programme in the art of examination and cross-examination of witness, as well as gathering and presenting evidence. IIPA is most pleased that the government of Malaysia has recognized the need to develop a cadre of good prosecutors in order to tackle the piracy dilemma, and looks forward to working with the new prosecutors and assisting in any way our local members on the ground can (i.e., trainings and the like).

**Courts' Response to Piracy/Specialized IP Court:** IIPA also understands that an Intellectual Property Court has been established as a pilot project in Kuala Lumpur. Understanding that it will take some time for such programs to spread to other cities and provide a uniform quality in the judiciary, unfortunately, the result is that in 2006, there remains a backlog of copyright cases, as there remains a significant divergence between the number of raids being carried out and the number of cases being processed through the courts.<sup>27</sup> For the recording industry, court cases are progressing faster for retail cases where arrests are made during raids than for non-arrest cases. Other cases, however, languish in the current court system. In addition, a number of appeal cases lodged by the prosecution against acquittals, some dating back to 2003, have never been concluded. In addition to steps to speed the processes of the court, the Malaysian government should additionally issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

**Section 42 "Affidavit" Provision Causes Serious Problems for Right Holders in Court:** Section 42 of the Malaysian Copyright Act has proved problematic in practice, leaving statutory declarations of ownership and subsistence too vulnerable to technical challenges by defendants. Section 42 must be modified to afford right holders with these presumptions in practice. For example, right holders have noted, among other problems, that Section 42, while not expressly requiring the maker of an affidavit (of copyright ownership or subsistence) to be present, has been applied to require presence in practice, since defendants have claimed they have a right to cross-examine the maker of the affidavit. In addition, Section 42 should not contain the wording "at the time specified therein" since it creates confusion (it should suffice to say "copyright subsisted and continues to subsist at all material times"). Finally, the "true copy" requirement is overly burdensome (e.g., a right holder in a motion picture should not be required to produce the bulky film print, or the right holder in books should not be required to produce copies of all the books involved in a particular case).

IIPA notes that "presumptions" of ownership are required under Malaysia's current TRIPS obligations, and "presumptions" of ownership and subsistence would be important requirements of an IPR chapter in the USMFTA. While recognizing that the "affidavit" provision of Section 42 does not fully substitute for these presumptions, if the government wishes, it can reinterpret Section 42

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<sup>27</sup> IIPA members report that some cases from 2002 have still not obtained a single hearing in court. Though many of the criminal end-user software piracy 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. It has also been reported that cases, once filed, do not move forward, as officers are transferred, etc. Notwithstanding this over-arching problem, the year 2005 saw a couple of breakthrough events in the courts. The MDTCA achieved its first-ever criminal end-user conviction in a contested case that went through a full trial, resulting in a sentence of a fine of RM120,000 (US\$34,358) 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. The defendant, Sarawak-based Alom Industries Sdn Bhd, is currently appealing the conviction.

so that it is consistent with the presumptions; at present, the way Section 42 is interpreted and implemented in practice calls into serious question Malaysia's compliance with its current international obligations.

**Right Holders Now Being Permitted to Access Criminal Files to Initiating Legal Actions Against Infringers:** The Copyright Act (Section 52) has previously been 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 in the past been refused access to evidence seized by local authorities on the argument that such access would violate a non-disclosure provision in the Act.<sup>28</sup> While section 52 of the Copyright Act 1987 has not been amended, a court case decision in August confirmed that right holders have the right to file civil actions based on information gathered in criminal cases.<sup>29</sup> Subsequent to this decision, MDTCA and the Attorney-General's Chambers have agreed that information with regards seizures made during a criminal may be forwarded to the copyright owner, for the purposes of lodging concurrent civil actions. Section 52 should still be amended (for clarification), but the MDTCA and Attorney-General's position in following the ODVD case decision is welcomed.

**Hologram Sticker Program Does Not Deter Piracy:** The IIPA generally supports efforts by governments directed at combating piracy. Historically, IIPA has not found sticker authentication programs helpful in fighting piracy, since, in the end, such programs usually end up adding costs and documentary requirements and other burdens on legitimate right holders, while pirates either do not bear such burdens or costs, or, worse yet, find ways to make fraudulent uses of the means of authentication (either by obtaining legitimate stickers etc. or by fraudulently producing such stickers etc.). IIPA has in the past expressed similar concerns about the program introduced in 2002 in Malaysia. However, IIPA recognizes the efforts of the Malaysian government to use the hologram sticker program to combat piracy, and several members have found benefits from the program.<sup>30</sup> IIPA supports the Malaysian government's efforts, but there are several areas which must be changed or the system will be a failure in terms of the aims which it purports to serve. IIPA understands that the MDTCA and Attorney-General's Chambers have suggested amendments to the Hologram Law to address the current

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<sup>28</sup> 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.

<sup>29</sup> On August 8, 2006, the Malaysian Court of Appeals dismissed an appeal by ODVD Manufacturer Sdn Bhd's against a High Court decision that allowed copyright holders to file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies. In September 2002, Malaysia's Ministry of Domestic Trade & Consumer Affairs (MDTCA) raided ODVD Manufacturer Sdn. Bhd., a licensed VCD replicating factory, and seized 1,670 suspected pirate optical discs, some of which were infringing Motion Picture Association (MPA) member company titles. Based on information obtained during the September 2002 raid, Columbia Pictures Industries, Inc., owner of the copyright of the movie *Stuart Little 2*, initiated a civil action against ODVD Manufacturer Sdn Bhd. ODVD Manufacturer Sdn. Bhd. applied to the High Court to dismiss Columbia Pictures' claim on the grounds that the civil action was initiated based on information obtained by the MDTCA during the criminal raid. ODVD Manufacturer Sdn. Bhd. argued that it was illegal for the MDTCA to have divulged information gathered during the raid. The High Court dismissed the application by ODVD Manufacturer Sdn. Bhd., and ODVD Manufacturer Sdn. Bhd. appealed to the Court of Appeal.

<sup>30</sup> See note 7, in which the Malaysian government representative to the ASEAN+3 seminar in Tokyo in March 2006 claimed that since January 15, 2003, a total of 135.4 million labels had been used, and that as of November 2005, 3,564 cases had been taken against "offenders who fail to comply with the requirement."

loopholes in the law, which are expected to pass and be gazetted in February 2007. It is hoped those amendments go to some of the issues discussed below.

The benefits to the hologram program as currently operating in Malaysia include the following:

- The implementation of the hologram system has reportedly improved and is developing as a useful investigative tool for both enforcement agencies and industry in identifying parallel imports and pirated and counterfeit products.
- The hologram assists the MDTCA officers to quickly identify premises which are retailing pirated optical discs, enabling them to take immediate action against the illegal traders. To date, the recording industry reports a total of 3,608 cases involving product requiring holograms, including cases against parallel importers.
- The hologram law has substantially reduced parallel imports, especially from China, into Malaysia. Singapore, by contrast, is flooded with parallel imports from China.

Notwithstanding these benefits, IIPA notes several areas which must be improved in order to merit our continued support. We continue to note the following:

- IIPA's chief concern with the issuance of hologram sticker remains added costs to legitimate right holders. Holograms in Malaysia cost 20 sen (US\$0.05). The Minister of MDTCA has reportedly announced recently that holograms will be available for purchase at 16.3 sen (US\$0.04), while IIPA has suggested that the government lower the cost of holograms to 4 sen (US\$0.01), and take other steps to lower indirect costs to legitimate businesses. There remains a relative lack of parity in the costs when compared, for example, to the pharmaceutical industry. IIPA urges the MDTCA to ensure that a meaningful reduction in the cost of the stickers charged to distributors is reflected when a new contract is awarded to the next vendor company selected to produce the hologram stickers.
- Another concern remains overly burdensome statutory declarations/affidavits to receive hologram stickers.
- As noted, occasionally, reports still indicate a lack of auditing as to whom such stickers are provided to (several associations assert that there are instances where pirates or unauthorized parties have used the holograms on pirate/unauthorized product).
- Lack of transparency: The Malaysian government does not at present post hologram numbers (with the full particulars of the applicants and volumes of hologram issued for each number) on MDTCA's website so that the industries and consumers can verify the numbers issued. For the purpose of transparency and avoidance of abuse by the issuing officers, this should be done.
- One of the key benefits from an effective hologram program is that it provides an addition tool to prosecutors to take action against infringers of copyright, since infringers can be prosecuted under the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82) for failing to use holograms (in addition to any possible copyright infringement claims). We understand that MDTCA prosecutors and Deputy Public Prosecutors have expressed the view that the Trade Descriptions Act may not be applicable

to “pirated” optical discs. Section 4(3) of the Act, however, is crystal clear on this point, namely,

Any person who—

- (a) supplies or offers to supply or offers for hire goods which are not affixed with an original label; or
- (b) affixes an original label to goods which are not original goods, commits an offence.

“Original goods” are defined as legitimately produced goods. The fact that Section 4(3)(a) mentions “goods” not affixed with an original label indicates that the Act applies to infringing or pirated copies. Thus, when MDTCA officers arrest traders for selling pirated goods for not having the appropriate hologram stickers on, they should prosecute such cases without hesitation. We believe this is plain from the statute, but support consideration of an amendment if such a clarification would assist MDTCA and the AG’s office to bring more prosecutions for violations of the Act by pirates/infringers.

## **TRAINING AND PUBLIC AWARENESS**

The copyright industries once again organized and/or participated in many training and public awareness activities in 2006 related to copyright protection and piracy issues in Malaysia. These included,

- March 2006: The Business Software Alliance organized a one-day seminar on prosecuting end-user software cases for a team of around 20 MDTCA prosecuting officers responsible for running such cases.
- April 2006: The Motion Picture Association organized a seminar for MDTCA prosecutors and Deputy Public Prosecutors from the AG’s Chambers aimed at strengthening the prosecution team’s ability to bring copyright cases. Jointly with MDTCA and the AG’s Chambers, the industry is preparing a prosecution manual as a guide for the officers. Part 1 of the manual had been distributed to the officers and industry is currently finalizing the complete version of the manual.
- June 20, 2006: MDTCA, MPA representatives, and representatives of Internet service providers (ISPs) met for a discussion on the increasing threat of Internet piracy in Malaysia. At the session, the ISPs agreed to cooperate with the government to tackle the issue of Internet piracy.
- June 2006: MPA representatives worked with the MDTCA in organizing a discussion on best practices for campus anti-piracy with representatives of universities in Malaysia. Given that large numbers of university students are involved in Internet piracy, university administrators must play a role in tackling the problem.
- June 2006: The local record industry group participated in training on “Post-Raid Investigation Techniques,” organized by the International Federation of Phonographic Industries (IFPI)<sup>31</sup> on June 19, 2006.

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<sup>31</sup> The Recording Industry Association of America (RIAA) is a member of IFPI.

- July, August, September 2006: In view of the increasing number of cases involving camcording in cinemas and the use of sophisticated and difficult-to-detect equipment, MPA representatives organized a series of camcorder piracy training sessions in Penang, Johor and Kuala Lumpur for the cinema operators, MDTCA and police officers.
- September 2006: MPA representatives organized a global Internet enforcement training workshop held in Hong Kong from September 18-19, 2006 aimed at strengthening investigative skills to combat Internet piracy. The head of the Internet Piracy Unit of MDTCA attended the training.
- December 12, 2006: The software industry organized a one-day prosecutorial training for 25 MDTCA prosecutors. A prominent criminal lawyer was engaged to lead the training on evidence and criminal procedure. This was the first of a series of prosecutorial training organized by the software industry to be continued in 2007. The record industry participated in this training.
- December 23-24, 2006: The local record industry group participated in a seminar/dialogue with the State Directors of Enforcement to brief the State Directors on the current status of record industry related issues. Also discussed were anti-piracy figures and strategy.
- Throughout 2006: The local record industry group conducted ongoing trainings and mock trials for MDTCA officers and prosecutors (e.g., as cases come up for hearings). MPA representatives conducted several other training sessions for prosecutors and judges.

## **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.

## **COPYRIGHT AND RELATED LAWS**

**Copyright Law in Need of Further Revision, But Proposed Amendments Should Not Proceed Without Proper Review and Consultation with Relevant Industries:** Copyright protection in Malaysia is afforded under the Copyright Act, 1987, as amended through 2003. The 2003 amendments<sup>32</sup> strengthened criminal penalties to up to five years and fined 20,000 ringgit for each infringement and generally gave enforcement authorities more ability to carry out enforcement against copyright piracy, e.g., Section 50A gives MDTCA officials the ability to carry out arrests for copyright piracy, practically on an *ex officio* basis.<sup>33</sup> The 2003 amendments did not make other changes necessary to meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall.<sup>34</sup>

The Malaysian government should modernize its Copyright Act, including fully implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (including by full implementation of TPMs, expressly protecting temporary copies), and joining these treaties to provide adequate protection of copyright in the online age.<sup>35</sup> The government should make other changes consistent with international standards or practice (e.g., term extension to "life plus 70" and 95 years from publication for films and sound recordings etc.). 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.<sup>36</sup> IIPA understands that the government has prepared copyright law amendments that sit in the Attorney General's Office that would aim to implement the WCT and WPPT,<sup>37</sup> but there has been no consultation on this bill, and therefore, IIPA is unaware whether it will succeed in fully

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<sup>32</sup> The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

<sup>33</sup> These changes address in part the issue raised by IIPA in past filings about the need to deem piracy a "public crime," and while the amendments did not go quite that far, they did in a practical sense address the need for MDTCA to be able to carry out its duties *ex officio*.

<sup>34</sup> The 2003 amendments did not make other changes which were necessary either for Malaysia to comply with international standards, or to improve the workings of the enforcement system. They did not, for example:

- Impose mandatory minimum jail sentences for piracy;
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright;
- Permit disclosure by enforcement authorities to copyright owners of evidence;
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.

Please see the 2003 Special 301 report on Malaysia, at the website <http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf> for a full discussion of needed amendments to the Malaysia Copyright Act.

<sup>35</sup> Malaysia amended its copyright act in 1999 to partially implement the WCT and WPPT, including the recognition of a broad exclusive right of "communication to the public" including the right to make works available on demand (for instance, via the Internet). However, other treaty requirements, such as prohibiting the circumvention of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. In addition, the law should be clarified as to the protection of temporary copies under the reproduction right. IIPA also suggests that provisions dealing with secondary liability be adopted, such that Internet Service Providers (ISPs) will have incentives to cooperate with right holders in defeating online piracy. At least the "aiding and abetting" standard should be adopted so that service providers do not condone piracy on their services.

<sup>36</sup> Industry has submitted a Memorandum proposing specific amendments to the Copyright Act 1987, to, *inter alia*, make it a specific offence for a landlord to permit its premises to be used for the distribution or sale of pirated products.

<sup>37</sup> IIPA has learned that the legislation was to be tabled in Parliament as early as November 2006, but that no draft has been shared with the U.S. government (e.g., in the context of the FTA negotiation). IIPA also understood that the government planned to share the draft with certain groups such as the U.S. Chamber of Commerce in Malaysia, but has not heard that anyone outside the government has seen a draft.

implementing the WIPO Treaties. IIPA welcomes any opportunity to consult on and review the draft.

**Proposed Changes to Optical Discs Act:** The Optical Discs Act could also be improved to address the changing situation in Malaysia, including, *inter alia*, the need to (1) prohibit the gouging or other removal 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.

**Organized Crime Legislation:** With the involvement of organized criminal syndicates in piracy operations in the country, the government of Malaysia should be encouraged to adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A particularly good example of such legislation is Hong Kong's Organized and Serious Crimes Ordinance (OSCO) which allows Hong Kong authorities (1) to employ more extensive investigative powers into organized criminal operations involved in piracy and into the proceeds derived from this illegal activity; (2) to seize records, freeze assets and confiscate illicit proceeds; and (3) to impose higher penalties on those convicted of engaging in pirate operations. Other laws, such as those criminalizing money laundering, fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime/IP nexus in Malaysia.

## **FREE TRADE AGREEMENT**

On March 8, 2006, the United States announced its intention to enter into negotiations toward a free trade agreement with Malaysia.<sup>38</sup> IIPA submitted a Notice of Intent to Testify at, and Testimony for, a Public Hearing Concerning the Proposed Free Trade Agreement with Malaysia on April 18, 2006, and testified on May 3, 2006.<sup>39</sup> The Malaysia FTA should require full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards, including but not limited to those already embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The agreement with Malaysia must also require it to upgrade its copyright enforcement practices, with the goal to ensure that copyright owners and law enforcement officials have available to them the tools necessary to impose effective, consistent, predictable and deterrent penalties on copyright pirates, including in the Internet environment. The negotiations should also aim to dismantle or significantly reduce the market access barriers and discriminatory practices that keep U.S. copyright holders from full participation in the Malaysian market.

While many of the issues are undoubtedly will be dealt with in the IPR Chapter of the FTA,<sup>40</sup> there are several worth mentioning.

**Government Legalization:** While previous FTAs have included a commitment for the governments to ensure that use of software in the government is legalized (and that appropriate

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<sup>38</sup> See The Office of the United States Trade Representative, United States, Malaysia Announce Intention to Negotiate Free Trade Agreement, at

[http://www.ustr.gov/Document\\_Library/Press\\_Releases/2006/March/United\\_States\\_Malaysia\\_Announce\\_Intention\\_to\\_Negotiate\\_Free\\_Trade\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States_Malaysia_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html).

<sup>39</sup> The Notice of Intent and Testimony can be found at <http://www.iipa.com/pdf/IIPA%20MalaysiaFTA%20Request%20to%20Testify%20040406.pdf>.

<sup>40</sup> We conclude this based on an examination of the IPR Chapters of prior FTAs.



software asset management is employed), in today's digital and online environments, it is essential to ensure that government networks are not being used for illegal uses of copyright materials, whether it be software, online publications, music, movies, games, or the like. As a result, governments are recognizing and agreeing that they must take steps to ensure that government computer networks are not used for illegal copyright uses, including peer-to-peer file sharing (P2P). APEC Ministers recommended that "government entities" (which should include educational institutions funded by the State) should ensure that copyright usage, including on P2P networks, is legal,<sup>41</sup> and Leaders cemented the understanding among the 21 APEC Members in November 2006 in Hanoi, Vietnam that all "government agencies" should ensure that copyright usage is legal.<sup>42</sup> As a result, the government of Malaysia should not have difficulty agreeing to this. IIPA members view the government legalization of copyright materials text as a very important component of a successful FTA.

**Signal Theft:** IIPA would like to ensure that the problem of Pay TV piracy – signal theft – does not become a major source of trade losses to U.S. owners of broadcast content. Language should be included in the FTA, including the broadcast right and the right to control against the unauthorized decryption of encrypted program-carrying signals (as well as to stop the manufacture or distribution of devices used to decrypt). In addition, language should be included to ensure that onward distribution of signals without authorization (re-broadcast or re-transmission) is also illegal in Malaysia.<sup>43</sup>

**Other Key FTA Issues:** Other key FTA asks include the following:

- outlawing the use of an audiovisual recording device to transmit or make a copy of a copyright work from the performance in a motion picture exhibition facility.
- improving customs authority and border enforcement measures.
- outlawing the knowing trafficking in counterfeit labels or illicit (unauthorized) labels affixed to, enclosing, or accompanying (or designed to be affixed to, enclose, or accompany) works or sound recordings.
- outlawing false documentation/declarations in the trade, import, or export involving goods suspected of infringing intellectual property rights.

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<sup>41</sup> The APEC Ministers stated the following:

Recommended that APEC Leaders should endorse the principle that government entities should not use illegal software or other content on their computer networks, especially pertaining to Internet usage. This keeps APEC at the forefront of addressing the growing problem of illegal file sharing on the Internet.

<sup>42</sup> The APEC Leaders stated the following:

We also called on member economies to exercise appropriate oversight to achieve the objective that central government agencies use only legal software and other copyright materials; that such bodies implement effective policies intended to prevent copyright infringement on their computer systems and via the Internet, in accordance with relevant international conventions and domestic laws and regulations concerning copyright and related rights; and that central government funds are not used by contractors or recipient institutions to purchase illegal software or other illegal copyright materials.

<sup>43</sup> CASBAA estimates that over US\$4 million is lost due to illegal Pay TV connections (US\$1.8 million) or satellite overspill (US\$2.4 million). See CASBAA, *The Cost of Piracy: Asia-Pacific Pay-TV Industry Study*, October 2006.

Finally, in addition to the problems noted above, there are some other specific concerns which should be addressed by inclusion of commitments in the FTA itself or in side letters. These include ensuring that the optical disc laws are strengthened to:

- cover “burning” of copyrighted content of others onto recordable discs;
- outlaw gouging or scouring of discs;
- ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are found (e.g., in transit) or stored;
- reinstate the requirement to include SID Codes on blank optical disc media (CD-R/DVD-R etc.) and make the sale of optical discs without SID code an offense;
- ensure that samples (exemplars) are collected from every plant;
- ensure that officers are authorized to seize discs in inspections and make arrests;
- allow right holders to participate in inspections and collect evidence;
- allow for inspections at any time, day or night;
- allow for forcible entry where entry is obstructed;
- provide for automatic revocation if a plant or agent has violated the law.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### NIGERIA

**Special 301 Recommendation:** Nigeria should be placed on the Watch List.

#### **EXECUTIVE SUMMARY**

Piracy is so bad in Nigeria that the local music industry has actually called for a ban on the importation of music CDs.<sup>1</sup> But Nigeria's problems are sadly just taking root in a more serious way, as Nigeria exports pirate product to other parts of Africa. In particular, IIPA knows of 15 optical disc factories that have been operational in Nigeria, having at least 52 lines, capable of producing at least 182 million discs (a conservative estimate). Some of these plants are owned by Asian companies displaced by enforcement against them in Asia. Reports from neighboring countries suggest that large quantities of pirate discs are being exported from these plants in Nigeria across the region. As such, Nigeria has unfortunately earned the dubious distinction of becoming an optical disc piracy hotspot, and IIPA calls upon the U.S. government to urge the Nigerian government to deal with this problem as an urgent matter. Namely, it is imperative that the Nigerian government swiftly implement regulations to control the illegal production of optical discs, including a licensing (and revocation/renewal system), with source identification code requirements for discs, stampers, and masters, license of import of raw materials and equipment, inspection authority, and sanctions for plants violating the law. IIPA understands that the Minister of Justice has signed new Optical Disc Regulations into law, and that these regulations will be published in the Government Gazette soon (we further understand the Nigerian Copyright Commission is working on this). Then, the Nigerian government must take urgent steps to stamp out pirate optical disc production in the country. Other piracy problems must be dealt with as well through strong enforcement by the Nigerian Copyright Commission (NCC) and Nigerian Customs, and use of publications (as well as other copyright materials) by universities and libraries must be legalized.

#### **ACTIONS TO BE TAKEN IN 2007**

- Enactment of draft optical disc regulations to require the 15 known optical disc plants and two mastering facilities to come forward and be licensed, to require the plants' use of SID codes (mastering LBR code and mould code) on all discs produced and sold in Nigeria, and to empower the government authorities to inspect plants and take deterrent action against any plants found to operating outside the law.

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<sup>1</sup> All Africa Lagos, *NARI Advocates Ban On Importation of Recorded Music*, March 13, 2006 (noting that with an 85% piracy level for music/records, the chairman of the Nigerian Association of Recording Industries (NARI), Toju Ejueyitchie, called for the ban on the importation of prerecorded music or film carriers into Nigeria). In the article, the chair of NARI also admitted to the existence of "about 15 optical disc factories, and the number increasing by the day," and posited that virtually 100% of works imported were pirated. The press conference also announced the seizure of 1.7 million CDs in Cotonou, and raids on suspected IP pirates Akina and Nassinma. The head of NARI also called for a serious purge of the Alaba International Market, which he described as a "notorious haven for pirates, and their nefarious activities."

- 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.”

For more details on Nigeria's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>NIGERIA</b> <b>ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY</b> <b>(IN MILLIONS OF U.S. DOLLARS)</b> <b>AND LEVELS OF PIRACY: 2002-2006<sup>2</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	52.0	95%	52.0	95%	50.0	99%	NA	NA	NA	NA
Business Software <sup>3</sup>	59.0	82%	46.0	82%	30.0	84%	29.0	84%	4.3	67%
Books	8.0	NA	6.0	NA	4.0	NA	NA	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>119.0</b>		<b>104.0</b>		<b>84.0</b>		<b>29.0</b>		<b>4.3</b>	

## **PIRACY UPDATES IN NIGERIA**

**Pirate Optical Disc Plant Production:** As noted, there are a reported 15 optical disc plants that have been in operation in Nigeria, some of which have migrated to Nigeria from Asia and operate to supply Central and West Africa. IIPA is aware of at least 52 production lines capable of producing at least 182 million discs per year. Many of the plants are not licensed to produce any kind of copyright content. Two of these plants (Akina and Nasinma) were raided in

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Israel under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Nigeria, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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.

June and July 2004, and were raided again in 2006. 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.

**Retail Piracy:** Nigeria is a very large potential market, but the country is overrun with pirate materials domestically. Pirated CD-Rs containing copyright materials, for example, compilations of up to 300 songs by local and international artists, are being sold for less than the equivalent of US\$1 in the local market. There has also been a recent influx of imported pirate CDs from unknown locations in Asia.

**Book Piracy:** Book piracy continues to be a serious problem, due in part to the Nigerian government’s decision in 2003 to cut all funding for university and library purchases. This decision has created a climate fostering illegal photocopying, which plagues the academic market. Furthermore, Nigeria has for years been a destination for pirate book imports, primarily from Asia (China and Malaysia). Customs authorities should increase vigilance in seizing pirate product before it has a chance to saturate the local market.

**Business Software Piracy:** For the business software industry, hard-disk loading of pirate software and unauthorized use of software in businesses remain significant problems. The piracy rate, at 82%, is unacceptably high.

**Organized Crime/Violence Associated with Piracy:** There are disturbing trends in terms of the level of violence associated with piratical activities in Nigeria. In June 2006, Nigerian police raided the Alaba International market in Lagos, during which pirates shot two police officers, burned a police vehicle, and threw stones and bottles, injuring the industry coordinator when he was struck on the head by a stone.<sup>4</sup> Tear gas had to be used to quell the violence. Several thousand pirate CDs and VCDs were seized and four men were arrested.<sup>5</sup> This raid demonstrates the serious criminal nature of pirate enterprise in Nigeria and that a coordinated approach focused on criminal enforcement must be mounted.

## **ENFORCEMENT UPDATES IN NIGERIA**

There is little enforcement activity in Nigeria,<sup>6</sup> and cooperation between government agencies to implement and enforce the law, including law enforcement, is sparse and erratic.<sup>7</sup> The Nigerian Copyright Commission (NCC) has responsibility in Nigeria for anti-piracy activities, and the National Customs Service (NCS), as the nation’s gateway police, has a significant role

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<sup>4</sup> IFPI Enforcement Bulletin, September 2006 (on file with IIPA). Fortunately all those wounded have recovered.

<sup>5</sup> The raid was led by the Director of Special Operations of the National Copyright Commission (NCC) and an industry representative. More than 100 anti-riot policemen surrounded the market while 10 armed officers took up positions on the rooftops. They supported the 12 Copyright Inspectors and 15 packers who went into the Alaba market to inspect suspect merchandise.

<sup>6</sup> 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.

<sup>7</sup> For example, we understand the National Copyright Commission (NCC) launched a Strategic Action Against Piracy (‘STRAP’) campaign during 2005, and that while the goal of STRAP was to curb piracy and restore an environment conducive to a credible copyright system, very few actions were taken. We also understand that NCC accepts “Copyright Notifications,” a scheme designed to enable creators of copyright works or persons who have acquired rights in copyright works to give notice of their copyright. This system is largely ineffective, however, in combating piracy.

to play in anti-piracy enforcement, although NCS has never to our knowledge seized any product on its own initiative. There needs to be better coordination between these two enforcement entities. The NCC's Director General was suspended in November 2005 for several months over the de-certification of one of Nigeria's music collecting societies, the Musical Copyright Society of Nigeria,<sup>8</sup> but has since been reinstated. 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. Meanwhile, the courts provide no sure relief, as bringing civil claims continues to be an expensive and risky remedy for right holders.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in Nigeria is governed by the Copyright Act (Cap 68 Laws of the Federation of Nigeria, 1990) as amended. The law, while by no means perfect, provides a solid basis for enforcing copyright and combating piracy. Unfortunately, there is apparently a new broadcast compulsory license being proposed that would curtail the ability of U.S. channels to freely contract to show sporting events.<sup>9</sup> This should not be imposed in Nigeria.

As the government has come to recognize the severity of the optical disc piracy problem,<sup>10</sup> it is positive that it has issued an optical disc regulation. Effective prevention of optical disc piracy can only be achieved through targeted legislation and by the establishment of specific enforcement mechanisms. While IIPA has not reviewed the legislation, we note that 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. In addition, commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.

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<sup>8</sup> 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>.

<sup>9</sup> IIPA understands that the Nigerian National Broadcasting Commission (NBC), under the supervision of the Federal Ministry of Information and National Orientation, resolved during August 2006 that NBC would not recognise exclusivity in sports transmission. Section 1.16.1 of the Code provides,

In Nigeria, the coverage of Sporting and Major National Events shall not be Exclusive to any Station. Such Programme shall be made available to other Operators on Mutually negotiated terms.

Section 1.16.2 of the Code further states that

Where the Commission needs to arbitrate its decision shall be final and binding on all parties.

<sup>10</sup> See Ruby Rabi, at <http://allafrica.com/stories/200611290465.html>, Daily Trust (Abuja), November 28, 2006 (reporting that NCC admitted there are "14 replicating plants in Lagos used to manufacture pirated CDs, DVDs and books," and noting that ten years ago, Nigeria had just two replicating plants). The NCC indicated that it intends to re-introduce the "hologram" as a means to determine authenticity. IIPA is skeptical that a hologram purchase program will achieve anything other than foster fraudulent holograms and increase costs to right holders.

- The requirement to use source identification (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). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### PAKISTAN

**Special 301 Recommendation:** IIPA recommends that Pakistan remain on the Watch List in recognition of effective action taken to eradicate optical disc piracy. However, IIPA remains extremely concerned about Pakistan's persistent failure to address book piracy in a meaningful way and to take other necessary actions to address piracy in general. Thus, IIPA recommends an out-of-cycle review (OCR) to be conducted in September 2007 to assess Pakistan's progress in (1) undertaking significant action against pirate booksellers, often located in Urdu bazaars, namely, FIA-led enforcement followed by prosecutions of cases leading to significant penalties; (2) ensuring that the National Book Foundation ceases all activity considered infringing under international norms; (3) making the Intellectual Property Organization a more meaningful and effective organization, functioning to allow input from government officials and private sector representatives alike, and staging a comprehensive plan for tackling Pakistan's outstanding piracy issues; (4) beginning the prosecution of the optical disc manufacturing pirates that were arrested over a year ago; (5) stepping up enforcement against retail piracy; and (6) improving border enforcement against the growing number of pirate imports from Malaysia and other countries.

### **EXECUTIVE SUMMARY**

IIPA recommended that Pakistan be lowered to the Watch List in the 2006 annual Special 301 cycle, and that USTR conduct an out-of-cycle review. Citing "notable progress on IPR issues during the past year," Pakistan was lowered to the Special 301 Watch List, and noting that "[d]espite significant improvements, piracy rates remain a concern and the United States will work with Pakistan to achieve further improvements in its IPR protection and enforcement regimes." Notwithstanding that optical disc production for export has largely ceased, and that former retail piracy havens like Rainbow Centre appear to be largely clean, IIPA once again notes concern that book piracy continues unabated, while other problems like end-user software piracy and cable piracy also cause significant losses to legitimate U.S. business. In addition, the FIA and Pakistani government still have not followed through on prosecuting the key optical disc plant owners. Thus, a key component of enforcement against optical disc piracy remains unfinished. IIPA now understands that the Chair of the IPO resigned from his post and that the Vice Chairman is serving in the interim, so, it is even more important in this period of transition to keep the pressure on good enforcement against piracy and to avoid backsliding in this area.

### **PRIORITY ACTIONS REQUESTED IN 2007**

- **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 print piracy have completely decimated the market for most legitimate publishers. The Federal Investigation 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 is no longer tolerated.

- **Fix Royalty-Free Book Compulsory License That 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 2007 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 to 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.
- **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 serious problem.
- **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 mold codes) to track the location of production, etc.

For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<b>PAKISTAN</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music</b>	25.0	100%	25.0	100%	70.0	100%	70.0	100%	60.0	83%
<b>Books</b>	55.0	NA	55.0	NA	52.0	NA	44.0	NA	44.0	NA
<b>Business Software<sup>2</sup></b>	20.0	84%	26.0	86%	14.0	82%	9.0	83%	11.2	80%
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>Motion Pictures</b>	NA	NA	NA	NA	12.0	NA	12.0	95%	12.0	95%
<b>TOTALS</b>	<b>100.0</b>		<b>106.0</b>		<b>148.0</b>		<b>135.0</b>		<b>127.2</b>	

## **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 print piracy make the market virtually untenable for legitimate publishers. All types of books are pirated – practically anything that can sell more than a few hundred copies. English language novels and other trade books are popular among pirates, and as a result, U.S. publishers of mainstream commercial fiction and non-fiction are struggling. This type of piracy affects academic titles as well. 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 more difficult to differentiate from the legitimate versions. 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.<sup>3</sup> 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

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Pakistan under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Pakistan, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> 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. However, in 2006, for example, one piracy case involved the discovery of 200,000 covers of grade 2 social studies books seized from a bindery; the legitimate company had sold 50,000 copies for the year of that book.

class, or lend the book to other students for them to copy any material they require.<sup>4</sup> 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, and fines are derisory. Thus, there is little deterrence in the market. Piracy levels can range from 40% to over 90% of the market, depending on the title.<sup>5</sup>

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.<sup>6</sup> 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 sellers 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. Notwithstanding some enforcement actions in late 2005 and into 2006,<sup>7</sup> the bazaars remain rife with piracy, and enforcement has been weak to nonexistent given the political connectedness of the pirate booksellers. In addition, IIPA continues to be alarmed by the incidents of violence carried out by pirate operators.<sup>8</sup>

Illustrative of the lack of will and weakness of the authorities in Pakistan was a police-assisted raid in Karachi in a book market replete with piracy. Books were seized and some offenders were taken to the neighborhood police station. However, there was a strong reaction from the market and many of the booksellers surrounded the police station demanding that the police not file the "First Information Report" (FIR) against the offenders and to release them immediately. The police folded under the pressure and asked for a written undertaking from the

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<sup>4</sup> 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.

<sup>5</sup> 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 are pirated at far higher rates.

<sup>6</sup> Included in "technical" titles are business, economics, and pure science books.

<sup>7</sup> In September 2005, publishers began conducting a series of inspections on the Urdu Bazaar in Karachi. The initial 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. 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.

<sup>8</sup> In one incident in 2005, a copyright agent was kidnapped and tortured (by being hung upside down for several hours) before escaping. During his absence, his family was threatened. Other industry representatives note that they have tried to get Pakistani government assistance in 2006, but due to lack of responses, they have had to make private security arrangements.

offenders that they would not engage in piracy, whereupon they released the defendants without filing an FIR.

**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 TRIPS<sup>9</sup> and Pakistan must delete it.

**Successful Prosecutions Needed in Optical Disc Factory Piracy Cases:** The Pakistani government (with great leadership of the Federal Investigation Agency) took unprecedented actions in 2005, initially shutting down six pirate factories, raiding warehouses, and overseeing the closure of four other plants,<sup>10</sup> all of which had been engaged in brazen production of pirate optical discs for several years. 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. 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. IIPA is pleased that the IPO continues to keep this issue on the front burner in Pakistan, but looks to leadership to finally dispose of cases against plant owners and financiers.

**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. In 2006, there was very little known importation of polycarbonate (the plastic used to make optical discs). There remains one factory in Pakistan with one known line, but this capacity is dwarfed by the capacity levels in previous years. 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.<sup>11</sup> However, it appears these are imported from Southeast Asia, possibly Indonesia and/or Malaysia. Recent Customs seizures would appear to back this assertion up. There have been only a few enforcement actions against major burning operations.<sup>12</sup>

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<sup>9</sup> The compulsory license cannot withstand scrutiny when compared with the Berne Convention’s three-part test, which is incorporated by reference into the TRIPS Agreement. 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.

<sup>10</sup> As of February 2006, only one plant (Sadaf CD) had apparently reopened but only for the production of licensed Pakistani products. The remaining optical disc plants remained sealed or voluntarily closed.

<sup>11</sup> As of late 2005, pirate film DVDs were sold for US\$2, while pirate film DVD-Rs were sold for US\$1.35.

<sup>12</sup> See *IFPI Enforcement Bulletin*, September 2006 (on file with IIPA) (reporting the first major raids on pirate CD-R duplication facilities by the Federal Investigation Agency (FIA). Total seizures included 273 CD-R burners - 39 stacks

**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 2006, such piracy remained 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 2007.

**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).<sup>13</sup> IPO reports directly to the Prime Minister via a 15-member Policy Board, drawn from the public and private sector. On April 16, 2005, there was also an official announcement that the Federal Investigation 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 placing enforcement authority with the FIA. However, to our knowledge, no overall strategy for performing the anticipated functions of the IPO has been formulated. The IPO must take meaningful steps to build a public/private partnership in this organization, stabilize its leadership and promote implementation of its mandate.

IIPA continues to advocate establishment of an Intellectual Property Rights Task Force within FIA and provided at all provincial levels. Reportedly, the Pakistani 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. FIA reported some impressive actions in the Karachi area during the period from April 2005 to April 2006, with seizures of 367,252 pirate DVDs and CDs containing illegal copies of software, recorded music and films along with manufacturing equipment.<sup>14</sup> FIA also reported that 56 people involved in the illegal business had been arrested in Karachi, Lahore, Rawalpindi and Peshawar under the Copyright Ordinance during the same period.<sup>15</sup> Industry applauds the major seizures made during 2006 in Lahore (over 300,000 CDRs seized including 279 burners) and in Rawalpindi (over 150,000 CDs/CVDs/CDRs/DVDRs seized).

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each with 7 burners - from a private apartment in Lahore, 18,000 pirated CD-Rs containing Pakistani TV dramas, stage plays and songs, around 2,000 pirated CD-Rs containing Hollywood and Bollywood films, about 20 pornographic films and 1,983 blank CD-Rs; in total the FIA confiscated more than 22,000 pirated CD-Rs and arrested two brothers who ran a CD shop in Hall Road, Lahore).

<sup>13</sup> 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.

<sup>14</sup> *FIA Seizes Over 300,000 Pirated DVDs, CDs in 12 Months*, The Baluchistan Times, April 9, 2006.

<sup>15</sup> *Id.*

**Business Software End-User Piracy Is Endemic:** Despite significant public awareness and enforcement drives by the business software industry, the piracy situation for the business software sector remained serious in 2006. Pakistan holds the dubious distinction of having one of the highest end-user software piracy levels in the world.<sup>16</sup>

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

## **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.<sup>18</sup> Remaining problems in the ordinance include criminal fines that remain far too low to deter piracy.<sup>19</sup> 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.

**Pakistan Should Implement the WCT and WPPT:** Pakistan should join and further amend its laws to fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which establish the framework for the protection of copyrighted works in the online environment. Pakistan should also 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 optical disc pirate production does not return, the Pakistani

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<sup>16</sup> In 2005, 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. However, these cases have apparently not had a deterrent effect.

<sup>17</sup> Cases from 2005 are still languishing in the courts, marred by delays, so IIPA does not yet have 2005 statistics for book publishers.

<sup>18</sup> 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.

<sup>19</sup> Some industries have suggested that the minimum fine must be increased, e.g., to PKR500,000 (US\$8,240).

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 mold codes) to track location of production, in order to successfully halt the production of pirate optical discs.<sup>20</sup> 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, IPO was once again provided with model optical disc legislation, and it is hoped that a draft will emerge and proceed to passage in 2007.

**Generalized System of Preferences:** On January 24, 2005, IIPA endorsed termination of the Generalized System of Preferences (GSP) piracy investigation of Pakistan, and called on the Pakistani government to remain vigilant against book piracy.<sup>21</sup> 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. As a result of termination, Pakistan continues to enjoy duty-free status for imports of certain products into the United States. During 2005, the United States imported \$96.8 million worth of products into the United States duty-free, or 3% of its total imports to the U.S. During the first 11 months of 2006, \$116.7 million of products from Pakistan were imported into the U.S. duty-free, representing 3.4% of Pakistan's total imports into the U.S.<sup>22</sup>

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<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> 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

## 2007 SPECIAL 301 REPORT

### PERU

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

Despite macroeconomic numbers that point to an improved economy in Peru, the copyright industries continue to have difficulties in commercializing their products due to piracy. These industries report that 2006 was a difficult year to obtain effective criminal and administrative copyright enforcement in Peru. Optical disc piracy is on the rise and street piracy remains uncontained. More police actions and administrative investigations are needed, prosecutors must pursue piracy cases, and judges should impose the deterrent-level sentences afforded in the criminal code. The government has yet to enforce its software legalization program within government agencies and illegal photocopying on university campuses continues. Border control remains weak. IIPA supports the Free Trade Agreement process and urges U.S. Congressional ratification of the U.S.-Peru Trade Promotion Agreement.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- 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) with enhanced support of the National Police (which should provide more policemen when requested by the Prosecutor) 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.
- Better coordinate efforts between the Copyright Office and local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses.
- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses of hard-good piracy.
- Support more administrative enforcement efforts by INDECOPI against piracy of business software, motion pictures (DVD and cable), books, entertainment software and music.
- Enforce the 2004 software legalization regulation (the December 31, 2006 deadline has been unacceptably extended to July 31, 2008) against those public agencies that did not comply with the business software inventory requirements and the licensing of such software.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- 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 -- *Division de Investigacion de Delitos contra los Derechos Intelectuales*, in particular with National Police support when large raids are conducted) as well as enhancing financial resources for INDECOPI.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.



- Train the judges in the new four specialized IPR courts and new appeal court in Lima.
- 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 end-user and retailer actions and coordinating with INDECOPI on border measures.
- Implement the Importation Register for importers of blank media and recording devices and equipment.

### **Legislation**

- Work with the U.S. Government and copyright industries to properly and fully implement the FTA IPR obligations and the WIPO Treaties.
- Adopt a content protection system to protect digital audiovisual content to be broadcast and delivered by Digital Terrestrial Television effective measures from unauthorized re-distribution.

<b>PERU</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006 <sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Sound Recordings &amp; Musical Compositions <sup>2</sup></b>	<b>53.5</b>	<b>98%</b>	66.0	98%	68.0	98%	87.0	98%	70.2	98%
<b>Business Software <sup>3</sup></b>	<b>27.0</b>	<b>70%</b>	22.0	73%	22.0	73%	19.0	68%	14.7	60%
<b>Motion Pictures <sup>4</sup></b>	<b>NA</b>	<b>NA</b>	12.0	63%	4.0	75%	4.0	45%	4.0	50%
<b>Entertainment Software</b>	<b>NA</b>	<b>NA</b>	NA	NA	NA	NA	NA	NA	NA	NA
<b>Books</b>	<b>NA</b>	<b>NA</b>	9.0	NA	8.5	NA	8.5	NA	8.5	NA
<b>TOTALS</b>	<b>80.5</b>		<b>109.0</b>		<b>102.5</b>		<b>118.5</b>		<b>97.4</b>	

The U.S. and Peru began FTA negotiations in May 2004, and negotiations concluded in December 2005. On January 6, 2006, President Bush notified the U.S. Congress of his intent to

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Peru under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA's prior country reports on Peru are posted on the IIPA website at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> 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.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

enter into this Trade Promotion Agreement with Peru.<sup>5</sup> In June 2006, Peru ratified the TPA, leaving the U.S. to complete its ratification vote. The TPA 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.<sup>6</sup> Peru currently is a beneficiary country of several U.S. trade programs which contain IPR standards, including 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) and December 2006 ATPA Extension Act.<sup>7</sup> Once the FTA is in force, these trade benefits for Peru will end.

## **COPYRIGHT PIRACY IN PERU**

**Street piracy and optical disc piracy:** Optical disc piracy is a major problem in Peru, harming the markets of almost all the copyright industries. There are entrenched black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda (which is located one block away from the police and Public Ministry's headquarters) where pirates operate during daylight with little risks of suffering raids. Indeed, during the last semester of 2006, the Specialized Fiscal Police and Prosecutor have not received support in the form of policemen from the National Police, who were requested with the purpose of organizing large raids against these black markets. Most of the pirate product is burned and copied in small-medium size replication facilities hidden in neighboring areas of these markets. Thousands of blank tapes and CD-Rs are smuggled into the country each week and then distributed for illegal duplication around the country.

The Copyright Office of INDECOPi reported that blank OD imports have decreased from 140 million copies in 2005 to an estimated 52 million during 2006. This does not necessarily mean that there is less blank media entering Peru. The reports do not indicate any increase or decrease in the imports of media with an uncertain destiny. Rather the data suggests that certain border measures have created incentives to smuggle the blank media into Peru as contraband, no longer being declared as imports. According to official 2005 customs statistics, the major blank media importer has moved to Iquique, a free port in the north of Chile, from which it is publicly known that significant amounts of contraband come to Peru.

**Business software piracy:** The business software industry reports that its most critical problem in Peru during 2006 was the illegal duplication of business software within small- and medium-sized private sector companies. OD piracy poses another challenge for this industry. Reseller piracy remains a significant problem too; illegal bazaars operate openly in high traffic areas in the center of Lima (Galerías Garcilaso de la Vega) with virtual impunity. Enforcement actions slowed in 2006 (see enforcement section, below). Preliminary estimated trade losses due

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<sup>5</sup> The President's letter gave 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>.

<sup>6</sup> The final text of the U.S.-Peru FTA IPR Chapter is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html). Peru also signed four IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

<sup>7</sup> See IIPA's March 28, 2006 Comments to the U.S. International Trade Commission regarding the Peru Trade Promotion Agreement at [http://www.iipa.com/pdf/IIPA\\_PeruFTA\\_Letter\\_to\\_USITC\\_032806.pdf](http://www.iipa.com/pdf/IIPA_PeruFTA_Letter_to_USITC_032806.pdf). In terms of trade benefits Peru has received, during the first 11 months of 2006, \$160.8 million worth of Peruvian goods entered the U.S. under the duty-free GSP code, and an additional \$1.5 billion worth of Peruvian goods entered the U.S. under ATPA.

to business software piracy in Peru rose slightly in 2006 to \$27.0 million, and the estimated piracy level dropped slightly to 70%.

**Record and music piracy:** Over the last few years, the legitimate recording industry in Peru has nearly disappeared because of the high levels of piracy. Piracy of music and sound recordings still remains at one of the highest levels in the world. The only market left in the country is made up of a few retail stores in Lima. No major recordings have been produced in Peru over the last few years. Due to dwindling company resources, local artists have had very limited access to organized marketing and sale campaigns to offer their products. The end result is a poor market that does not support either local or international productions. With international support, the remaining companies in Peru still run an anti-piracy operation aimed at preserving what is left of the market. Estimated trade losses due to music and recording piracy in Peru were \$53.5 million in 2006, and the level of piracy continue to be 98%.

**Book piracy:** The book publishing industries report little change in the piracy situation in Peru for 2006. Large-scale photocopying (the most damaging form of piracy) remains at high levels. Furthermore, trade books of U.S. origin 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. Such widespread piracy over the last decade has devastated the local book industry, causing bookstores to close and interfering with the ability of 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, as found in the Law of the Book (Law 28086 of 2003) which recognizes the important public need to create and protect books and editorial products.

**Audiovisual piracy:** MPA reports that optical disc piracy of audiovisual programming continued 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 industry's 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. Internet is becoming a bigger concern, although there are no statistics to show the exact extent of possible internet-based movie piracy in Peru. Interestingly, the theatrical market in Peru has increased despite the piracy problem. The home entertainment market, however, has been decreasing dramatically, due to both piracy and the closing of several stores of a major rental chain. Some supermarket chains are trying to get into the DVD sell-through market, and there may be some positive prospects there to help fill the gap in the legitimate video rental market.

**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's informal markets.

## **COPYRIGHT ENFORCEMENT IN PERU**

Last year (2006) was an election year in Peru (Presidential and Congressional elections in May and June, and local and regional Governments elections in November), and some industries feel that that raised challenges for generating political and enforcement-related support needed to

engage in concerted, effective anti-piracy enforcement actions. Industry sectors report generally good cooperation with many (not all) Peruvian IPR agencies, but the main problem remains that results (lower piracy and effective deterrence) did not happen in 2006.

Peru has a number of agencies involved in anti-piracy activities. The appointment of the High-level Multi-Sectorial Commission against Contraband and Piracy, formed in 2004, and headed by the Ministry of Production and including 22 members from both the public and private sector, was extended for one additional year (through 2007); this does represent a political gesture supporting IPR enforcement activities. During 2006, this commission was a positive form in obtaining the appointment of the four special courts and one special appeal court with national jurisdiction on IPR crimes. However, it has to-date not been able to get SUNAT (the tax and customs authority) actively involved in anti-piracy operations.

BSA reports a good relationship with officials in the INDECOPI Copyright Office and with the IPR prosecutors. Even so, BSA notes that 2006 was a difficult year for enforcement against software piracy. MPA reports that its work with the *Cruzada Antipirateria* (a private association created by the audiovisual sector, including distributors, exhibitors, and video rental stores) continues to have good relationships with SUNAT, Policia Nacional (Cyber Crime Division and IP Special Unit), and the Ministerio Publico. Unfortunately, the *Cruzada* feels that the municipal authorities such as those in Lima Municipalidad have no commitment to fight audiovisual piracy. There is also little support from the Ministry of Interior, through the Policia Nacional (7<sup>th</sup> Region), for permanent enforcement activities to conduct raids in the major black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda. IFPI reports some improvement in general enforcement but with the added requirement of filing formal complaints.

**Police actions:** The copyright industries believe that members of the Peruvian police forces still protect the pirates of Mesa Redonda. 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 and to compromise the effective support of the National Police (7<sup>th</sup> Region) providing troops when large raids are to be conducted in the above referred black markets. Three industries report their experiences in 2006, below.

BSA reports that 2006 was not a good year for its enforcement activities. *Ex officio* enforcement actions, in particular large raids against black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda by both the police and INDECOPI, significantly decreased during 2006. The Fiscal Police Special IP Unit basically stopped running large raids since May 2006, likely due to the lack of government support of the uniform police forces; it was likely also due to election year politics which halted anti-piracy momentum. Large *ex officio* or *ex parte* raids, regardless of the copyright sector, have not resumed after the elections.

MPA has an active campaign in Peru, working through the *Cruzada Antipirateria*, with both INDECOPI and the Federal Police. MPA reports that for the first nine months of 2006, its campaign undertook 63 actions against stores, arresting 2 people, seizing 462,000 blank optical discs and 182,000 pirate burned DVDs and jewel boxes.

The music industry reports an increased level of anti-piracy operations in 2006 mainly coming from the special IPR prosecutor in Lima, Pablo Seminario. Mr. Seminario's office has been willing to conduct weekly street raids in selected parts of Lima to limit the availability of pirate product around viable commercial centers. The local industry welcomes these actions despite the

drawback that it doesn't generate arrests or convictions. In addition, the anti-piracy group has been able to promote actions against major pirate centers such as "El Hueco" and "Las Malvinas". The anti-piracy campaign seems to be taking a turn for the better compared to 2005 but it still lacks the greater frequency in actions and sentences with effective jail time needed to generate a real impact in the market. The industry hopes that the number of actions increase in 2007 and target major pirate markets. They also see favorably the changes in criminal code procedures currently taking place as it may facilitate and expedite sentencing and jailing major pirates. Over the last year, authorities with support from the local anti-piracy team have been able to seize 5.7 million units of recorded optical discs and 2.6 million of blank units. In addition, 30 persons were sentenced for piracy that did not carry effective jail terms.

**INDECOPI's administrative efforts:** INDECOPI continues to experience problems due to limited resources; it is supposed to be self-funding from the income it gets from patent and trademark registrations and from the fines that its administrative bodies are permitted to impose. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPI's enforcement efforts.

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. BSA reports that, on a positive note, INDECOPI and Municipalities have used its new powers in two opportunities to temporarily close the premises of bazaars caught in illegal business software reproduction and marketing. More examples like these would contribute to increase the perception of effective enforcement in the country. BSA reports that in 2006, INDECOPI organized several trainings in software compliance and licensing for Governmental Agencies. This contributed to generating a climate of compliance among these agencies' public servants and a comprehensive knowledge of the government guide for software management approved in 2004. However, INDECOPI still, in 2006, 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 choose not to comply with the settlement terms.

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 should also work jointly with local and regional governments, as well as with the National Library and the Ministry of Education.

**Criminal prosecutions remain few:** Prosecutors have been unable to move copyright cases. Peru still has two IPR prosecutors who work with INDECOPI when requested to do so. Unfortunately, these IPR prosecutors have restrictions on their jurisdiction, in that after they file the complaint (which happens with an excessive delay of 4 to 6 months after the raid), the case goes to a general prosecutor's office instead of staying under the responsibility of the specialized IPR office. This situation, along with the fact that there have not been any specialized IPR courts for copyright cases, have historically lead to suspended sentences and non-deterrent penalties (see discussion below on courts).

**Non-deterrent results in the criminal courts:** Few criminal cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. What happens in practice is that the Peruvian Criminal Procedure 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 continued even after the 2004 amendments to the criminal code, which provided an increase of minimum sentencing to four or more years for copyright infringements.<sup>8</sup>

Industry hopes that the appointment of four special courts and one special appeal court with national jurisdiction on IPR crimes in November 2006 will improve the enforcement environment in Peru this year. In addition, industry hopes that amendments made in November 2006 to the criminal code to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes will also give both prosecutors and judges more legal groundwork to pursue and impose deterrent sentences.

**Border enforcement weakened in 2006:** Border measures in Peru are simply inadequate to stop the flow of pirated material into the country. Interventions by customs authorities to seize suspect shipments are few. Border interventions during 2006 conducted by INDECOPI's representative at Customs have decreased in quantity and quality. INDECOPI has convened to a working committee to try to identify the cause of this phenomenon. Several steps could be taken to improve this situation:

- 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.
- Customs should 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 shall pay in advance the VAT of the reseller of such merchandise, in addition to its own VAT.
- SUNAT should implement its obligation under the 2004 criminal code amendment to create an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register.
- 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.

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<sup>8</sup> An ESA member company reports that several of its cases remain stagnant within the court system, with some dating back to 2000.

## **COPYRIGHT LAW AND RELATED ISSUES IN PERU**

**1996 Copyright Law and TPA implementation:** 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 TPA, Peru will have to make additional reforms to its copyright law in order to fully comply (the TPA does contain transitional periods). Additional reforms to the copyright law will have to include: comprehensive protection against the circumvention of technological protection measures and rights management information, statutory damages, presumption of ownership, ISP liability and notice and takedown provisions, *ex officio* border measures, and *ex parte* seizure of infringing products.

**2004 criminal code amendments increased sanctions:** Peru's criminal code was amended in 2004 by Law No. 28,289 which increased criminal sanctions to a minimum of four years of prison and a maximum of eight years of prison for those who commit copyright infringement. The law also restricts judges' powers to suspend criminal sentences.

**2006 criminal code amendments (Law No. 28,726 and No. 28,730):** These amendments to the Criminal Code penalize recidivist offenders with stronger sanctions and established additional penalties for more crimes.

**Customs and the 2004 criminal code:** The 2004 criminal code amendments also included several provisions to address customs crimes and piracy. The law created a permanent commission to fight customs crimes and piracy, designating SUNAT as the secretary of this commission. The law requires Customs officials to give INDECOPI all necessary support to help it fulfill its mission. It 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 supposed to be administered by SUNAT, however SUNAT did not activate such registry during 2006.

**New IPR courts in Lima:** New Federal Ordinance No. 122/2006 gave federal jurisdiction to some courts to analyze customs and tax crimes against intellectual property. This law also created the four new courts.

**Levy on imported blank media:** SUNAT Ordinance No. 224/2005 created a levy ranging from US\$ 0.03 to 0.06 per unit of blank optical media imported. The industries have attempted to collect this levy but with major difficulties. Equipment and blank media Importers are unwilling to pay. The industries see an apparent increase in contraband to avoid this levy as well as importation related VAT's. The copyright office seems to show some concern over this issue and has begun to take some *ex-officio* actions against delinquent importers. We encourage additional enforcement in this area.

**Digital terrestrial television:** In 2006, Peru announced that will adopt and implement a digital terrestrial TV system. Peru has not yet announced which standard it will adopt. MPA calls attention to the need to select a method of protection against unauthorized re-distribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

**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 created an entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*), within the Ministry of Education

**Government software asset management deadline of December 2006:** BSA urges the Government to implement the software guide and the decree as swiftly as possible. The Government should enforce this regulation by punishing public servants that did not comply with the business software inventory requirements and the licensing of such software used in the respective public entity. To review, 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 published the government guide for software management in 2004. The Government issued Supreme Decree 037-2005-PCM in May 2005, postponing the enforceability of the agencies' obligations to provide an inventory of their software and to erase all illegal software until December 2006. Once again, on January 11, 2007, the Government issued Supreme Decree 002-2007-PCM, postponing the enforceability of the Decree 013-2003-PCM until July 2007. This three-year delay in enforcing this decree is unjustified.

## **IPR TRAINING AND PUBLIC AWARENESS**

During 2006, BSA organized and sponsored several training seminars, and expects to continue this training effort in 2007, directed at the newly appointed four IPR courts. Many of these seminars are conducted with INDECOPI, to train chief technology officers of several Government Agencies in their software management obligations. BSA sponsored and organized, along with the pharmaceutical industry and the U.S. and Swiss Embassies, the XI International conference on IPR, which was the most important IP conference organized by the private sector in 2006. Finally, BSA organized and sponsored an IPR seminar for criminal judges; judges and prosecutors attended this event.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### PHILIPPINES

**Special 301 Recommendation:** The Philippines should remain on the Watch List<sup>1</sup> in recognition of some good work by the government in the fight against piracy. However, because of the lack of criminal convictions against pirate plant owners and mall owners, general ineffectiveness of the courts hearing piracy cases, the continued prevalence of book piracy, optical disc piracy, Pay TV piracy, and the unknown final disposition of pirate goods and materials and implements found in various raids, IIPA calls for the U.S. government to conduct an out-of-cycle review to determine whether the Philippine government has taken adequate steps to address these concerns.

### EXECUTIVE SUMMARY

The government of the Philippines made some strides in 2006 against copyright piracy. Several optical disc plants were shut down (some due to raids carried out by the Optical Media Board, under the leadership of OMB Chairman Edu Manzano, and some that closed for other reasons). In addition, the Philippine National Police, under the leadership of Philippine National Police Senior Superintendent Noel de los Reyes, has turned a corner for the better, taking actions on right holder requests and informing right holders of specific piracy issues (but still not exercising *ex officio* authority). Despite the efforts of OMB and the PNP, problems in the Philippine IP enforcement system and some forms of piracy persist. For example, illegal photocopying of books, offset print piracy, and CD-R "burning" severely damage U.S. book publishers in the Philippines. The lack of prosecutions of key pirate operators, including plant owners, mall operators and pirate book producers, keep those who engage in piracy activities in the Philippines largely insulated from consequences. There have been only a handful of criminal cases that have proceeded to conviction (and some of those cases, as well as some criminal cases that remain pending, were commenced over 10 years ago). Signal theft remains a major problem in the country. Finally, notwithstanding the actions against optical disc plants, optical disc piracy (whether locally produced or imported, e.g., from China) remains a major piracy concern.

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<sup>1</sup> In its out-of-cycle review (OCR) announcement on February 15, 2006, the United States Trade Representative decided to lower the Philippines to the Watch List, noting improvements in IPR protection, and noting that "[t]he United States will use the bilateral Trade and Investment Framework Agreement to engage the Government of Philippines on strengthening its IPR regime." See [http://ustr.gov/Document\\_Library/Press\\_Releases/2006/February/US\\_Government\\_Praises\\_Philippines\\_for\\_Improved\\_IPR\\_Enforcement.html](http://ustr.gov/Document_Library/Press_Releases/2006/February/US_Government_Praises_Philippines_for_Improved_IPR_Enforcement.html). On February 7, 2006, President Arroyo issued a memorandum through Cabinet Secretary Ricardo Saludo to the Office of the Press Secretary, the head of the government's mass media, Department of Justice, Department of the Interior and Local Government, Philippine National Police, Optical Media Board and the Philippine Information Agency. See *Pgma Orders Anti [Piracy] Copyright Drive, Names Cristobal as Oversight Head*, Philippines News Agency, February 7, 2006. It is ironic that, on the same day, pirates were doing booming business in the malls in Manila. See *Pirates envelop Manila as bootleggers flourish*, Feb. 18, 2006 (noting, "[t]he United States has removed the Philippines from its intellectual piracy 'priority watch list,' but in Manila's malls it was business as usual Friday for hawkers selling copies of the latest Hollywood movies. 'Friday is one of our busiest days. People always stock up,' said Raul, as customers perused stacks of pirated discs at his stall, including films such as 'Munich' and 'Walk the Line' that are still in theatres).

## **PRIORITY ACTIONS REQUESTED IN 2007**

- **Carry Out Tougher Enforcement Against Unlicensed, Unregistered (Including Formerly Licensed/Registered) Plants, Seizing and Properly Disposing of Machinery**
- **Stop the Flow of Pirate Optical Disc Factory Facilities and Machinery from Outside the Philippines (e.g., Malaysia and Indonesia)**
- **Significantly Increase Criminal Prosecutions for Piracy in the Philippines, Especially Against OD Plant Owners (Licensed or Unlicensed), Key Mall Operators, and Pirate Book Producers**
- **Ensure that the Optical Media Board (OMB) Develops a Meaningful “Work Plan”**
- **Address Book Piracy, Through Closer Monitoring of Key Areas Selling Pirated Books, Both On and Off University Campuses, and Designate One Government Agency as Responsible for Oversight of Book Piracy Issues**
- **Report on Status of All Copyright Cases, Including Optical Disc Factory Cases, and Information About Disposition of Seized Items in Raids, Including OD Equipment**
- **Provide Greater Funding and Resources to OMB and Customs, Including Optical Disc Forensic Equipment by the Philippine Government**
- **Re-Establish IPR Court, and Develop IP Expertise in Judges and Prosecutors**
- **Address Internet Piracy Threat Through Sustained Actions to Legalize Usage of Copyright Content on the Internet (Internet Cafés as well as Peer-to-Peer Piracy)**
- **Curb Pay TV (Cable and Satellite) Piracy by Shutting Down Some of the Estimated 800 Pirate Cable Systems**

For more details on Philippine’s Special 301 history, see IIPA “History” Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006<sup>2</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Books</b>	49.0	NA	48.0	NA	48.0	NA	45.0	NA	45.0	NA
<b>Business Software<sup>3</sup></b>	35.0	72%	46.0	71%	38.0	71%	33.0	72%	25.0	68%
<b>Records &amp; Music</b>	50.3	62%	21.0	40%	20.0	40%	22.2	40%	20.9	40%
<b>Entertainment Software</b>	NA	NA	11.3	85%	NA	90%	NA	95%	NA	NA
<b>Motion Pictures<sup>4</sup></b>	NA	NA	NA	78%	33.0	85%	33.0	89%	30.0	80%
<b>TOTALS</b>	<b>134.3</b>		<b>126.3</b>		<b>139.0</b>		<b>133.2</b>		<b>120.9</b>	

## **PIRACY UPDATES IN THE PHILIPPINES**

**Book Piracy:** Book piracy in the Philippines remains a major problem, increasingly decimating the market for foreign and domestic book publishers alike. Illegal commercial-scale photocopying of entire books plagues academic publishers. Pirate reprints are common and still being sold under the excuse of a long-ago-repealed compulsory license. Increasingly, “burned” CD-Rs are sold with 100-200 titles on board, and scanned files available for download onto PDAs in hospitals, educational institutions, and even shopping malls are becoming quite common. The Philippines boasts a large number of higher education and graduate students and demand for university textbooks, technical books, and professional medical and nursing books is high. This demand is unfortunately being fulfilled by pirates hawking poor-quality versions, compromising the very educational infrastructure the Philippines government is working so hard to build.

Illegal photocopying most often takes place in commercial establishments surrounding universities or in street stalls concentrated on a single street or small group of streets.<sup>5</sup> Photocopy shops also operate on campuses, in hospitals, and in medical and nursing schools, often in highly organized fashion, selling door to door to doctors’ offices and medical establishments. These shops avoid holding stockpiles of infringing goods by copying on a “print to order” basis, complicating investigations and enforcement actions. It is disturbing that one set

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Philippines under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Philippines, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</sup> 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.

of photocopiers is in operation near the Philippine Regulations Commission, the government institution that 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). Under the able leadership of Superintendent de los Reyes, the PNP has made significant progress in collaboration with right holders on these issues. However, the industry remains frustrated that the good efforts by the PNP and NBI are then hindered by the lack of progress when cases move to the prosecution stage. Judicial reform is imperative to complete the puzzle of effective enforcement.<sup>6</sup>

Since much of the photocopy piracy takes place on or around university campuses, it is important for the Commission on Higher Education (CHED) and the Department of Education (DepEd) to get involved in the issue, especially where on-campus activity is involved.<sup>7</sup> Recent raids at the Diliman Center at the prestigious University of the Philippines illustrate that activity on campus continues and must be addressed. U.S. publishers have encouraged CHED to provide incentives to campuses that tolerate illegal activity by vendors or students, and consequences (regarding evaluations or funding) for universities that fail to take measures to deter this activity. IIPA will be monitoring measures taken in this regard during 2007.

Apart from the photocopying issue, pirate reprints continue to harm the publishers' market in the Philippines. 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. The National Book Development Board (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."<sup>8</sup> This declaration is a good start, but must be reinforced by action. Prior to the issuance of this statement, the IPO had 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, the industry remains concerned that the illegal stock has merely moved from the front display area to the back room.

Given the prevalence of optical media product containing book and journal material, publishers have met with OMB about possible collaboration with regard to optical disc piracy. The industry is encouraged by signs of inclusion from OMB. IIPA will be looking for continued willingness by OMB to act on behalf of the industry in 2007.

Books and journals, especially medical and nursing titles, and trade books are increasingly being offered for download onto PDAs by for-profit entities in shopping malls and on medical campuses. Infringers are especially targeting medical students and practical physicians who want easy access to reference titles. This is a dangerous practice that must be stopped immediately.

The Philippines government is working hard to set up a reproduction rights organization (RRO). The National Book Development Board (NBDB), under the direction of Dr. Dennis Gonzalez, has taken charge of this initiative on the government side, and is working with right holders and interested parties to get the RRO underway. The hope is to have universities and

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<sup>6</sup> See *infra* discussion of Multilinks Book Supply case.

<sup>7</sup> Third party vendors renting space on campuses, for instance, conduct illegal activities with impunity.

<sup>8</sup> Statement by NBDB Chairman Dennis T. Gonzalez, printed in the *Manila Bulletin*, January 15, 2006.

schools enter into licensing agreements with copyright owners. Book publishers support this effort in principal but warn that it is only one part of the solution to piracy in the Philippines. IIPA welcomes a “plan” but insists that right holders must be involved in the process of establishing terms. In addition, IIPA still 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.<sup>9</sup>

**Optical Disc Piracy Still a Key Piracy Concern:** Notwithstanding that several optical disc plants were closed in 2006,<sup>10</sup> nine licensed plants and at least one unlicensed plant remain in operation in the Philippines. The nine licensed plants are known to have 31 replication lines and 6 mastering lines (although some of the mastering lines may not be operational). The one additional unlicensed plant was allowed to continue in production since being raided in April 2005 until it was raided again in December 2006. This plant had 8 replicating lines. These plants have an estimated production capacity (at conservative per line/per annum numbers) of 157.5 million discs, well beyond any conceivable rational legitimate domestic demand. There is little authorized production,<sup>11</sup> and unfortunately, the capacity to produce optical discs still far exceeds legitimate demand in the Philippines. There remains evidence of pirate optical disc exports to Australia, New Zealand, and Europe, and there is also evidence of the emergence of locally “burned” recordable discs.<sup>12</sup>

A major issue relates to the disposition and whereabouts of machinery that is not licensed and not authorized to be producing discs in the Philippines. For example, two machines from one of the closed plants remained in circulation despite the plant having been ordered to return the machines by the court. The machines still have not, to IIPA’s knowledge, been returned. A formerly registered plant imported a DVD machine which was relocated by the owners without notification to the OMB. Yet another company has had machinery returned to it following a warrant quashal. That plant apparently remains unregistered with the OMB, and indications are this entity has other unregistered replicating machinery as well. There is also hard evidence that a major pirate producer in Malaysia has plans to move its replication lines into the Philippines, and that a known pirate producer from Indonesia has already done so.

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<sup>9</sup> 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.

<sup>10</sup> IIPA knew of eleven plants in existence at the outset of 2006, and knows of five plants having been shut down or closed. However, recent reports indicate that as many as ten licensed plants remain in existence today (nine from previous licensing and one being licensed in 2006 but with no SID Code as of yet); one of the licensed plants was raided in April 2005, but remained in operation until raided again in December 2006. A recent seizure at the border of four second-hand production lines smuggled into the country underscores that production capability is growing or at least holding steady in the Philippines.

<sup>11</sup> 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.

<sup>12</sup> For example, between January and October, 2006, the motion picture industry program in the Philippines undertook 3,720 investigations and participated in 153 raids, resulting in the seizure of 260,882 VCDs, 564,601 DVDs, 292,777 CD-Rs, 15,344 DVD-Rs, and 24 CD-R burners. A total of 98 new criminal prosecutions and 658 administrative proceedings were initiated, with 421 criminal cases and 2,041 administrative declarations resolved.

**Import Piracy and Mall Piracy:** Pirate imports enter the Philippines from Malaysia, China, and Indonesia, continuing to flow into the Philippines feeding the many pirate malls.<sup>13</sup> One of the major criminal cases in 2006 was tried against importers bringing pirate discs in from Indonesia.<sup>14</sup> Since key mall owners are also in the Philippine Congress, defeating piracy in the malls has been an elusive goal. There has been a marked increase in 2006 in the number of optical discs available in the pirate market coming from China. Entire buildings in the Quiapo Bartertrade area have been refurbished and stalls dedicated to the sale of pirate optical discs imported from China. Many of these stalls specialize in concert DVDs although there has been a significant increase in the sale of Chinese-made movie DVDs as well. The quantities involved indicate regular importations. Additionally, while the Quiapo Barter trade complex is often subject to high profile raid activity by OMB, within 48 hours of a raid, the location is fully stocked and back in full operation. This supply pipeline needs to be addressed with resolute enforcement activity and the barter area shut down permanently.

**Signal Theft (Cable and Satellite) a Growing Problem in the Philippines:** Signal piracy is a growing problem in the Philippines notwithstanding recent positive statements from the government regarding the problem, 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\$80 million in 2006 (up from \$70 million in losses in 2005) (this translates to 910,000 legitimate Pay TV subscribers, and 887,500 illegal users). The two major concerns are that: small cable television operators (especially in the outer provinces) are moving to the use of pirated programming; and the Philippine 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; quite to the contrary, NTC continues to renew the licenses of rogue operators. IP Philippines and NBI have in recent years cooperated with right holders in carrying out industry raids of pirate operators, but 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.

A Memorandum Agreement (MOA) was recently signed between IP Philippines and the NTC that would establish an administrative enforcement procedure that would enhance investigations of and regulatory action against pirate operators. However, to date there are apparently no implementing regulations on the MOA.<sup>15</sup> Specifically, under the Agreement,

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<sup>13</sup> Sources indicate couriers regularly bring infringing DVDs through Manila airport as checked luggage. Movies, music, software, concert DVDs (bootlegs) are coming in 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. 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. 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.

<sup>14</sup> On November 13, 2006, Judge Rufino S. Ferraris, Jr. of the Metropolitan Trial Court, Branch 7, Manila, handed down guilty verdicts against two DVD pirates caught smuggling DVDs and labels from Indonesia at the Davao International Airport in 2004.

<sup>15</sup> Alexander Villafania, *NTC, IPOPhil Partner to Tackle Cable TV Piracy*, July 10, 2006, at [http://technology.ing7.net/infotech/infotech/view\\_article.php?article\\_id=8924](http://technology.ing7.net/infotech/infotech/view_article.php?article_id=8924). The article notes that

[t]he NTC-IPOPHIL agreement puts into action the enforcement of laws against signal piracy and content copyright infringement not just for the CATV industry but also for the entire broadcasting industry in the country. Under the agreement, the NTC will forward intellectual property

complaints involving alleged intellectual property infringement would be referred to the IPO for determination of that matter alone. Unfortunately, even with the MOA, there has been no real change in the government's policy or actions related to signal theft. The judiciary is also implicated in that criminal complaints remain stalled in courts.

**Broadband Has Brought Internet Piracy to the Philippines:** With the increased availability of broadband both in homes and Internet cafés in the Philippines in 2006,<sup>16</sup> illegal Internet downloads are becoming more of a threat to legitimate sales and distribution in the Philippines. Motion picture industry representatives have also noticed an increase in hard goods optical disc websites hosted in the Philippines and supplying overseas consumers. The major problem reported by the local music recording association is now illegal loading of pirate music titles to a variety of recording media by dedicated booths and stalls within shopping malls. Here the operators copy MP3 format recordings to mobile telephones, flash drives, recordable optical discs and even computer hard drives. Legitimate sales of musical recordings on optical discs are declining rapidly as a result.

In 2006, the Business Software Alliance noted a drop in the number of online software infringements traced to Philippine ISPs from 5,412 in 2005 to around 3,300 with the infringements being mainly in the peer-to-peer (P2P) domain. In 2006, IIPA is pleased that the Philippine National Police is paying some needed attention to the problem of unlicensed software usage at Internet cafés. IIPA understands that the government of the Philippines is currently considering four Bills to combat cyber-crime, but is unaware of whether these bills concern copyright.<sup>17</sup>

**End-User Piracy:** End-user piracy of business software remains the most serious threat to the business software industry in the Philippines, severely inhibiting the growth of the legitimate market for software. The business software industry has generally been pleased with the Philippine Government's response to calls to enforce against this form of piracy.<sup>18</sup> In 2006, the Business Software Alliance (BSA) worked with two Pilipinas Anti-Piracy Team (PAPT)

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infringement cases against cable TV pirates to the IPOPHIL within five days from receipt of complaint. The IPOPHIL would in turn adjudicate the case. IPOPHIL Director General Adrian Cristobal Jr. said both agencies will be coming up with regulatory and enforcement strategies against cable signal piracy, which has been steadily growing in the past few years, largely due to lower cost of cable services and installation of more cable infrastructure ... Joint reports from the Philippine Cable TV Association and the Federation of International Cable TV Association of the Philippines said that the industry's losses on piracy amount to roughly seven billion pesos annually, or about 30 percent of their revenues. Both also stressed that about 1.5 million cable subscribers are illegally connected.

<sup>16</sup> In 2005, the Philippines had one of the fastest rates of growth in the world – well over 100% – in broadband lines. From September 2005 to September 2006, the Philippines was only exceeded in percentage of growth of broadband connectivity by three other countries – Greece, India, and Croatia. The number of broadband connections grew 133.6% in that period. See Vince Chook, *World Broadband Statistics: Q3 2006*, Point Topic Ltd., December 2006.

<sup>17</sup> These are: 1) House Bill No. 1246 (An Act Preventing and Penalizing Computer Fraud, Abuses, and Other Cyber-Related Fraudulent Activities and Creating for the Purpose of Cybercrime Investigation and Coordination Center); 2) House Bill No. 2093 (An Act Defining Cybercrime, Providing for Prevention, Suppression, and Imposition of Penalties); 3) House Bill No. 2528 (An Act Providing Protection Against Computer Fraud, Abuses, and Other Cyber-Related Fraudulent Activities, Providing Penalties Therefor); and 4) House Bill No. 3777 (An Act Defining Cybercrime, Providing for Prevention, Suppression, and Imposition of Penalties Therefor). IIPA is unaware whether any of these relate to copyright, but commends the drafters and the government of the Philippines to the Council on Europe Cybercrime Convention, which contains important provisions on copyright; similar provisions as to all copyright materials (works, software, sound recordings, etc.) should be included in this legislation.

<sup>18</sup> BSA primarily uses the Intellectual Property Rights Division of the National Bureau of Investigation (IPRB-NBI), but also uses the Anti-Fraud and Commercial Crimes Division of the Philippine National Police, Criminal Investigation and Detection Group.



members, i.e., the National Bureau of Investigation (NBI) and the Philippine National Police (PNP), to conduct a record six end-user software piracy actions in addition to seven retail piracy cases in Manila and Cebu.<sup>19</sup> In total, since the crackdown began, Php19 million (US\$369,040) worth of pirated software, computers and servers have been confiscated.

The PAPT also set up a dedicated web site (<http://www.papt.org.ph/>) through which it delivers information on actions it has taken, and also provides a means to receive information from the public on piracy issues. They have proactively sought to get companies to use legal software. For example, the Criminal Investigation and Detection Group's Anti-Fraud and Commercial Crimes Division (AFCCD) of the PNP has started sending out letters signed by Police Senior Superintendent Noel delos Reyes, head of the AFCCD to some business establishments in Cebu City that have been reported to the PAPT website for alleged use of software without proper licenses. In addition, following technical training for PNP officers arranged by BSA in January 2007, the PAPT Technical Inspection Panel (P-TIP) team in the PNP can now assist companies in determining whether the software they are using is licensed or not.

Nevertheless, systemic enforcement problems remain. For example, in one of the raids conducted in November 2006, even where there was overwhelming evidence of the use of unlicensed software, the defendant sought to file a Motion to Quash the search warrant. This is often a common ruse to tie up a case in the legal system.

There were two criminal convictions involving software copyright infringement in 2006 (albeit the cases were commenced more than eight years ago, in 1998):

- Two cases against Nestor Yao (owner of Gains Computer which was raided in 1998). Defendant Yao was sentenced in July 2006 to one year in prison for one case, and three to six years for the other case. The court also required him to pay a total of Php200,000 (approximately US\$4,000)
- The case against Harold Chua, owner of Triac Marketing which was raided in 1998. Mr. Chua was sentenced to one year imprisonment and a fine of Php50,000 (US\$1,000) in 2002.

One administrative case was resolved in favor of the software companies:

- An administrative case against Big Byte in 1997 through the Department of Trade and Industry's Office of Legal Affairs was resolved in October 2006, holding Big Byte's owners liable for copyright infringement and ordering them to pay US\$300.

Nevertheless, delays remain in fully resolving other cases.

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<sup>19</sup> In 2005, NBI successfully conducted end user raids against two companies in Manila using pirated and unlicensed software. On August 24, 2005, 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. 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.



- As reported in previous years, the case against Beltron, which was raided in 1995, was resolved in favor of a software company right holder by the Philippine Supreme Court in 2005 – ten years after the initial raid. The issue involved a ruling made by the Department of Justice that Beltron was only civilly liable (as it was a former licensee of Microsoft). The Supreme Court disagreed and ruled in 2005 that Beltron's officers were liable criminally. Notwithstanding this positive result, the Department of Justice must now file criminal charges before the competent court, the Manila Regional Trial Court, where arraignment of the respondents and criminal trial will ensue. The industry has yet to receive any notice from the court regarding the arraignment of the accused. In effect, they are into the 12th year since the case began.

In addition to this case, there remain cases pending in court, some of which were filed more than a decade ago.<sup>20</sup>

**Camcorder Piracy:**<sup>21</sup> Infringing copies of U.S. motion pictures distributed globally have been forensically linked to illegal copies made on camcorders in Philippine cinemas. An essential element in the fight against such 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 the Philippines, 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 the Philippines to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

**Organized Crime Links to Piracy:** Recent piracy activities in several countries have been linked to organized crime. In a raid on July 27, 2006 on a residential proper in the Taguig suburb of southern Metro Manila, Optical Media Board, Philippine National Police, and Special Action Force officers, in addition to industry representatives, made a disturbing find. In addition to 6,500 pirated DVD movies, optical discs containing pirated copies of Sony PlayStation games, Microsoft Xbox games and MP3 music files, and substantial amounts of hard-core pornographic material, the raiding party also seized several hand grenades, hundreds of rounds of 5.56 mm ammunition, and sachets of a highly addictive and illegal amphetamine derivative known locally as "Shabu" and elsewhere as "ice." The seized ammunition is of the sort used by high-powered automatic assault weapons and the raiding party immediately notified the Bomb Search and Bomb Disposal Unit of the Philippines National Police, which transported the items to a secure facility. The discovery of dangerous drugs and lethal weapons and ammunition confirms yet again that piracy is frequently linked to other organized criminal activities, what the OMB Chairman even considers a link to terrorism.<sup>22</sup>

<sup>20</sup> For example, The EKG Computers case arose out of a raid in 1995, and the Pro Data System case arose out of a raid conducted in 1997. Both cases are pending in the regional trial court of Quezon City.

<sup>21</sup> 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.

<sup>22</sup> Nini Valera, *OMB Chair Eyes Terrorist Angle in Pirated CDs Raid*, Philippine Daily Inquirer, August 2, 2006, at [www.inq7.net](http://www.inq7.net).

## **ENFORCEMENT UPDATES IN THE PHILIPPINES**

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006 PHILIPPINES</b>			
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS SOFTWARE</b>	<b>SOUND RECORDINGS</b>
NUMBER OF RAIDS CONDUCTED	183	13 <sup>23</sup>	1
NUMBER OF VCDs SEIZED	312,161		80,000
NUMBER OF DVDs SEIZED	878,954		240,000
NUMBER OF CD-Rs SEIZED	328,686		112,000
NUMBER OF INVESTIGATIONS	1,016	13	10
NUMBER OF VCD LAB/FACTORY RAIDS	1	0	1
NUMBER OF CASES COMMENCED	15	1	1
NUMBER OF INDICTMENTS	NA	0	0
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	6	2	0
ACQUITTALS AND DISMISSALS	NA	0	0
NUMBER OF CASES PENDING	12	6 <sup>24</sup>	1
NUMBER OF FACTORY CASES PENDING	4	0	1
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		3	0
SUSPENDED PRISON TERMS			
MAXIMUM 6 MONTHS	NA		
OVER 6 MONTHS	NA	2	
OVER 1 YEAR	NA		
TOTAL SUSPENDED PRISON TERMS			
PRISON TERMS SERVED (NOT SUSPENDED)			
MAXIMUM 6 MONTHS	NA		
OVER 6 MONTHS	NA		
OVER 1 YEAR	NA		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)			
NUMBER OF CASES RESULTING IN CRIMINAL FINES			
UP TO \$1,000	NA		
\$1,000 TO \$5,000	NA	2	
OVER \$5,000	NA		
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	NA	5000	

In general, IIPA notes improved strategies by enforcement authorities, particularly the Optical Media Board, as opposed to ad-hoc responsiveness previously employed.<sup>25</sup> However, the OMB's efforts, as laudable as they may be, need to be more consistent and decisive. It appears that through the combination of locally produced factory discs, discs imported from China, and discs "burned" in stores, retail sale of illegal optical discs remains as serious a problem as in previous years. Strict vigilance at the borders<sup>26</sup> (especially at the Central Postal

<sup>23</sup> This number includes six end-user software piracy raids and seven retail raids.

<sup>24</sup> Four cases are pending in the DOJ and two cases are being litigated in court.

<sup>25</sup> In the Philippine government's half-year report, they noted that in January there were 61 inspections/searches, with seizures of 67,725 discs, that in March there were 15 inspections/searches and three plant "audits" and 272,407 discs seized, and that in May there were 155 inspections and 352,748 discs seized.

<sup>26</sup> IIPA is heartened by the criminal conviction achieved in November 2006 against two pirate importers of DVDs from Indonesia. On November 13, 2006, Judge Rufino S. Ferraris, Jr. of the Metropolitan Trial Court, Branch 7, handed down guilty verdicts against two DVD pirates caught smuggling DVDs and labels from Indonesia at the Davao International Airport in 2004. Defendants Macacuna Gandarosa and Alinor Pangcatan, residents of Tagum, were caught in the act at the Davao International Airport trying to smuggle in several bags containing 8,200 pieces of DVDs

Clearance Centres) and in the malls will be required. Meanwhile, responses to Pay TV piracy and book piracy remain largely ineffective.

**Need Prosecutions Against Pirate OD Plant Owners and Key Mall Operators:** A key deficiency in the enforcement system in the Philippines is the failure of the authorities to follow on raids and closures with criminal prosecutions, and thus there is little deterrence against piracy in the Philippines. The OMB, Customs, and other appropriate enforcement authorities must, in addition to continued investigations, raids and seizures, significantly step up arrests. The 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).<sup>27</sup> In cases where convictions have already been achieved and sentences meted out, those sentences must be served.

Regarding the optical disc plants, IIPA understands that five plants closed in 2006. This shows a commendable level of effort on the raiding end (two of the plants closed for reasons apparently unrelated to raids), and follows on some activities in 2005 (notwithstanding some problems in those 2005 raids with leaks, etc.).<sup>28</sup> Some of the closures may have been related to the administrative cases commenced in 2005 against three plants; *Bright Future*, *Alpha Plus*, and *MHN Optical Technologies, Inc.*<sup>29</sup> IIPA urges the U.S. government to request the Philippine

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and 16,000 printed labels from Manado, Indonesia on board a Merpati airlines plane on September 23, 2004. They eventually pleaded guilty and the court accepted guilty pleas as to two counts each of violating Sec. 19(c)(1) of Republic Act No. 9239 for knowingly possessing pirated goods with intent to profit, and Sec. 19(c)(2) for importing discs without the necessary import clearance from the Optical Media Board. The sentencing of the two accused occurred on November 29, 2006, and they were sentenced to six months in prison (although we do not know whether there was a fine or whether the sentences were served).

<sup>27</sup> The Optical Media Board did take some actions including prosecutions against retailers, but these actions, while commendable, pale in importance to the impact that could be achieved by prosecutions of plant owners and mall financiers. See, e.g., *Cases Filed vs Owners of Counterfeit Items*, BusinessWorld, March 7, 2006 EDIT (describing criminal cases filed before the Department of Justice against the owners of magazine and computer shops which they raided in January 2006 for selling pirated optical discs. The OMB filed these cases based on violations of the Optical Media Act against the owners of Filbar's, Pro-Con Computer Center and Genex Meditech, while the police filed a case against one individual for selling pornographic animation (*anime*) compact discs which is a violation of Article 201 of the Revised Penal Code. The cases stemmed from the simultaneous joint raids conducted by the agents of the OMB and the police's antifraud and computer crimes division of the Criminal Investigation and Detection Group in which over 6,000 pirated CDs, mostly counterfeit copies of several software programs, were confiscated from the three stores. The joint operations by the OMB and PNP were part of the Pilipinas Anti-Piracy Team's activities, as part of the government's campaign to promote awareness of intellectual property rights and curb piracy in the country.

<sup>28</sup> 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). 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 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.

<sup>29</sup> 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. *Bright Future* was raided again in December 2006, operating unlicensed in the same premises originally licensed by OMB. An effective optical disc law would not permit the re-licensure of a company just convicted for violating the statute, or catching a plant in the act of pirating after its license had been stripped. In the *MHN Optical Technologies, Inc.* matter (OMB Admin. Case Nos. 2005-09-761 and 762), three inspections (on August 12,

government to provide detailed updates, including police reports of raids or administrative actions pursued, seizures as a result, disposition of pirate stock and, importantly, machinery from those plants, follow-up operations, and legal action taken against the owners and operators of those plants. IIPA also urges that OMB invite industry to participate in plant inspections and raids regarding the other licensed plants, and regarding any other plants (i.e., underground plants) being investigated by the Philippine authorities.

In 2007, OMB should immediately commence sustained inspections. The single most effective means of preventing pirate production is plant regulation by means of surprise inspection and rigorous enquiry into plant operation. The OMB has an investigation and inspection department of many people, and it should use these resources primarily to follow its charter which is to regulate optical disc plants. 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.

Regarding the malls, IIPA has noted that many of the pirate vendors in the Virra Mall have moved to Metrowalk, under the same security coordinator as that for Virra Mall. While OMB raided Metrowalk in 2005, we understand that leaks compromised those raids. Cases like Virra Mall/Metrowalk emphasize the need for landlord liability in the copyright law, and also, emphasize the importance of anti-corruption measures to ensure that the government is in fact capable of and will act against piracy enterprises, including the key malls in the Philippines.

**No Ex Officio Authority:** A major hurdle in the Philippine enforcement system remains the fact that the Police cannot act *ex officio* but must always act in conjunction with the Optical Media Board or on a right holder complaint. This should be remedied, as the Police have resources to devote to the piracy dilemma and wish to be of assistance to the industries, but feel hamstrung and unable to act when the opportunity presents itself. The authority should of course extend to initiating actions and seizing infringing items *ex officio*.

**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, 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.<sup>30</sup> Prosecuting infringers is an expensive and costly exercise in the Philippines due to the lengthy

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September 9, and October 7, 2005) 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. The significant shareholder of this operation, a Hong Kong replication company, is again exporting replicating machinery to entities in the Philippines.

<sup>30</sup> For example, it is extremely important in copyright cases to obtain search warrants in a timely manner, and when the Philippines experimented with specialized judges, obtaining a search warrant would normally take 1 to 2 days. However, for the current cadre of judges, it is taking much longer. Even in a recent case in which it took the judge 6 days to issue a search warrant, the result was that the raid was compromised as the target company purchased licensed software prior to the issuance of the warrants. Another known problem is the failure of authorities to seize products not found in the warrant which are clearly infringing. This has led on certain occasions in the past to leaving behind pirate goods, tools and implements at the scene of the crime.

judicial process. While the creation of IP judges or panels in various courts around the country would tend toward resolving many of the issues, there has been no progress since the Supreme Court resolved to defer the creation of special intellectual property courts due to what they considered a “low number” of IP cases.<sup>31</sup>

IIPA has long documented the justice system gone wrong in the Philippines. A prime example of this 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, and all appeals have since been exhausted. To this day, she remains free, and there is evidence that she remains in illegal business activities.<sup>32</sup> Based on evidence gathered throughout 2005, the Marquezes were raided once again on August 3, 2005, and two additional prosecutions were initiated. The availability of the never-ending delay tactics in these cases, and the ultimate failure to date to impose the sentence, 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.<sup>33</sup>

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 copyright 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.<sup>34</sup> IIPA is pleased that such resources are being devoted to prosecute copyright piracy cases, 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. IIPA also understands that the DOJ Task Force, which is currently led by DOJ Senior Prosecutor Leah Tanodra-Armamento, is formulating guidelines to further streamline and strengthen DOJ procedures on the prosecution of criminal IPR cases. This is certainly a welcomed step if it leads to more and more efficient prosecutions of copyright pirates.

It remains 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 2007.

**Irregularities in Enforcement System Must be Resolved:** Right holders have in the past experienced irregularities in the enforcement processes 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, and failure to seize infringing items found in inspections. Such irregularities

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<sup>31</sup> IIPA appreciates the fact that IP Phil Director General Adrian Cristobal has stated support for the establishment of specialized IP judges in the Philippines.

<sup>32</sup> It appears several government-run universities, hospitals and agencies are still ordering illegal photocopied books from her.

<sup>33</sup> 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.

<sup>34</sup> This was accomplished as per Department Order No. 657 s 2005.

in enforcement must be resolved if the government of the Philippines is to be successful in lowering piracy levels.

## **TRAINING AND PUBLIC AWARENESS**

IIPA members provided various public awareness and training activities in the Philippines in 2006. IIPA participated in a seminar entitled "Copyright in the Knowledge Economy: Challenges, Emerging Issues and Future Prospects," sponsored by the Commercial Law Development Program (CLDP), the U.S. Patent and Trademark Office, the Philippine Government, and WIPO, held from September 11-14 in Manila. The motion picture industry participated in five training sessions in the Philippines in 2006. The book publishing industry has also participated in several training sessions and is also developing a website addressing availability of legitimate product, especially in the provincial areas of the country. The business software industry also participated in training and seminars in the Philippines as follows:

- IPR Protection Training Program Organized by Philippine IP Office and BSA, April 26, 2006. Audience: Officers From IPO and Other Enforcement Bodies.
- "A Safe And Legal Digital World," April 17, 2006 – Venue: Microsoft Office, Makati City; Audience: School Officials (20 Attendees); Seminar Organized by Cyberfair Philippines.
- IP Training for Judges organized by the Philippines Judicial Academy (Philja) and IP Philippines in November 2006. The purpose of the course was to provide judges in commercial courts with a more in-depth knowledge on intellectual property law as well as develop the skills necessary to apply the said knowledge to resolve frequently raised issues in cases before Philippine courts. Business Software Alliance (BSA) members participated in this training.
- Technical training on software licensing for five Philippine National Police officers arranged by BSA on January 31, 2007 in order to form the PAPT Technical Inspection Panel (P-TIP) team.

There has also been a concerted effort to develop judges' and prosecutors' expertise on intellectual property rights. There have been seminars and lectures undertaken by both IP Philippines and the Philippine Judicial Academy. A number of private entities and associations have also invited judges and prosecutors to their seminars. The motion picture industry ran a training course for the Thai CIPIT and Thai Supreme Court in June 2006 and had Judge Antonio Eugenio, of the Manila Regional Trial Court provide a presentation on the IP judicial process in the Philippines, where he also covered (lamented) how defendants can use the system to stall or stymie judicial enforcement efforts.

## **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.<sup>35</sup> 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 2006.<sup>36</sup>

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**

**IIPA Supports Passage of House Bill 3308/3320:** As has been noted in our submissions to the Philippine government (of November 2005 and September 2006), IIPA strongly supports passage of H.B. 322/3308 (and the corresponding legislation in the Senate). This legislation would, if passed, 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 and online environments.

One of the principal achievements of the Bill is that it would result in full and proper implementation of the WIPO “Internet” Treaties, the WCT and WPPT. The Philippines’ current Intellectual Property Code was enacted in 1997 and, due in part to the proliferation of copyright materials on the Internet, the current Code is no longer able to sufficiently protect and preserve the nation’s Intellectual Property. The Bill would update and expand the scope of copyright protections for the digital and online world and allow authorities in the Philippines to successfully combat Internet piracy. In particular, the legislation would expand the scope of the reproduction right 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 also provides critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.”

The Bill would establish a world-class copyright legislation, both in areas of substantive protection and enforcement. The Bill’s improvements include (a) increasing the term of protection for works and sound recordings in line with international trends, (b) providing an importation right, (c) narrowing certain exceptions, (d) providing for Berne and TRIPS-compatible protection for pre-existing works, (e) providing criteria for secondary liability (e.g., creating liability for landlords who lease stalls to pirates in malls), (f) criminalizing end-user piracy of business software, (g) providing for a Berne and TRIPS-compatible presumption of ownership to ease burdens on right holders when enforcing their rights, (h) strengthening border measures, (i) providing for *ex parte* civil searches as required by TRIPS, (j) providing for disclosure of information to right holders to assist in investigations of infringement, (k) allowing

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<sup>35</sup> Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

<sup>36</sup> IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

“sampling” to efficiently deal with massive seizures of pirated materials, and (l) 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/claimant. All of these improvements together, if passed and implemented, will result in one of the best and most effective copyright laws in the world.

Philippine creators and society stand to gain much from the passage of a strong copyright law and adequate copyright enforcement. Indeed, Philippine President Gloria Macapagal Arroyo has said as much in her recent speech to mark the U.S. Trade Representative’s recognition of the Philippines’ improved standing on IPR, stating:

“[W]hile we appreciate the U.S. government’s recognition of our efforts to protect intellectual property rights, we mustn’t lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people.”

In the 1990s, the music markets in several Asian countries/territories, including the Philippines, saw enormous growth in the market share for local music; it is no coincidence that such changes occurred just as these countries/territories adopted better copyright laws and saw increases in enforcement activity.<sup>37</sup> A study of the Business Software Alliance and IDC estimates that for the Philippines, a 10-point reduction in the current 71% piracy rate would yield additional US\$25 million (Php1.3 billion) in tax revenues and US\$470 million (Php 25.3 billion) to the economy, create 2,200 new IT jobs and increase local vendor revenues by US\$325 million (Php 17.5 billion).<sup>38</sup> Other creators in the Philippines, e.g., film makers like Gerardo De Leon,<sup>39</sup> Ishmael Bernal,<sup>40</sup> Eddie Romero,<sup>41</sup> and film producers like Pia Clemente who in 2006 became the first ever Filipina nominated for an Academy Award for producing the comedy short *Our Time is Up*,<sup>42</sup> writers like Nick Joaquin,<sup>43</sup> Edith Tiempo,<sup>44</sup> and Virgilio Almario;<sup>45</sup> musicians

<sup>37</sup> Local market share in the Philippines, Taiwan, Indonesia, Korea, and Hong Kong all increased in the 1990s. The domestic music industry in the Philippines made up 42% of the market in 2000, up from 30% in 1998. The international music market declined in the Philippines for this same period from 67% to 57%. See IFPI, 2001: The Recording Industry in Numbers 86-110 (2001). In Taiwan, local music represents a substantially larger percentage of the market than international music, 66% vs. 28% in 2000 (and local market share in Taiwan has increased since 1991, from 60% to 66%). In Korea, for example, domestic recorded music made up 63% of the market in 2000, up from 49% in 1991, correlative in part to stronger copyright protection in Korea.

<sup>38</sup> See *New BSA study shows that Philippines’ Emerging IT Sector Could Nearly Double in Size by 2009*, December 8, 2005, at <http://www.bsa.org/philippines/press/newsreleases/IDC-Study.cfm>.

<sup>39</sup> In the 50s and 60s, he produced many films that are now considered classics including “Daigdig ng Mga Api,” “Noli Me Tangere,” “El Filibusterismo,” and “Sisa.” Among a long list of films are “Sawa sa Lumang Simboryo,” “Dyesebel,” “The Gold Bikini,” “Banaue,” “The Brides of Blood Island.” See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/cinema/deleon.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/deleon.php).

<sup>40</sup> Among his notable films are “Pahiram ng Isang Umaga” (1989), “Broken Marriage” (1983), “Himala” (1981), “City After Dark” (1980), and “Nunal sa Tubig” (1976). See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/cinema/bernal.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/bernal.php).

<sup>41</sup> See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/cinema/romero.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/romero.php) (“Eddie Romero, is a screenwriter, film director and producer, is the quintessential Filipino filmmaker whose life is devoted to the art and commerce of cinema spanning three generations of filmmakers”).

<sup>42</sup> The Philippines has a rich tradition of motion picture production, including the films of the late Lino Brocka.

<sup>43</sup> Among his voluminous works are *The Woman Who Had Two Navels*, *A Portrait of the Artist as Filipino*, *Manila, My Manila: A History for the Young*, *The Ballad of the Five Battles*, *Rizal in Saga*, *Almanac for Manileños*, *Cave and Shadows*. See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/literature/joaquin.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/joaquin.php).

<sup>44</sup> Tiempo’s published works include the novel *A Blade of Fern* (1978), *The Native Coast* (1979), and *The Alien Corn* (1992); the poetry collections, *The Tracks of Babylon and Other Poems* (1966), and *The Charmer’s Box and Other Poems* (1993); and the short story collection *Abide, Joshua, and Other Stories* (1964).

See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/literature/tiempo.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/tiempo.php).

<sup>45</sup> Among his 10 books of criticisms and anthologies are *Ang Makata sa Panahon ng Makina*, *Balagtismo versus Modernismo*, *Walong Dekada ng Makabagong Tula Pilipino*, *Mutyang Dilim* and *Barlaan at Josaphat*. See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/literature/almario.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/almario.php).



like Antonio Molina,<sup>46</sup> Jose Maceda,<sup>47</sup> and Ernani Cuenco,<sup>48</sup> as well as those involved in entertainment software development,<sup>49</sup> all stand to reap the benefits of better copyright protection in the Philippines.

**IIPA Views on “IP Philippines Comments and Recommendation”:** IIPA has reviewed the “IP Philippines Comments and Recommendation” on H.B. 322/3308. Overall, IIPA is pleased that IP Philippines agrees with many of the Philippine government-proposed amendments in H.B. 322/3308, especially in the area of copyright enforcement. The changes proposed in H.B. 322/3308 will enhance IP Philippines’ and other competent authorities’ ability to bring enforcement actions against piracy in the Philippines, and it is hoped that many such actions will occur, in conjunction with a greater focus on judicial enforcement, particularly through criminal prosecutions where warranted, leading to reductions in the overall piracy level in the Philippines in years to come.

At the same time, IIPA believes that many of the IP Philippines recommendations, if implemented, would result in weakening the House Bill in significant respects, and would result in lack of clarity on other respects. Some changes being proposed in H.B. 322/3308 would not only result in the failure of the Philippines to fully implement the WCT and WPPT but would potentially place the Philippines at risk of violating its international obligations. The following summarizes some of IIPA’s comments on some key provisions in which IP Philippines has proposed changes to the House Bill.

- **Temporary Copies:** H.B. 322/3308 would result in express protection for temporary copies under the reproduction right in the Philippines. However, the IP Philippines recommends removing the word “temporary,” thereby muddying the provision, while explicitly adopting language from an “Agreed Statement” to the WCT/WPPT. While the “Agreed Statement[s]” by their intention and meaning should clearly result in coverage of temporary copies, the IP Philippines does not make this clear, instead indicating in Comments that because “[t]he proposed amendment aims to make the definition of reproduction applicable to the digital environment,” the word “temporary” should not be adopted. The IP Philippines Comments leave it unclear whether temporary copies would be covered under their formulation. Many experts have noted that these Agreed Statements concerning the reproduction right were adopted to clarify that “storage” in a digital medium, regardless of the duration of such storage, qualifies as “reproduction,” consistent with the definition of reproduction under Article 9(1) of the Berne Convention, which extends to reproduction “in any manner of form.” This means that the concept of reproduction as an exclusive right of an author must not be restricted just because a reproduction is in digital form, in storage in an electronic memory, or of a temporary nature. Thus, to avoid unnecessary ambiguity, the word “temporary” should be retained as the clearest and most succinct way of expressing the intent of the

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<sup>46</sup> Among his compositions are Hatinggabi, a serenade for solo violin and piano accompaniment. Other works are (orchestral music) Misa Antoniana Grand Festival Mass, Ang Batingaw, Kundiman- Kundangan; (chamber music) Hating Gabi, String Quartet, Kung sa Iyong Gunita, Pandanguhan; and (vocal music) Amihan, Awit ni Maria Clara, Larawan Nitong Pilipinas. See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/music/molina.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/molina.php).

<sup>47</sup> Among his compositions are Ugma-ugma (1963), Pagsamba (1968), and Udlot-udlot (1975). Other major works include Agungan, Kubing, Pagsamba, Ugnayan, Ading, Aroding, Siasid, Suling-suling.

See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/music/maceda.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/maceda.php).

<sup>48</sup> His songs and ballads include "Nahan, Kahit na Magtiis," and "Diligin Mo ng Hamog ang Uhaw na Lupa," "Pilipinas," "Inang Bayan," "Isang Dalangin," "Kalesa," "Bato sa Buhangin" and "Gaano Kita Kamahal." See [http://www.ncca.gov.ph/about\\_cultarts/cultprofile/natarts/music/cuenco.php](http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/cuenco.php)

<sup>49</sup> See IT Matters, <http://www.itmatters.com.ph/features.php?id=090705b>, Sept. 7, 2005 (an article about a Philippine company ArtFarm, which partnered with Tokyo-based software organization Software Partnership International Japan, through its president, Katsumi Yamaguchi, to develop content for video games).

Agreed Statements. The global trend roundly demonstrates that temporary copies are recognized as part of the reproduction right.<sup>50</sup> Covering temporary copies is a priority issue for the copyright industries.

- **Technological Protection Measures (TPMs):** H.B. 322/3308 importantly provides critical protections against circumvention of “technological protection measures.” The IP Philippines recommends minor changes to the definition of TPMs, and as long as it is confirmed that access controls are covered, IIPA has no problem with the proposed changes. The IP Philippines suggests, however, deletion of one of the three criteria of showing that trafficking in circumvention devices has an unlawful purpose, namely, the deletion of the phrase “have only a limited commercially significant purpose or use other than to circumvent any effective technological measure” in proposed Section 229 A.1(b)(ii). The IP Philippines’ stated purpose in such deletion is “in order not to hold liable any person who does not have any intent to commit infringement or circumvent the technological protection measures.” IIPA wants to emphasize that the purpose of Section 229 A.1 (b)(ii) is not to hold someone who does not intend to circumvent technological safeguards liable, rather this section seeks to take into account *objective evidence* indicating that devices or services have the improper purpose to descramble, decrypt, or otherwise circumvent technological safeguards. The point of the provision IP Philippines proposes deleting is that if the prohibited purpose (or intent) cannot be directly proven (for instance, through the words of the defendant or its agents), then it may be indirectly proven in the fact that a device or service has only a limited commercially significant purpose or use other than to circumvent. This criteria permits the manufacture and sale of legitimate consumer electronics and home computer equipment that are not meant to circumvent, but should be sufficient to catch those in the business of providing the means to defeat technological protection measures. In order for the provisions against circumvention to be effective as required by Article 11 of the WCT and Article 18 of the WPPT, the phrase “have only a limited commercially significant purpose or use other than to circumvent any effective technological measure” must be retained. Adequate and effective protection of technological measures is an essential element of the Philippines legal framework for copyright into the future.
- **Terms of Protection:** H.B. 322/3308 would provide for extended terms of “life plus 70” years for those whose term is calculated based on the life of the author, and “95 years” from publication (audiovisual works) or from the performance or recording (for performers and sound recording producers, respectively). The IP Philippines states several reasons that extending term in the Philippines “is not necessary.” However, the international trend is clear, since 82 countries now provide, have committed to provide, or are expected to commit to provide, more than the Berne/TRIPS minima of 50 years pma or 50 years from publication for cinematographic works or sound recordings.<sup>51</sup> Recent enactments in many countries/territories, both developed and developing, mark the unmistakable trend toward extension of the term of copyright protection beyond the existing TRIPS minima. As cross-border transmissions become the norm, it is important for the Philippines to harmonize in this area so that the Philippines’ shorter term does not become an irritant in relationships with the majority of countries that have longer terms. Extending term will also afford Philippine creators whose works are getting close to the end of their terms in the Philippines

<sup>50</sup> Aside from the Philippines, as of August 14, 2006, at least 96 countries/territories provided protection for temporary copies as part of the reproduction right either explicitly or by interpretation, or had committed, through the EU Information Society Directive or through an FTA with the U.S., to do so, or had draft legislation pending which would provide such protection.

<sup>51</sup> For example, all but 5 of the 82 countries provide or will provide a term greater than “life plus 50” for authors, and 73 of the 82 provide at least “life plus 70” for authors.

a chance to reap continuing economic benefits (i.e., due to longer life expectancies, it is reasonable to grant such Philippine creators longer terms).<sup>52</sup> Since the duration of protection for films and sound recordings are calculated differently than other works, the economic benefit to those creating such works is translated into the actuarial equivalent,<sup>53</sup> which is 75 years (related to “life plus 50”) and 95 years (related to “life plus 70”).<sup>54</sup> Thus, the House Bill should be accepted, and the Philippines should agree to protect works for the life of the author plus 70 years, or 95 years from publication in the case of sound recordings, cinematographic works, works whose author is a legal entity, and other works whose term is measured from publication.<sup>55</sup> Term extension is an absolutely essential issue for the copyright community whose authors are living longer and whose right holders rely on harmonized terms in order to fully enjoy their copyrights and foster further development of copyright through more creation and more resources to widely disseminate their creations.

- **Liability of Mall Landlords Benefiting from Premises Where Piracy is Occurring:** H.B. 322/3308 would bring the concept of indirect liability into the Philippine Copyright Act, with the specific aim of holding landlords who permit lessees conducting pirate business on their premises liable for copyright infringement.<sup>56</sup> The IP Philippines has deleted the indirect liability language from its proposal. If IP Philippines is serious about reducing piracy domestically, especially that found in the malls, it will reinstate the indirect liability language, at least to ensure that landlords can be held liable when they are aware of and facilitate infringement, or when they can control and financially benefit from infringement. This provision is an essential aspect to the fight against mall piracy in the Philippines.
- **Reprographic “Reproduction” Exception for Libraries:** H.B. 322/3308 would appropriately narrow the exception for reprographic reproduction to a single copy by the National Library or the Supreme Court, and only to the extent the work is not commercially available on reasonable terms. IP Philippines is proposing changes to the Bill and to the current Act that would go well beyond what is currently allowed under the law and may run

<sup>52</sup> See, e.g., the writings of Claro Mayo Recto (1890-1960), one of the Philippines’ major writers, which would go into the public domain in 2010 unless term is extended. The works of Zoilo Galang (1895-1959) would enter the public domain in 2009. The recordings of Philippine composer Eliseo Pajaro’s music (including award-winning operas and ballet) would be getting close to the end of their terms, unless term is extended. The works of Manuel Arguilla (1910-1944) (e.g., *How My Brother Leon Brought Home A Wife (And Other Stories)*) and award-winning poet Cecilio Apostol (1877 – 1938, e.g., *A’ Rizal* (To Rizal) and *Mi Raza* (My Race)) have already entered the public domain in the Philippines, but if term is extended and recapture is permitted, the families of these authors can enjoy the benefits of their creations for several more years. The works of Amado V. Hernandez (1903-1970) (*Isang Dipang Langit*; he was named a “National Artist for Literature”) and others would enter into the public domain sooner than they would if term extension is enacted, benefiting these authors’ families for the intended period (due to increasing life expectancies).

<sup>53</sup> The IP Philippines indicate there is no “cogent reason” to have 95 years, but indeed, an “actuarial equivalent” is a perfectly cogent reason.

<sup>54</sup> Movies like Lamberto Avellana’s award-winning *Anak Dalita* (The Ruins) (1956), the stark tragedy of post-WWII survival set in Intramuros, would fall into the public domain this year without term extension, and his award-winning *Kundiman ng lahi* (1959) will fall into the public domain without term extension, depriving his heirs of any possible economic benefit. Award winning films like *Genghis Khan* (1952), Manuel Conde’s movie, which was accepted for screening at the Venice Film Festival, fell into the public domain due to lack of term extension, depriving the heirs that movie of the intended economic benefits of copyright. Gerardo de Leon’s award-winning *Ifugao* (1954) similarly fell out of protection in 2004. See *History of Philippine Cinema*, Onlineessays.com.

<sup>55</sup> IIPA also proposes the elimination of a still remaining formal conflict with Article 9 of the WCT concerning the term of protection of photographic works.

<sup>56</sup> Specifically, one could be held liable for “direct” infringement (including one who “causes an infringement to be committed”), vicarious liability (one who “benefits financially from the infringing activity of another person who commits an infringement if the person benefiting has the right and ability to control the activities of the other person”) and contributory liability (finding liability when one “enables or induces infringement by another person enabling or inducing the infringement has or reasonably should have knowledge of it and materially contributes to it”).

afoul of the Berne three-step test for judging whether an exception to protection is permissible under that international convention to which the Philippines is a party. Namely, the IP Philippines proposed changes, if adopted, would result in the exception not limiting the number of copies that can be made (the House Bill, like the current Act, limits reprographic copies to “a single copy”) and in an expansion of the exception to reproductions beyond “reprographic” copies, i.e., to digital copies as well as analog copies. Finally, while the House Bill would limit the exception to the National Library or the Supreme Court, the IP Philippines proposal would broaden the exception to cover any library or archive (to make such copies as long as such copies are “not for profit” regardless of the amount of harm caused to a legitimate right holder or the interference with the right holder’s normal exploitation of the work). These suggested changes are incompatible with the Philippines international obligations, would cause severe harm to right holders, and should be rejected.

- **Limitations and Exceptions in General:** IIPA proposes a systematic approach to exceptions and limitations in the IP Code and in H.B. 322/3308, which would consist, on the one hand, in the extension of the application of the “three-step test” to all limitations on and exceptions to copyright provided for in Chapter VIII, and, on the other hand, in extending, in a *mutatis mutandis* manner, the application of copyright limitations and exceptions to related rights (applying the technique of Article 17 of the WPPT). These proposed modifications offer a fuller guarantee for compliance with international norms.
- **Importation Right:** H.B. 322/3308 would clarify the existence of an exclusive “importation” right covering both piratical imports as well as parallel imports not authorized by the local Philippine right holder, which may also be deduced from the existing norms, in particular Subsection 190.1 of the IP Code. With increasing cross-border transactions in pirated copyright materials, as well as the unauthorized importation of pirated goods across borders (or pirated goods disguised as parallel imports), such a right is essential to fight piracy and to protect the investments of local Philippine licensees who have purchased the exclusive right to distribute a copyright product in the local market. The drafters are to be commended for confirming the recognition of this important right. IP Philippines has asked for “clarification” of the intention of the drafters in what it refers to as “adding” a full “importation” right,<sup>57</sup> and is arguing for “international exhaustion.” However, there are compelling reasons the Philippines should maintain a full importation right. For example, many economists agree that allowing copyright owners to control parallel imports is a necessary condition for realizing creativity-enhancing benefits, and economic evidence supports the view that controls on unauthorized imports in the exercise of intellectual property rights are under most conditions pro-competitive in that such restraints not only reduce “free riding” on pre-sales marketing and after-sales maintenance by unauthorized distributors, but also contribute to the growth of local copyright-based industries and related infrastructure.<sup>58</sup> Contrary to IP Philippines’ argument (that an importation right covering parallel imports “could have great implications on access to works such as books as well as undermining free competition and trade”), the recognition of an importation right in the Philippines and elsewhere will ensure that right holders, including publishers, can make works available on reasonable terms, consistent with the level of development in each market, without fear that products sold at a lower price in the Philippines, for example, will not find their way back into

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<sup>57</sup> IP Philippines states that an importation right “could have great implications on access to works such as books as well as undermining free competition and trade.”

<sup>58</sup> See, e.g., Claude E. BARFIELD, *The Economic Case for Copyright Owner Control Over Parallel Imports*, Journal of World Intellectual Property 1 (6) (1998), 903-939.

higher price markets. Such protection will in fact insure that there remain reasonably priced books in the Philippine marketplace.<sup>59</sup>

- **Other Comments:** One provision in need of clarification is the exclusivity of the “making available” right in the context of related rights so that it is clear that the right of remuneration in Section 209 of the current IP Code does not and will not apply to acts of “making available” a sound recording or performance. The easiest way to accomplish this is to modify Section 209 to expressly provide that it shall not disturb the exclusivity in the “making available” right (proposed Section 208.4 and existing Section 203.5). Another way to approach the problem is by amending Section 202.9 (the definition of “communication to the public” in the context of related rights) to add to the end of the first sentence of Subsection 202.9: “and other than making them available to the public... .”

**Quezon City to Become “IP City”:** It is laudable that the Mayor of Quezon City has determined that Quezon will be “IP City.” In order to achieve his objectives of fostering legitimate IP, the Mayor pushed for passage of a City Ordinance addressing the shortcomings of its previous anti-piracy ordinance, and is currently setting up an IPR Unit to handle complaints involving IPR violations within his jurisdiction.

**Free and Open Source:** House Bill 5769, otherwise known as the “free and open source software” Bill, aims to mandate the use of open source software in all government agencies, including public schools, instead of proprietary software applications. IIPA is strongly opposed to many provisions in this Bill, which would shatter the government’s current policy of technology neutrality.

**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 2005, \$1.0 billion worth of Philippine imports to the United States benefited from the GSP program, accounting for 10.9% of its total exports to the U.S. During the first 11 months of 2006, \$1.1 billion worth of Philippine goods (or 11.8% of the Philippines’ total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.<sup>60</sup> 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.<sup>61</sup>

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<sup>59</sup> Further, Section 190 of the current Act already implies an importation right, i.e., a right to authorize or prohibit imports into the Philippines, since it exempts personal use importations (3 copies) from being considered infringement (i.e., 4 copies is considered infringement), and Section 190.3 provides that Customs must have the ability of “preventing” illegal importations under the Act as well as “under treaties and conventions to which the Philippines may be a party” (including TRIPS Article 51 and Berne Article 16).

<sup>60</sup> 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.

<sup>61</sup> 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

## 2007 SPECIAL 301 REPORT

### POLAND

**Special 301 Recommendation:** IIPA recommends that Poland remain on the Watch List in 2007.

## **EXECUTIVE SUMMARY**

Copyright piracy in Poland remains widespread, especially given the challenge of pirated optical disc products being burned in-country and imported into the country, growing Internet piracy plus the distribution problem caused by street piracy. Industry cooperation with many enforcement authorities remains good. However, there remain numerous problems with weak border enforcement, lengthy delays and onerous burdens in bringing prosecutions, and the failure to impose deterrent penalties, especially against recidivists. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions to the optical disc regulations, are long overdue. Furthermore, the police need to use their *ex officio* authority.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- Encourage police to take *ex officio* action to initiate investigations/raids on their own motion in the software area and for sound recordings, and to expand *ex officio* authority so as to include more than just crimes above a certain scale.
- Support the continued cooperation between industry and the Polish police and the IT team to take actions against piracy on the Internet. This should include using Government resources to arm the police with additional resources (training, IT equipment).
- Continue progress made in 2006 to halt the sale and distribution of all optical media product containing copyrighted materials and hard-goods copyrighted products in and around the Warsaw Stadium. 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.
- Ban the sale and distribution of optical disc products at other stadiums, bazaars, outdoor markets and public places which sell infringing products in particular along the Polish-German border, and prosecute those cases.
- Considerably improve border enforcement to halt the increasing flow of pirate products, especially at the eastern and northern borders (Belarus, Ukraine, Russia and Lithuania), by ensuring that sufficient resources (both technical and personnel) of Polish customs agencies are dedicated to this effort, and by improving cooperation with the customs agencies in neighboring countries.
- Continue to have government officials work with rights holders regarding the enforcement of the law and regulations on optical disc production and distribution.
- Have prosecutors press for expeditious consideration of criminal copyright cases.
- Appoint specialized prosecutors in each office to handle copyright cases.
- Use existing organized crime legislation to investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials.
- Appoint specialized judges to handle criminal IPR cases and establish a specialized IPR court.



- Continue to conduct and support training seminars for police, prosecutors, and judges on copyright enforcement.
- Make progress on implementing the strategic goals set out by the Polish Government.

### **Legal reform**

- Strengthen enforcement provisions by affording *ex officio* powers to authorities in copyright infringement cases, especially for films, music, sound recordings and books (it appears that although *ex officio* powers now apply to all protected materials—not just software—but in practice, the authorities still request motions from some rightsholders).
- 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.
- Refrain from introducing a mechanism to regulate the relationship between private copying exception and technical protection measures provisions, and from deleting the multiple damages provision. Permit industry to continue to work to resolve issues related to technological protection measures and interoperability in the marketplace.
- Introduce criminal sanctions in the optical disc decree.
- Introduce criminal provisions addressing internet piracy (Article 118 of the Copyright Law).
- Refrain from over-regulating collective management of copyright and neighboring rights.
- Formally withdraw Poland's reservation to Article 12 of the Rome Convention.

<b>POLAND</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>2</sup>	264.0	58%	202.0	58%	197.0	59%	171.0	58%	107.9	54%
Entertainment Software <sup>3</sup>	NA	75%	NA	60%	109.3	94%	NA	NA	337.7	91%
Sound Recordings & Musical Compositions	24.0	35%	25.0	31%	36.0	37%	34.0	45%	45.0	45%
Motion Pictures <sup>4</sup>	NA	NA	102.0	66%	30.0	35%	30.0	30%	25.0	30%
Books	NA	NA	5.0	NA	5.0	NA	5.0	NA	5.0	NA
<b>TOTALS</b>	<b>288.0</b>		<b>334.0</b>		<b>377.3</b>		<b>240.0</b>		<b>520.6</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Poland under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> 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.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

## **COPYRIGHT PIRACY IN POLAND**

**Optical disc piracy, street piracy, the Stadium and outdoor markets:** Hard good piracy continues to shift from CDs and DVDs toward the burning of CD-Rs and DVD-Rs. Digital piracy has worsened because “burning” has become widespread throughout the country. The vast majority of pirate optical discs are sold at public markets. In addition, Polish pirates are making locally burned discs specifically for German consumers, and distributing them at markets on the Polish-German border and in Germany.

Concerted efforts must continue at the Dziesięciolecie (Warsaw) Stadium (also known as Jarmark Europa), and other mini-stadiums, to combat trade in pirated and counterfeit goods. The situation at the Dziesięciolecie Stadium continues to improve slowly. The recording and motion picture industries report that the Warsaw Stadium has declined as a source of pirate distribution in recent years, due to the stadium administrator (DAMIS)’s contractual obligations that include a total ban on the trade in optical discs and accompanying enforcement authority for security employees of the administrator. For the entertainment software industry, the Stadium continues to be a distribution point for pirated video game product but is not longer the significant threat that it was in past years. According to law enforcement agencies, the Stadium still serves as a “redistribution point” of pirated materials, which are traded in large quantities for further distribution in other regions of Poland. Organized criminal elements are still believed to be engaged in the warehouse distribution at this Stadium.

In November 2005, ZPAV submitted a petition to the Warsaw authorities to close down the marketplace at the Stadium. The authorities supported this motion but the final decision was under the authority of the Ministry of Education. Even though the Damis contract expires in June/July 2007, it is not at all certain that the market will be closed down since the government is worried about the number of lost jobs this would cause.

Illegal trade has now expanded at “bazaars” and public markets in other parts of the city (such as the electronic market WOLUMEN) and is growing in other regions, 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 Anti-Piracy Coalition (a group of private sector associations) collected detailed information about markets located at the Polish-German border and in Wrocław (similar work still needs to be done for Cracow and Poznan), which was sent to the Ministry of Interior. Contacts should now be taken with the Provincial Authorities that should then organize meetings with the markets’ administrators. Similar to the Warsaw Stadium, the Anti-Piracy Coalition also suggested banning the sale and distribution of OD products at other bazaars and flea-markets. Despite the Coalition’s efforts, there has been no noticeable improvement at these other bazaars and markets.

**Imported pirated discs due to weak border enforcement:** Most industries report that this situation got worse in 2006, as more imported pirated discs entered the Polish market. Specifically, the problem of pirated optical media products (CDs, DVDs, and CD-ROMs), including illegal sound recordings, audiovisual products, videogames and business software applications, entering Poland continued in 2006. ZPAV reports an increased number of imports compared to 2005. Almost 100% of seized pirate pressed discs come from former Soviet Union countries (particularly Russia, Belarus, and Ukraine) on trains, trucks and cars and are distributed in almost every metropolitan area. It is believed that organized criminal networks involved in music piracy are now primarily responsible for the distribution of these imported discs. This organization trickles down to the local level as the illegal trade taking place in public markets is highly organized and generally controlled



by criminal gangs. The recording industry (ZPAV) observes that the majority of pirate carriers smuggled from the East remain in Poland, however many of them are further distributed to Germany and other countries of the EU. For 2006, ZPAV reports an alarming drop in the number of seizures made at the border and subsequent cases brought (see discussion in the enforcement section), underlining the urgent need of increased and improved border enforcement.

**Internet piracy in Poland is growing steadily.** Internet piracy is steadily growing as a result of increasing broadband penetration and wider Internet household penetration. The main focus of interest of Internet users now lies in peer-to-peer (P2P) services (such as Emule, eDonkey, BitTorrent and Direct Connect), but the sale of hard goods through websites and networks remains a concern. Music files also are still distributed through websites and FTP servers. ESA reports that Internet piracy of entertainment software is likewise becoming of 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, but P2P use is on the rise. 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. Major actions undertaken by industry groups and the Polish police during 2006 are described in the Enforcement Section, below. In addition, the Polish Ministry of Culture is supporting a team of private and public sector representatives working on methodology (for police and prosecutors) addressing the issue of internet piracy.

A recent market survey data has been conducted on the Polish online market. This survey, done in July 2006 by an independent third party company (GEMIUS), shows the popularity of P2P sites. 74% of those Internet users that download music from the Internet are P2P users. 36% of these users responded that, each week, they download one to five copies of music and sound recordings and then make them available for public download (without authorization from the rightsholders, common in P2P file-sharing practice). This means that every week about nine million music files are being shared by Polish users. Survey results also show that 53% of P2P users are younger than 25 years old. 81.4% of those surveyed said they use their personal computers. Only 9.9% of P2P users buy music from legal Internet stores after they have downloaded the files from P2P services. The same study also shows that Internet users' fear of viruses, spyware and malware, as well as worries about legal action, are providing a deterrent to illegal P2P file-sharing; 25% of Internet users who shun P2P say that viruses are the main reason for their decision to stick with legal sites.

**Domestic OD production in Poland:** Optical disc (OD) production within Poland saw a minor decrease in 2006. According to information available to ZPAV, currently there are 11 active OD plants in Poland with an estimated 153 manufacturing lines (as compared to 122 in 2005). Production capacity of these plants is estimated at approximately 830 million units per year. Despite this large production capacity, there is no evidence to suggest that Polish plants are involved in pirate production of optical discs. The high production capacity in Poland is mainly due to the presence of one of TechniColor's largest plants which exports almost 100% of its production, legitimately. Instead, forensic examination of sound recordings conducted by the recording industry indicates that 85% of sound recordings taken from the Polish market were manufactured in Russian plants. ZPAV reports good cooperation with the Ministry of Culture in carrying out joint visits to OD plants and with the Polish forensic unit (under the police department).

**Piracy of music and sound recordings:** Piracy affecting the recorded music industry in Poland remains severe, given the growth last year in both optical disc piracy and Internet piracy (especially P2P). ZPAV statistics show that, in 2006, 312,451 physical carriers with pirated music were seized by Polish law enforcement agencies. Additionally, in Internet cases the total value of computer equipment seized by law enforcement amounted to PLN 486,000 (about US\$162,000). With respect to international repertoire, estimates of the level of music piracy in Poland in 2006 rose

to 35%, and the estimated trade losses due to piracy of music and sound recordings was \$24.0 million.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that organized criminal involvement in the manufacturing and distribution of pirated entertainment software is somewhat in decline given the rise of domestic burn-to-order operations. Though some factory-replicated products still enter the market, the majority of the pirated game products seized are burned copies and factory replicated pirated video game products are now rarely found in Poland. Counterfeit videogames in cartridge format from Asia are entering the market and remain readily available at informal markets. 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 75%. As noted above, piracy at the Stadium continues but is not the severe problem that it used to be for the industry. Overall, there has been some improvement in the market due to increased support from the police.

**Audiovisual piracy:** The motion picture industry reports that in 2006 audiovisual piracy worsened. This is largely due to unrelenting optical disc piracy coupled with increased Internet piracy. Internet piracy has steadily increased due to increased broadband availability and wider Internet household penetration. Pirate DVDs imported into Poland and DVD-R piracy problems are huge. Although imported pressed discs represented 85% of the problem a few years ago, the local motion picture anti-piracy organization (FOTA) estimates that burned CD-Rs and DVD-Rs represent between 50% and 55% of the pirate optical discs in the local market. Moreover, these burned discs increasingly contain multiple titles. In addition, the illicit recording of movies in 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. Additionally, cable network operators often use illegal decoders and pirate cards to distribute programs on their networks without license although these operators have been significantly restricted due to numerous actions taken by the police in cooperation with FOTA. With regard to smart card piracy, the change of the smart cards used by Canal Plus in Poland has had a substantial positive impact on combating piracy and the new codes have not yet been broken. Unfortunately, a new form of piracy is emerging where pirates buy one legitimate smart card and use it to share access to Pay TV with other people via the Internet.

**Business software piracy:** 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 2006 losses due to business software piracy in Poland rose to \$264.0 million, with the piracy level staying the same (58%). Lowering the business software piracy level in Poland could contribute significantly to the Polish economy. 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.

**Book publishing piracy:** The Association of American Publishers (AAP) reports steady levels of illegal photocopying of academic texts and journals in and around universities. Industry representatives report that in some cases they are losing the majority of their market to this type of individual photocopying, which harms producers of 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.

## **COPYRIGHT ENFORCEMENT IN POLAND**

Industry cooperation with police agencies throughout Poland remained generally good in 2006. However, this level of cooperation has slightly slowed down as the new government's main focus is on violent crime and corruption and not on copyright infringements. Sustained, comprehensive and deterrent actions which result in lower piracy levels have not yet occurred in the Polish marketplace.

**Police actions:** The industry groups continue to report good cooperation with police authorities in 2006. For example, the recording industry (ZPAV) reports that the police conducted well coordinated raids in specific regions, particularly during ZPAV's Internet campaign in October 2006. In most cases, ZPAV assists the police prior to raids and during the aftermath, when expert product verification is required.. ZPAV reports several positive police actions in 2006 including: (A) regular actions against distributors of pirate sound recordings at marketplaces along the Polish-German borders; (B) actions undertaken at the initiative of some police units against major internet uploaders; and (C) the introduction of the subject of intellectual property rights protection to the curriculum of police training programs.

MPA also highlights several positive developments with the Polish police last year. For example, in August 2006, officers from the Metropolitan Police's Economic Crimes and Corruption Unit raided a garage in Warsaw and seized 18,597 pirate discs. The discs were commercially-pressed DVDs each containing, on average, four titles, with off-set printed covers. Three computers and a laptop were also confiscated. The haul totaled some 1,000 different movies, both Polish and international releases (recent and catalogue). From the police investigation which was conducted with the assistance of FOTA, it appears that the movies were sourced in Poland as camcorder, downloaded or DVD rips, and burned to master DVD-Rs. The copies were then professionally pressed and covers printed at labs in Russia, Belarus and the Ukraine, and then smuggled back into Poland for distribution country-wide.

BSA notes that in 2006 the Polish police remained one of the most active in Eastern Europe in investigating cases of software piracy and in conducting *ex officio* raids (the Polish Criminal Code does provide *ex officio* authority for software piracy crimes). BSA does not have 2006 statistics available, but notes that many actions are taken.

ESA reports that police support for its member companies has been positive, and in fact, increased in 2006, which some of its members hazard has resulted in some improvement to the market. The local police are active and seek member assistance when specific problems arise relating to cases that the police have commenced through *ex officio* actions. ESA member companies report that the number of actions initiated by law enforcement has been relatively high. Most of the enforcement actions are still conducted at the street vendor level, though also increasingly against Internet vendors. Actions against so-called "big fish" (or large operators) are not the norm, though with the shift to distribution of predominantly burn-to-order products from typically "mom-and-pop" operations, it is perhaps to be expected that larger targets are not found.

Following is a summary of some industry enforcement efforts in 2006. The recording industry (ZPAV) reports that from January-15 December 2006, 1,026 criminal cases were initiated in Poland: 962 by the police, 61 by customs, and 3 by the border guard. In addition, 76 more criminal cases were commenced based on work done by ZPAV against major uploaders during its October 2006 internet campaign. The motion picture industry (FOTA) reports that from the January-7 December 2006, there were 1,186 investigations (compared to 1,643 in 2005), which resulted in the seizure of 136,574 DVDs (compared to 215,618 in 2005), 133,715 CD-Rs/DVD-Rs (132,000 in 2005) and 450 computers and hard discs (482 in 2005).

MPA and FOTA report three problems with the Polish police last year: (1) Unfortunately, there is no central unit within the Police Headquarters assigned to supervise and coordinate the activities of the regional police Internet units. (2) The test program agreed between FOTA and the Warsaw Municipality at the beginning of September 2005 whereby the Municipality agreed to finance the cost of 100 police officers to conduct daily controls at the market focusing on IP violations was abandoned when the Director of the Warsaw Security Department left in the beginning of the 2006. Pirates at the Wolumen market have now resumed their illegal activities. (3) A long-standing problem is that the police do not have the authority to initiate investigations *ex officio*. This authority would significantly help in the anti-piracy fight.

ZPAV observes at least two systemic difficulties. First, law enforcement agencies are not proficient in recognizing and prosecuting organized crime activities of pirate distribution both in the country and abroad, coordinating with other law agencies in other countries. ZPAV continues to send letters on this issue and has also done several presentations evidencing the existence of an organized crime factor. However, the law enforcement agencies still do not consider that there is enough evidence to support this. Second, there is a lack of consistent actions and severe penalties against repetitive copyright infringers which gives them a feeling of impunity.

**Internet piracy enforcement:** The industries report that cooperation with criminal authorities on Internet cases is good. MPA also reports that the police, despite suffering a lack of resources, has shown increased interest in dealing with infringements on the Internet.<sup>5</sup>

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<sup>5</sup> The following six cases involving enforcement against internet piracy in 2006 are illustrative. The cases were joint actions carried out by MPA, ZPAV and BSA (the Antipiracy Coalition): (1) In January 2006, police in the northern city of Koszalin arrested five administrators of a pirate server called "HUB." Since May 2005, over 2,400 users of the server worldwide shared an estimated 88,000 gigabytes of pirate movies, music, games and software. Following the arrests, Polish police conducted 120 raids on homes in Koszalin, and a further 55 raids across the entire country. These raids yielded over 30 PCs and approximately 100 hard drives. (2) In March 2006, FOTA investigators and police in Lublin, together with officers from the Economic Delinquency Department of the City Police in Biala Podlaska, seized the main server of one of the Internet companies functioning in the Bialski district. It is estimated that more than 400 individuals were freely using the server, uploading and sharing illegal files with films, music and computer programs. In order to attract new customers, the provider was distributing fliers in which he offered access to 1,000 GB data with the newest films, games and music. Most of the ISP users were secondary school students whose parents were unaware of these illegal activities. The net administrator was a 26-year-old IT student of one of the renowned private high schools in Warsaw. (3) On October 16, 2006, a FOTA investigator together with officers from the Economic Delinquency Department of the Provincial Police Unit in Wroclaw arrested a pirate who was distributing illegal copies of computer programs, games and films in DVD and DIVX formats. The suspected pirate operated his business from his home. However, the server was housed at the home of a second individual who had agreed to store the equipment in return for access to the server's content; this person was also arrested. The suspected pirate operated this "business" as his main source of income. The server with 2 TB capacity (including 10 hard discs with about 2,000 films and 500 computer programs), 2 computer central units, 4 hard discs and about 40 DVDs and CDs were seized. (4) On October 11, 2006, police officers from 16 districts throughout Poland under the supervision of the Economic Crimes unit from Police HQ in Warsaw coordinated searches of 72 premises in an operation focusing on people illegally sharing encrypted TV signals through the Internet. A technologically-complicated form of TV signal theft, signal "sharing" is the latest form of signal piracy in Poland where one encryption card is used to give access to multiple users. The piracy was first identified by officers from the Provincial Police's Economic Crimes unit in Radom. In the first action of this kind, the police were assisted by investigators from FOTA and representatives from Cyfra+. Forty-two people believed to have been profiting from this piracy were arrested and their homes searched. Seizures included 115 computers, 117 decoders, 89 code-cards, 3,900 CDs, 66 HDDs, plus 100 other pieces of electronic equipment. The operation also disclosed details of 1,100 illegal subscribers who will be the subjects of further investigations. (5) In a follow-up to the October 16 raid in Wroclaw and the arrest of two individuals for copyright offences, analysis of the equipment seized has resulted in further arrests. On November 8, a 35-year-old man suspected of distributing pirate computer programs and games, as well as DVDs containing films, was arrested by police officers in Warsaw. A search of his home revealed a computer server and about 4,000 DVDs including illegally copied content. The police have further established that the suspect, believed to have been the ringleader of the group, was using a computer server at his place of employment in Jelenia Góra for his pirating activities. In Wroclaw, further arrests were made of three men between 20 and 25 years of age who are believed to have been involved with circumventing the encryption on legal copies and also with counterfeiting covers inserts. A search of their homes resulted

International Intellectual Property Alliance

In mid-October 2006, as part of its worldwide campaign against Internet piracy, the international recording industry commenced 76 criminal actions against people involved in the file-sharing of music. These actions targeted major “uploaders” using all the well-known P2P services, including BitTorrent, eDonkey, DirectConnect, Gnutella, Limewire, SoulSeek and WinMX. ZPAV reports that 76 cases were initiated during this campaign.

Although activities conducted by the police to address Internet piracy are praiseworthy, MPA reports that only a few units are ready to undertake such Internet actions, due to lack of professional equipment and of the necessary knowledge to prosecute intellectual property infringements on the Internet. During the first meeting at the end of 2005, after reactivation of the Governmental Group dealing with copyright infringement, it was decided that an Internet sub-committee be established to work on criminal procedures and training manuals for Internet crimes. Unfortunately, this sub-committee consists of only two people, so its actual impact will likely be limited. The training manuals are supposed to be implemented in the course of 2007.

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. However, as a result of the ongoing reorganization process, the special and coordinating IP unit has been disbanded; following private sector protests against this unwelcome development, the new head of the Polish police assured right holders that the unit will be restored. However, this has still not happened. ZPAV submitted a draft cooperation agreement to the National Police Headquarters (‘NPH’) covering a broad range of issues, including the fight against Internet piracy. The NPH does not seem to be willing to enter into a cooperation agreement with a private organization, but ZPAV continues to push for the conclusion of such an agreement urging the Director of the Chief Commander’s Office to intervene.

Reports suggest that civil enforcement against Internet piracy will be more complicated. Rightsholders 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. Rightsholders cannot obtain from ISPs, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information may, however, be obtained via the public criminal authorities. BSA specifically recommends that the unauthorized downloading of copyrighted files onto personal computers should be clearly added to Article 118 of the copyright law.

**Border enforcement:** The recording, business software, and film industries all report that the Eastern border remains a problem, despite legislative reforms to the customs law as part of the EU accession process. More action must be taken by government authorities to halt infringing imports pouring into Poland. Official data on 2006 customs actions is not yet available.

For 2006, the recording industry reports an alarming drop in the number of seizures made at the border and subsequent cases brought. “Instigated cases” in the first chart below refers to all cases instigated by Customs, that is, not only at borders but also inside the country (e.g., trains, cars, etc); the second chart is directed at border cases involves seizures at the borders.

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in the seizure of computer servers and hard discs containing evidence of their pirating activities. So far this brings the total of arrests to six.

	Number of instigated cases in total	Quantity of seized sound recordings
2004	181	157,456
2005	177	128,528
2006	55	32,760

	Number of seizures at the borders	Quantity of seized sound recordings
2004	16	8,806
2005	15	5,957
2006	5	2,002

Source: ZPAV

On a positive note, the recording industry reports that the Polish police, working in partnership with law enforcement officials, that the Polish police (no customs officials were involved) made the biggest single seizure at border market for five years. The border towns along Poland's western frontier have long been attractive to German shoppers keen to purchase the illegal music and film titles on offer in their pirate markets. In August 2006, police from Gorzow and Zielona Gora raided the market in Slubice which is at the border crossing with Frankfurt Oder in Germany. The successful raid involved over 50 law enforcement officers and over 25,000 pirate discs seized. Duplication equipment was also seized during the action. Ten arrests were made and one of those arrested was kept in custody by the prosecutor. Over 45 retail outlets were closed down during the raid and the prosecutor has insisted that the stall holders all have to appear before him to obtain permission to re-open.

**Criminal prosecutions:** The industries continue to report generally good cooperation with Polish enforcement agencies on investigations and raids, as noted above. However, problems pressing forward with cases through prosecution continued in 2006. Eleven prosecutors were appointed at the end of 2004 but they still need IPR training. MPA reports there about 5,000 pending cases at this time but not all of them are pending in courts; it seems that approximately 120 cases were concluded in 2006. Official 2006 criminal statistics are not yet available, and courts do not release such information about individual case decisions.

ESA member companies also noted that actions against street sellers continue to improve, with increased support from the police in anti-piracy actions. However, the Polish Government should also begin to investigate the upstream sources of pirated products in the market. It has also been reported that in a small number of courts, the right holder's representative or counsel is obliged to appear before the court. Such an appearance is often unnecessary as counsel is merely expected to confirm information that has already been provided to the police at an earlier stage of the proceedings, and can be introduced through a sworn statement. Though only a small number of courts currently demand the presence of the rightsholder's representative, should this practice become widespread, it will add an undue burden on rights holders by increasing their costs in bringing criminal actions.

**Expert reports add a bureaucratic layer:** The recording and software industries continue to report in 2006 the problem of Polish 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, more judges needed:** The Polish judicial system is notoriously slow. In the large urban centers, where most piracy cases are filed, it can take between three to four years before a case is concluded. Polish courts are overloaded with a substantial backlog of

cases (not just IP cases). One possible solution is to increase the number of judges and the information technology to improve overall productivity in the judicial process (although current economic conditions may preclude this). 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. ZPAV reports 5,632 criminal cases were pending in 2006. BSA reports 282 cases pending as of 2004. Additionally, Polish courts are not specialized enough and the judges are changing and leaving their positions too often. BSA and the recording industry have often expressed the opinion that special IP courts should be established. The film industry believes that it might be more practical appoint specialized judges. The bottom line is that more judges with IPR competences are needed on the courts.

In 2005, the industries were informed that the then-new Minister of Justice planned 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. In November 2006 the President of Poland signed the law on the establishment of 24-hour courts. They will run from mid-March 2007 and will deal with minor offences and misdemeanors such as acts of hooliganism, theft, pickpockets and drunk drivers. The industries hope that the new system will limit delays in completing small-scale copyright piracy cases. Still not known are what categories of offenses will be considered by such courts.

**Polish courts fail to apply deterrent sanctions:** Although the majority of cases brought to court conclude with guilty verdicts, sentences have been insufficient to provide a reasonable level of deterrence. The average fine has not increased over time (usually about US\$50 to US\$150) and imprisonment has not generally been used. 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 2006. In July 2003, amendments were made to the Polish Criminal Procedure Code to simplify procedures, including those applicable to intellectual property cases.<sup>6</sup> As noted, the fact that Polish courts require an expert opinion on each seized disc or cassette is problematic. To the best of the industries' knowledge, there were major sentences in 2006 related to copyright infringement.

**Civil copyright enforcement:** BSA has not conducted any civil actions in Poland in the last four years. Instead, BSA has relied on criminal enforcement to address its piracy problems in Poland mostly because of effective and efficient police cooperation. Procedural delays in obtaining civil orders in the past have been so great that the target was able to legalize its software shortly before raids were conducted. The *ex parte* provisions be further clarified so that judges could begin to implement such procedures. It can take up to three years for a civil copyright infringement case to be closed. BSA reports that all recoveries are collected through settlements.

**Lack of consistent government leadership in anti-piracy strategy:** The government has not consistently implemented the national strategic goals. For example, in December 2003, the Council of Ministers approved an anti-piracy strategy plan, emphasizing increased inter-disciplinary cooperation and the prioritization of intellectual property crimes. There the Council called for the National Public Prosecutor to appoint two prosecutors in every office to assist on such crimes, and also reiterated the need for intensified actions using all resources within Poland such as the police, border guards, and Customs. Since then, the Governmental Group dealing with copyright

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<sup>6</sup> 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.

infringement issues every year a report describing the activities of the current year and the strategies for the following year.<sup>7</sup>

Despite the appointment of 11 prosecutors at the end of 2004 (who still remain to be properly trained), the implementation and realization of these plans is generally proceeding slowly. In 2005, it seemed that government actions slowed in advance of the elections. The activities of the Governmental Group were then temporarily suspended following the resignation in mid-2005 of the Ministry of Culture's Head of Legal Department who was also the Head of the Governmental Group. Although he was temporarily replaced, the Governmental Group only fully resumed its activities in May 2006.

## **COPYRIGHT AND RELATED LEGAL REFORM 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 troubling issues raised by the copyright industries were not addressed in the 2004 amendments.<sup>8</sup> In addition, the 2004 amendments failed to fully comply with the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT) in several ways: (a) inadequate legal protection of technological measures (the language suggests that circumvention for private use may be legal); (b) inadequate protection of rights management information, and (c) a number of new exceptions, including the private copy exception is too broad and there is no express implementation of the three-step test. In order to improve Internet enforcement, the unauthorized downloading of copyrighted files onto personal computers should be added to Article 118 of the Copyrights and Neighboring Rights Act.

**Implementation of the EU Enforcement Directive:** The Polish Government has been working on amendments to both the Copyright Act and the Civil Procedure Code in order to implement the EU Enforcement Directive. A revised bill to implement the Enforcement Directive was issued on November 13, 2006 for inter-ministerial consultation; it was adopted by the Government on November 21 and sent to Parliament on December 6, 2006. IIPA members have not yet seen an

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<sup>7</sup> A government strategy for 2007 regarding the prevention of copyright infringements was presented. However all the points from the previous year were repeated. The necessity of efficient implementation of tasks by state institutions has been underlined. 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.

<sup>8</sup> For example, other problems (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, and using the *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).



English translation but we understand the earlier concerns related to the right to information have been addressed. Industry will continue to monitor these developments.

**Future legislation:** Furthermore, concerns remain about possible future, and separate, legislation in at least two areas. First, the industry is concerned about any effort to regulate the relationship between the private copying exception, technological protection measures, and interoperability; this is best left to the marketplace. Second, Article 70, amended in the 2000 legislation, involves a remuneration paid by users of an audiovisual work to a collecting society. This provision, which is highly detrimental to motion picture companies, makes it more difficult for foreign works to resist collective management of author/performer remuneration rights. The Copyright Law as amended in 2004 includes several amendments related to collecting societies, and the copyright-based industries have been concerned in recent years that additional amendments might be proffered. It is difficult to say when if legislation affecting this measure might be drafted and considered by the parliament.

**Optical disc decree and the need for criminal sanctions:** Industry recommends criminal sanctions be added to the decree, given the widespread nature of pirate optical discs in the Polish market. Another reason for introducing criminal penalties is the fact that plants fail to report regularly to the Ministry, as required by the regulation. The 2004 Copyright Law amendments required the Ministry of Culture to issue regulations to implement the optical disc production provisions of the copyright law. In turn, the Polish OD Decree (published on June 2, 2004) seemed adequate at that time to control the production of optical discs. In 2004, the Ministry of Culture called for the operational optical disc plants to register their lines and equipment. A two-person team of inspectors was established at the Ministry of Culture to control optical disc production. However, the industries expressed concern then, and again now, that 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 fact, the industry submitted a recommendation to add criminal sanctions for the Government Strategy for the year 2005, but it was not included. During 2006, informal reports suggest that some plants were not fully cooperating with the inspections.

**Police *ex officio* authority:** The Criminal Code contain *ex officio* authority, giving the Polish police the power to initiate investigations on their own motion, for all cases involving the infringement of copyright and neighboring rights. The problem is that these powers should be used more often and more regularly; *ex officio* actions should not be limited to just larger cases.

**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 for any subsequent offense. A single illegal 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. The Internet sub-committee, to which the anti-piracy coalition is a member, is working on its final report that should be released in March 2007 and supplied to the Governmental Group (headed by the Ministry of Culture. Proposals for Anti-camcording provisions should be part of this report.

**Withdrawal of Poland's reservation to the Rome Convention:** Another year has passed and the Polish Government has still failed to withdraw 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.

## **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. This provision, which goes beyond what is prescribed in the EU's Television without Frontiers Directive, has a negative effect on market access. 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. No improvement in this situation occurred in 2006.

**Foreign ownership restrictions:** Article 35 of the 1992 Radio and Television Law, restricts foreign ownership in a broadcasting company to 49%. MPA continues to promote the reduction and elimination of such restrictions in order to further stimulate the foreign investment necessary for the continued development of the television industry. No improvement in this situation occurred in 2006.

## **IPR TRAINING AND PUBLIC AWARENESS**

The copyright industries continue to participate in seminars for law enforcement agencies. In 2006, the motion picture industry (FOTA) individually or with the Anti-Piracy Coalition (including FOTA, ZPAV, BSA) participated in 16 training seminars organized across the country. These seminars were directed at police and customs officials and also to judges and prosecutors. One of the seminars was dedicated for secondary school teachers. For example, BSA participated in the training addressed to the Polish Patent Office (May 2006) and to police and prosecutors near Pila (June 2006).

The recording industry (ZPAV) continues to organize trainings on IPR issues for law enforcement agencies and participates in training programs conducted by Police Academies and prepare training materials for police officers working in the country. In 2006, ZPAV has implemented its project of training seminars for police officers dealing with copyright infringements on the Internet.

The motion picture industry (FOTA), the recording industry (ZPAV) and the business software industry (BSA) also contribute to the workings of the Governmental Group that deals with copyright infringement that was established in 2000 by the Prime Minister. These organizations are regularly invited by the Minister of Culture to take part in the Group's working sessions as special

experts. The Anti-Piracy Coalition (including FOTA, ZPAV, BSA and ZAIKS (Poland's largest collection society) also launched an education program addressed to young people. The campaign entitled "Be Original" was launched in May 2006 and was premiered at the Mazowieckie Culture Center in Warsaw. Guests were invited to view a film in which students from the 32nd Gymnasium participated, along with authors and performers who contributed to and supported this educational initiative. Guests attending the launch included popular celebrities: the singer, Patrycja Makrowska; actor, Bartosz Obuchowicz and members of the band, Sistars. So far, some 6,400 discs have already been distributed to schools and colleges. The launch was covered extensively by local and national print and broadcast media. The foregoing initiative was approved by the Polish Ministry of Education and the Ministry of Culture.

In June 2006, FOTA also participated in one-day picnic organized by the Police for primary school students at Wroclow's Wolności Square to raise the childrens' awareness about the need to "be original." Customs representatives, members of the anti-piracy alliance and various artists also attended the event and participated in the press conference during which the Police discussed piracy. The event ended with public destruction of 30,000 pirate discs by a bulldozer.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### ROMANIA

**Special 301 Recommendation:** IIPA recommends that Romania remain on the Watch List in 2006.

#### **EXECUTIVE SUMMARY**

Piracy continued almost unabated in Romania during 2006, with the problems of Internet piracy (including peer-to-peer filesharing) gradually replacing the traditional optical disc piracy (including burning) and affecting almost all the copyright industries. Border enforcement remains weak and pirated product from other countries easily enters the Romanian market. Industry cooperation with police authorities during 2006 was good, but prosecutions were few and deterrent criminal sentences scarcer. Most disturbingly, the administrative oversight by the Copyright Office (ORDA) continues to work in ways that do not foster effective enforcement. ORDA still has a stranglehold over the objectionable hologram system and produces substantial delays in criminal investigations by taking many months to deliver the technical reports on the piratical materials. Copyright reform efforts in recent years seem to be an annual exercise in making small positive amendments and correcting deficiencies, and it looks like another such performance may happen again in 2007.

#### **PRIORITY ACTIONS IN 2007**

##### **Legislation**

- Closely monitor any proposed legislation or draft “Emergency Ordinance” which will make further amendments to the copyright law.
- Abolish the mandatory ORDA-regulated hologram decree, including the related phonogram and videogram registration procedure.
- Repeal ORDA's exclusive mandate for issuing expert reports in copyright infringement cases and the related obligation to pay fees for ORDA's expertise.
- Amend Law No. 161 of 2003 to provide that the mere verification of the existence of software installed on the computers should not require such a search warrant, or provide clarity on this issue in an amendment to the Copyright Law adopted by the Emergency Ordinance, mentioned above.

##### **Enforcement**

- Have senior levels of Romanian Government officials express a strong political will and a commitment to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment in-practice.
- Have the police, including the anti-organized crime directorate, continue the positive trend of undertaking regular and consistent anti-piracy enforcement actions. The police have been doing a good job. Now they should increasingly engage and tackle the root source of the problem: the suppliers of pirate discs to the small-scale retail and street vendors.
- Make sure that the appointed special IPR prosecutors start providing results by actively and swiftly initiating criminal infringement cases. Reports indicate the Central IPR Department in the General Prosecutors Office has nine members – one heading the office, three having executive powers and five of them undertaking coordinating activity.

- Instruct prosecutors to stop dismissing copyright cases. This undermines the motivation of the police to take actions. Prosecutors should expeditiously pursue criminal cases, even small-scale infringement 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.
- 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).
- 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. Also establishing specialized courts with criminal jurisdiction should be considered.
- 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.

<b>ROMANIA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>2</sup>	12.0	60%	17.0	80%	18.0	78%	18.0	80%	15.0	75%
Business Software <sup>3</sup>	66.0	69%	61.0	72%	32.0	74%	28.0	73%	20.7	70%
Entertainment Software <sup>4</sup>	NA	77%	NA	75%	NA	65%	NA	NA	35.2	97%
Motion Pictures <sup>5</sup>	NA	NA	12.0	NA	8.0	55%	8.0	35%	6.0	55%
Books	NA	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
<b>TOTALS</b>	<b>78.0</b>		<b>92.0</b>		<b>60.0</b>		<b>56.0</b>		<b>78.9</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Romania under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> The legitimate market for recorded music in 2006 saw a sharp decline, which was not only due to piracy. Physical piracy also dropped sharply, but retained a relative importance against the dropping legitimate sales. In addition, Internet and mobile piracy grew exponentially and very seriously affected international repertoire. These elements are reflected in a lower piracy percentage and a correspondingly lower loss figure compared to 2005.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> 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.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

On January 1, 2007, Romania joined the European Union. When the Commission confirmed Romania's accession, it noted progress on key issues, which included Romania's fighting corruption and improving judicial reform.<sup>6</sup> 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.<sup>7</sup>

## **COPYRIGHT PIRACY IN ROMANIA**

**Optical media piracy and street piracy:** Optical disc piracy in 2006 decreased significantly. Whilst there are still pirate Russian optical discs entering Romania through its eastern borders, their number is relatively small. Pirates nowadays use imported pirate discs from Russia as master copies for their underground CD-R burning. There is a substantial increase of CD-R and DVD-R burning are the main sources of physical piracy in Romania, and burning operations are often controlled by organized criminal groups. Pirate discs are sold via Internet sites or press advertisements and then delivered by mail or personally on the streets. Given the massive CD-R/DVD-R burning, establishing a system at the borders to track the importation of blank optical media products is strongly recommended.

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 are two optical disc plants in Romania, having three production lines with an annual estimated capacity of 10.5 million units/year. Blank CD-Rs and DVD-Rs are imported. Last year, the Government issued Ordinance No. 25/2006 (entered into force on March 1, 2006) which obliges plants to use SID Codes, a helpful tool in monitoring OD plant operations. As a result, it remains premature at this time for the industries to suggest that the Romanian Government adopt a comprehensive optical disc regulatory regime.

**Internet piracy:** Internet piracy, both in the form of websites offering pirate goods for sale and the use of peer-to-peer systems, has increased significantly. Many websites have advertised their service to burn copyright content onto CD-Rs and DVD-Rs on-demand. Physical products (including pressed discs) are sold using the Internet. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Due to a significant penetration of broadband Internet services and falling prices, provided by regular ISPs or LAN (local area network) companies that are offering subscription prices even cheaper than those of regular ISPs, the Internet piracy on P2P networks grew significantly. Large amounts of video files are shared over the networks, mainly in Bucharest and other several important countryside cities like Galati, Timisoara, Cluj, Ploiesti, Iasi, Suceava. Such networks activities were somehow affected / slowed down during the summer of 2006, as at the end of the spring 2006, a successful peer-to-peer investigation, with very good media coverage at national level, took place in Iasi. Even so, peer-to-peer

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<sup>6</sup> Press Release IP/06/1257 of the European Commission, 26 September 2006, "Commission confirms Bulgaria's and Romania's EU accession on 1 January 2007, completed by a rigorous package of accompanying measures," link at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1257&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>7</sup> 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/2007SPEC301HISTORICALSUMMARY.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 2006, \$247.5 million worth of Romanian goods (or 23.3% of Romania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 0.5% decrease over the same period in 2005. Now that it has entered the EU, Romania's eligibility status for GSP has ended.

piracy increasingly became an issue. There are about 681 local networks all over the country, out of which 373 are located only in Bucharest. Torrent sites represent another type of emerging piracy. Many of them are maintained, at least at first sight, by individuals or the same smaller companies selling cheaper Internet connections.

Local industries continue to report in 2006 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 computer search warrant must be issued in order to search a private computer, 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. The ISPs are generally responsive when it comes to software industry requests to shut down websites promoting copyright infringing content.

**Record and music piracy:** The recording industry reports a significant drop in physical piracy in 2006. Very few stores, commercial centers or markets sell pirated music. The fact that more severe penalties were introduced played a role. The operating method of selling pirate products changed and concentrated around illegal burning studios in private apartments. The illegal goods are advertised on Internet or specific closed circuit channels. Russian-made pirate products have become quite rare and, as a result, relatively expensive (currently priced around US\$12 instead of the usual \$3-7). Close cooperation between recording industry group UPFR and police resulted in the closure of 25 illegal duplicating studios. All pirate products are CD/DVD-R's, and are either sold over the Internet or by intermediaries roaming around with the products in bags in commercial centers, offices, banks, etc.. Such intermediaries will not venture beyond a limited group of well-known clients, which makes it very difficult for UPFR and law enforcement agents to penetrate the system. The same is true for pirate distribution based on Internet advertising.

**Entertainment software piracy:** The Entertainment Software Association (ESA) reports that piracy rates for its members' products in Romania have not dramatically changed in Romania over the last year. For 2006, the pirated game software product available is almost all burned, with very little replicated product found in the market. Pirated entertainment software products continue to be available on the streets, as well as being advertised on the Internet and in newspapers. Internet café piracy remains a problem in Romania, although the situation continues to improve because police and right holder enforcement actions continue against unlicensed cafés. With increased broadband availability, Internet piracy via P2P and torrent downloads of videogames is also on the rise.

**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. DVD piracy has reached a level of about 80% of total disc sales. 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). 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.

**Business software piracy:** The Business Software Alliance (BSA) reports that even if the high levels of software piracy basically remained unchanged in Romania, the authorities have taken important steps in enforcing the law and addressing the industry's priorities in terms of the type of cases investigated and the size of the infringers targeted. The market is mostly affected by end-user piracy and the illegal distribution, including hard-disk loading and the distribution of home-burned CDs). Although the police have taken serious action against hard disk loaders, the police continued to focus on 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 under Decree H.G. Number 470/01-04-2004, and reports that Government ministries have undergone training to develop software asset management policies to promote legal software use within Government entities and local public authorities. BSA reports its preliminary 2006 estimates for business software piracy in Romania were \$66 million, at a slightly lower 69% rate.

**Book piracy:** Piracy of U.S. books, especially textbooks and popular fiction, continues at a moderate level in Romania.

## **COPYRIGHT ENFORCEMENT IN ROMANIA**

Other than the police force, which has been increasingly helpful and active, anti-piracy efforts remain an overall low to medium priority for other 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 lead to the imposition of deterrent penalties. Although the police have been conducting an increasing number of raids, these too often have been targeted at the "soft" end of pirate operations (i.e. the small operators, street vendors). Even more importantly, prosecutors have failed to push for deterrent sentences and courts have failed to impose such sentences.

An "IPR Working Group," consisting of right holder representatives and steered by the IPR department in the General Prosecutor's Office (GPO), was officially established in July 2006 and is working to improve communication between private industry and enforcement on various legislative and enforcement problems. There are 32 institutions, both public and private, in this Working Group, including: the General National Police Inspectorate, Romanian General Prosecutor's Office, Justice Ministry, Culture Ministry, European Integration Ministry, National Institute of Magistrates, ORDA, and private groups such as UPFR, BSA, RoAct, Credidam, Vivendi Universal Games, Electronic Arts and HBO. However, proposals for amending the Copyright Law still need to be imposed and the Group should work on it. The group continues to meet with the GPO to address enforcement and legislative problems, and is reportedly currently addressing the requirement of obtaining a search warrant before a computer hard drive may be searched for pirated software. The law apparently requires that a criminal investigation be first initiated before such a warrant will be issued. This is slowly leading to some improvement.



Corruption among enforcement officials remains a recurring and severe problem in Romania (and was noted by the EU during Romania's accession process). Moreover, there is minimal prosecution of corrupt acts

### **Criminal Enforcement**

The business software, music and film industries report good cooperation with local enforcement authorities, in particular the police forces. The police have assigned two officers in each county to deal with IPR cases. Each county should have a specially-assigned prosecutor for IPR. Even though there are specialized IPR prosecutors appointed in each district, they keep changing frequently. The problem remains that the personnel with IP training — especially with prosecutors — are constantly being shifted to other jobs. There are only specialized civil IPR courts in Bucharest; more are needed in the country and in the criminal area as well.

**Police actions and prosecutions:** During 2006, MPA reports that there was a noticeable improvement in the cooperation of law enforcement bodies. ROACT's relationship with the Police, Anti Fraud Departments, works smoothly (as confirmed by enforcement activities results that have tripled in terms of raids and seizures). Also the quality of files showed significant improvements in certain areas of enforcement mainly large-scale actions. The Public Order Police increased the number of their actions in street sales. The Border Police became more active compared to Customs in their *ex officio* actions. Perhaps such a boost in police activity is a positive result of the copyright law amendments made in 2005 via the Emergency Ordinance No 123/2005, which enabled the police to conduct more domicile searches and ORDA's supervisory role over copyright criminal cases.

MPA reports improved police enforcement efforts took place in 2006. By the end of November 2006, there were almost 350 raids on film piracy compared to almost 130 raids in 2005. In the same period, the number of criminal court actions rose to 34 compared to 7 in 2005 and 13 in 2004. As an example of increased cooperation, the Police in Iasi took first action against file-sharers in May 2006 (executing 14 search warrants against users sharing between 100GB and 500GB of pirate files on the file-sharing hubs UNITED and ARM). The raids provoked a storm of press and public interest, while the prosecutor received serious threats from Internet users. The Anti Fraud Police and Border Police increased the number of *ex officio* actions.

The recording industry reports in 2006 that it worked with enforcement agencies filing 211 criminal cases. It requested damages in 131 of these cases. UPFR was notified that 19 of these actions were dropped (apparently another 31 cases were dropped as well, but UPFR was not notified). 22 cases were before the courts (this included raids conducted by the Police in 2004 and 2005). Case results included 2 fines, 3 (suspended) terms of imprisonment and 1 acquittal. In addition to these cases, UPFR filed 19 criminal complaints. The recording industry reports a positive development in this sense that most prosecutors no longer drop cases against infringers that have caused serious damages to the music industry. Such cases have been sent to the Court for sentencing. However, the practice of dismissing smaller cases remains a serious problem. With respect to cases involving collective licensing issues, 653 criminal cases were brought in 2006 (147 broadcasting and 506 public performance). 145 of these cases were dropped, with one case resulting in an administrative fine and one acquittal, 26 settlement agreements. Seven cases were before the courts (this included raids conducted by the police in 2005).

For 2006, BSA reports that the authorities took *ex officio* actions but proved opened to private industry's referrals also. There were more than 600 new raids in End-Users and Resellers cases (in 2005 there were only 350 cases); dramatic increase of HDL raids – 18 successful raids in 2006 – please note that during the calendar year 2005 there were only six successful HDL raids; in June 2006, a case was reported where a reseller was convicted to imprisonment for software copyright infringement; other 15 convictions were reported until November 2006; in October 2006, an important End-User raid happened in Bucharest where illegal software amounting to more than 100,000 USD was found on the PCs. Also, the police has taken action against OD resellers. The relationship with the local enforcement authorities was significantly improved. They became more receptive to industry's needs and requirements. As a highlight, at the end of June 2006, a high-level cooperation protocol was signed between the Romanian authorities and the private industries, aiming at institutionalizing a working group meant to take concrete steps of improving both legislation and enforcement thereof. In July, the Government also organized a regional congress focused on anti-counterfeiting and anti-piracy. In addition, BSA notes that big end-users still need to be targeted next year. In general, the relationship with the law enforcement is considerably improved and no major bottlenecks can be reported. One of the major issues is the need to have a computer search warrant issued in order to search computers with a view to identifying the software installed on them; such 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 initiated only if sufficient evidence exists. In practice it has proved difficult to gather such evidence necessary for having the criminal investigation initiated. This issue was also reported last year and it is still unsolved.

ESA reports that the number of raids taken by the enforcement authorities has increased substantially in the last year, but the majority of targets were small (i.e., mostly against Internet game rooms and street/internet vendors). Given the nature of the piracy problem, this is good news.

Unfortunately, piracy levels remain high and raids are not being initiated against larger companies and organizations involved in piratical activities. Ineffectiveness by the police may be caused by several factors:

- Police are just beginning to consider taking actions against large-scale piracy cases. It remains important to target both large- and small-scale pirate traders with anti-piracy actions. Very often, a small case leads to bigger illegal networks.
- Police are not motivated to take actions because the prosecutors and/or the courts keep dismissing the copyright cases. This problem lies with the constant staff turnover among the prosecutors and the lack of specialized judges/panels in criminal cases.

Although ROACT reports improved prosecution activity in certain areas of the country (thanks to the establishment of a special IP prosecutor and an IP Department at the Prosecutor General's Office), prosecutors in some other areas of the country are still reluctant to send piracy cases to courts and remain too ready to drop cases, due to a lack of understanding of the damage caused by copyright offenses and of social harm caused.

**Non-deterrent sentences:** Finally, Romanian courts are still reluctant to impose deterrent penalties. They typically will only impose fines or suspended jail sentences and are opposed to publicity of their sentences. So far ROACT has secured four favorable court decisions in 2006, out of eighteen sent to the Courts (the rest still pending). Some reports indicated that the number of cases actually reaching the court system has nearly doubled in the last year, but the number of cases dismissed by the court for "lack of social harm" has also increased by a large percentage. There are still many cases where the decision is never communicated to the right holder. 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).

**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 whatsoever was reported in 2006. 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 2006 were rejected by the courts.

### **Administrative Enforcement**

The Romanian Copyright Office (ORDA) is an independent Government agency which still has some enforcement authority. The good news is that, during 2006, ORDA hired more personnel, acquired more modern equipment, and organized training seminars for their own staff. It also increased its transparency, all these efforts being welcome and long overdue.

However, ORDA still has a stranglehold over the objectionable hologram system and produces substantial delays in criminal investigations by delivering the technical reports on the pirate products in months (between three and twelve months). These lengthy delays continued despite the fact that in 2005, ORDA lost its criminal enforcement jurisdiction and should have focussed its efforts on improving its examination procedures to support criminal investigations. To outline a few continuing examples of the continuing problems involving ORDA:

- **The stickering program.** 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. This type of a state-mandated sticker system, attempted in other countries (Malaysia, Ukraine, Russia), is counterproductive to anti-piracy efforts because it often results in “legalizing” pirate material where the stickers are themselves forged. In addition, there is the potential for Government officials to provide pirates with the legitimate stickers to place on their product. Alternatively, it may prevent the legal distributor from getting product into the marketplace in a timely fashion, due to bureaucratic delays. Pirate material may incongruously become more readily available than legal material because of the sticker program itself. In this context it should be noted that ORDA, other than issuing the holograms as part of this highly bureaucratic system, fails to exercise any meaningful control of how the issued holograms are actually applied by the users. This reinforces the futility of the system as it currently stands.
- **Registering sound recordings and fees:** 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.
- **Expert reports and fees:** ORDA issues expert reports in copyright cases. This happens at a very slow pace, which results in major delays in criminal investigations (up to 12 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.

- **Collective management:** ORDA supervises collecting societies. It should be once again stressed that collecting societies, as is the case in the majority of jurisdictions world-wide, should be treated like any other commercial business and should not fall under an overly detailed special regulation

### **Border enforcement**

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. However, the borders remain porous. It remains critical that Romania's border enforcement system improve, because it is far too easy for pirate product to be imported into and exported out of Romania. Establishing a system at the borders to track the importation of blank optical media products is strongly recommended.

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.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Copyright Act of 1996, as amended:** The 1996 Romanian Copyright Law has been amended a number of times in the past decade. Unfortunately, the resulting legal structure continues to contain a number of key gaps and deficiencies, and as a result, Romanian law is not yet fully compliant with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, nor the EU Copyright and Enforcement Directives nor the WTO TRIPS Agreement.

To summarize, among the current problematic provisions reported by local industry colleagues are the following. Article 143 does not appear to prohibit acts of circumvention, but only preparatory acts of circumvention and therefore fails to implement the WIPO Treaties and the EU Copyright Directive. Also of concern is Article 121(2) which would deny protection in the form of retransmission royalties to audiovisual works broadcast on must carry television stations and retransmitted by cable operators. This approach would violate protections required under Berne Convention's Article 11bis(2) and the Trade Related Aspects of Intellectual Property Rights (TRIPS). Reports suggest that a new draft Emergency Ordinance (now in the legislative lineup) includes a provision which could be interpreted as to subject the making available right of authors to compulsory collective management. This proposal would be contrary to the principles enshrined in the Berne Convention and the WIPO Treaties. Finally, the "right of information" referred to in Article 8 of the EU Enforcement Directive does not seem to be correctly implemented.

**2004 Amendments:** Romania passed amendments to its 1996 Copyright Law (Law 285/2004) which came into force on August 1, 2004. This legislative package sought to bring it into compliance

with European Union directives and the WIPO Treaties (which Romania ratified in February 2001). Nevertheless, this package was inadequate, and the industries then argued that further reform of the copyright law, was still needed, 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; and (4) amending two provisions regarding ownership and performance royalties which adversely affect the distribution of films.

**2005 Emergency Ordinance:** The copyright law was further revised through an Emergency Ordinance that entered into force on September 21, 2005. Looking at implementing the EU Enforcement Directive, (EC/48/2004) on September 19, 2005, the Romanian Government adopted the Emergency Ordinance No. 123/2005, which accomplished additional amendments to the Copyright Law. Although far from being ideal, there are some positive elements, for example, as summarized for IIPA by industry colleagues: (1) ORDA no longer has direct enforcement authority in criminal cases, or a central role vis-à-vis other enforcement authorities; (2) penalties for copyright infringement were increased; (3) jurisdiction for criminal piracy cases were moved to the higher level tribunals in hopes of expediting cases; (4) the principle of having a unique collecting society for all right holders was eliminated; (5) 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. IIPA colleagues identified these issues before and they remained accurate in 2006. 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*."

During 2006, the local copyright industries noted that there were other groups trying to re-introduce provisions objectionable to the copyright industries (for example: user groups wanting to add collective management provisions and the Ministry of Justice lobbying to downgrade the classification of small-scale copyright cases from crimes to contraventions/misdemeanors).

**2006 Amendments:** The 2005 Emergency Ordinance was voted in the Parliament and became Law No. 329 of 2006. Law No. 329 of 2006 made the Copyright Law compliant with the new Romanian Criminal Code.<sup>8</sup> This 2006 law also expressly introduced the competence of the Romanian Gendarmerie to conduct raids. There is a current another emergency ordinance draft to again amend the copyright; the full scope of the proposals or when it might be introduced in 2007 is not yet known.

**Street piracy:** Also adopted last year was Government Ordinance No. 25 of 2006 (adopted with amendments by Law no. 364 of 2006) which provides for a new legal framework of the Romanian Copyright Office's activity, which includes onerous registration requirements (discussed above, in the administrative enforcement section). This ordinance also prohibited street commerce of copyrighted goods (original or pirated).

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<sup>8</sup> By compliance this means that, according to the Criminal Code, the level of criminal fines is not be established anymore in the special laws (like the copyright law), but instead such laws should merely provide that the criminal offense is also punishable by criminal fine, and the level of such fine is to be established according to the Criminal Code provisions. Also, the new Criminal Code was initially due to enter into force in September 2006; however, its entry into force was postponed until September 2008. Nevertheless, several provisions were adopted by Law No. 278 of 2006 and entered into force this year

**Future work in 2007:** Reports indicate that the Copyright Law may again be amended, as mentioned above. Reports suggest that this might include a dangerous provision which could be interpreted as to subject the making available right of authors to compulsory collective management.

As mentioned above, one of the major issues is the legal prerequisite to have a computer search warrant issued in order to search computers with a view to identifying the software installed on them; such 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 initiated only if sufficient evidence exists. In practice it has proved difficult to gather such evidence necessary for having the criminal investigation initiated. This issue was also reported last year and it is still unsolved. However, the current emergency ordinance draft for amending again the Copyright Law provides for a solution in this respect, but it is still to be adopted.

**Criminal Code reform:** A large part of the Criminal Code reform, including the intellectual property chapter, has been postponed until September 1, 2008. However, in a notable change, Law no 278 of 2006 introduces criminal liability for legal entities and also provides for the general limits of criminal fines. 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:** BSA reports that a continuing problem in 2006 is that the 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. 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. Industry reports suggest that the Romanian IPR Working Group has been lobbying to amend the law with respect to the requirement of obtaining a search warrant before checking a computer hard drive for pirated software. The amendment should provide that the mere verification of the existence of software installed on the computers should not require such a search warrant.

## **IPR TRAINING AND PUBLIC AWARENESS**

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, and the public prosecutors in 2006. Romanian police have organized their own trainings and invited BSA and ROACT experts to give presentations. These training sessions are important because they help educate law enforcement and introduce them to industry experts who are investigating cases.

## **MARKET ACCESS**

**Broadcast quotas:** MPA reports that the Audiovisual Law of June 2002 introduced a quota of “a majority proportion” of EU works from the day Romania accedes to the EU. Such a provision should include a degree of flexibility to respond to market realities. Regulation no. 39 of July 14, 2005 (effective August 1, 2005) imposes a 3% levy on the advertising revenues of all public and private TV stations in support of domestic film production.

**Discriminatory tax treatment of U.S. audiovisual works:** The Regulation of July 2005 (includes new taxes on box-office and on video/DVD sales to finance subsidies for Romanian and European films. These taxes, besides having a detrimental effect on the Romanian audiovisual market, unfairly burden MPA member companies with the cost of financing the Government’s cultural policy.

**Screen quota:** The new Regulation of July 2005 obliges Romanian cinemas to devote 5% of their screen time to Romanian films, of which at least 1% must be during the highest attendance show times. MPA opposes any type of quota restrictions that limit the ability to distribute film products on based market demand.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SOUTH KOREA

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** The U.S. and Korea are nearing the end of negotiations for a Korea-US Free Trade Agreement (KORUS FTA), which, if successfully concluded, will have major implications for Korean copyright law and enforcement policy. IIPA recommends that South Korea remain on the Watch List, with an out-of-cycle review in the second half of the calendar year, focused primarily on (1) the outcome of the KORUS FTA negotiations; (2) the content of decrees implementing the recently revised Copyright Act of Korea; (3) implementation of university action plans against on-campus book piracy; and (4) the extent to which the ROK is investigating and prosecuting entities involved with illegal Internet sites, servers, storage services and file sharing services.

#### **Key Actions to be Taken in 2007:**

**Step Up the Fight Against Internet Piracy:** Korea's advanced digital networks remain rife with pirate materials of all kinds. To sustain the progress it has begun to make in developing legitimate online markets in copyrighted materials, Korea needs to improve its copyright laws to provide better tools for online enforcement and to strengthen incentives for cooperation by network providers in the fight against piracy. The government's Copyright Protection Center (CPC) must redouble its efforts and begin to enforce consistently against the online piracy of the works of foreign right holders. The Korean government must begin investigating and prosecuting entities involved with illegal Internet sites, servers, storage services and file sharing services.

- **Take Effective Action Against Illegal Photocopying and Printing of Published Materials:** Despite some positive steps 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 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.
- **Further Modernize Laws for the Digital Networked Environment:** While the just-enacted revision of the Copyright Act of Korea indicates some progress, Korean law still falls short of full compliance with the WIPO Internet Treaties that set the global minimum standard for copyright law in the digital networked age. Korea's advanced digital economy demands a world-class copyright law which includes: (1) full legal back-up for technological protection measures used by copyright owners; (2) providing all copyright owners, including sound recording producers, exclusive rights over all forms of Internet dissemination; (3) clarifying



liability of Internet service providers and providing effective notice and takedown; (4) recognizing protection for temporary copies and narrowing the private copying exception in the digital realm; (5) conforming copyright exceptions for schools and libraries to international norms; (6) clarifying and strengthening criminal prohibitions on “camcording” (use of a video camera to illicitly record a movie at a movie theater); and (7) updating enforcement and remedial provisions, including providing for statutory damages in civil actions for infringement. Korea should also extend the term of copyright, in line with the growing international trend.

- **Implement the Revised Copyright Act Responsibly and Transparently:** The revised law leaves many key issues to implementing decrees, ranging from new regulation of the providers of peer-to-peer file sharing services, to mandatory collective administration of several programs for payment of remuneration to right holders for uses of their works. The decrees will also flesh out many new responsibilities allocated to the Ministry of Culture and Tourism. Korea should use a transparent process for drafting these decrees before the June 2007 deadline, and should ensure that they provide the best possible protection for right holders consistent with the new law.

<b>SOUTH KOREA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <i>(in millions of U.S. dollars)</i> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>2</sup>	NA	45%	200.0	46%	276.0	46%	275.0	48%	285.9	50%
Entertainment Software <sup>3</sup>	353.5	68%	415.1	55%	349.0	43%	248.4	36%	381.0	36%
Books	45.0	NA	43.0	NA	42.0	NA	38.0	NA	36.0	NA
Records & Music	0.3	7%	1.3	13%	2.3	16%	3.5	20%	6.9	20%
Motion Pictures <sup>4</sup>	9.0	7%	NA	7%	40.0	20%	40.0	20%	27.0	25%
<b>TOTALS</b>	<b>407.8</b>		<b>659.4</b>		<b>709.3</b>		<b>604.9</b>		<b>736.8</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at <http://www.iipa.com/pdf/2007spec301methodology.pdf>. For information on the history of South Korea under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in South Korea, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>3</sup> 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.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>

# **PIRACY AND ENFORCEMENT UPDATES IN KOREA**

## **Online Piracy**

South Korea is one of the most Internet-savvy countries in the world. It is thus not surprising that the copyright industries face extraordinary enforcement challenges in Korea because of the prevalence of all kinds of pirated materials online. Korea made some progress in combating online copyright piracy in 2006, but much more remains to be done.

Statistics compiled by the OECD show that in June 2006, there were more subscribers to broadband access to the Internet in South Korea than in any other developed country, save the much larger markets of the U.S. and Japan. With more than 26 broadband subscribers per 100 inhabitants,<sup>5</sup> Korea's broadband market is nearly saturated, and the Koreans use this access to consume unrivalled amounts of infringing copyrighted materials of all kinds. The challenge is to legitimize the use of these materials by Korea's huge online population. While there are encouraging signs, the pirates remain one step ahead.

While every sector of the copyright industry is impacted by online piracy in Korea, the specific problems vary. The music industry has long felt the brunt of the impact, from illegal streaming, download and peer-to-peer (P2P) services. Intensive enforcement efforts have made a dent in the problem, and legitimate online music services have grown to the point that Korea has become the world's first market where the sale of physical product in CD format is far outstripped by legitimate digital delivery over networks. By 2006, however, the locus of online music piracy had begun to shift from P2P to "web-hard services," a form of closed file sharing system in which pirates store their unauthorized files online and distribute passwords to the storage facilities to would-be downloaders. The downloaders usually "pay" for access through "cybercash" credits administered by the web-hard operator. (Some sites provide free downloads, but at slow speeds.) According to Korean music industry statistics, nearly half of the almost 6 million infringing music files identified by anti-piracy investigators in the first nine months of last year resided on web-hards. This probably understates the scope of the problem, since these closed systems are harder for investigators to locate and penetrate than the mass file-sharing services that were the principal problem in earlier years.

Web-hards are also popular with audio-visual pirates, since they make it easy to store even the very large files that digitized movies demand. Software applications also show up on web-hard services. In 2006, 53% of CPC's enforcement actions were against web-hard files, 27% against P2P services and 20% were against portal services.

P2P piracy also remains a major problem. While some services have begun to legitimize their operations, unauthorized file sharing remains widespread. In 2006, an estimated 100 to 120 sites provided P2P file-sharing. From only 20-30 file sharing services monitored in 2005, the Motion Picture Association identified over 9,500 Korean uploaders engaged in audiovisual piracy. While cease & desist letters were sent to all of 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. P2P sites are affecting other

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<sup>5</sup> See [http://www.oecd.org/document/9/0,2340,en\\_2649\\_201185\\_37529673\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/9/0,2340,en_2649_201185_37529673_1_1_1_1,00.html).

industries as well, including the book publishing industry. Sites offering scanned versions of books and journals are growing in number, threatening legitimate markets.

The realization that Internet-based piracy posed a threat to all copyright industry sectors was one of the motivations for consolidating several separate enforcement agencies into the Copyright Protection Center (CPC) within Korea's Ministry of Culture and Tourism (MOCT). CPC was assigned to deal with online piracy in September 2005, and was much more active in the online arena last year. Its efforts seem to have enhanced public awareness of the problem. But CPC's progress is limited by its exclusive identification with the established "copyright trust and management" entities.<sup>6</sup> Major foreign rights holders do not belong to these agencies, and thus online enforcement activities by CPC on behalf of foreign rightholders are limited or non-existent. IIPA urges the Korean government to correct this problem as soon as possible and to undertake aggressive enforcement against online piracy of foreign works. Otherwise, Korea's commitments in the TRIPS Agreement to national treatment in enforcement activities could be questioned.

In a setback to the prospects for using civil litigation to combat illegal file-sharing, the Seoul Central District Court in August 2006 denied an application by the four major international record labels for a preliminary injunction against a fifth version of the Soribada P2P service, despite evidence that widespread unauthorized file sharing was continuing for titles for which the operators of Soribada 5 had not sought a license. The decision marked an overbroad application of the immunity granted to online service providers (under Article 77-2 of the Copyright Act of Korea) based on a claim by the provider that action to cease infringement is "technically impossible." The decision is being appealed but in the meantime may pose a roadblock to effective enforcement efforts.

## Offline Piracy

Piracy problems in Korea are by no means limited to the Internet.

**Book Piracy:** This problem continues at unacceptable levels in Korea. The chief problems facing book publishers in Korea include massive illegal photocopying in and around university campuses, and more sophisticated pirate print operations. The problem of pirate printing (targeting mostly high level scientific, technical and medical text and reference books) 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 of both pirate printing and illegal photocopying have been exacerbated in recent years by the fact that illegal operatives have developed increasingly evasive practices, moving operations underground where they are quite difficult for authorities to track. The quality of the pirate prints is becoming so high as to make detection increasingly difficult, hence, cooperation with right holders is key to distinguishing pirate (unlicensed) production from legitimate.

The problem of photocopying of educational materials in Korea, in addition to plaguing universities and traditional primary and secondary schools, also permeates Korea's many thriving English language institutes. These for-profit institutions reportedly use massive numbers

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<sup>6</sup> Examples of these entities include KAPP for sound recording producers, and KRTRC for book publishers.

of unauthorized copies of U.S. publishers' English Language Teaching (ELT) materials in their programs, competing for students based on the asserted quality of their illicit copies.

While most Korean students prefer to go to a copyshop to get a hard copy of a book rather 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,<sup>7</sup> and copyshops using scanned versions of texts to speed up the generation of new pirate "copies on demand." Furthermore, leading international academic journal publishers complain about copies of their articles being illegally accessed and offered on pay-for-download or P2P sites. This problem is sure to grow unless checked now.

Beginning in 2005, the Korean Government has taken some important steps to recognize and start to address the serious book piracy issues. When the CPC took over the enforcement functions of the Korea Reprographic Transmission and Rights Center (KRTRC), this should have eliminated the "conflict of interest" that plagued KRTRC enforcement efforts, since licensing and enforcement functions are now separate. It appears, however, that CPC's main focus is online; KRTRC remains in charge of enforcement against "offline" infringement, such as unauthorized photocopying. Moreover, even in the online sphere CPC's commitment to act on behalf of foreign right holders (who do not participate in KRTRC) is still quite suspect. Regarding pirate printing, the publishing industry, with some government cooperation, had continued success in 2006 in tracking down massive underground printing operations, leading to significant seizures. However, the burden of initiating, investigating and carrying through enforcement actions remains on right holders. IIPA urges the Korean government to commit more resources to fighting book piracy in 2007, and to act more boldly by initiating its own enforcement actions.

There was further progress in 2006 in promoting the legal use of published materials at higher educational institutions, but close monitoring of this effort is needed. Following the issuance by the Minister of Education of a letter in March 2005 requesting every university to devise an action plan for reducing book piracy on campus, some campuses responded positively. However, many more failed to respond at all, and several responses lacked significant substantive measures. The March 2005 letter has been followed by other MOE-issued letters regarding campus crackdowns in March and September 2006, but it is unclear what action followed these letters. While the letters are a good start, real progress requires concrete implementation of the action plans and sustained follow-up. Universities were supposed to report to the Ministry at the end of 2006 on implementation of their action plans, which include adoption of strong pro-copyright policies, monitoring on-campus photocopy shops, and crafting educational campaigns; but as of November, the majority had not done so. The Ministry has committed to an ongoing effort, and it should use the tools at its disposal to encourage universities to fulfill their plans, including by reflecting implementation of the action plans in its positive or negative evaluation of institutions, and by withholding some of its funding of the least cooperative universities. Since on-campus infringements tend to spike around the beginning of academic terms – March and September – those periods will be critical for the success of the Ministry's pro-copyright initiative, and IIPA urges USTR to schedule its Out of Cycle review for maximum effect during these time frames. IIPA also hopes the CPC will work with industry to devise an appropriate response to raise public awareness about illegal use of

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<sup>7</sup> Kim and Lim, *Cell phone users using their cameras to copy textbooks*, Joong-Ang Ilbo, August 12, 2004.

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.

**Burned Optical Media:** The motion picture, entertainment software, and music and sound recording sectors all suffer losses due to sales of “burned” optical media (DVD-Rs or CD-Rs) with their copyright product on them. Street vendors continue to hawk these products, despite a number of raids carried out over the past two years. Such retail piracy is a low priority for Korean enforcement authorities, and the vendors are rarely caught with much pirate product (only catalogs and empty cases). While street sweeps must continue, a more effective strategy would target the dispersed underground labs where the discs are burned to order to supply the vendors. While the individual labs are hard to find and neutralize, cumulatively they amount to a significant force, particularly in the audio-visual marketplace. More investigative and enforcement resources should be devoted to identifying shops and offsite facilities engaged in illegal disc burning.

**End-User Piracy of Business Software:** Although counterfeit software CDs are starting to show up in the market, unauthorized use of software by businesses still causes the greatest losses to the business software industry in Korea. The Korean government continues to work actively to fight corporate end user piracy through its enforcement programs and its efforts to promote public awareness about the benefits of respecting copyrights. In 2006, the police and prosecutors conducted 1,305 end user actions. It is important that the Government maintain this level of enforcement activity. The continuing effectiveness of Korea's enforcement efforts also depends on the willingness of police and prosecutors to seek warrants in end user piracy cases, and on the willingness of courts to issue them, taking into account the fact that first-hand evidence of piracy is not always available at that stage of the case.

There is also unauthorized use of copyright materials, particularly entertainment software products, by some of the more than 20,000 Internet cafés (called PC baangs) in Korea, of which about 40% have now been legitimately licensed by game publishers.

## **UPDATE ON LAW REFORM**

### **Revision of the Copyright Act of Korea**

In December 2006, Korea adopted the first comprehensive rewrite since 1986 of its main copyright law, the Copyright Act of Korea (CAK). The new act contains some significant improvements. For example, it provides a new point of attachment for protection under Korean law for sound recordings produced by citizens of countries with whom Korea has treaty relations, regardless of where fixation occurs. It also conforms the term of protection for sound recordings with provisions applicable to e.g., cinematographic works (in both cases the 50-year term would run from date of publication unless the work remains unpublished within 50 years after fixation). Another positive feature is that the statutory license for use of works whose authors cannot be identified or located is made inapplicable to foreigners' works.

However, in many other ways the copyright law reform is a disappointment, and a missed opportunity for Korea to bring its laws into closer compliance with 21st century global minimum standards. Furthermore, the real impact of a number of critical provisions depends on how they are treated in implementing decrees, which are due to take effect in June 2007, six months after enactment. IIPA calls upon the Korean government to adopt over the next few

months as transparent a process as practicable for the drafting of these key implementing decrees. We also urge USTR to monitor the process carefully and to evaluate the content of these decrees as an important factor in the out-of-cycle review that we recommend it undertake.

In some ways, IIPA believes the changes made by the CAK reform have made the law worse. Some of IIPA's major concerns are the following:<sup>8</sup>

- **Rights of sound recording producers:** The exclusive right accorded to phonogram producers – the transmission right under new Article 81 – covers only “on-demand” or “interactive” services. All other means of digital dissemination of sound recordings to the public, including webcasting, are covered only by new Article 83, “digital sound transmission service” over which the producer does not have an exclusive right, but only a right of remuneration from service providers. This distinction, based on whether or not a service is classified as “on demand” or “interactive,” is not meaningful in light of rapidly changing technologies for delivery of sound recordings, and in light of marketplace realities. 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, especially in Korea. 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. Thus, producers need exclusive rights over all forms of Internet or other digital transmission of their phonograms. The old law appeared to provide this, according to the interpretation posted by the Ministry of Culture and Tourism (MOCT) on its website in January 2005, which stated that “regardless of the format or methods, any unauthorized use of music files on the Internet constitutes an illegal act.” The new law may thus be a significant step backward that will be counterproductive to Korea's efforts to foster the healthy development of the information society.
- **Expansion of educational exceptions:** The new law expands educational exceptions to copyright in ways that create real questions about Korea's compliance with applicable international standards. For example, under the new Article 25, students as well as teachers at any level could “transmit” complete works (i.e., disseminate them online) “when deemed necessary for classroom teaching,” without any consideration of the availability of licenses to authorize such use. There would be no compensation to the right holder for such transmissions on the secondary school level. The impact of this expanded exception may turn in part on how the Korean government exercises its authority under Article 25.10 to set standards for “anti-pirating measures” that schools must adopt in order to take advantage of the expanded exception.
- **Mandatory Collective Management:** The new law sets out procedures for mandatory collective administration of rights of remuneration created under several provisions, including those noted immediately above: “digital sound transmission” with respect to sound recordings; reproduction or transmission by libraries; or use of copyrighted material in school textbooks, or online by post-secondary educational institutions.<sup>9</sup> Under these procedures, codified in Article

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<sup>8</sup> The following is based on an unofficial translation of the CAK reform legislation as presented to the National Assembly on December 1, 2006. IIPA will update its analysis as it resolves what appear to be translation differences between the accessible texts of the old and new law, and to the extent that it learns of any changes that were made by the National Assembly before enactment.

<sup>9</sup> Mandatory collective administration also applies to the remuneration right for conventional broadcasting of sound recordings under Article 82. Although the new law for the first time allows foreign sound recording producers to claim (...continued)

25, it appears that only one collective administration organization can be recognized by the Minister of Culture and Tourism for each remuneration right; that the organization can collect remuneration payments even for non-members who may not even be aware of the organization; and that the organization can spend “for the public interest” any collected payments that it has been unable to distribute in three years. The copyright industries have had enough experience with existing collecting societies in Korea to know that such a system lacks transparency and presents numerous opportunities for formal or informal discrimination against foreign right holders. Korean law should allow recognition of more than one organization to collect and distribute remuneration payments, 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. The implementing decree should be closely scrutinized to ensure that it provides the maximum degree of flexibility possible under the new law.<sup>10</sup>

The new CAK also fails to address sufficiently (or at all) a number of areas where Korea’s copyright law needs to be updated for the challenges of the global digital networked economy, where Korean law should be playing a leadership role, not struggling to catch up. These missed opportunities include:

- **Technological protection measures.** Providing strong legal back-up for technologies that copyright owners use to protect their works in the digital networked environment is a key mandate in the ten-year-old WIPO Internet Treaties, but one which Korea has only partially implemented. The revised CAK seems to take a small step forward in the definition of technical protection measures (TPMs) (Article 2-28), by extending protecting to technologies that “inhibit” copyright infringement, as well as those that “prevent” it altogether. However, the next step is long overdue: Korea must also protect technologies (such as encryption and password controls) that are used to manage access to a work. In order to come into full compliance with the WIPO treaties’ requirement for an adequate and effective regime to protect TPMs, Korea must also define prohibited circumvention devices and services to include those that have only a limited commercially significant purpose or use other than to circumvent TPMs, and must prohibit the act of circumvention itself.
- **Online Service Provider liability.** The new CAK makes a slight modification to previous law in this area,<sup>11</sup> but still fails to provide a solid foundation of appropriate legal incentives for network operators to cooperate effectively with right holders to combat online infringement. Besides spelling out more clearly the potential liability that network operators face if they contribute to, profit from, or encourage infringing activity on their systems, the law should also make it clear that in all cases, the courts retain the authority to issue appropriate injunctions against OSPs; that there is no liability limitation when the OSP has the right and ability to control

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(...continued)

these payments, it still denies them to U.S. producers, because U.S. law contains no corresponding provision. Thus, Korea’s long-standing and unjustified discrimination against U.S. producers remains in place.

<sup>10</sup> The new law also does nothing to make MOCT 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.

<sup>11</sup> When a network operator receives notice from a right holder about infringing activity on the network, the operator is now obligated to cut off access to it “immediately,” rather than “without delay.” IIPA hopes that this change, reflected in new Article 103.2, will improve the efficiency and responsiveness of the “notice and takedown” system under the CAK.

infringing activities on its network from which it derives a direct financial benefit; and that infringement carried out by an employee or agent of the OSP, or by any other affiliated party, does not benefit from any liability limitation. Another needed feature of Korean law is a speedy and simple procedure whereby right holders can obtain contact information on subscribers or customers who commit infringements online. Such information would also reduce the number of legal claims brought against network operators for their participation, since it would enable right holders to pursue the primary infringer directly.

Article 104 of the new CAK appears to be targeted at the operators of peer-to-peer file sharing services, and obligates them to “take necessary measures such as blocking illegal transmission ... when requested by the right holders.” Potentially this is a valuable new tool against online piracy, although much will depend upon the contents of the implementing decrees applicable to this new provision.

- **Temporary reproductions.** Almost alone among nations, Korea still denies copyright owners exclusive rights over temporary reproductions of their works, even though the use of temporary copies of all kinds of works is of dramatically increased economic significance in the digital networked environment.<sup>12</sup> Although it missed an opportunity to do so in its recent CAK reform, Korea should clarify that the reproduction right under its copyright law includes: (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.

- **Library exceptions.** The new CAK retains unchanged the sweeping exception allowing 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 sold in a digital format. This exception clearly threatens markets in many works – notably including textbooks, English language instructional material, and scientific, technical and medical journals – that are actively sold in the market far longer than five years after first publication. To ensure compliance with international standards for copyright exceptions (i.e., the three-step test in Article 13 of TRIPS), Korea should at a minimum narrow this exception so that implementation of technological safeguards is a pre-condition to exercise of the exception; allow networking of works only beginning ten years after the material is first published in Korea; require libraries to notify publishers of their intention to digitize works in their collection that the publisher has not chosen to distribute digitally; and provide a more robust compensation mechanism that is, as a practical matter, more accessible to foreign right holders.

- **Copyright term extension.** In line with the international trend in over 80 countries to exceed the minima provided in the Berne Convention and TRIPS Agreement, 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

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<sup>12</sup> Such models continue to grow in Korea’s technologically sophisticated marketplace. For instance, Korean companies now provide technology to enable up to ten users to share one PC and simultaneously use all the software running on it; virtual partitions are temporarily created for storing each copy of the operating system and the application programs running under it. These copies disappear when the user disconnects from the PC. Under such a scenario, whether the copyright owner has the exclusive right to authorize the making of temporary copies in RAM is a very concrete question, not a philosophical abstraction. The copyright owner’s exclusive right of transmission does not fully address this scenario.



countries. Inaction on this issue also undermines Korea's cultural heritage, as classic films, sound recordings and other titles from the 1950's and 60's pass into the public domain and become less attractive subjects for investment in preservation, repurposing and re-release.

- **Private copying exception.** The new CAK retains unchanged the exceptions in Articles 30 and 87 allowing copying of complete works for “non-profit private purposes” or within the home. Proposals to narrow these exceptions in light of technological and market changes were presented to the National Assembly but ultimately were not adopted. It is past time for Korea to recognize that the market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. 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, and should be made inapplicable to copies made from infringing sources.
- **Statutory damages.** Korea's system for civil damages for copyright infringement lacks the deterrent impact that TRIPS requires in Articles 41 and 45. To remedy this, Korea should give right holders the option to choose pre-set statutory damages at a level sufficient to achieve the deterrence objective.
- **Ex parte relief.** Current law and practice in Korea does not make *ex parte* civil relief available to right holders on a basis expeditious enough to satisfy TRIPS Articles 41 and 50. Amendments should be adopted to make this essential enforcement tool available promptly.

Finally, a number of provisions of the CAK reform require further explication (including, in some cases, adoption of appropriate provisions in implementing decrees) before their full impact on copyright law and enforcement can be gauged. These include:

- **“Exclusive right to use”:** Articles 57-63 create new restrictions on exclusive licensing of all copyright materials, modeled on some existing provisions of the CAK (old Articles 54-60) applicable to publications “in writing or drawing.” The extent to which these provisions impinge excessively on contractual freedom (and the extent to which they can be overridden by contract) is unclear.
- **Certification:** Article 56 empowers MOCT to “designate certification agencies to ensure the safety and reliability of transactions of copyrighted works.” A definitional provision in Article 2-33 spells out that certification means “proving the eligibility of a right holder to grant the use of literary works, etc.” The implementation of these provisions should be closely watched to ensure that these agencies do not in fact become impediments to commerce in copyrighted materials, and that certification does not become a formal pre-requisite to exercise of exclusive rights in a way that would contravene the Berne Convention.
- **Copyright Commission:** Article 112 would greatly expand the role of today's Copyright Conciliation and Deliberation Committee. The new Copyright Commission would have jurisdiction over such matters as “formulation of policies on technical protection measures and rights management information,” as well as “projects to establish order in the use of works and maximize fairness in the use of works.” While this charter is somewhat narrower than that which appeared in earlier drafts of copyright reform legislation, the Commission still seems likely to occupy an important place in the development of copyright policy in Korea. Accordingly, MOCT should take steps to ensure that its appointments to the Commission include representation of a broad cross-section of right holders, foreign as well as domestic.

- **Copyright Commission Management Business:** Articles 105-111 enhance the powers of MOCT to intervene in the marketplace for copyrighted materials in several ways, including to change the royalty rates charged users (Article 105.5 and 105.8). Recognizing that these new powers have been scaled back from what was originally proposed in this area, IIPA nevertheless urges caution and calls for implementation of these new provisions to be closely monitored.
- **“Donation” of Works:** Under Article 135, MOCT can designate an agency to receive “donations” of copyrighted works. Although the legislation provides that such works cannot be used for commercial purposes or against the will of the right holder, there remains a danger that third parties will “donate” works to which they do not own rights. Implementation of this provision should take this danger into account and provide safeguards against it.
- **“Environment for fair use:”** Another new job that the CAK reform gives MOCT is to “promote fair use of works such as making public notification of works upon which copyrights have lapsed.” Article 134.1. While this could be beneficial in some instances, the consequences of erroneous notifications could be severe, and the boundaries of this new authority remain undefined. The Presidential Decree that implements this provision bears close watching.
- **TPM/RMI Policies:** MOCT’s new authority under Article 134.2 to “draw up and implement policies on rights management information and technical protection measures” needs to be fleshed out in a Presidential Decree. If these new policies have the effect of bringing Korea into greater compliance with its obligations under the WIPO Internet Treaties, this authority could be a positive development, but clearly there is also a risk that it will be counter-productive. The provision should be implemented in a way that maximizes the benefits and minimizes the risks.

### **Other Legislative Developments**

**Computer Programs Protection Act Amendments:** In September 2006, new amendments to the Computer Programs Protection Act (CPPA) took effect. Besides renaming and giving expanded powers to the Computer Program Protection Committee (formerly the Program Deliberation and Mediation Committee), the amendments created an administrative enforcement procedure (in addition to the statutory notice and takedown procedure) for issuance of “corrective orders” against Internet service providers who make available infringing programs or information that enables the circumvention of technological protection measures. Criminal penalties for CPPA violations were also increased. One unresolved issue is the scope of CPPC’s new authority for the CPPC to “support the establishment and enforcement of policy necessary for the development and standardization of technology related to TPM and RMI.”

We can anticipate that there will be further CPPA amendments in the near future to keep this statute in conformance with the revised CAK. It will be important to monitor this process to ensure that the new CAK provisions eliminating the need for a formal complaint pre-requisite for prosecution of repeat infringers for profit (Article 140) are transposed to the CPPA in a way that preserves the ability of right holders to control the progress of cases against corporate end users of infringing business software applications.

- **Presidential Decree to Amend Enforcement Regulations of the Copyright Act of Korea:** These amendments, which took effect in 2006, made it an infringement to screen films within the first six months of their release in government buildings, community centers, libraries, museums, public baths, and the like. This should facilitate enforcement against unauthorized

public performance of videos licensed for home use only. Other amendments specified that e-mail can be used by copyright management services to deliver takedown notices to ISPs under the CAK.

**Music Industry Promotion Act:** Entry into force of this legislation in October 2006 eliminated one tier of review required by the Korea Media Rating Board (KMRB) before importation of foreign sound recordings (although not for music videos). The legislation also introduced regulation of “[o]nline service providers for phonograms,” who:

- are required to obtain copyright licenses and to “take technical measures to prevent illegal reproduction (Article 25.1);
- can have their license to operate such a business revoked or suspended by local or regional officials (Article 32), and can have their servers confiscated if operations continue after revocation (Article 35);
- can have pirate recordings confiscated and destroyed by MOCT or local officials if technological protection measures (TPMs) have been removed (Article 35.3);
- can have criminal penalties imposed (probably fines only) for operating such services in defiance of a revocation order (Article 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 which succeeds it not result in weakening of enforcement against piracy of recorded music. For example, Article 37 provides that enforcement activities can be contracted out to an association or similar organization. This is intended to expand the resources available for enforcement against piracy; but if foreign right holders are not able to participate in the designated enforcement organization, the current problem with CPC failing to enforce on behalf of foreign right holders will be re-created.

- **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 has been identified as a source of camcordered masters for pirate video production. Korea should take whatever legislative steps are necessary to criminalize use of a video camera to illicitly record a movie at a movie theater.

## **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. Foreign content limits under the same law on programming in cable and satellite services should also be phased out in favor of letting market forces determine the content presented to Korean consumers.

Amendments to the Movie Promotion Law that took effect in October 2006 eliminated the “import review” procedure previously imposed against foreign films by the KMRB (a secondary review over and above the “content review” required for all films distributed in Korea). This change has sped up the process of censorship clearance for foreign film titles, reduced costs, and given foreign producers a more level playing field in the Korean market. As noted above, a similar discriminatory import review for sound recordings was also eliminated.

The Korean National Intelligence Service is in the process of implementing a requirement that all vendors of security software (defined broadly) to any entity of the Korean government and certain segments of the private sector must undergo a security review, even if the software has been certified under the Common Criteria. Although the original proposal was modified so that disclosure of source code is no longer a requirement, software vendors would still be required to disclose confidential proprietary information about their products that goes beyond what is required by any other parties to the Common Criteria Recognition Agreement. This requirement is not justified by the legitimate security concerns of the Korean government, and erects a substantial barrier to an important segment of the Korean market for the business software industry. The requirement for disclosure of confidential proprietary information should be abandoned.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPAIN

**Special 301 Recommendation:** IIPA recommends that Spain be placed on the Watch List in 2007.

#### **EXECUTIVE SUMMARY**

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 (particularly peer-to-peer (P2P)) is also a major problem, exacerbated by increased penetration of broadband services. A 2006 circular issued by the General Public Prosecutor saying that peer-to-peer downloading is not illegal is a significant setback; according to the Instruction 1/2006, peer-to-peer activities will be considered a civil infringement but not a criminal one. The Spanish Copyright Act allows the reproduction of works for private use of the copier on a non profit basis (provided the copy is not to be used collectively). Consequently, downloaders of illegal files from the Internet cannot be prosecuted in a criminal proceeding because the copies they make are considered private copies. With respect to pirated hard goods, organized crime syndicates have maintained their active role in the production and distribution of pirated materials. With respect to legislation, there remain some flaws in Spain's implementation of EU Directives, and particularly with the issue the liability of intermediaries under the E-Commerce Directive. Furthermore, it is essential that the Spanish Government increase its commitment to the fight against piracy.

#### **PRIORITY ACTIONS IN 2007**

##### **Enforcement**

- Take concerted actions in well-known markets to combat the widespread street piracy problem, including: (1) more actions against labs supplying street vendors; (2) more *ex officio* police actions against street sales; (3) increased police coordination; and (4) prosecutors pursuing and courts issuing deterrent criminal penalties.
- Identify a single government agency to undertake Internet piracy investigations in order to strongly tackle the country's growing Internet piracy problem.
- Seek a reversal of the Chief Prosecutor's May 2006 official instruction "decriminalizing" peer-to-peer (P2P) downloading.
- Seek additional human resources from the Ministry of Interior for investigation of Internet activity.
- Assign additional human resources for Internet investigation from the Guardia Civil and National Police.
- Encourage the Ministry of Culture to broker an agreement with ISPs allowing private Notice-and-Takedown procedures and a code of conduct.
- Judges and prosecutors should attend seminars to increase their knowledge of intellectual property rights and the impact of piracy and intellectual property courses should be incorporated into law schools' curricula.
- Establish training sessions for criminal and commercial courts dealing with intellectual property issues.
- Improve interagency cooperation on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing.

## Legislation

- Acknowledge incorrect implementation of the E-Commerce Directive, particularly regarding the creation of limitation of liability for intermediaries, and amend the legislation. Specifically, the Spanish "Law of Information Society Services and Electronic Commerce Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI") (2002) has improperly implemented the E-Commerce Directive.
- Work with the copyright industry groups in a transparent and cooperative way if comprehensive reform of the Spanish copyright law moves forward in 2007. This would include, for example, ensuring against any weakening of the exclusive right of record producers with respect to rights of communication to the public and of making available. Also, the additional right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represent an erosion of the value of the exclusive rights of rightsholders that were already granted in accordance with the requirements of the WPPT and WCT, and should be eliminated in future copyright law reform. As agreed in the WPPT, exclusive rights should form the foundation of market based licensing for the delivery of signals.

<b>SPAIN</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2005-2006 <sup>1</sup></b>				
INDUSTRY	2006		2005	
	Loss	Level	Loss	Level
Sound recordings & musical compositions <sup>2</sup>	25.0	22%	27.0	22%
Entertainment software <sup>3</sup>	111.5	48%	135.3	43%
Business software <sup>4</sup>	501.0	46%	417.0	46%
Motion pictures <sup>5</sup>	NA	NA	253.0	32%
Books	NA	NA	NA	NA
<b>TOTALS</b>	<b>637.5</b>		<b>832.3</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Spain under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

## **COPYRIGHT PIRACY IN SPAIN**

Piracy in Spanish continued to flourish in 2006, with industries reporting no improvement last year. Internet piracy and widespread street piracy contributed to the industries' growing concern about the state of the illicit markets in this country.

**Internet piracy widespread:** 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. 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. In a stunning blow to Internet anti-piracy efforts, the General Public Prosecutor published an order in May 2006 saying that P2P downloading is not illegal (not subject to criminal prosecution).

Additional resources for Internet investigations must be dedicated by the Spanish Government (see enforcement section, below). The lack of a specific enforcement agency tasked with addressing Internet piracy is a problem; 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). ISP were still difficult in 2006. They are taking advantage of the law's provision that states that they are only be liable if they receive a court order, as only a court can be a "competent body." Also, 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 2006 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 and Senegalese syndicates are increasingly dominating the pirate trade in Spain. The Chinese syndicates are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€ per CD), with aggressive distribution through the use of itinerant sellers on the streets and on 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), as well as the majority of counterfeit Nintendo video game products. Product consists primarily of international releases, although albums of some important national artists have also been detected.

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. Significant increases in pirate activity have occurred in Granada, Seville, Oviedo and Gijón.

Overall, the sense in 2006 is that there has been a reduction in the amount of pirate product seized. However, this does not imply a decrease in police efficiency. In fact, 80 organized networks were dismantled in 2006 compared to 72 in 2005.

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.

In 2006, the local police performed much better and more effectively against street sellers (blanket men and vendors in public premises) than in the year prior. Local police and some City Mayors from Cambrils, Castelldefels, Barcelona, Madrid, Tarragona and Albacete started new enforcement efforts against street piracy, outlawing consumers from purchasing pirate product. In Barcelona, both sellers and buyers of illegal CDs and DVDs can be fined by the local police (minimum 125€ to maximum 500€, or US\$162-\$650) and the illegal CDs/DVDs can be seized. Unfortunately, seven judicial decisions issued in Barcelona did not consider street vendor piracy a criminal offence. These cases received significant coverage and created a lot of misunderstanding. Starting in December 2005 and continuing in 2006, Madrid police have requested 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. In November 2006, the City of Madrid local authorities implemented a public campaign in bars, restaurants and entertainment premises against the sale of pirate products.

**Piracy of sound recordings and musical compositions:** The international recording industry reports that the Spanish authorities undertook 10,516 enforcement actions in 2006 which resulted in the arrest of 2,382 individuals. The rapid growth of Internet piracy has made it the primary problem in Spain (as mentioned above) for the music publishing and recording industries. By the end of 2006, there were 6.5 million broadband lines in Spain, providing services up to 20 MB of traffic. The ISP Telefonica has announced that from March 2007 forward, up to 50 MB broadband service will be available in major cities. The National Music Publisher's Association (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. In addition, 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%. The situation for the recording industry in Spain is dire. Pirate recordings are openly on the streets. 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).

**Entertainment software piracy:** 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, less than 10% are licensed. Hard goods piracy of video game software is now predominantly domestically burned products, available through street vendors. Importation of counterfeit cartridge games from Asia also continues to be a significant problem in the country, with several seizures in 2006 identifying China as the source country. The exponential growth of Internet piracy is also of great concern to the entertainment software industry. The Entertainment Software



Association (ESA) reports that Spain, along with Italy and France, is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. In addition, the ISPs in Spain are generally non-responsive to the notices of infringement sent to them by the ESA. The industry would also encourage the Spanish government to finally implement the EU Copyright Directive, a process which is long over due. Adequate implementation would provide for prohibitions against circumvention of the technological measures employed by rights holders to protect their works. The ESA estimates that the value of pirated videogame product in the Spanish marketplace was \$111.48 million in 2006, with a 48% piracy rate.

**Audiovisual piracy:** The Motion Picture Association (MPA) reports that in 2006, piracy worsened, as Internet file exchanges and street sales are causing significant damage to the industry. Piracy is becoming more locally-based, from organized OD production and distribution to local internet link sites for P2P exchange. In fact, it appears that even exchanged P2P movies are now produced locally via camcording in Spanish theaters. Street vendor piracy, which seemed to decrease at the beginning of 2006 due to special measures driven by government and local authorities, increased during the summer, likely due to illegal immigration. With respect to internet piracy, MPA reports that 132 million movies were downloaded on Spanish P2P services in the 12 months of June 2005 to June 2006. During this same time frame, 41 million DVD-Rs were sold by street vendors. An unforeseen effect of Spain's rampant street vendor piracy is that it sends the message to consumers that downloading is also okay. In 2006, 750 video stores closed, including 105 from a major U.S. retail chain. 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 Spain's source piracy problem.

**Business software piracy:** The Business Software Alliance (BSA) reports several sources of piracy in Spain. Widespread piracy keeps companies (end-users) using unlicensed software; resellers distribute illegal software on the streets; and the Internet continues to present challenges. Nearly all the big and major companies in Spain have policies to implement a reasonable legal use of software, with only some under-licensing problems. However, piracy at SMEs has stayed at high levels, supported by the high level of piracy in the distribution channel (it is estimated that about 40% of software distributors in Spain are involved in illegal distribution of software). Conscious of this situation, the Ministry of Industry has reached to an agreement with BSA (together with AETIC, the major local IT industry association), in order to implement a specific plan to fight against piracy in the illegal distribution channel, agreement to be implemented during 2007. BSA's anti-piracy campaign involving end user companies using illegal software are pursued through civil *inaudita altera parte* searches or through cease and desist letters, where the objective is to obtain compensation of damages caused and legalization the use of software. Reseller infringement cases are referred to the police for investigation and enforcement, and internet cases are pursued through cease and desist letters in nearly all cases.

## **COPYRIGHT ENFORCEMENT IN SPAIN**

The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Enforcement Directive, whereas the Ministry of Culture is responsible for implementation of the EU Copyright Directive. 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 (see further discussion, below), and it was responsible for the implementation of the EU Copyright Directive, which has now been implemented. The Spanish court system, particularly the new commercial courts, still needs improvement.

**Police actions:** The industry groups report good relations with the Spanish police authorities. Some enforcement authorities are taking effective action (but with limited resources and with little political support from higher political authorities. For example, in addition to the Internet raid (mentioned above) and the good local work by Municipal authorities, the Federal Police did take action against organized OD crime in 2006. Here are three examples: (1) Operación Autobus in January 2006: National police arrested 43 individuals in four cities in a coordinated raid. All of the persons arrested were members of an organized gang which distributed pirate optical discs throughout the country. Police seized 36 burners, 56,000 Euros in cash (US\$72,800) and documents indicating the organized nature of the operation in these and other cities. (2) Operación Cabeza in Madrid: Police arrested four people and seized 99 DVD- and CD-burners and more than 3,000 discs prerecorded with music and movies. (3) Operación Mikado in Madrid: Police arrested seven Chinese persons and dismantled an important gang, seizing 68 burners and 37,000 optical discs in five different flats in Madrid. An ESA member company reports that in 2006 the police/civil guard conducted 21 raids against vendors of pirated video game software. The recording industry also reports that it took 10,516 raids in 2006, resulting in seizures of 17,310 CDs, 1.8 million CD-Rs, and 46,322 blank DVD-Rs.

BSA reports that its work in 2006 with the police forces continued at a fluid level. . Ordinarily, the police request support of the BSA in order to file criminal complaints that speed up the granting of raids by courts, and also request industry support in technical experts and other support for the organization of the raids. During 2006, BSA has conducted the following actions: four raids against end user companies; 261 cease and desist letters to end user companies; 71 cases referred to the police for investigation of alleged infringement activities by illegal distributors; 15 cease-and-desist letters to Internet infringers; and 10 judgments have been awarded against business software copyright infringers.

**Internet piracy enforcement:** In April 2006, Spanish police arrested fifteen operators of seventeen separate websites dedicated to the unauthorized exchange of movies, music and videogames via E-mule or BitTorrent. This raid was based on several investigation initiated by the film industry's group (FAP) and was the first such police action ever taken in Spain. These websites received over 615 million visits prior to the raids and the operators grossed over 900,000 Euros (US\$1.17 million) annually (from associated advertising, such as virtual casinos and pornography, controlled by the website operators). Of the fifteen arrested, all were charged with criminal copyright violations and five have been charged with additional charges involving false registrations, fraud and obstruction of justice.

Given the growth of Internet piracy and the havoc it heaps on the legitimate copyright industries, much more work must be done, especially with criminal enforcement, to combat this problem. Here are four suggestions:

- Seek a reversal of the Chief Prosecutor's official instruction "decriminalizing" P2P downloading. A May 2006 "circular" setting out the Attorney General's position for many areas of IP law, said (1) P2P is not a prosecutable offense because it is not a "commercial gain" (note: the standard should be "material" gain) and (2) a download for private use is a private copy exception to the law.
- Encourage the Ministry of Culture to broker an agreement with ISPs allowing private Notice-and-Takedown procedures and a code of conduct.
- Seek additional human resources from the Ministry of Interior for investigation of Internet activity (at present, only four police officers from the National Police and three from the Guardia Civil are assigned to prosecute internet cases in all of Spain; authorities have imposed a ceiling on the number of cases that each of four associations with an anti-piracy

function (FAP, EGEDA, AGEDI, Promusicae) can submit for prosecution to two per association every six months).

- Seek assignment of additional human resources for Internet investigation from the Guardia Civil and the National Police.

**Civil actions and the commercial court:** BSA reports that in addition to its criminal cases, the civil actions in Spain worked at an acceptable level during 2006. The Commercial Courts, which were granted jurisdiction in 2005 for enforcement on intellectual property in the civil arena, are proving to act reasonably quickly in the granting of *inaudita altera parte* search order, taking only days or weeks since the search warrant request is filed before the court. However, BSA does report several problems when working with the commercial courts:

- a) Raids granted based on anonymous information: Before the commercial courts were empowered to handle intellectual property issues, civil courts had no problems in granting raids based on anonymous information. Nowadays, some commercial jurisdictions (Madrid and Barcelona) do not accept anonymous information to grant a raid, while all other commercial courts in Spain have no problems in granting raids on the basis of anonymous information. This is making it more difficult for the software industries to pursue actions in the two major markets in Spain
- b) High bonds: All raids are granted under the condition of bonds being posted. Although amounts requested as bonds are reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested are so costly (€120,000 – approximately US\$150,000 – in one instance) as to make it impossible to bring the case.
- c) Calculation of damages: The definition given by the law to the damages to be awarded as result of piracy activities might result confusing and, in some aspects, play against copyright owners' interests. Although nearly all piracy cases against business software award retail value as compensation of damages (a good result), an important case on business software piracy, now at discussion before the Supreme Court, might result on damages based lowered down by a wrongful application of the criteria given by the law to award damages.

BSA will be proposing to the Ministry of Justice that a training session for commercial courts be held in 2006 in order to address the above issues.

**Border enforcement:** Entertainment software companies also noted good cooperation from the Customs authorities in 2006. There were five seizure actions by the Customs authorities in 2006; but enforcement activity must continue to be stepped up 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.

**Government coordination needs improvement:** Simply put, the Spanish government needs to improve its national anti-piracy strategy by improving its implementation. Only the Ministry of Culture is acting against piracy. The other Ministries involved in the Governmental anti-piracy plan are reluctant to apply effective measures, with the local police and some federal police units being exceptions. The working group created with copyright holders and the ISPs did not reach an agreement, and the Ministry of Industry does not want to amend the LSSI law.

Lack of agency coordination: Though the Spanish Government has indeed been 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.

**“Plan Integral”:** In April 2005, the Spanish Government unveiled its integrated anti-piracy plan, which aimed to coordinate eleven 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 the courts to fight against these illegal activities. Unfortunately, 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 2006 has been almost inexistent in practice. The Ministry of Culture’s working group with the cultural industries and the Internet Service Providers (ISP) which aimed to reach an agreement on self-regulation failed and the Ministry of Industry has refused to amend the Internet law. 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, although now created, has not adopted any measures yet.

**National Campaign:** 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\$1.3 million) on the “Defend your culture from piracy” media campaign, covering the holiday gift-buying season. In December 2006, the Ministry of Culture launched the second part of the “Defend your culture” campaign in the mass media, this time with a direct message that piracy is clearly illegal.

During 2006, the music, recording and film industries, including some in cooperation with some collecting societies, organized seminars for Spanish police, judges and public prosecutors. In contrast, the Government held only several such enforcement seminars, where far more are needed urgently.

## **COPYRIGHT LAW REFORM IN SPAIN**

For years, the copyright industries, led by local rightsholders’ groups, have been working very hard to seek improvements in proposed legislation to implement the Spain’s EU obligations. As an overarching matter, legislation should be 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 expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” Unfortunately, Spanish implementation of these directives has been unsatisfactory.

**Possible work in 2007:** Reports indicate that Spain might consider comprehensive revisions of its copyright law in 2007. In addition to the problems identified in the implementation of the EU Directive (below), two additional points are in order. First, it is imperative that the government work with the copyright industry groups in a transparent and cooperative way if comprehensive reform of Spanish copyright laws moves forward in 2007. For example, this would include ensuring against any weakening of the exclusive right of record producers with respect to rights of communication to the public and of making available. Second, the additional right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represent an erosion of the value of the exclusive rights of rightsholders that were already granted in accordance with the requirements of the WPPT and WCT, and should be

eliminated in future copyright law reform. As agreed in the WPPT, exclusive rights should form the foundation of market based licensing for the delivery of signals.

**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 still 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.<sup>6</sup> The EU Commission instituted an infringement proceeding against Spain in July 2005 for its non-implementation of the EU Copyright Directive,<sup>7</sup> and sent a reasoned opinion to Spain in April 2006. Finally, on July 7, 2006, the Spanish Congress approved Act 23/2006 which amended the law to implement the Copyright Directive.

**Improper Implementation of the EU E-Commerce Directive:** The Spanish "Law of Information Society Services and Electronic Commerce Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI")) which entered into force in October 2002 has improperly implemented the E-Commerce Directive.<sup>8</sup> Spanish Law creates a limitation of liability for Internet Service Providers (ISPs) in that it fails to correctly implement the constructive knowledge standard and imputes liability only on the basis of "effective knowledge." In addition, another serious problem with Spain's implementation is that its law does not require ISPs to respond to any take-down request that is not accompanied by a Court Order. The Spanish implementation appears to say in Section 16 of the LSSI that ISPs can only be liable if they receive a court order, as only a court can be a "competent body" within the meaning of that section. ISPs have interpreted the implementation to say that this applies to taking action in relation to illegal P2P traffic (suspension or termination of users' accounts), on the basis that they can not suspend or terminate accounts without a court order to do so. The Spanish Government presented a self-regulation initiative for ISPs and intellectual property rights' associations, but after one year no agreement has been reached, so the aim has not been achieved and the negotiation terminated.

In September 2006, the Spanish Ministry of Industry, Tourism and Trade prepared draft amendments to the E-Commerce legislation. (This initiative is part of "plan 2006-2010", the information society development plan, which was adopted by the Spanish Government in November 2005.) In its explanatory memorandum, the Ministry states that the purpose of these amendments is *inter alia* to amend or suppress "excessive" or "unnecessary" obligations. As discussed above, the current Spanish e-commerce legislation fails to implement correctly the EU E-commerce directive by creating a limitation of liability for intermediaries that goes beyond that permitted by the Directive. The draft amendments proposed by the Ministry do not seek address this problem but rather seem to further limit any possibility to effectively fight on-line piracy. For instance, the Ministry proposes the following: to delete the provisions on data retention (Article 12); to delete the requirement on those providing online services to register domain names (Article 9); and make a number of drafting changes (in particular to Article 11 which refers to the duty of cooperation of ISPs) which would -- at the very least -- create legal uncertainty. The only positive point is that the draft (Article 11.2) refers to the possibility to prevent access from Spain to a specific service/to specific content provided from a non-EU State when the competent authorities have asked the removal/interruption of such

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<sup>6</sup> 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. Adequate implementation of the Copyright Directive should provide for protection against circumvention of technologies used by right holders to protect their copyrighted works.

<sup>7</sup> 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>.

<sup>8</sup> 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.

content/service. Industry understands that the Ministry is still working on a draft and is open to new proposals. It will likely take several months before the Ministry presents a draft to the Government. Once approved by Government, the draft will be sent to the Parliament.

**Poor implementation of the EU Enforcement Directive:** Effective implementation of the EU Enforcement Directive<sup>9</sup> is especially important, as it should facilitate enforcement efforts, particularly in the digital environment. However, that appears not to be the case in Spain. Unfortunately, a serious problem in the Spanish implementation involves the “right of information” afforded in Article 8 of the Directive; this right allows rightsholders to identify infringers and obtain information about violations. This right is supposed to extend to Internet service providers and to allow rightsholders to obtain an order requiring the disclosure of the identity of an ISP's customer, where it appears the customer has been committing infringements. This is a critical tool in internet piracy enforcement. However, industry colleagues report that this right in the Spanish law appears to suffer from two defects. First, it is limited to commercial infringements. Second, it may not extend to non-infringing ISPs. The only persons who can be made subject to an order for provision of information are: (1) the suspected infringer; (2) anyone who for commercial purposes [sic] has used the infringing services or been found in possession of the infringing goods; and (3) anyone indicated by the preceding two respondents. Apart from referring to commercial “purposes,” rather than “commercial scale” (a major problem in itself), the Spanish formulation misses a fundamental principle of the Directive, which is that intermediaries who are acting on a commercial scale are liable to provide information on their customers (whether the latter are acting on a commercial scale or not). Furthermore, the right of information is not conditioned on a commercial activity by the infringer.

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<sup>9</sup> The Directive 2004/48/CE on the Enforcement of Intellectual Property Rights (the “EU Enforcement Directive”).

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### TAIWAN

**Special 301 Recommendation:** Taiwan should remain on the Watch List with an Out-Of Cycle (OCR) review to monitor (and ensure) prompt passage of P2P and ISP legislation and continued aggressive enforcement actions against Internet piracy and photocopying of academic materials.

## **EXECUTIVE SUMMARY**

### **PRIORITY ACTIONS REQUESTED IN 2007**

- **Internet Piracy Has Become a Pervasive and Corrosive Piracy Problem and Stronger and More Focused Enforcement Action Must be Taken:** Internet piracy is now one of Taiwan's most urgent piracy problems. Despite significant efforts to control it and some good enforcement results, P2P piracy of music, movies, business software, books, journals and entertainment software continues to grow. Enforcement by the Joint Internet Infringement Inspection Special Taskforce (JIST) and by the IPR Police (IPRP) must be stepped up. Because Internet piracy is not a "public crime" in Taiwan, enforcement authorities must work even more closely with industry to create a workable and deterrent enforcement system. The business software industry reports that the highest rate of Internet infringements of business software in Asia is in Taiwan. This will threaten what is otherwise a good record on reducing software piracy in the territory.
- **Adopt as Soon as Possible Pending P2P File-Sharing Legislation, Followed by ISP Liability Legislation with an Effective Notice and Takedown System:** The local and U.S. industry groups strongly support the pending P2P Bill which would prohibit inducing infringement through such file sharing services and improve the legal framework to shut down Taiwan-based and foreign (primarily PRC) pirate services and sites. ISP liability legislation must also be adopted to fully clarify liability of ISPs who know or should know about infringements and who fail to timely take down/block access to infringing sites and services. Statutory notice and takedown mechanisms must be quick and effective, including providing notice to right holders.
- **Adopt Effective and Deterrent Policies and Penalties for Online Infringements Occurring Over the Government-Owned TANet:** The TANet network is being used widely throughout Taiwan for Internet piracy, including unauthorized P2P file sharing of virtually all copyright products. The Ministry of Education (MOE), while it has taken some policy actions to inhibit piracy over its services, must acknowledge its obligation and take far stronger deterrent actions to stem P2P file sharing. TIPO/MOEA and MOE should take the lead to ensure that these actions are taken, including encouraging direct enforcement actions as necessary.
- **Provide Improved Training and Manpower to JIST and IPRP:** The growth in Internet piracy must be matched by trained and effective enforcement officers within JIST and IPRP. There



are also insufficient numbers of computers and related equipment, both in quality and quantity, for use in combating Internet piracy.

- **Improve Enforcement Against Illegal Photocopying On and Around University Campuses:** While some progress has been made, the Taiwan Government 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 continues to urge that the Ministry of Education adopt strong 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, including lease termination.
- **More Effectively Monitor Exports of Blank ODs to Regions like Latin America and of Counterfeit Cartridge-Based Videogames and Components to China and throughout Asia:** Customs and other enforcement authorities in Taiwan must work more closely with, particularly, the international recording industry, to take action in Taiwan to prevent smuggled and misdeclared shipments of blank media exported from Taiwan factories to affiliated pirate operations in Paraguay and throughout Latin America. 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 stem all such exports.
- **Extend Coverage of the New IP Court Legislation to Criminal Copyright Cases in Taiwan's Courts of First Instance:** This legislation should be revised to permit prosecutions of criminal copyright cases in courts of first instance (trial courts).
- **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. We are hopeful that Taiwan will abolish this requirement in the near future.
- **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/2007SPEC301HISTORICALSUMMARY.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: 2002-2006<sup>1</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures <sup>2</sup>	NA	NA	98.0	51%	40.0	40%	42.0	44%	42.0	44%
Records & Music	16.2	28%	21.5	26%	49.4	36%	58.0	42%	98.6	47%
Business Software <sup>3</sup>	90.0	41%	56.0	43%	88.0	43%	83.0	43%	91.2	43%
Entertainment Software <sup>4</sup>	NA	NA	161.9	42%	123.0	63%	261.8	42%	596.1	56%
Books	18.0	NA	18.0	NA	20.0	NA	20.0	NA	20.0	NA
<b>TOTALS</b>	<b>124.2</b>		<b>355.4</b>		<b>320.4</b>		<b>464.8</b>		<b>847.9</b>	

## PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

**Internet Piracy:** With over 60% of Taiwan's population using the Internet (13.8 million users), and with broadband connections growing from 4.2 million users to 4.6 million (10.3% growth) between the 3Q 2005 and 3Q 2006,<sup>5</sup> it is not surprising that Internet piracy has become the predominant form of piracy for most industries in Taiwan.

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) found on Taiwanese ISPs was 49,539. This number had risen to 89,993 by the end of 2005 representing an increase of nearly 82%. In 2006, the number of infringements were close to 80,000, with Taiwan again topping the list for the most infringements in Asia Pacific.

For the music industry,<sup>6</sup> the conviction of Kuro and the settlement with Ezpeer has had a salutary effect, but new major illegal sites such as MXIE ([www.mxie.com](http://www.mxie.com)) and Foxy ([www.gofoxy.net](http://www.gofoxy.net)) are now in operation. Foxy has over 350,000 users and action against it is being

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Taiwan under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Taiwan, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> 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%.

<sup>5</sup> Point Topic Ltd., *World Broadband Statistics Q3 2006*, December 2006 on file at IIPA.

<sup>6</sup> 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.

prepared. The recording industry took action in 165 cases involving 439,686 infringing files and a total of 3.95 million users in 2006. Many of these, like AVPeer and Music King were very large websites. As a result of this continuing effort, the industry reports that at least 150 illegal Taiwan sites have relocated to the Mainland and continue to serve Taiwan. Despite the difficult state of Internet piracy, however, the legal Internet music market has started to boom with the new clarity on liability. There are four major legitimate online services, KKBox, Yahoo music, the “new” Ezpeer, and the soon to commence new and legitimate Kuro, resulting from these aforementioned cases. While this gives reason for some optimism, piracy, both of physical product and on the Internet, has continued to result in a decrease in overall music sales in Taiwan (in 2006 36% by unit and 34% by value compared to 2005).

Academic journal publishers report some 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, not only of published material, but of other copyrighted products as well. The Ministry of Education (MOE) oversees TANet and MOE and TIPO have communicated that they wish to put into place a policy for complaining about infringements to TANet and disciplining students for violations. This is far too weak a response and controls on downloading, improved firewalls and real enforcement must be instituted. TANet must fully acknowledge its responsibility for how its network is used and adopt policies and enforcement mechanisms in conjunction with enforcement agencies that bring real discipline to the network.<sup>7</sup>

Other forms of Internet piracy also are growing. Entertainment software publishers face the problem of piracy at Internet cafés, especially involving unlicensed use of entertainment software. There are approximately 1,500 Internet cafés in the country, most of which remain unlicensed by entertainment software publishers.

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. The recording industry has been cooperating with Yahoo and eBay and in 2006, there were 354 cease and desist letters sent by IFPI-Taiwan to ISPs resulting in the shutdown of 315 websites/FTP/auction etc. sites. Unfortunately, many of these websites are registered in foreign countries which makes tracing these sites and enforcement against them 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 normal inter-government relations. MPA reports excellent cooperation with enforcement authorities in dealing with auction sites.

**Kuro and Ezpeer Decisions:** In IIPA’s 2006 submission, we reported in detail on these milestone decisions. The upshot as noted above is that Kuro will open a legal service in early 2007 and Ezpeer’s legal service is already up and running after settling with the recording industry. This

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<sup>7</sup> For example, even after Kuro was convicted, TANet continued to facilitate unauthorized music file-sharing and swapping. The MOE has left 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, 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.

trend will be bolstered by passage of the strong P2P legislation now pending, effective and workable ISP legislation and notice and takedown mechanisms. MPA reports great cooperation with the authorities on Internet piracy. Unfortunately, the original Ezpeer pirate service remains running and MPA reports continuing infringement of its movies. As a result, the service was raided again in November and December 2006.

**Provide Needed Training, Equipment, and Manpower to JIST and IPRP:** In 2005 the severity of the Internet piracy problem was acknowledged and TIPO/MOEA instituted the Implementation Plan for Strengthening Internet Infringement Preventive Measures (effective from May 1, 2005 to December 31, 2006) under which JIST is exclusively responsible for tackling Internet piracy. JIST comprises selected personnel with expert knowledge in computers, IT, and technology from the IPRP (who are chiefly tasked with executing the Plan) and the Joint Optical Disk Enforcement Taskforce (JODE). Raiding, as reported in the enforcement tables, has been effective but more training and manpower is needed to cope with the magnitude of the problem. In particular, the IPRP needs better broadband connections and improved equipment to deal with infringing sites in the PRC.

**Optical Disc Production in Taiwan Has Shifted 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. However, OD factory production still remains a problem, particularly the export of blank media knowingly destined for piracy operations outside Taiwan. Regarding OD production facilities, JODE reported running 1,027 inspections in 2006, down from the 1,193 run in 2005.<sup>8</sup> JODE reported issuing no fines but that 10 OD plants were closed. This likely contributed to the reduction in optical disc factories in 2006 from 89 in 2005 to 83 in 2006, owned by 51 companies. These plants have an estimated 2,795 production lines (including for production of blank CD-Rs) and the estimated capacity of all the optical discs plants in Taiwan amounted to approximately 9.8 billion units annually. While pirate factory production has been significantly reduced, it is crucial that Taiwan continue to monitor the plants vigilantly to avoid backsliding. It is particularly worrisome that no fines or prosecutions against plants were instituted in 2006. Also, 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).<sup>9</sup>

OD “burning” remains the biggest problem and challenge to the authorities. IPRP reports seizing 2,067 OD burners in 2006, up 119% from 2005 and 810,508 infringing discs vs. 451,463 in 2005, up 79%.<sup>10</sup> Effective enforcement has reduced the number of infringements in night market stalls to under 50. These are still manned by minors and criminal syndicates continue to be behind this business. Because of more effective enforcement and deterrence (including seizure of product from the stalls even when no one is present), distribution has increasingly moved to home delivery as the predominant form of retail piracy.

**Book Piracy:** The most damaging activity to U.S. publishers in Taiwan in 2006 remained the illegal photocopying of academic textbooks and journals, English language teaching (ELT)

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<sup>8</sup> <http://www.tipo.gov.tw/eng/prosecution/jode.asp>

<sup>9</sup> 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. IFPI Taiwan reports that 4 cases against pirate plants remain pending; raids occurred in 2000, 2002 and 2003.

<sup>10</sup> JODE reported that no infringing discs were seized in their inspections, and, while it is not possible to ascertain from the statistics given whether all the discs seized were “burned” discs, we believe that virtually all were. The recording industry reports that “almost 100% of discs seized are burned.”

materials and professional reference books, primarily on university campuses.<sup>11</sup> While the authorities have been helpful in running raids against these commercial photocopy shops (at least off campus) at copyright owners' requests, self-initiated action by the Taiwan Government remains rare and is particularly needed when piracy occurs at copy shops ON campus.<sup>12</sup> 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 more sophisticated investigative techniques to stem this form of piracy.<sup>13</sup> 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.<sup>14</sup>

The industry continues to suffer 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.<sup>15</sup> Search warrants have been occasionally denied arbitrarily, or refused on bogus arguments.<sup>16</sup> Undue hurdles relating to Powers of Attorney and proof of copyright ownership continue to plague the attempts at convictions, especially in Tainan.

As with Internet piracy, because most hard goods book and journal piracy is occurring on or near university and school campuses, the MOE must 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 (such as terminating leases) for those facilities caught engaging in illegal activity. Promised tough policies are still not in place, though TIPO has indicated its willingness to work with right holders to develop these policies.<sup>17</sup>

**End-User Piracy of Business Software:** The use of unlicensed or pirate software in the workplace has always caused the greatest revenue losses for the business software industry. BSA has a good working relationship with the enforcement authorities and is able to get the cooperation

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<sup>11</sup> 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.

<sup>12</sup> Publishers continue to report reluctance by authorities to take traditional enforcement measures on campuses, further highlighting the need for separate on-campus measures to complement appropriate raiding action.

<sup>13</sup> 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.

<sup>14</sup> Publishing industry representatives reported that the lack of incentives for local police and prosecutors to fight this sort of piracy aggressively is hindering efforts more and more. One example: A publishing representative called to the police station to give an affidavit was surrounded—at the police station—by defendants there to pressure the representative to drop the complaint, while local police stood by and watched.

<sup>15</sup> 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.

<sup>16</sup> 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 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.

<sup>17</sup> Indeed, dialogue between right holder groups and TIPO has been quite good on this initiative in recent months and the industry is hopeful that, with TIPO's gestures of willingness to assist, the project can move forward in the near future.

of the police and prosecutor's office for enforcement action fairly promptly. Nevertheless, many of the procedural problems noted in IIPA's 2006 submission persisted this year, i.e., unclear guidance on the information needed to secure a search warrant for police raids and unduly focusing on the use of informer testimony for all end-user enforcement. BSA urges TIPO to cooperate with it in helping to train prosecutors and judges in the particular intricacies and unique aspect of end-user piracy enforcement.

**Piracy of Cartridge-Based Videogames:** Key components of infringing Nintendo products continue to be manufactured in Taiwan and exported to China for assembly.<sup>18</sup> 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. 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. Though concerns remain about the ability of Customs to effectively police and halt the export of infringing Nintendo videogame components and products, 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 decreased in 2006, with only 8 customs seizure actions occurring.

**Specialized IPR Court to be Established in 2007:** In a development that has been commended by IIPA, 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), but, for criminal copyright cases, only at the appellate level. However, IIPA and IIPA members have urged that the IPR court mechanism be extended to first instance criminal cases. We understand that the Judicial Yuan believes that copyright and trademark cases are relatively simple, thus not warranting a specialized court, at least at the first instance level. IIPA disagrees with this, especially given the fact that an increasing number of copyright cases involve fairly complicated legal issues associated with online technologies. We urge the Judicial Yuan to look to remedying this deficiency and to clarify arguments now being made that, somehow, first instance criminal IPR trial courts would be "unconstitutional." The IPR court is scheduled to commence in March 2007.

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<sup>18</sup> 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 copyrighted 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.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006 TAIWAN				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF RAIDS CONDUCTED	681	6	393	1080
NUMBER OF DVD-Rs SEIZED	588,608		73	588,681
NUMBER OF DVDS SEIZED	137,386			137,386
NUMBER OF CDs AND CD-Rs SEIZED	288,365 (CD-R)		85,295	373,660
NUMBER OF INVESTIGATIONS	1,708			1,708
NUMBER OF VCD LAB/FACTORY RAIDS	0			0
NUMBER OF CASES COMMENCED	502		378	880
NUMBER OF INDICTMENTS		9 <sup>19</sup>		9
NUMBER OF CONVICTIONS (INCLUDING GUILTY PLEAS)	462	3	146	611
ACQUITTALS AND DISMISSALS	NA		2	2
NUMBER OF CASES PENDING	588		195	783
NUMBER OF FACTORY CASES PENDING	5		5	10
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		3	117	120
SUSPENDED PRISON TERMS			19	19
MAXIMUM 6 MONTHS	0	2	8	10
OVER 6 MONTHS	0		8	8
OVER 1 YEAR	54		0	54
TOTAL SUSPENDED PRISON TERMS		2	35	37
PRISON TERMS SERVED (NOT SUSPENDED)			15	15
MAXIMUM 6 MONTHS	26		4	30
OVER 6 MONTHS	52		7	59
OVER 1 YEAR	9	1	4	14
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		1	15	16
NUMBER OF CASES RESULTING IN CRIMINAL FINES		1	17	18
UP TO \$1,000	2		0	2
\$1,000 TO \$5,000	4		10	14
OVER \$5,000	1	1	7	9
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	NA	\$10,486	\$86970	\$97,456.00

CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006: TAIWAN			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
NUMBER OF CIVIL RAIDS CONDUCTED	0	6 <sup>20</sup>	6
POST-SEARCH ACTION			
CASES PENDING	0	6	6
CASES DROPPED	NA	0	0
CASES SETTLED OR ADJUDICATED	NA	0	0
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)	NA	\$1,631,383	\$1,631,383
SETTLEMENT/JUDGMENT AMOUNT (\$USD)		NA	

<sup>19</sup> The number of indictments includes cases from 2004 and 2005.

<sup>20</sup> These cases originate when a criminal complaint is filed and run parallel with the criminal complaints, hence the number of criminal and civil complaints are the same.

## **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>.

**P2P Legislation:** This remains the industries' highest priority and is critical to establishing the legal infrastructure to fight growing Internet piracy through P2P file sharing services. A Bill dealing with this issue was introduced into the LY by Mr. Hsieh Kuo-Liang in April 2006 (it passed its first reading on April 24) and is being strongly supported by IIPA and the local and international copyright industries. The bill would amend Articles 87 and 93 and add Article 97-1 and would make illegal, and subject to civil and criminal liability, the provision of file sharing services with the intent to facilitate infringement. The bill would also give TIPO the authority to close an infringing service once convicted. This latter would prevent what occurred with Kuro when they continued to operate illegally after the service was convicted and while on appeal. The one aspect of the amendment to Article 87 that industry has objected to is requiring that the provider of these services must "thereby gain profits." Industry has sought deletion of this condition. The Bill was delayed by its opponents but it is hoped that it can be moved to a second reading at the earliest date possible.

**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 infringing activity is occurring over their services,<sup>21</sup> but may not be aware of the specifics of each act of Internet piracy. A voluntary Code of Conduct had been in negotiation since 2004 between the copyright community and the Taiwan ISP association, TWIA, but those negotiations broke down. Legislator Hsieh then introduced legislation, again in April 2006, and which is supported, we understand, by TIPO, that would subject ISPs to liability as co-infringers if they "gain economic benefits" and are "capable of monitoring or controlling said infringing act by others" (Article 88). It would exempt from liability ISPs who promptly took down or blocked access to the infringing material under circumstances modeled on the DMCA. While the Bill would benefit from certain technical changes and we would need to see the text of the rules authorized by the Bill that would establish the exact procedures for notice and takedown,<sup>22</sup> it contains the basic elements of a much needed system in Taiwan.

**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 Article 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

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<sup>21</sup> 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.

<sup>22</sup> It is not yet agreed, for example, whether notices can be made by email – a crucial element of any workable system



would leave optical disc-related offenses (Articles. 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.

**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 15 months, during which ARCO could neither collect remuneration nor bring litigation to collect fees for the use of sound recordings throughout Taiwan.<sup>23</sup> We understand that a draft amendment to the Copyright Intermediary Act will soon be put forward intended to address this problem. We strongly urge that such legislation be introduced and enacted promptly. In the interim, TIPO should stop conducting tariff reviews.

**Earlier Proposed Legislation/Regulation/Guidelines on Fair Use, Rental and Parallel Imports:** Attempts were made by TIPO to draft guidelines on fair use. Publishers remain concerned that these guidelines may exceed the narrow limits and appropriate context for application of fair use. The attempt to draft such guidelines has been abandoned at this point but could always be resurrected and is worth close monitoring.

Legislation was contemplated in 2006, led by the Taiwan video rental store community, to propose legislation that would decriminalize parallel imports under certain circumstances and the act of unauthorized rental, also under certain circumstances. IIPA opposed these changes and it appears that these will no longer be considered by the LY. However, monitoring is needed given the penchant for the rental community to fashion loopholes in existing legislation in both these areas.

**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.

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<sup>23</sup> 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\$7.58) per guest room. CEMC cut the rate to NT\$40 (US\$1.21) per guest room without reason. One other example is that ARCO proposed an annual tariff rate for convenience stores of NT\$1,250 per store, but CEMC cut it to NT\$560 per store without providing any reason. Three major collecting societies (ARCO, AMCO and MUST) have reviewed CEMC’s approved rate for 2005 as being too low.



## **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\$18.20) 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.

## **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:

- Participation in two anti-piracy investigation-training seminars held by TIPO for the IPR Police (each training involved around 60-80 police officers) on March 31 and April 14, 2006);
- Participation in two seminars held by local police on February 22-23, 2006;
- Participation in a seminar held by the Tainan Prosecutor’s Office for 20 prosecutors in September 2006;
- BSA gave two seminars on software piracy enforcement to the IPRP in March and April 2006;
- MPA participated in a total of 20 training programs between January and October 2006.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### TAJIKISTAN

**Special 301 Recommendation:** IIPA recommends that Tajikistan remain on the Watch List in 2007 for failing to enact the necessary IPR legal reforms it obligated itself to adopt well over ten years ago.

In 2006, the U.S. Trade Representative, in retaining Tajikistan on the Watch List noted that Tajikistan “has not yet fulfilled its IPR obligations under the [1993] U.S.-Tajikistan Bilateral Agreement” and that it needed “to bring its IPR regime into conformity with the TRIPS Agreement as part of its ongoing efforts to join the WTO.” In fact, the Tajik IPR legal regime falls far short of Tajikistan’s obligations under the 1993 bilateral 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, well 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; this is a cumbersome and ineffective tool that should be repealed.

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 well over ten-year 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. In 2005, the last year during which piracy levels were calculated, it was estimated the music piracy was well above 80%.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### TURKMENISTAN

**Special 301 Recommendation:** IIPA recommends that Turkmenistan remain on the Watch List in 2007 for failing to enact the necessary IPR legal reforms it obligated itself to adopt well over ten years ago.

#### **EXECUTIVE SUMMARY**

In 2006, the U.S. Trade Representative, in retaining Turkmenistan on the Watch List, noted “Turkmenistan’s lack of progress on IPR issues” and its “lack of fulfillment of its IPR obligations under the [1993] United States--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). Now well 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 Trade Agreement. Turkmenistan is neither a member of the Berne Convention, the Geneva Phonograms Convention, nor the WIPO “digital” treaties. Thus, Turkmenistan is not providing any protection for foreign works or sound recordings, denying even the most basic rights or remedies, much less any actual enforcement of those rights, as required by 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) Adoption of 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 2006.

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, last estimated in 2005, was at about 85%, with trade losses reported that year at about \$7 million.

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

## 2007 SPECIAL 301 REPORT

### UZBEKISTAN

#### Special 301 Recommendation and Summary

IIPA recommends that Uzbekistan remain on the Watch List in 2007 for failing to adopt the necessary IPR legal reforms it obligated itself to adopt well 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 April 2006, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List noted “the lack of significant progress on IPR issues” and the failure of Uzbekistan to “move forward with several IPR-related amendments that had been contemplated.” These legal and enforcement reforms, as the U.S. Government noted, are necessary to comply with 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 preexisting foreign works (pre-2005). The USTR noted that “IPR enforcement in Uzbekistan remains weak.”

#### Legal Reform Deficiencies

In November 1993, Uzbekistan and the United States signed a bilateral Trade Agreement (in force, January 13, 1994) which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. 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 well 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 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 2004 drafts were missing key provisions, including the necessary protection for pre-existing works and sound recordings. In any case, the 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 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 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. If a similar draft is proposed, the first

provision must be deleted; and the second provision (regarding the minimum wage) must be raised considerably to at least 500 times the minimum wage, as has been done in other countries.

Another 2004 draft to amend the Customs Code would have established a complicated registration system for IPR enforcement at the border. IIPA strongly recommends that Uzbekistan not adopt a border registration plan because it will prove counterproductive to effective enforcement at the border.

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. Industry 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 2005, Uzbekistan benefited from \$11.4 million worth of GSP benefits, although in 2006, that number decreased to \$1.7 million (in the first 11 months). Thus, 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. Uzbekistan is not in compliance with its bilateral and multilateral obligations, and is woefully inadequate in its IPR regime 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 95%. Trade losses for 2005, the last year they were estimated, exceeded \$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.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### VIETNAM

**Special 301 Recommendation:** Vietnam should remain on the Watch List.

#### **EXECUTIVE SUMMARY**

Vietnam became the 150th member of the World Trade Organization on January 11, 2007. With its new membership come important responsibilities in the area of protection of copyright, since Vietnam still may hold the dubious distinction of having the highest piracy rates in the world for many sectors. Exacerbating the piracy situation, market access barriers as to foreign content remain some of the most restrictive in the world. Necessary laws for change are being put into place, with a Circular expected soon that will confirm criminalization for all copyright piracy on a commercial scale. Nonetheless, an organized campaign, including stiff deterrent criminal remedies against large-scale producers and distributors of pirate product in Vietnam, has not been forthcoming. Finally, the Vietnamese government must take steps to gradually open the market which will pave the way for Vietnamese as well as foreign copyright industries to flourish in Vietnam into the future.

#### **PRIORITY ACTIONS FOR 2007**

- **Commence Piracy Crackdown:** Now that Vietnam has joined the WTO, it should make good on its promise to provide a “deterrent” against infringement by commencing a crackdown against organized piracy activities in the country, including targeting sources of pirate production, like the optical disc plants in operation in Vietnam, pirate distribution warehouses, and pirate retail shops selling CDs, DVDs, books or engaging in hard-disk loading of computers. Remedies should include not only tough administrative fines, license revocations, and shop closures, but criminal penalties through targeted prosecutions. In addition, steps should be taken to ensure that TV signals in Vietnam are being shown and received legally, and if not, government action against illegal distributors of Pay TV should commence.
- **Confirm Criminal Remedies for Copyright Piracy (TRIPS Requirement) and Lower Thresholds:** A new Circular that the Vietnamese government has promised to issue should confirm that infringements of copyright on a commercial scale and other violations of the IP law shall be subject to criminal remedies in Vietnam. Assuming this delinks copyright infringement from the very high criminal thresholds in the current Circular, this would be an extremely positive step.
- **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 must be lifted to let

foreign right holders participate in the Vietnamese market in order to provide a legitimate alternative to pirate product.

- **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 mandatory use of source identification (SID) Code (including on blank discs), imposition of inspections by the Government on optical disc production facilities, revocations and suspensions for violating plants, and the like.

For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<b>VIETNAM</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>2</sup>	40.0	88%	21.0	90%	30.0	92%	24.0	92%	29.1	95%
Books	18.0	NA	16.0	NA	16.0	NA	12.0	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	10.0	NA	7.0	100%	7.0	100%
Records & Music	NA	95%	NA	95%	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	58.0		37.0		56.0		43.0		36.1	

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Piracy levels in Vietnam rank among the highest in the world; the music/sound recording industries and the business software industry report piracy rates near or well over 90%.

**Optical Disc Plants in Vietnam:** The Vietnamese Government has indicated in 2005 that there are between five and seven optical disc plants in the country. The plants included at least 12 production lines, capable of producing at least 42 million discs per year. This production capacity is far greater than any rational legitimate domestic demand. In addition to nearly 100% piracy rates domestically, Vietnamese-sourced pirate products have been found in several

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Vietnam under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Vietnam, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

Asian countries (including China, where a recent smuggling ring was uncovered in Guangxi Province, which borders Vietnam),<sup>3</sup> Canada, the Czech Republic, and Poland.

**Book Piracy:** 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.

**Signal Piracy:** Piracy of cable and satellite broadcasting signals remains a significant problem and is growing due to the increasing demand for international content.<sup>4</sup> Most content owners have licensed distributors to onward sell to both hotels and cable systems, but they are being undercut by pirate operators picking up and redistributing (without payment) feeds from outside Vietnam (e.g., Thai UBC). The signal piracy problem in Vietnam is made more egregious by the fact that a state owned company, Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telecommunications, continues openly pirating content in serving hundreds of thousands of end users throughout the country. After much pressure on the Ministry of Trade, VTC began discussing licensing content with legitimate copyright owners in 2006, but such discussions never progressed because VTC was not ready to negotiate on fair commercial terms. Instead of dropping the content, however, they continue to pirate it without payment. It is unacceptable that such state-sponsored piracy has been allowed to continue, and the U.S. government should take steps to press the Vietnamese to cease doing so. In Vietnam's WTO accession protocol, it committed to adopt laws requiring that only fully licensed content be broadcast. This commitment has not yet been implemented.

**Business Software End-User Piracy:** Business software piracy remains rampant in Vietnam. The most damaging form of piracy for this sector is corporate end-user piracy. In 2006, the Vietnam authorities, working with the software industry, began running raids against this damaging form of piracy, with some success. Currently in Vietnam, however, no software IPR case has been brought to court. The usual resolution of copyright violation cases has been in the form of administrative penalties which are imposed under a decision issued by the Ministry of Culture and Information (MOCI) Inspectorate.<sup>5</sup> In terms of enforcement against software

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<sup>3</sup> *Bootleg DVD Movie Kingpin Jailed for Life*, The Standard Online, November 25, 2006, at [http://www.thestandard.com.hk/news\\_detail.asp?we\\_cat=3&art\\_id=32633&sid=11044738&con\\_type=1&d\\_str=20061125](http://www.thestandard.com.hk/news_detail.asp?we_cat=3&art_id=32633&sid=11044738&con_type=1&d_str=20061125) (a court in southern Guangxi convicted Lin Yuehua and 11 gang members of buying five production units to make DVDs and VCDs, setting them up in "a foreign country" - Guangxi borders Vietnam - and smuggling more than 30 million bootleg discs into China from 2002 to 2005; Lin's pirate smuggling business was the "largest one which has been so far uncovered in China," according to Xinhua, being worth about 188 million yuan). The case was reported in the Vietnamese press at <http://www.toquoc.gov.vn/vietnam/showPrint.asp?newsId=9385>. See also *China Locks Away Pirate Movie Moghul*, Reuters News, November 23, 2006 (reporting that Lin was sentenced to life in prison and the accomplices received jail sentences of two to 15 years).

<sup>4</sup> The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates the cost of piracy in Vietnam to the legitimate industry in 2006 at US\$37 million; the true cost is likely to be substantially higher.

<sup>5</sup> Although the relevant laws and regulations provide that an administrative action can be brought to the court, in practice this has never happened.

piracy, most of the actions have been initiated and supported by the software companies and not by the authorities acting on their own. Vietnamese authorities conducted the first two administrative raids in Vietnam against end-user software piracy in 2006. On October 5, 2006, the MOCI and the Economic Police<sup>6</sup> successfully raided a joint venture company in Hanoi. Forty-two computers were examined during the raid. The total value of pirated software used by the infringing company was estimated at about VND1 billion (approximately US\$62,500). In early December 2006, officers from the same enforcement bodies raided a ceramics company in Ho Chi Minh City and confiscated 30 computers containing unauthorized software applications. The estimated total value of the illegal software found amounted to 1.5 billion VND (approximately US\$93,800).

## **TRAINING AND PUBLIC AWARENESS**

The copyright industries remained available in 2006, as they will in 2007, to conduct training of enforcement officials in Vietnam. The Business Software Alliance (BSA) conducted two seminars on software asset management in March 2006, one each in Hanoi and Ho Chi Minh City. The attendees, totaling 460 people, were IT experts and specialists from various domestic and international businesses and organizations. In September 2006, BSA provided training to 25 officers from the IT Crime Unit of the Department of Economic Police and the MOCI on identifying illegal software and the collection of evidence in end-user software piracy cases. The training was followed by the first ever end user raid in October 2006. The Motion Picture Association participated in the November 2006 ASEAN-PTO Workshop on IPR in broadcasting and effective practices in anti-piracy enforcement.

The U.S. government has also been active in training in Vietnam in 2006. For example, in November 2006, the Star program had a chance to bring Mr. Luu Hoang VAN, Director of VTC, Southern Branch, to Bangkok to attend the ASEAN-USPTO Workshop on IPR in broadcasting and effective practices in anti-piracy enforcement.<sup>7</sup>

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law Goes Into Force and Implementing Regulations to IP Code Issued:** On November 29, 2005, the Vietnamese National Assembly passed the "Intellectual Property Law,"<sup>8</sup> which by its terms went into effect on July 1, 2006. The law resulted in a number of advances in Vietnam's copyright system. For example, it provided protection for temporary reproductions (Article 4(10)), and provided, 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)).<sup>9</sup>

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<sup>6</sup> The Business Software Alliance has developed good relationships with the two most notable and important enforcement authorities in Vietnam in the field of copyright protection, the IT Crime Unit of the Department of Economic Police of Vietnam, and the Inspectorate under the MOCI. IIPA recognizes these groups for the work carried out to date, and calls upon a more general strategy to combat piracy in all its forms.

<sup>7</sup> As a follow-up to this training, it is hoped VTC may survey all the television stations in Vietnam as a starting point to legalize broadcasting, as a suspicion is that many stations simply do not know the rules.

<sup>8</sup> 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 Section of the 10th National Assembly dated 25 December, 2001.

<sup>9</sup> The term "technical methods" is undefined (the term used throughout is a technical measure "applied by a copyright owner to protect copyrights of his or her work"). The draft implementing regulations we have reviewed do not include a definition of "technical methods." Article 30 of the draft implementing regulations we have reviewed seems to say,

The new Law still contains some deficiencies when evaluated on the basis of full TRIPS compliance and on the basis of the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).<sup>10</sup> 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.<sup>11</sup> The Vietnamese government should work to correct as many deficiencies as possible in the coming months. The following lists in a non-exhaustive manner several key remaining concerns.

## 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 creates inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties. 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 could even 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 also runs 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 should be deleted.<sup>12</sup> Article 4 of the draft implementing regulations we have reviewed does not do anything to allay the concern raised.
- **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. Again, the draft implementing regulations do not address this issue, and by referring to the dual provisions of the Civil Code and the IP Code, only reinforce the potential legal uncertainties.
- **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

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importantly, that violations such as circumvention or trafficking in circumvention devices is a separate violation, but as to remedies is to be treated similarly to other infringements.

<sup>10</sup> 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.

<sup>11</sup> 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 that Vietnam will eventually accede.

<sup>12</sup> 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.

performer or producer is also required, and vice versa. Article 35 of the draft implementing regulations reinforces the supremacy of copyright over related rights.<sup>13</sup>

- **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”), 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.<sup>14</sup> The draft implementing regulations worsen the situation, in that, under draft Article 28(2) of the implementing regulations, it appears the IP Code would allow the copying of a computer program “for archives in libraries for the purposes of research.” If this is what is intended by the implementing regulation, it would create a TRIPS-incompatible exception which must be remedied.
- **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)).<sup>15</sup> 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

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<sup>13</sup> Draft Article 35 provides,

Protection of related rights without prejudice to copyright provided in paragraph 4 of Article 17 of the Intellectual Property Law means that organizations or individuals using works subject to copyright protection for performances, phonograms or broadcasting must guarantee personal rights and property rights as specified in Articles 19 and 20 of the Intellectual Property Law.

<sup>14</sup> 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).

<sup>15</sup> 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.

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.<sup>16</sup>

## 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 could impose 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.
- **Criminal Penalties: IP Code/Criminal Code TRIPS-Incompatible on Their Face, But Circular Should Hopefully Resolve Deficiency:** Article 212 dealing with criminal penalties did nothing to resolve doubts about whether Vietnam’s criminal remedy is TRIPS-compatible.<sup>17</sup> 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

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<sup>16</sup> BTA Article 4.4. provides,

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.

<sup>17</sup> 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.”

“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. The Criminal Code (Article 131) on its face is not helpful in resolving the ambiguities and potential weaknesses in the criminal statutes, regulations and interpretations. The good news is that a new Circular is set to be issued to clarify 1) that all infringements/violations listed in Articles 28 and 35 of the IP Code would be subject to criminal penalties under the Vietnamese Criminal Code (Article 131), and 2) that the threshold for criminal liability is whether such infringements/violations are carried out “on a commercial scale.” Resolution of these issues is crucial to Vietnam meeting its TRIPS and BTA commitments, and to establishing a healthy copyright enforcement system.

- **“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.” The draft implementing regulations do nothing to resolve this issue.
- **Secondary Liability and Limitations of Liability for Internet Service Providers:** Article 442(2) of the 3rd Draft IP Code provided that “[t]he person who does not directly conduct the act of infringement of intellectual property right but assigns, hires or orders other person to conduct that act shall be considered as the infringer of intellectual property rights.” Unfortunately, this was struck from subsequent revisions, including the final IP Code that passed. 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 given ISPs blanket immunity for copyright infringement occurring over their services was scrapped, in favor of the approach taken in the IT Bill.<sup>18</sup> 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,<sup>19</sup> and to adopt a robust “notice and takedown” mechanism.<sup>20</sup>

<sup>18</sup> Bill 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.”

<sup>19</sup> In 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.

<sup>20</sup> The IT Bill creates no notice and takedown mechanism whereby right holders can make “suppliers” aware of infringing



## Criminal Code of Vietnam

Prior to consideration of the new Circular, there were several problems with Article 131 of the Criminal Code noted by IIPA:

- It was unclear what the thresholds were (e.g., terms like “serious consequences,” “very serious consequences,” and “particularly serious consequences” are defined in only vague ways in court interpretations).
- It was unclear whether “appropriating” in Article 131 covers all commercial scale piracy (e.g., potentially all acts of infringement, end-user piracy of software, etc.).
- 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).<sup>21</sup>
- 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.
- A more serious problem was that the police in Vietnam had indicated great reluctance to investigate or enforce copyright infringement cases because Article 131 violations fall under the category of “human rights” violations rather than economic crimes. If the police remain uncommitted to act against criminal piracy once the Circular is in effect, this would be a serious problem that must be addressed for Vietnam to achieve TRIPS compatibility.

**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” in 2003, which contained many key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join 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. In addition, commercial CD-R/DVD-R “burning” (i.e., for the purpose of sale,

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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.

<sup>21</sup> The 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).

distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.

- 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). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

## **MARKET ACCESS**

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 explicit 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, which is a major restriction on the number of imported films allowed. 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 are now investing 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, but under the Cinema Law (Article 13(2)), foreign organizations and individuals and Vietnamese residing overseas may establish and manage “film distribution enterprises” and “film projection enterprises” in Vietnam, apparently with no ownership restrictions.<sup>22</sup>

**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 recordings (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.

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<sup>22</sup> This is in contrast to “film production” in which the Director or Director General must be Vietnamese.

## **306 MONITORING**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### PARAGUAY

**Special 301 Recommendation:** IIPA proposes that Paraguay remain under Section 306 monitoring. IIPA also requests that the U.S. Government engage in much more technical consultations to review progress made under the IPR Memorandum of Understanding with Paraguay.

## **EXECUTIVE SUMMARY**

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 criminal 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. Unfortunately, despite their best efforts, the Paraguayan Administration has failed to create the legal environment to effectively deter piracy.

While recognizing that the Paraguayan Government has undertaken several important steps in trying to address piracy, and that a great deal more attention is now given to this issue, it is nonetheless extremely important to simultaneously examine, from a relatively objective standpoint, Paraguay's performance under the IPR Agreement. Specifically, Paraguay has not achieved the following:

- Significantly reducing the levels of copyright piracy;
- Increasing penalties available and applied in criminal copyright cases through legislative changes;
- Strengthening deterrence by requiring imposition of mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods;
- Providing for the seizure of an infringer's assets upon conviction for commercializing pirate product; and
- Working with the judiciary to resolve cases on a timely basis.

## **PRIORITY ACTIONS IN 2007**

### **Enforcement**

- 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 in order to improve effective deterrence against criminal 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.
- Coordinate an independent survey of the levels of piracy in the country for the most impacted products.

### **Legislation**

- 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.

<b>PARAGUAY</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>1</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions <sup>2</sup>	128.0	99%	128.0	99%	127.8	99%	154.6	99%	204.4	99%
Business Software <sup>3</sup>	7.0	81%	6.0	83%	6.0	83%	5.0	83%	2.2	71%
Entertainment Software <sup>4</sup>	NA	98%	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
Motion Pictures <sup>5</sup>	NA	NA	2.0	86%	2.0	95%	2.0	80%	2.0	80%
<b>TOTALS</b>	<b>135.0</b>		<b>138.0</b>		<b>137.8</b>		<b>163.6</b>		<b>210.6</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Paraguay under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> 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.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Paraguay, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> ESA's estimated piracy rates for Paraguay in 2006 reflect on the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in country. 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.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

**Bilateral engagement and the IPR MOU:** 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 has established a Statistics Center to collect data on IPR cases.

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), which was made publicly available in April 2004<sup>6</sup> 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 specific element of this is to increase criminal sanctions for those convicted of copyright and trademark violations; this element clearly has not been satisfied.

The IPR MOU, which expired on December 31, 2005, was extended for two more years, through the end of 2007.<sup>7</sup> The MOU also requires regular review of Paraguay's progress, and IIPA urges that bilateral discussions targeting the effective implementation of the all of Paraguay's MOU obligations be conducted as soon as possible in 2007.

## **COPYRIGHT PIRACY IN PARAGUAY**

**Optical media piracy, border measures and transshipment:** Paraguay continued in 2006 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. Paraguay is one of the main sources of piratical copyrighted goods, blank media and recording devices to the Brazilian Market. For example, it is estimated that around 50,000 people, 15,000 cars and 10,000 motorbikes, cross the "Friendship Bridge" in Ciudad del Este each day.

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

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<sup>6</sup> The full text of Paraguay's 2003 IPR MOU is available on the U.S. Department of Commerce's website at <http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:1:185>.

<sup>7</sup> See U.S. Department of State, Paraguay: Background Note, October 2006, posted at <http://www.state.gov/r/pa/ei/bgn/1841.htm>. Paraguay also receives preferential trade benefits under the GSP program, which includes IPR obligations. During the first 11 months of 2006, \$22.8 million worth of Paraguayan goods entered the U.S. under the duty-free GSP program.

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. As if the excessive levels of imported blank media were not a severe problem in its own right, now four OD factories have been established in the country. These plants have 15 new lines and the capacity to produce 5 million blank CD-Rs and 2 million DVD-Rs monthly (or approximately 52.5 million units annually). It is also known that one of the principals in one of the factories has been convicted of piracy-related charges.

Through October 2006, it was reported that 230 million optical discs had been imported. Nearly 30% of those were DVD-Rs and the remaining 70% were CD-Rs. By the end of 2006, estimates suggest that Paraguay imported (not including what was smuggled) more than 300 million blank optical discs last year. In addition, the local CD-R and DVD-R plants may have produced another 100 million units. We are not aware of any official statistics coming from the plants but certainly have the potential to produce at least that amount.

**Organized crime:** 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. Some industries continued to report that organized crime elements are working more with smaller labs, making it harder to identify those operations.

**Domestic piracy remains widespread:** Copyright piracy remains pervasive in Paraguay, with little to no improvement in 2006.

The sound recording and music publishing industries report that their primary concerns are Paraguay’s position as a transshipment and organization hub for optical disc piracy, and the lack of opportunities for local talent due to piracy within the country. 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 and Argentina. RIAA reports that its estimated piracy losses in Paraguay include both domestic piracy in Paraguay, with most of the losses based almost exclusively on the sale of pirate product with a nexus to Paraguay but intended for consumption outside the country. Since the situation has not improved, the industry estimates that trade losses in 2006 due to music and record piracy remain at approximately the same levels as in prior years, which is approximately \$128 million annually, with a 99% piracy level in-country. The level of pirate product being offered in Asuncion and Ciudad del Este are overwhelming compared to the very few stores with legal product that exist in the country.

The entertainment software industry reports that Paraguay continues to be a hub and transshipment point for pirated entertainment software products, for all formats including games on optical disc and of cartridge-based video games. The counterfeit and pirated material (including component parts) continue to be imported largely from Asia, to then be exported to neighboring countries after being assembled in the country. Due to a lax enforcement environment, an ESA member company reports that there has been an increase in retail piracy. Despite Paraguay’s continued role as a transshipment point for pirated video game products, Paraguayan enforcement authorities did little in 2006 to combat piracy. In fact, according to Nintendo of America, Inc. (NOA), in



2006 there was a marked decline in enforcement activities against pirate operations trafficking in counterfeit and pirated Nintendo products. The company noted that unlike 2005 where there were 26 actions resulting in the seizure of 395,000 counterfeit Nintendo products, in 2006, only five actions took place netting less than 50,000 infringing products.<sup>8</sup>

The business software industry reports that Ciudad del Este continues to be a major source of piracy for business software, primarily for distribution to other Latin American markets such as Brazil and Argentina. Severe problems with end-user piracy in businesses inflict the most economic harm on the potential growth of a legitimate software base in Paraguay. BSA reports that Internet-based piracy does exist, but is presently not at a large scale, mostly due to the low access to the internet, which is on the rise. There are a lot of “cyber cafes” (places where you can rent the use of internet services) where almost all the computers has installed illegal games and software, and where copyrighted content can be uploaded and downloaded. The 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. BSA’s preliminary estimated trade losses in 2006 due to business software piracy in Paraguay rose to \$7.0 million, while the estimated piracy level dropped slightly to 81%.

MPA reports that Paraguay remains a significant threat to other Latin American markets because of the large-scale pirate transshipment operations in Ciudad del Este, which is the hub and principal supplier of blank optical discs (CD-Rs and DVD-Rs) and locally reproduced CD-Rs and DVD-Rs to neighboring countries. In addition, growing hard goods sales being made through Internet websites are also reaching local markets.

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.

## **COPYRIGHT ENFORCEMENT IN PARAGUAY**

The copyright industries continue to note again in 2006 that the enforcement efforts taken by Paraguayan authorities, while well intended, continue to be largely ineffective in deterring widespread piracy there. Organized crime elements remain intimately involved in the production and distribution of pirated products 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. Border enforcement remains weak, despite cooperative efforts between industry and border officials to halt suspect shipments and review false documents.

Paraguayan authorities have been cooperative and active during 2006, but they are fighting against deeply entrenched piracy problem. In January 2006, MPA signed an Agreement of Cooperation with the Ministry of Industry and Commerce to facilitate informational exchange and training for Paraguayan authorities. The recording industry signed a similar agreement several years ago.

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<sup>8</sup> A notable action occurred at the CDE Gallery Page market where a hidden bunker was found holding close to 30,000 counterfeit Nintendo products. Documentation found at the raid identified the products as originating from China. Additional information is available through Nintendo of America’s Special 301 Filing to USTR, dated February 7, 2007.

**Strengthen border enforcement:** It is well known that many piracy problems in Paraguay are centered in the border cities, and that problem continued in 2006. The Government needs to further its customs procedures to combat cross-border piracy and corruption of its agents. The border with Brazil is open 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.

Through October 2006, it was reported that 230 million optical discs had been imported. Nearly 30% of those were DVDs and the remaining 70% were CDs. Estimates suggest full-year 2006 imports would reach 300 million units.

Customs operations and industry coordination with the Ministry of Industry and Commerce (MIC) continued during 2006. In September 2003, the recording industry reached an agreement with customs and the MIC which provides that no blank CD-R shipment will be released until these groups verify that the submitted invoices and documents are valid and accurate. As a result of this new system and other investigations, over ten million blank CD-Rs and DVD-Rs with false or questionable invoices were seized during 2006. In addition, close to 10,000 burners for CD-Rs and DVD-Rs were also seized during the course of various operations throughout the year. Most of these raids have been coordinated by the Paraguayan anti-piracy unit.

In late 2006, as part of the holiday anti-piracy actions throughout the region, a significant case was initiated as a result of intelligence gleaned from the recording industry’s program in Paraguay and passed on to Brazilian authorities. Investigators identified a large shipment of blank optical media being moved by a local distributor in Ciudad del Este, Paraguay. Along the route the delivery personnel added boxes of suspected burners to the existing shipment. With the vehicle heading for Brazil over the “Friendship Bridge” the investigators notified Brazilian Customs of the situation. Based on that information, authorities seized, several miles inside the border city of Foz de Iguaçu, a huge shipment containing 475,000 blank CD-Rs/DVD-Rs, 20,000 prerecorded CD-Rs, 35,000 MP3 and CD-RS, 38,000 film DVD-Rs, 10 printers, 250 CD burners, 300 DVD burners and more than 100,000 inlay cards. The subsequent follow-up investigation in Paraguay identified two labs in Ciudad del Este that provided the pirated film and music product seized in the shipment. As part of that raid a total of 110 burners, and 13,332 music and film CD-Rs and DVD-Rs were seized. Five persons were arrested at the Paraguayan labs at the time of the raid; the blank optical media distributor is currently under investigation by Paraguayan authorities for tax evasion.

The recording industry reports that another major action took place on January 20, 2007, when Customs officials seized a cargo container containing 1.5 million blank CD-Rs at a Paraguayan port known as Chaco-I. The container was consigned to a suspect blank CD-R importer with a nexus to Brazilian pirate organizations. In this case, the suspect importer was using a false bill of lading to smuggle the media under a lower import tariff classification. The container originated from Taiwan and the seized optical media was identified by the brand name of “Dr. Hank.”

However, troubles with customs are reported by another industry. An ESA member company reports that despite the flood of counterfeit components entering the country, there were no shipments apprehended by Paraguayan customs in 2006. The inaction by Customs is frustrating, particularly given the country’s status as a top transshipment destination for pirated video game products moving into South America, thus, continuing to make pirated and counterfeit Nintendo video games widely available in the region.

**Criminal copyright enforcement:** 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. Since mid-2005, MPA's anti-piracy enforcement actions in Paraguay have been coordinated by APDIF.

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 2006, the recording industry conducted 156 raids, which resulted in the seizure of over 1.1 million units of infringing products (mostly music CDs) and the closure of 43 manufacturing facilities, most of them small to mid-sized CD-R replication facilities, and 49 storage facilities of different sizes. Another two major organized crime cases with international nexuses are currently under investigation. Shipments of contraband blank CD-Rs/DVD-Rs amounting to 9.5 million units, allegedly destined for the pirate market, were seized by Paraguayan authorities based on information provided by APDIF Paraguay.

Here are a few examples of some major actions taken in cooperation with Paraguayan authorities and the recording industry during 2006:

- On January 16, 2007, the UTE executed a major street operation in Ciudad del Este, Paraguay in the infamous Paseo San Blas. Several major points of sale were targeted which resulted in the seizure of 107,835 music and film DVD-Rs, 43,349 music CD-Rs, several hundred PlayStation2s and over half million jewel boxes. The "Paseo San Blas" is the renovated pedestrian open mall area located at the foot of the Friendship Bridge, which separates Ciudad del Este from Brazil's Foz de Iguacu. The Paseo San Blas has now approximately 235 points of sale with another 250 more points of sale scheduled for opening in 2007. The significance of this operation is not only the quantities of pirate product seized, but also that it was first time that Paraguayan authorities raided this location after its serving as a major known distribution point of pirate product for two years. Paraguay has an anti-piracy enforcement program through a specialized team focused on major laboratories and warehouses; however, it has failed to take appropriate action against retailers and street hawkers that on average account for more than a million pirate units of films and music product available for sale to mostly Brazilian tourists and smugglers.
- Officers from the UTE and the Economic Crime Department of the Policía Nacional conducted eight simultaneous raids on shops and warehouses distributing pirate music and film products in July 2006. Over 158,000 optical discs containing infringing material and 1.5 million inlay cards all containing details of infringing titles were seized. The discs consisted of over 43,000 DVD-Rs containing both films and music and more than 114,000 CD-Rs containing music titles.
- During August 2006, APDIF provided information to the local authorities who in turn seized 3,060 CD-R/DVD-R burners during an on-going investigation into optical media distributors in Ciudad del Este. UTE determined these targetted distributors had arranged for the burners to be mis-declared by a front company in order to pay a substantially lower import duty. Intelligence from multiple sources indicates this shipment of burners was obtained in Taiwan at a very low price and was being stored in a bonded customs warehouse until arrangements could be made for clearance. It is likely that this shipment was mainly bound for distributors in Sao Paulo, Brazil, catering to the pirate market for the 2006 holiday season. The shipment was subsequently seized and another official investigation was initiated against the suspect distributors.

BSA reports that the authorities remain cooperative with industry officials on both criminal and civil cases during 2006. UTE has also been working with BSA members on *ex officio* actions regarding investigations into suspected pirated and counterfeit product. During 2006, BSA conducted 5 channel actions made in Ciudad del Este; these actions involve the making of a formal complaint by the rightsholders, *ex officio* action taken by UTE and the cooperation of the specialised IP District Attorneys. These resulted in the confiscation of pirated software valued at US\$1.8 million. BSA appreciates the investigations and follow-up actions taken by the UTE. In addition, BSA has circulated a considerable number of cease and desist letters to companies in order to improve the use of legitimate software in the marketplace. For 2007, BSA is considering a series of actions in Asunción against the sale of pre installed software in the machines without any licence

**Few prosecutions and non-deterrent sentences:** There are nine 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).

One positive note was that the Government issued a new publication on IP procedures to judges and prosecutors. This book, *The Handbook for District Attorneys and Judges on Intellectual Property Rights Matters*, is an essential reference book for all IP matters. It is being used in conjunction with mandatory training programs for judges, district attorneys and customs officials.

The recording industry reports that in 2006, Paraguayan courts issued 32 criminal judgments against pirates of sound recordings, but none resulted in effective incarceration. Despite these convictions, the courts do not seem to be resolving cases in an expeditious manner. An example of the problem and major concern for the industry is the case of three Taiwanese nationals, only one of whom is incarcerated, that have been indicted for custom’s violations and tax evasion related to blank media imported (over 200 million units over a period of three years) for, what is believed, supplying pirate replication cells. The case (also known as Santa Ana) has been lingering in the judicial system for over two years and received fourteen postponements to date.

**False expert reports:** Severe problems remain with the Paraguayan judiciary, especially related to corruption. BSA reports that one of the most pressing problems it has encountered involves inadequate reports by expert witnesses. There is no punishment for the issuance of the expert witness’s false reports. This also happens in trademark cases, where individuals who purport to be experts continue to be appointed by the courts, but they are not qualified and often simply tailor their findings to suit the wants of the party willing to purchase such testimony. As a result, unfounded opinions by both experts and judges have been issued and seized merchandise returned to the pirates. The Supreme Court’s Superintendence Council, the agency responsible for issuing licenses for court experts, does not effectively monitor the performance of those they license.

**Civil *ex parte* searches and delays:** BSA reports that in 2006, it obtained a favorable sentence (resolution) at a civil court against a company which was ordered to pay damages of US\$13,500 plus court costs. BSA hopes that this case will assist users, courts and the public in understanding that it is against the law to use unlicensed business software. Another continuing problem 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.<sup>9</sup> 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.

**Needed criminal code reform for copyright infringement:** Back in 2003, members of the IIPA came together to support introduction of amendments to Paraguay's 1998 Law on Copyright and Neighboring Rights. That copyright reform package was aimed at increasing criminal penalties (among other issues) in Paraguay.<sup>10</sup> The bill was introduced, but legislative consideration stalled in 2005, and has fallen off the legislative agenda entirely. Meanwhile, reform of Paraguay's criminal code is ongoing. There are some troubling gaps regarding the scope of copyright protection in Article 184 of the Criminal Code (see discussion below). As a result, the IIPA members have been working years to try to fill those gaps and strengthen those provisions. Given the recent end of the proposed copyright bill, effective reform of the criminal code becomes more urgent.

In the spring of 2006, IIPA members working in Paraguay learned of two proposals to reform Article 184 of the Criminal Code which have been submitted to the Paraguayan Congress. The first proposal would reduce the level of criminal sanctions, and the copyright industries are unable to support it. The second proposal, by the Ministry of Industry and Commerce (MIC), appears to have been drafted quickly in a well-intentioned effort to respond to the inadequacy of the first proposal. Unfortunately, the MIC proposal also failed to address many of the deficiencies identified by the industries over the years.

To assist in improving the current criminal law, IIPA and its members, working with local colleagues, drafted and proposed a simple amendment to Article 184 that would strengthen sanctions for copyright infringement in Paraguay and address the longstanding inadequacies in the current law. The industries' proposal tracked efforts made by the industries in 2003 and which were included in the industries' 2004 copyright reform proposal. All these bills have been dismissed and consolidated in one project drafted by the commission to reform the criminal code. This project includes provisions for *ex officio* actions, protections for technological protection measures, higher penalties for organized crime cases and also increases the upper limit sanctions for piracy. Unfortunately, it does not include a minimum penalty for piracy that will allow judges to suspend or opt for fines.

**Criminal Code and Administrative Remedies:** Paraguay reformed its criminal code in October 1998. This reform, however, 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

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<sup>9</sup> See IIPA's 2005 301 report on Paraguay at <http://www.iipa.com/rbc/2005/2005SPEC301PARAGUAY.pdf>.

<sup>10</sup> The copyright industries had been working to support a copyright law amendment which would have: (1) increased 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; (2) specifically made these criminal provisions "public" offenses; (3) include knowingly supplying raw materials to pirate organizations as a punishable criminal offense; (4) provide penalties for violations of technical protection measures and rights management information; and (5) permit *ex officio* action for prosecution of intellectual property rights violations.

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 these best of IIPA’s members’ knowledge, to date no judicial decision has contested this interpretation of the law.

**Term of protection for sound recordings:** The recording industry has also presented a project to extend the term of protection for works and phonograms from 50 to 70 years. The bill is in the lower house, presented by Congressman Edmundo Rolon, and it is being evaluated by the copyright office. We would encourage the Paraguayan Government to support this bill that would provide authors, performers and producers with much needed protection.

## **IPR TRAINING AND PUBLIC AWARENESS**

The recording industry reports four training seminars in 2006, one done in cooperation with the U.S. Embassy, aimed at enforcement personnel. Two seminars covered border operations and the other two investigations and organized crime. Some of these seminars had up to 100 people in attendance. In 2006, the State Department’s Bureau of International Narcotics and Law Enforcement Affairs (INL) provided Paraguay with \$494,000 in assistance to support its efforts to combat narcotics trafficking, money laundering, and violations of intellectual property rights. Also, since 2003 the U.S. Government has had a Resident Justice Advisor in Paraguay to support efforts to combat money laundering and terrorist financing and other financial crimes as well as organized crime and corruption.

## **COUNTRIES DESERVING SPECIAL MENTION**

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### DISPUTE SETTLEMENT

The U.S. government's negotiation of regional and bilateral free trade agreements (FTAs) offers an important opportunity to persuade our trading partners to further modernize their copyright laws and enforcement regimes. The FTAs have set new global precedents in copyright protection and enforcement, providing further impetus to e-commerce and to global economic growth and employment. However, these beneficial impacts of the FTAs will not be realized unless the obligations they create are rigorously fulfilled in the national laws of our trading partners. The U.S. government should be generous with advice and technical assistance in helping our FTA partners to fully implement the terms of the FTAs; but the U.S. government also should not hesitate to invoke the dispute settlement procedures of the respective FTAs when FTA partners fail to live up to the obligations they have undertaken and which constitute the commercial benefits of the deals for U.S. copyright industries. In this section of the report we identify outstanding FTA implementation issues with several of our partners – Bahrain, Jordan, Morocco, and Singapore – which we believe could be the basis for dispute settlement proceedings unless they can be promptly and satisfactorily resolved on an informal basis.

## BAHRAIN

The United States-Bahrain Free Trade Agreement went into force on August 1, 2006. A review of the newly enacted Bahrain Copyright Law, Law No. 22 of 2006 related to Copyright and Neighboring Rights (issued on June 25, 2006, published on July 5 in Edition 2745 of the Official Gazette) has revealed various compliance issues with the FTA. In addition, a review of a draft optical disc law we have seen has also revealed some compliance issues (we are unaware of whether that law has been finally agreed upon, although the FTA obligations are in force). It is disappointing that the Bahrainis have enacted FTA-incompatible legislation constituting a significant denial of benefits to U.S. right holders, including a major violation in terms of the rights that must be afforded to producers of sound recordings.

### FTA Issues in Law No. 22

Based on our analysis, we conclude that the following provisions either leave Bahrain in violation of its current FTA obligations, or raise serious issues as to compliance.

- **Equitable Remuneration (Article 18(2)) for Producers of Phonograms Violates FTA Article 14.6.3:** Article 18(2) of Law No. 22 provides:

Without prejudice to the rights established under the provisions of this Law, producers of phonograms and broadcasting organizations shall have a right to receive a single equitable remuneration for the direct or indirect use of sound recordings and for broadcasts broadcast for commercial purposes or communicated to the public by any means, unless otherwise agreed to in writing.



This provision, which was not in the draft law forwarded to the Consultative Council and Chamber of Deputies, is an attempt to implement 14.6.3(b) and (c), but the terms “use,” “broadcasts broadcast” and “communicated to the public by any means” (to the extent these latter two terms relate to sound recordings) are overly broad, and deny the exclusivity required by the terms of the FTA to producers of sound recordings as to their rights. The provision must be deleted. If it is to be kept, it must be amended to abide by the limitations imposed in the FTA over which kinds of acts in respect of phonograms may be subject to remuneration, as follows:

Without prejudice to the **exclusive** rights established under the provisions of this Law, producers of phonograms ... shall have a right to receive a single equitable remuneration for **analog and other noninteractive transmissions and free over-the-air broadcasts** ~~the use of direct or indirect sound recordings and broadcasts broadcast or communicated to the public by any means,~~ unless otherwise agreed to in writing.

- **Express Provision on National Treatment Are Missing, in Addition to “First Publication” Language Concerning Related Rights:** FTA Articles 14.1.5 and 14.6.1 deal with national treatment generally and as to related rights, respectively. In addition, Article 14.6.1 further requires that Bahrain consider that “A performance or phonogram shall be considered first published in the territory of the other Party if it is published in that territory within 30 days of its original publication.” These provisions of the FTA are there to ensure that U.S. works and sound recordings (and performances) are not discriminated against in the Bahraini market (and vice versa). Express provisions in the Bahraini Law No. 22 are missing.
- **Bahrain Law Does Not Include Express *Ex Officio* Criminal Authority as Required by FTA Article 14.10.27(d):**<sup>1</sup> Nowhere in Chapter 13 (Sanctions) of Law No. 22 is there a provision for Bahraini officials to exercise *ex officio* criminal authority. Notably, Article 62(4) does provide *ex officio* authority in the area of customs enforcement, so it may be inferred that there is no *ex officio* authority in criminal enforcement, which would violate the requirement of FTA Article 14.10.27(d) that “authorities may initiate legal action *ex officio*, without the need for a formal complaint by a private party or right holder.”
- **Destruction of Devices and Products Involved in TPM and RMI Violations is Not Provided For in Violation of FTA Article 14.10.14(d):** FTA Article 14.10.14(d) requires that civil remedies against violations involving TPMs and RMI must include “destruction of devices and products found to be involved in the prohibited activity.” Law No. 22 Article 64(5) refers only to “materials and implements that have been used in the manufacture or creation of ... infringing goods” which suggests it is only applicable to copyright infringement, not violations of TPMs and RMI. This must be clarified, and amended if necessary to provide for this remedy required by the FTA.

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<sup>1</sup> We also note that *ex officio* authority as to customs authorities may be unclear. FTA Article 14.10.23 requires that “competent authorities may initiate border measures *ex officio*, with respect to imported, exported, or in transit merchandise, without the need for a formal complaint from a private party or right holder.” However, according to Article 62(4) of Law No. 22, Bahraini Customs can act on an *ex officio* basis only when sufficient proof is “apparently” available. It should be confirmed that the meaning of “apparently” comports with the FTA notion of “sufficient information” as per FTA Article 14.10.20.

- **Ex Parte Civil Search Provisions Fail to Comply with FTA Article 14.10.17:** Article 14.10.17 of the FTA provides, “Parties shall act upon requests for relief *inaudita altera parte* expeditiously and generally execute such requests within 10 days, except in exceptional cases.” Article 63(4) of Law No. 22 provides,

The President of the court shall where appropriate and requested act *inaudita altera parte* in any case where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. Provided that the other party shall be notified of the order without delay which may, where appropriate, be without delay after executing the order.

The Bahrain provision does not indicate that requests shall be acted upon “expeditiously” and does not indicate they shall generally be executed “within 10 days,” but instead restates the TRIPS language, and in addition, indicates “that the other party shall be notified of the order without delay which may, where appropriate, be without delay after executing the order.” The failure to provide for the express terms of the FTA and, in addition, the provision that a defendant will be notified “without delay” raise questions as to whether the Bahrainis comply with the terms of FTA Article 14.10.17.

- **“No Mandate” Clause on TPMs is Missing from Bahrain Legislation:** FTA Article 14.4.7(c) provides,

In implementing subparagraph (a), neither Party is obligated to 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, so long as such product does not otherwise violate [the prohibitions on circumvention of TPMs].

This language is missing from Law No. 22.

- **Absence of Provision to Award Costs, Attorneys’ Fees to Prevailing Party Violates FTA Article 14.10.8 and 14.10.14:** There is no provision in Law No. 22 that the prevailing party shall be awarded costs and attorneys’ fees as required by FTA Article 14.10.8 (as to copyright infringement) and 14.10.14 (as to TPMs and RMI violations). Article 64.6 provides, “The competent court shall assess the expenses and fees of the experts and specialists, authorized to initiate any mission in the lawsuit, according to the volume and nature of the mission assigned to them without any unreasonable prevention to take such measures,” which goes to experts and is also required by FTA Article 14.10.16. Other articles deal only with service providers, but do not satisfy the FTA requirement.<sup>2</sup>
- **Software Exception Appears Overly Broad to Meet the Three-Step Test:** FTA Article 14.4.10(1) provides that limitations and exceptions to copyright must be confined to “certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.”

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<sup>2</sup> Article 46 defines the term “monetary relief” to include “costs, attorneys’ fees, and any other form of monetary payment to be reimbursed,” but this is expressly limited to the section on service provider liability, and Article 50(3) provides, “The service provider shall not be responsible for costs or attorneys’ fees associated with any judicial proceeding for the issuance of an order in accordance with the provisions of this article. Those requesting an order shall bear all the expenses, fees, and charges.”

Leaving aside other possible exceptions that go beyond this requirement, one exception that appears to violate the three-step is the software-specific exception in Article 26(b) of Law No. 22. Specifically, it states,

The legitimate holder of a copy of a computer program may, without the author's permission and without compensation, make ... [a]n adapted, altered or modified copy of a program, or a copy translated to another program, if such copy is essential for the compatibility of the program with a particular machine and is made only for the personal use of the legitimate holder of the original copy.

We believe the Bahrainis have attempted here an approximation of a limitation which exists in U.S. law, namely, Section 117(a)(1), which provides that it is not an infringement of copyright for the owner of a computer program to copy or adapt a computer program if "such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner." The purpose of the Bahraini provision seems to be the same as 117(a)(1), namely, to ensure that someone who is the lawful owner of a computer program may use it on a particular machine, and to allow adaptation or copying when such adaptation or copying is an "essential step" to use the program on that machine. The Bahraini provision, however, goes well beyond what is required to use the program on a particular machine, exempting such activities as altering or modifying the program or even translating the program "to another program." Such activities take the Bahraini provision outside the scope of what the three-step test as enumerated in the FTA would allow. One possible way to resolve the issue would be to amend Article 26(b) as follows:

The legitimate holder of a copy of a computer program may, without the author's permission and without compensation, make ... A copy or an adapted, altered or modified copy of a program, ~~or a copy translated to another program,~~ if such copy is essential for the use compatibility of the program on with a particular machine and is ~~made only~~ for the personal use only in that manner by of the legitimate holder of the original copy.

- **ISP Liability: Provision That "Cached" Copy Must Not be Modified When "it is transmitted to subsequent users" May Be Inconsistent With FTA Article 14.10.29(b)(iv) Limitation on Liability for ISPs for "Caching":** The FTA includes the potential safe harbor for service providers for "caching carried out through an automatic process" when the service provider meets certain conditions. This safe harbor does not contemplate that the ISP would engage in the subsequent transmission of the interim copies to further users, although it does contemplate users accessing the cached content. Article 49(2) of Law No. 22 provides that in order to qualify for the safe harbor, a service, among other things, must "not make any modification to the content of the temporarily cached copy of the material as it is transmitted to subsequent users." Since this "condition" suggests that it would otherwise be acceptable for a service provider to transmit cached material to "subsequent users," it may be inconsistent with the FTA.
- **ISP Liability: Conditions for ISP Safe Harbors With Respect to Storage and Information Location Tools Must Be Notice "or" Knowledge to Satisfy FTA Article 14.10.29(b)(v):** To qualify for the safe harbor for "storage at the direction of a user of material residing on a system or network controlled or operated by or for the service provider" or "referring or linking users to an online location by using information location

tools, including hyperlinks and directories,” a service provider must, according to FTA Article 14.10.29(b)(v), “expeditiously remov[e] or disable[e] access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement.” However, the exact terms of Article 49(3)(b) and (c) of Law No. 22 could make it appear that a notice is required (i.e., it is not set out as “notice” or “knowledge” but as “notice” and “knowledge”). It must be confirmed that the law means that as long as the service provider knows or becomes aware of facts or circumstances from which infringement is apparent, it must expeditiously take down infringing material in order to qualify for the safe harbor.

- **FTA Article 14.10.20 and 14.10.21 Border Measures Requirements that Information Requirement or Security Requirement Shall “not unreasonably deter recourse to these procedures” is Missing from Bahrain Law (Article 62(1) and (3)):** Based on experience in this field, industry believes that the authorities might impose lengthy and costly procedures in the absence of the FTA language.
- **Maximum Criminal Fine of 4,000 Dinars (US\$10,612) May Not Meet FTA Article 14.10.27 Requirement of “removing the monetary incentive if the infringer”:** Article 14.10.27(a) provides that criminal remedies must be “sufficient to provide a deterrent to future acts of infringement consistent with a policy of removing the monetary incentive of the infringer.” It is difficult to see how 4,000 Dinars will be viewed as “deterrent” consistent with 14.10.27(a). The minimum fine is only 500 Dinars (US\$1,327). For large-scale commercial pirates, it is very difficult to imagine the monetary incentive for piracy could be reduced by such static and low fines.
- **Definition of “communication to the public” in Bahraini Law Does Not Match FTA Definition with Respect to Phonograms:** The definition of “communication to the public” in FTA Article 14.6.4(g) is supposed to include, as to phonograms, the “making [of] the sounds or representations of sounds fixed in a phonogram audible to the public,” but nowhere is this definitional distinction found in the Bahrain law.
- **Vague Provision of Bahraini Law on “authorized” Acts with Respect to TPMs, Decryption of Encrypted Satellite Signals, etc. Leaves FTA Compliance in Doubt:** Article 68 of Law No. 22 provides:

Without prejudice to the provisions of Article (45) of this Law, it is not an infringement of the rights of authors or owners of related rights to import, use, possess, sell, or distribute copies of works, performances, or phonograms when approved or authorized by the owner of the rights in such works, performances or phonograms.

Since this provision refers to Article 45, dealing with, among other things, unlawful circumvention of TPMs or unauthorized decryption of encrypted satellite signals, a concern is that this might be interpreted as an exception to these prohibitions. If this provision is intended to say that right holders may authorize decryption or the lawful use of a TPM to access or otherwise use works or phonograms, this appears to be a confirmation of right holders’ ability to freely contract. In that case, we question the need for the provision. On the other hand, if it is intended to signal that the activities mentioned in Article 45 are permissible in cases in which approval or authorization is not required of a right holder, this

provision would violate the FTA. We would urge you to seek clarification as to the meaning of this provision which we believe may have been inserted into the legislation in the eleventh hour before passage.

- **Implementation of Government Legalization Requirement Unknown:** FTA Article 14.4.9 provides, “[e]ach Party shall issue appropriate laws, orders, regulations, or administrative or executive decrees mandating that its agencies use computer software only as authorized by the right holder. Such measures shall actively regulate the acquisition and management of software for government use.” The Bahraini law contains nothing on this point, and we are unaware of whether the Bahrainis have satisfied this obligation.
- **Unclear Implementation of Requirement to Prohibit “retransmission of television signals ... on the Internet”:** FTA Article 14.4.10(b) provides, “[n]otwithstanding subparagraph (a) and Article 6.3(b), neither Party shall permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.” There is no specific provision in Bahrain’s law to deal with this requirement, and we are unaware of what theory they would apply to cover such activity (e.g., under the exclusive broadcast right).
- **Civil Remedies Against Those Who Decrypt Encrypted Satellite Signals Do Not Expressly Include Remedy Against “any person that holds an interest in the encrypted programming signal or the content of such signal” as Required by FTA Article 14.7(2)**
- **Statutory Damages May Be Too Low to “constitute a deterrent” as Required by FTA Article 14.10.7:** The Bahrain Law No. 22 provides for a maximum of 9,000 Dinars (US\$23,876) per infringement, which may be too low to “constitute a deterrent” and to “compensate fully the right holder.” Industry indicates that such low damages will almost surely result in their not employing statutory damages, which further suggests the provision cannot provide the necessary deterrent and could leave the provision as dead letter.

## FTA Issues in Draft Optical Disc Statute

IIPA has only recently reviewed a draft optical disc statute for Bahrain and is not aware of the status of this draft, but notes preliminarily the following deficiencies in comparison with the FTA Side Letter. The draft, if passed without these changes, would violate the U.S.-Bahrain FTA Optical Disc Side Letter.

- **Article 2 (“Requirement of a License”):** The Bahrain draft would set a horrible precedent by exempting from the license requirement anyone who would produce “for the purpose of, and to the extent required for, research by a research institution.” This is not permissible under Para. (a) of the FTA OD Side Letter. A research institution producing discs must apply for a license like everyone else. The text “except for the purpose of, and to the extent required for, research by a research institution” must be deleted.
- **Article 18 (“Inspection”):** The Bahraini draft is missing the language “Every licensee shall produce its records for and permit inspection by the competent authorities at any time.” This is very important to ensure 1) records are not destroyed or hidden in other locations and are actually produced; and 2) that licensees do not obstruct inspectors from engaging in

inspections. It is also the case that failure to provide records and obstruction must be made offenses under the FTA, pursuant to FTA OD Side Letter Para. (g) of the side letter.

- **Article 22(5) and (9) (“Offences”):** The Bahraini draft Article 22(5) requires proof that the production was “for commercial gain” while draft Article 22(9) does not require proof of “commercial gain” (the latter is consistent with FTA OD Side Letter Para. (i); the former would not be, unless the phrase “for commercial gain” modifies only “traffics”). In addition, in both 22(5) and 22(9), the phrase “knowing, or having reason to know,” must be removed in order to achieve FTA compliance, since FTA OD Side Letter Para. (i) requires strict liability for this kind of activity.
- **Article 23 (“Forfeiture and Revocation of License”):** Article 23 of the Bahraini draft has the words “article or thing” which we assume refers to “equipment.” Since Article 23(2) refers to “Any forfeiture of optical discs, articles or things under Paragraph (1),” it appears the deletion of “article or thing” from 23(1) was a mistake. In any event, “equipment” must be confirmed to be included in Article 23(1) in order to comply with FTA OD Side Letter Para. (g).

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### DISPUTE SETTLEMENT

The U.S. government's negotiation of regional and bilateral free trade agreements (FTAs) offers an important opportunity to persuade our trading partners to further modernize their copyright laws and enforcement regimes. The FTAs have set new global precedents in copyright protection and enforcement, providing further impetus to e-commerce and to global economic growth and employment. However, these beneficial impacts of the FTAs will not be realized unless the obligations they create are rigorously fulfilled in the national laws of our trading partners. The U.S. government should be generous with advice and technical assistance in helping our FTA partners to fully implement the terms of the FTAs; but the U.S. government also should not hesitate to invoke the dispute settlement procedures of the respective FTAs when FTA partners fail to live up to the obligations they have undertaken and which constitute the commercial benefits of the deals for U.S. copyright industries. In this section of the report we identify outstanding FTA implementation issues with several of our partners – Bahrain, Jordan, Morocco, and Singapore – which we believe could be the basis for dispute settlement proceedings unless they can be promptly and satisfactorily resolved on an informal basis.

## JORDAN

The United States-Jordan Free Trade Agreement went into force on December 17, 2001,<sup>1</sup> triggering due dates for the government of Jordan to meet various requirements to protect intellectual property (as contained in Article 4 of the FTA). Jordan joined the WTO effective April 11, 2000 and the Berne Convention effective on July 28, 1999, making it subject to those international obligations as well. The triggering dates for Jordan's FTA obligations were as follows:

- December 17, 2003: WIPO Copyright Treaty Articles 1-14 and WIPO Performances and Phonograms Treaty Articles 1-23;<sup>2</sup> national treatment [Article 4(3)-(5)]; and the substantive obligations in Article 4(10)-(16) of the FTA.<sup>3</sup>
- December 17, 2004: The enforcement obligations in Article 4(24)-(28) of the FTA.

In the 2005 Special 301 cycle, IIPA urged the U.S. Government to initiate immediate dispute settlement consultations under Article 16 and 17 of the U.S.-Jordan Free Trade Agreement, and to take all steps necessary to resolve the dispute by bringing Jordan into compliance with the FTA as soon as possible.

In the 2007 review, we reiterate the following issues as ripe for dispute settlement if the government of Jordan does not take immediate steps to remedy them.

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<sup>1</sup> The FTA went into force when the United States formally notified the government of Jordan that it had taken necessary procedures to ratify the Agreement (Jordan had already ratified the Agreement in 2000).

<sup>2</sup> The FTA expressly states that the obligation to implement the WIPO Treaties does not apply to Articles 1(4) and 6(2) of the WCT, and Articles 5, 8(2), 12(2), and 15 of the WPPT.

<sup>3</sup> Jordan also needed to accede to the WCT and WPPT by December 17, 2003; it missed this deadline, but joined the WCT on April 27, 2004 and the WPPT on May 24, 2004.

- **Anti-Circumvention and Technological Protection Measures (“TPMs”) [FTA Article 4(13)]:** There are several noted deficiencies:
  - IIPA’s interpretation of the translations we have reviewed is that Article 55 of the Law may fail to cover all forms of “circulation” as required by the FTA regardless of whether there is a financial motive (Article 55 prohibits “[m]anufacturing, importing, selling, offering for sale, renting ... distributing or advertising in connection with the sale and rental of” circumvention devices).<sup>4</sup> The U.S. Government should seek an amendment to provide for express language that is FTA-compatible. The Jordanian Government has commented that “all forms of ‘circulation’ of circumvention devices are covered because Article 55 of the Law prohibits *inter alia* the activities of distribution,” noting that “such term is broad enough to encompass all forms of trafficking, whether or not they are done with the purpose of financial gain or profit.” After further review of the two translations IIPA possesses, it still appears that “to sell or rent” or “in connection with the sale and rental of” modifies the activities prohibited. Such an added proof requirement (a commercial motive requirement) cannot meet the FTA requirement, which would prohibit trafficking even without a commercial motive. Thus, Article 55 still violates the FTA and references to “for sale or rent” should be deleted.
  - The current law remains ambiguous on its face with respect to coverage of all components (i.e., “any part thereof”) as required by the FTA; the law covers “any device, service or process” which only arguably could cover components.<sup>5</sup> Article 55 should be amended to expressly cover component parts (and code). One of the translations IIPA has includes express coverage of “any part or machine or service or any mean,” however, IIPA considers this issue unresolved since the government of Jordan has indicated that ‘Article 55 does not expressly cover [part] of any device, service or process, but it should be pointed out that the words device, process or service include also, under normal rules of interpretation, any parts thereof.’ This recognition that “parts” are not covered in Article 55, reinforces our contention that the current law may not be in compliance with the FTA, and that this should be resolved through a simple amendment, rather than leaving this point of implementation to “rules of interpretation” which we are not assured the courts in Jordan will follow.
  - According to IIPA’s translations, the current law prohibits activities “primarily designed, produced or used for the purpose of circumventing, deactivating or impairing” TPMs; FTA Article 13 also requires Jordan to prohibit activity “performed or marketed” for engaging in such prohibited conduct, and requires Jordan to prohibit activity “that has only a limited commercially significant purpose or use other than enabling or facilitating” circumvention. The Jordan law does not provide these other two objective tests.<sup>6</sup> The

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<sup>4</sup> The Government of Jordan has apparently claimed that all forms of “circulation” of circumvention devices are covered because Article 55 of the Law prohibits *inter alia* the activities of distribution, and that such term is broad enough to encompass all forms of trafficking, whether or not done with the purpose of financial gain or profit.

<sup>5</sup> The Government of Jordan has apparently indicated that while Article 55 does not expressly cover “part” of any device, service or process, the words “device, process or service” include, under “normal rules of interpretation,” any parts thereof. The U.S. Government should seek to clarify what is meant by “normal rules of interpretation” as to coverage of components (i.e., judicial interpretation).

<sup>6</sup> The Government of Jordan has apparently indicated that a correct translation of Article 55 is “designed,” not “primarily designed” to circumvent, deactivate or impair TPMs. The government has also apparently indicated that under “proper rules of interpretation,” it may be inferred from the fact that any device, service, or technology has only a limited commercially significant purpose or use other than enabling or facilitating the prohibited conduct, that such device, service or technology is in fact designed to perform the prohibited conduct. Thus, the Government of Jordan claims, as presently worded, Article 55 is in compliance with the FTA. IIPA urges the U.S. Government not to permit



language “performed or marketed” and “limited commercially significant purpose” should be expressly added. The government of Jordan has indicated that, in their view, Article 55 prohibits the manufacture, importation and circulation of any technology, device, or service that is designed (and not primarily designed) to circumvent, deactivate or impair TPMs, and that ‘under proper rules of interpretation, it may be inferred from the fact that any device, service, or technology has only a limited commercially significant purpose or use other than enabling or facilitating the prohibited conduct, that such device, service or technology is in fact designed to perform the prohibited conduct.’ Notwithstanding the Jordan government’s representations that, under proper or normal “rules of interpretation,” their TPM provisions meet the requirements of the FTA, in fact (and in practice) they may not. For example, the test of whether a device etc. is “marketed” for engaging in circumvention is missing. The objective test of whether the device etc. “has only a limited commercially significant purpose or use other than enabling or facilitating” circumvention is also missing. These are significant omissions and believe we should not rely on courts in Jordan to read them into the statutory provision (nor do we think the Executive Branch is in a position to make the assertion they make). We think the law must be amended.

- **Exceptions and Limitations [FTA Article 4(16)]:** Exceptions and limitations, initially left untouched in the Jordan Copyright Law prior to the 2004 amendments, were narrowed somewhat in those amendments. Nonetheless, a few exceptions may still go beyond what is permitted under the Berne Convention, TRIPS, and the FTA. For example, it must be confirmed that Article 17(c) of the Law would never permit anthologizing of full articles to create textbooks,<sup>7</sup> and that Article 20 of the Law would never permit photocopying of entire books, including entire textbooks without authorization, since that would certainly “[damage] the copyrights of the author” and “interfere with the normal exploitation of the work.”<sup>8</sup> Specific exceptions [including Article 17(c) of the Law] should be narrowed through amendments to comply with the FTA [as required by FTA Article 4(16), as well as TRIPS and the Berne Convention]. As noted, Article 4 of the 2004 “Amendments to the Copyright Law” narrowed the scope of Article 17. However, because this Article permits the “use” of an entire work (and we assume this means performance, display and making reproductions), even if only for the purpose of illustration (or, as amended, as an “illustrative method/tool”), we think the exception remains too broad and, as literally written, does not pass muster under the FTA. The addition of the phrase “not contradict with normal exploitation of the work” is helpful, but may not exclude many uses, e.g., the possibility of “anthologizing” an entire work or copying an entire “audio recording” or “audio-video recording,” since it is not clear that a Jordanian court would rule that such uses fall under that limitation, although they would certainly “unreasonably prejudice the legitimate interests of the right holder.” To ensure that the overbreadth is eliminated, we propose at least some changes to Article 17(c), e.g., by adding “portion of a” next to “work,” deleting the word “cultural” and adding “non-profit” before “vocational training.”

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the Government of Jordan to rely on so-called “proper rules of interpretation” to satisfy the FTA on such important points.

<sup>7</sup> The Government of Jordan has apparently indicated that Article 17(c) is intended to implement Article 10(2) of the Berne Convention, and should definitely not allow for “anthologizing” of full articles to create textbooks. The government has indicated that Article 17(c) permits the utilization of work only by way of illustration, which should lead to the utilization of fragments or parts and not entire works. The government has said that an amendment to Article 17(c) of the Law will provide that such an exception will apply only to the extent that the utilization is compatible with fair practice, as provided in Article 10(2) of the Berne Convention.

<sup>8</sup> The Government of Jordan has apparently indicated that Article 20 of the Law allows photocopying in educational institutions provided such practices do not cause damage to author’s rights and do not conflict with the exploitation of the work, and indicated that this article should not condone the photocopying of entire books.

- Compensatory Damages [FTA Article 4(24)]:** Article 49 of the law (not amended in 2003) does not appear to comply with Article 4(24) of the FTA, and may leave Jordan in immediate violation of its TRIPS obligations. The FTA is a more detailed enumeration of the TRIPS standard in Article 45 with respect to civil compensatory damages. Article 4(24) of the FTA fleshes out what is meant by the TRIPS text, by, among other things, requiring “the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement and any profits of the infringer that are attributable to the infringement that are not taken into account in computing such damages.” In addition, the FTA confirms, “[i]njury to the right holder shall be based upon the value of the infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods.” Article 49 of the Jordan law, as amended in 2004, refers to “a fair compensation,” and the phrase “and the value of original work in the market” after the phrase “or artistic value [of the work]” was added. We presume that the “value of the original work” refers to the “retail price of the legitimate product.” However, Article 49, even as amended, still would violate the FTA. Article 49 as amended (and in part) would explicitly state, “[i]n deciding the compensation, the cultural standing of the author, the literary, scientific or artistic value of the work and the value of original work in the market, and the extent the infringer benefited by exploiting the work shall be taken into consideration.” This key provision suffers from two deficiencies. First, the drafters failed to delete two of the other criteria, “*the cultural standing of the author*” and “*the literary, scientific or artistic value*” which therefore are to “be taken into consideration” when assessing compensatory damages. These criteria lead to some troubling possibilities, e.g., that reference books, or computer programs written by unknown authors, might be valued lower than, say, literary novels or works by a famous author. Carried out to its logical conclusion, the implementation of these standards would almost certainly result in inequities and non-compensatory damages in many cases. Moreover, the FTA provision does not allow for the “consideration” of these other criteria. Finally, the FTA requirement is clear: “[i]njury to the right holder *shall* be based upon the value of the infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods.” The FTA criteria is mandatory, not one of several factors to be “taken into consideration.” And to the extent that the other factors are “taken into consideration” to lower damages or discriminate copyright materials based on the content, this would violate the FTA.
- Deterrent Statutory Maximum Fines [FTA Article 4(25)]:** Statutory maximum fines were doubled, from JD3,000 (US\$4,235) to JD6,000 (US\$8,470). These maximum fines should be increased to at least JD10,000 (US\$14,130). The FTA Article 4(25) test is whether penalties “deter future acts of infringement with a policy of removing the monetary incentive to the infringer.” TRIPS Article 61 requires availability (and imposition) of “monetary fines sufficient to provide a deterrent.” IIPA understands that Jordan and U.S. agreed that fines be raised to JD6,000 in a MOU (Article 3) signed and annexed to FTA on October 24, 2000. The MOU was negotiated several years ago, before the full extent of harm due to massive copying in digitized formats was fully understood. IIPA understands that Jordan now has one optical disc plant which may be capable of producing literally millions of discs per year. The fact that an owner of an optical disc plant, if illegally producing millions of copies of copyright content, would be subject to a mere “maximum” fine of US\$8,475 in Jordan demonstrates how absurdly low the maximum penalty is by today’s standards. It is probable that by today’s standards, JD6,000 does not meet TRIPS standards notwithstanding the MOU.

- **Seizure of Documentary Evidence [FTA Article 4(25)]:** There is also no express provision in Jordan's law as amended for seizure of documentary evidence, as is required by Article 4(25) of the FTA.
- **Ex Officio Enforcement Authority [FTA Article 4(26)]:** The FTA sets forth that Jordan must "provide, at least in cases of copyright piracy or trademark counterfeiting, that its authorities may initiate criminal actions and border measure actions *ex officio*, without the need for a formal complaint by a private party or right holder." There is nothing in Jordan's copyright law that authorizes *ex officio* action, although IIPA understands that Article 36 of the Copyright Law provides in practice that Copyright Office (National Library) personnel may carry out actions without the need for a complaint by the right holder. The business software industry representative in Jordan indicates that such raids are occurring as to software. However, the GOJ has not been asked and has not, to our knowledge, addressed this point to date. Express assurances should be provided.
- **Presumptions [FTA Article 4(27)]:** The Berne Convention requires a presumption as to authorship, and the FTA goes further to require presumptions as to ownership and subsistence of copyright for works, performances and phonograms. Jordan must amend its law to provide a presumption of subsistence of copyright that are consistent with the FTA.<sup>9</sup> Specifically, Article 4.27, cl. 2 requires Jordan to provide a presumption of subsistence of copyright: "It shall be presumed, in the absence of proof to the contrary, that the copyright or related right subsists in such subject matter. 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."
- **Altering Features in Seized Materials Impinging on Exclusive Adaptation Right [Article 47(a)]:** Article 47(a) of the Law provides that, as an alternative to destruction of infringing goods found in a seizure or raid, a court may "order the features of the copies, reproductions and equipment to be altered," which is not permitted under the FTA enforcement text. Alteration of copyrighted works in this way without approval of the copyright owner would be a violation of the author's adaptation right [Article 9(b) of the Law], and would violate the TRIPS Agreement and the Berne Convention (and the FTA).
- **Customs/Border Provisions:** Jordan enacted amendments to the Customs Law (No. 20 for the Year 1998) and Article 41, dealing with IP enforcement, appears on its face to meet the FTA requirement regarding the availability of *ex officio* action by Customs. Article 41 is silent regarding the requirements of Article 59 of TRIPS (as to remedies, e.g., regarding the GOJ authority to order the destruction or disposal of infringing goods). Availability of these remedies should be confirmed.

## GSP Program in Jordan

In addition to benefits Jordan receives under the FTA, Jordan continues limited participation 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

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<sup>9</sup> Article 2 of the 2004 "Amendments to the Copyright Law 2004" amended Article 4 of the Copyright Law, satisfying Jordan's requirement to provide a presumption of ownership pursuant to Article 4.27, cl. 1 of the U.S.-Jordan FTA. Article 6 of the "Amendments to the Copyright Law" enacted a conforming amendment to delete Article 26 of the Copyright Law (since that Article was folded into the amended Article 4).

intellectual property rights.” In 2005, \$11.7 million worth of Jordan’s imports to the United States benefited from the GSP program, accounting for 0.9% of its total exports to the U.S. During the first 11 months of 2006, \$14.4 million worth of Jordanian goods (or 1.1% of Jordan’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### DISPUTE SETTLEMENT

The U.S. government's negotiation of regional and bilateral free trade agreements (FTAs) offers an important opportunity to persuade our trading partners to further modernize their copyright laws and enforcement regimes. The FTAs have set new global precedents in copyright protection and enforcement, providing further impetus to e-commerce and to global economic growth and employment. However, these beneficial impacts of the FTAs will not be realized unless the obligations they create are rigorously fulfilled in the national laws of our trading partners. The U.S. government should be generous with advice and technical assistance in helping our FTA partners to fully implement the terms of the FTAs; but the U.S. government also should not hesitate to invoke the dispute settlement procedures of the respective FTAs when FTA partners fail to live up to the obligations they have undertaken and which constitute the commercial benefits of the deals for U.S. copyright industries. In this section of the report we identify outstanding FTA implementation issues with several of our partners – Bahrain, Jordan, Morocco, and Singapore – which we believe could be the basis for dispute settlement proceedings unless they can be promptly and satisfactorily resolved on an informal basis.

## MOROCCO

The United States-Morocco Free Trade Agreement went into force on January 1, 2006. A review of the Morocco Copyright Act, Law No. 2-00 on Copyright and Related Rights (of February 15, 2000), as amended in 2005, has revealed some significant compliance issues with the FTA, and there are other compliance issues as noted. While for the most part the legislation meets the FTA tests, the government of Morocco should work swiftly to resolve any remaining issues. The following are among the key issues.

- **Failure to Join the WIPO Internet Treaties [FTA Article 15.1.2(g) and (h)]:** Morocco agreed to join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) upon the coming into force of the U.S.-Morocco FTA. However, the government of Morocco has failed to date to submit accession legislation and to deposit its instrument of accession with WIPO in Geneva as to either treaty. This failure must be remedied. Other countries in the region are looking to accede; it would indeed be ironic if a regional neighbor were to accede before Morocco did, despite the fact that Morocco is obligated to do so bilaterally.
- **Anti-Circumvention and Technological Protection Measures (“TPMs”) [FTA Article 4(13)]:** Article 65(e) prohibiting the circumvention of TPMs is missing the “has only a limited commercially significant purpose or use other than to circumvent” prong of the three part test for proving an unlawful purpose. Omitting this objective criteria from the factors by which a device or service can be judged illegal leaves a major gap in legal protection of technological protection measures which must be remedied for Morocco to comply with the FTA.
- **Definitions of “broadcasting” and “phonogram” Should be Made FTA-Compatible [FTA Article 15.7.5]**

- **Unclear Coverage of Parallel Imports [FTA Article 15.5.2]:** Morocco agreed to protect against unauthorized parallel imports under Article 15.5.2 of the FTA.<sup>1</sup> Unfortunately, in the 2005 amendments, no change was made to Article 10 (“Economic Rights”) which provides the exclusive right to import copies of [a] work.” Article 50 provides performers with a right to control the “import of a fixation of [a] performance” and Article 51 provides phonogram producers with a right to control “the import of copies of [a] phonogram with a view to their distribution to the public.” In addition to confirming that the exclusive rights as to imports include parallel imports, IIPA also recommends that the phrase in Article 51, “with a view to their distribution to the public,” be deleted, as the phrase creates ambiguity as to the scope of exclusivity of the import right as to phonogram producers.
- **Internet Retransmissions of Television Signals Not Expressly Prohibited [FTA Article 15.5.11(b)]:** Article 15.5.11(b) of the FTA requires Morocco to ensure that “retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal” is not permitted. Article 10 of the Copyright Law provides an exclusive “broadcast” right (which does not expressly include retransmission) and a “communication” to the public right. It is not clear therefore that the Moroccan law satisfies the FTA. One way to meet the requirement is to add “including the retransmitting of television signals, whether terrestrial, cable, or satellite, on the Internet, without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal” to Article 10(i) (“communication to the public”) of the existing Copyright Law, or to add this language to the definitions (e.g., of “broadcasting”).
- **Temporary Reproduction – Overly Broad Exception Should be Narrowed [FTA Article 15.5.11(a)]:** The FTA requires Morocco to confine exceptions and limitations to “certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.” The exception for temporary reproductions in Article 13 is overly broad and should be narrowed. For example, it would conflict with a normal exploitation of a work and prejudice the interests of right holders if it is deemed that a pirate copy would be equally subject to this exception.<sup>2</sup> In addition, the conditions to qualify for the exception should be cumulative, unlike the Morocco approach in which meeting any one of the conditions will suffice.

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<sup>1</sup> Article 15.5.2 of the FTA provides

Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the importation into that Party's territory of copies of the work, performance, or phonogram that are made without authorization, or made outside that Party's territory with the authorization of the author, performer, or producer of the phonogram.

<sup>2</sup> The current exception in Article 13 reads:

[T]he temporary reproduction of a work shall be permitted provided that this reproduction:

- (a) takes place in the course of a digital transmission of a work or act designed to make a work stored in digital form perceptible;
- (b) is carried out by a natural person or legal entity authorized, by the copyright owner or by the law, to carry out the said transmission of the work or act designed to make it perceptible;
- (c) is of an accessory nature to the transmission, takes place as part of normal use of the material and is automatically deleted without allowing the electronic recovery of the work for purposes other than those specified in subparagraphs (a) and (b) of this Article.

- **Ex Officio Enforcement Authority at the Border [FTA Article 15.11.23]:** The FTA requires that “competent authorities [in Morocco] may initiate border measures *ex officio*, with respect to imported, exported, or in-transit merchandise suspected of infringing an intellectual property right, without the need for a formal complaint from a private party or right holder.” There is nothing in Morocco’s copyright law that authorizes *ex officio* action.
- **Criminal Penalties Too Low to Deter Piracy [FTA Article 15.11.26(b)]:** The minimum fine in the Morocco law is US\$1,138 or US\$2,276 for a recidivist, which is quite low, given the FTA requirement to “provide a deterrent to future infringements, consistent with a policy of removing the infringer’s monetary incentive.” The maximums of US\$11,138 to US\$22,760 (for recidivism) are higher. There are no mandatory minimum prison sentences (since imprisonment can be substituted by a fine alone), and jail times are from two to six months, or four to twelve months for recidivism, again, quite low and it is questionable whether they “provide a deterrent.”
- **Seizure Provisions Do Not Comply with FTA [FTA Articles 15.11.9 and 15.11.26(b)(ii)]:** The FTA requires seizure of items “suspected” to be infringing, but the Morocco Copyright Law (Article 64.3(1)) specifically requires that the items be “made in violation” of copyright. The phrase “suspected to have been” should be added before “made” to comply with FTA Articles 15.11.9 and 15.11.26(b)(ii). It is also necessary to establish sampling as required by FTA Article 15.11.26(b)(ii), namely, that “items that are subject to seizure pursuant to any such judicial order need not be individually identified, so long as they fall within general categories specified in the order.” Preferably, this would be expressly provided for in the law, but in the least, confirmation should be sought as to how Morocco implements the sampling provision.
- **Offenses for Trafficking in Counterfeit Labels and Illegal Documentation Missing from Morocco Law [FTA Article 15.11.27]:** The Morocco law contains no provision to prohibit “knowingly trafficking in counterfeit labels affixed or designed to be affixed to: a phonogram, a copy of a computer program, documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work,” or “knowingly trafficking in counterfeit documentation or packaging for a computer program” as required by Article 15.11.27 of the FTA.

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IIPA has proposed that the exception be revised to read as follows:

[T]he temporary reproduction of a work shall be permitted provided that this reproduction:

- is incidental and an integral part~~takes place in the course~~ of a digital transmission of a legal copy of a work in a network between third parties by an intermediary or act designed to make a legal copy of a work stored in digital form perceptible; and
- or transmission or viewing is carried out by a natural person or legal entity authorized, by the copyright owner or by the law of Morocco, to carry out the said reproduction, transmission, or viewing of the work or act designed to make it perceptible; and
- is of an accessory nature to the transmission, takes place as part of normal use of the material and is automatically deleted without allowing the possibility of using ~~electronic recovery~~ of the work for purposes other than those specified in subparagraphs (a) and (b) of this Article.

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## SINGAPORE

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, the treatment of certain non-interactive digital audio transmissions in the amendment places Singapore in violation of its FTA obligations.

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.

While the FTA permits Singapore to provide limitations with respect to non-interactive transmissions, it does so only "in certain special cases provided that such limitations do not

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<sup>1</sup> See also the Special Mention section of this Special 301 filing, at <http://www.iipa.com/rbc/2007/2007SPEC301SINGAPORE.pdf>.



conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders.”

Section 107B of the Singapore Copyright Act exceeds the allowable discretion under the FTA by wholly exempting certain non-interactive transmissions, notably, simultaneous retransmissions of a broadcast signal (so-called simulcasting), from protection. This exemption does not apply to a special case, and most certainly conflicts with the normal exploitation of a sound recording and prejudices the interests of the right holders. Interestingly, some of the principal beneficiaries of this gap in protection are state-owned entities (such as MediaCorp, which is in turn owned by Temasek Holdings, the Singapore Government's investment arm). MediaCorp relies on this provision to simulcast its radio broadcasts over the Internet to audiences all over the world, and as such refuses to obtain the multi-territory license for simulcasting. It is a matter of great importance that Singapore quickly addresses this FTA-incompatible provision.

## **COUNTRIES DESERVING SPECIAL MENTION**

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### SPECIAL MENTION

## AZERBAIJAN

Azerbaijan has still not fixed the deficiencies in its IPR laws or met its other enforcement commitments under the 1995 U.S.-Azerbaijan Trade Agreement (which entered into force on April 21, 1995). The U.S. Government should continue to seek Azerbaijan's full compliance with these obligations.

The current Azerbaijani Copyright Law (October 23, 1996) has many deficiencies which need to be corrected in order to bring the country into compliance with the Berne Convention (which Azerbaijan joined in 1999) and the Geneva Phonograms Convention (which it joined in 2001). Effective April 11, 2006, Azerbaijan acceded to 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 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, since it acceded to those 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. In 2006, there were no known cases in Azerbaijan imposing either an administrative sanction or a criminal penalty for an IPR violation, including a neighboring rights violation. In 2005, the last year when piracy rate estimates were calculated, the recording industry estimated piracy levels at 80% overall, and over 90% for international repertoire.

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.

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### SPECIAL MENTION

## CAMBODIA

Cambodia is specially mentioned again this year, since it is a destination for pirate imports from neighboring and nearby countries/territories, and since there may be optical disc or cassette production in the country. The Cambodian government denies the existence of optical disc or cassette production,<sup>1</sup> but admits that a “group of small traders formed by certain retail shops in the markets” trade in pirate materials. Since Cambodia has virtually no legitimate demand, the existence of an optical disc 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.<sup>2</sup> 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 locations or plants producing any carriers or optical discs with copyright content, and should shut down any found to be producing illegally. The government reported in March 2006 that it is engaging in seminars to explain the importance of copyright and raise “awareness,”<sup>3</sup> and that its Committee to Suppress the Infringement of Copyright of Motion Pictures and Videos has carried out raids (noting the most recent raid in 2005, in which 20,000 pirate CDs and VCDs and 10 CD-R burners were seized). The government indicates that six defendants were brought to court on April 7, 2005. However, there is no update provided on this case.<sup>4</sup>

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.” The Agreement also provides 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 the requirement that Cambodia join or at least give effect to major copyright treaties (the Berne Convention and Geneva [Phonograms] Convention), and to make “best efforts to join” those treaties by December 31, 1998.<sup>5</sup> 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. On July 14,

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<sup>1</sup> Mr. Long Ponnasirivath, Deputy Director General of Administration in Charge of the Copyright Office, Ministry of Culture and Fine Arts, reported at an ASEAN-3 Seminar in March 2006 that “presently Cambodia doesn’t have either manufacturing of optical disc/cassettes or big volume circulation and distribution of such products.” See Long Ponnasirivath, Country Report on the Copyright Policy for Promotion of Cultural Industries in Cambodia, The ASEAN-3 Copyright Seminar, “APEC Anti-Counterfeiting and Piracy Initiative” and “New Trends in Copyright Related Cultural Industries,” March 1-3, 2006, Tokyo, Japan (on file with IIPA).

<sup>2</sup> U.S. book publishers reported losses totaling \$4.5 million due to copyright piracy in Cambodia in 2005.

<sup>3</sup> See *supra* note 1. Deputy Director General Ponnasirivath indicates that 14 of 24 provinces in Cambodia have received training.

<sup>4</sup> *Id.*

<sup>5</sup> At that time, Cambodia was also already a member of the Universal Copyright Convention (U.C.C.).

2006, Deputy U.S. Trade Representative Karan Bhatia and Cambodian Minister of Commerce Cham Prasidh signed a Trade and Investment Framework Agreement (TIFA) aimed at enhancing trade and investment between the two countries and providing a forum to address bilateral trade issues. It is hoped that copyright piracy and protection issues will play an important role in the periodic discussion groups convened to further the TIFA.<sup>6</sup>

In order to join the WTO, and implementing many key obligations of the 1996 Agreement, Cambodia passed the Law on Copyrights and Related Rights (promulgated by His Majesty the King on March 5, 2003).<sup>7</sup> The 2003 Law went far in implementing the requirements of the WCT and WPPT. For example, it provides protection for temporary copies, a WIPO treaties-compatible definition of “communication to the public” including an interactive “making available” right, and provisions prohibiting the trafficking in circumvention devices which partially, but not fully, implement 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.<sup>8</sup> The gap in the legal structure is the absence of a regulation regarding optical disc plants, but the Law on Copyrights should be used to address illegal activities occurring in any locations or plants producing pirate materials. 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.

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<sup>6</sup> See United States Trade Representative, *United States, Cambodia Sign Trade and Investment Framework Agreement*, July 14, 2006, at [http://ustr.gov/Document\\_Library/Press\\_Releases/2006/July/United\\_States\\_Cambodia\\_Sign\\_Trade\\_Investment\\_Framework\\_Agreement.html](http://ustr.gov/Document_Library/Press_Releases/2006/July/United_States_Cambodia_Sign_Trade_Investment_Framework_Agreement.html) (USTR's press release specifically indicates the two countries “will discuss such issues as intellectual property rights....”)

<sup>7</sup> The law was adopted by the National Assembly on January 21, 2003 and ratified by the Senate on February 13, 2003. Deputy Director General Ponnasirivath reported at the March 2006 ASEAN+3 Seminar in Tokyo that a Sub-Decree to implement the 2003 Law as well as a Sub-Decree for the Governance of Collective Management Societies are being drafted by the Ministry of Culture and Fine Arts through support of “WIPO and other international organizations.” Other related regulations include the Sub-Decree No. 63 on the Protection and Enforcement of Motion Pictures and Videos; Proclamation (*Prakas*) on the Rights and Procedures Against Copying and Imitating Copyright Works; and Proclamation (*Prakas*) to Establish a Committee to Suppress the Infringement of Copyright of Motion Pictures and Videos.

<sup>8</sup> It should also be pointed out that there are no border measure provisions in the copyright law, but that, according to Deputy Director General Ponnasirivath, the Customs Code contains specific IPR provisions.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 Report

### SPECIAL MENTION

## HONG KONG

IIPA recommends that USTR actively monitor developments in Hong Kong during 2007 with respect to the issues discussed in this Special Mention report.

### **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. Two cases are bright spots in otherwise murky legal waters. In one, decided in 2005, and upheld on appeal in December 2006, a man who uploaded three motion pictures using BitTorrent was convicted of copyright infringement and sentenced to jail;<sup>1</sup> in the second, in January 2006, the court ordered four Internet service providers to identify 22 people who uploaded music illegally.<sup>2</sup> 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.

**Optical Disc Piracy:** There are currently 90 optical disc production plants with 733 production lines in the Hong Kong Special Administrative Region (HKSAR) (with an annual production capacity of over 2.565 billion units). Over the past 12 months, there have been difficulties in the filing of complaints with the Hong Kong Customs and Excise Department (C&E) for investigations into the involvement of OD plants in the manufacture of pirate product for export. In particular, the Department of Justice's requirement of full documentation from a copyright owner for the filing of a complaint is burdensome, especially for an overseas copyright owner. This requirement should be re-examined.

**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\$91 million in losses incurred by the software industry in 2006, with a software piracy rate of 54%.<sup>3</sup> In September 2006, the Business Software Alliance

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<sup>1</sup> 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." For the appellate ruling, see Washington Internet Daily, Dec. 18, 2006, at 5.

<sup>2</sup> Min Lee, Hong Kong Court Orders Internet Providers to Reveal 22 People Who Uploaded Music, Associated Press Newswires, January 26, 2006.

<sup>3</sup> While Hong Kong's software piracy rate saw no improvement over the past year, some other markets in the region reduced their software piracy rates, including Mainland China, South Korea, and Taiwan. This is a serious and ongoing problem and puts Hong Kong well behind other advanced economies in the Asia Pacific. A study released by  
(...continued)

(BSA), in conjunction with C&E and Hong Kong's Intellectual Property Department (IPD), launched a major anti-piracy initiative, the "Genuine Business Software Campaign," with education, legalization and certification components. This initiative illustrates the HKSAR government's commitment to tackle the problem of software piracy by businesses. Additionally, 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 fully contested case has ended in acquittal. More resources need to be invested in prosecution of these cases, and industry is concerned that, unless modified, Hong Kong's 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. Some judges now require that true copies of each of the video games allegedly infringed be appended to the affirmation to be served on each defendant in the case, an especially onerous requirement when there are multiple defendants and when older games are involved. 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.

Hong Kong remains a major transshipment point for pirated Nintendo video games originating in China and destined for the United States, Europe and Latin America. In 2006, over 34,000 counterfeit Nintendo products transshipped through Hong Kong were seized in France, Germany, Italy, the Netherlands, the United Kingdom, and the United States. The U.S. Customs and Border Protection Agency interdicted 9 shipments, seizing a total of 27,500 counterfeit Nintendo products. Pirates commonly use false information on the shipment documents, making it difficult to trace the shipment of counterfeits and pirated goods to its source. The Hong Kong Customs authorities should allocate more resources toward monitoring imports and exports of counterfeit products.

The book publishing industry reports that C&E has continued in its responsiveness to its complaints about illegal photocopying during 2006. Although there are sometimes burdensome procedural hurdles with regard to showing copyright ownership of books printed under different trademarks, or "imprints", 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 and making it more difficult to raid them. The industry needs the continued cooperation of C&E in changing enforcement tactics to tackle these new iterations of the problem.

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BSA 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.



## **LEGISLATIVE ISSUES**

Two legislative reform processes are now underway in Hong Kong: the Copyright (Amendment) Bill, which is currently under consideration by the Legislative Council (LegCo); and the Consultation on Protection of Copyright Works in the Digital Environment, recently launched by the Commerce, Industry and Technology Bureau (CITB).

### **Copyright (Amendment) Bill**

As IIPA reported last year, many of CITB's proposed amendments to the Copyright Ordinance would have been a step backward, weakening copyright protection and reflecting inattention to Hong Kong's international obligations under the TRIPS Agreement and the Berne Convention. Many of these problems remained when the Copyright (Amendment) Bill was formally published in March 2006. As a result, copyright industry organizations both in Hong Kong and on the international level, voiced strong concerns about the Bill. In November, CITB announced plans for a package of amendments to the Bill. While the full text of these amendments is being released piecemeal and many details are unresolved, it is clear that some of industry's concerns have been heeded. At the same time, serious flaws in the legislation remain. IIPA urges that these flaws be corrected, so that the final Bill will comport with international standards and will advance Hong Kong's stated policy of promoting the creative industries. Major problem areas include:

- **Treatment of business end-user liability:** The Bill would make permanent the unwise temporary provisions in the Copyright Ordinance that immunize from criminal liability the possession of pirated text materials for use in a trade or business. Likewise, the proposed amendments fail to make any changes in the new criminal offense for businesses that engage in "regular and frequent" infringing acts of copying or distribution of books or academic journals. This new offense, at least in its present form, falls well short of being an adequate substitute for full criminal liability for business end-users; among other flaws, it is subject to a wide "safe harbor" that will shelter a great deal of commercial scale infringement,<sup>4</sup> and it provides a defense that exempts otherwise criminal infringement if a court later finds the publisher's licensing terms to be "commercially unreasonable."

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<sup>4</sup> The current proposed 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." The HK\$8000 figure (about US\$1022) suggests an attempt to duplicate the U.S. criminal threshold in 17 USC § 506(a)(1)(B) (US\$1000). But 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 will almost always be the case with the activities covered by the Hong Kong safe harbor proposal) the US\$1000 retail value threshold does not apply, and a willful infringement involving even a single copy with a value of less than US\$1000 can attract criminal liability (17 USC § 506(a)(1)(A)).

The Bill also introduces a new, unnecessary and problematic defense to criminal liability for certain classes of professionals and employees. At a time when Hong Kong is making no progress in reducing its rate of business end-user piracy of computer software, it is inadvisable to introduce a broad new defense that is out of step with the laws of other Asia-Pacific jurisdictions and that will make it harder to reduce end-user piracy rates in Hong Kong.

- **Technological protection measures (TPMs):** While the proposed amendments (the text of which has not yet been made public) would fix some of the most serious problems with the Bill as originally presented, a number of fundamental flaws remain, that would prevent Hong Kong from offering the “adequate and effective” legal regime against circumvention of TPMs that is required under the WIPO Internet Treaties. These flaws include, among others —
  - Liability for distribution of circumvention devices is subject to the requirement that distribution is “for the purpose of or in the course of trade or business”; non-commercial distribution would carry civil liability if it has prejudicial effect on the rights holder. The requirements for “commercial purposes” or “prejudicial effect” significantly weaken the effectiveness of this prohibition and should be avoided;
- Failure to criminalize the act of circumvention of TPMs under any circumstances, even when there is a commercial motive;
- A broad defense to civil liability for circumvention whenever the defendant shows that the purpose of his violation was to “carry out a non-infringing act.” Such blanket immunity could open up a huge loophole in the anti-circumvention regime;
- Inadequate definition of “access controls.” All such technologies should be accorded protection;
- A “further exceptions by notice” system that will give an HKSAR official nearly unbounded power to recognize additional and permanent exceptions to the prohibition on circumvention of access controls, even when such controls have a net beneficial impact on access to copyright materials. Such a system will make it difficult to achieve the stable and predictable legal environment needed for the healthy development of a digital marketplace in such materials, a development to which the evolution of TPMs will make a significant contribution.
- The original Bill also proposed carve-outs to some prohibitions with regard to TPMs that “control market segmentation” (including but not limited to regional coding technologies) or that control time-shifting of broadcasts, cable programs, or other forms of streaming dissemination. The CITB document issued in November indicated that these carve-outs would be significantly narrowed, but a close examination of the actual text proposed will be critical.
- **Copyright exceptions:** The Bill as introduced proposed broad new exceptions for “fair dealing” in copyright materials for the purposes of education or public

administration, and the changes proposed by CITB in November do not provide much additional guidance or focus. “Fair dealing” would continue to excuse unauthorized uses by schools even of works that are targeted to the educational marketplace (e.g., textbooks), and even if the use falls within a licensing scheme that is readily available.<sup>5</sup> The availability of the exception to universities would be conditioned on the use of basic access control measures, which is welcomed; but to be a meaningful limitation, use controls (e.g., restrictions on printing, downloading, or forwarding) must also be required. The key concept underpinning the proposed public administration exception – that it is intended to be used only for “urgent business” of governmental bodies – will apparently remain undefined. More work is needed to ensure that these exceptions are confined within bounds that meet international standards that apply to Hong Kong, notably the “three-step test” of the TRIPS Agreement, Art. 13.

- **Parallel imports:** While the legislation originally proposed to reduce the period during which parallel imports would attract criminal liability to 9 months after public release (from 18 months), CITB now calls for a 12-15 month window. However, there still remains no persuasive justification of the need to shorten the period in which legitimate right holders may enjoy their full exclusive rights in Hong Kong.<sup>6</sup>

CITB has stated its intention to seek enactment of the Copyright (Amendment) Bill in the 2006-07 legislative session of the LegCo. IIPA urges the U.S. government to remain vigilant to ensure that problems such as those summarized above are adequately addressed before action is completed on these complex and extensive amendments.

### **“Digital Environment” Consultation**

In December 2006, CITB issued its long-awaited consultation paper on “Copyright Protection in the Digital Environment.” The paper asks questions and proposes options on a wide range of topics, including (1) liability for unauthorized uploading and downloading of copyright works; (2) whether an all-embracing exclusive right of communicating copyright works to the public ought to be introduced into Hong Kong law; (3) the role of online service providers in combating Internet piracy; (4) procedures to facilitate the identification of online infringers so that right holders may pursue them; (5) whether statutory damages for infringement should be provided; and (6) whether to expand Hong Kong’s existing statutory exception for certain temporary copies of works. Responses are due in April 2007, with the expectation that legislative proposals might ultimately follow. IIPA commends the Government for looking at these crucial issues for the future of copyright protection in Hong Kong, but it is regrettable that these issues are being considered on a separate, slower track from the problematic proposed amendments summarized above.

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<sup>5</sup> While CITB has backed off the proposal to repeal Section 45(2), which limits the scope of a separate educational exception when a licensing scheme is in place, it has proposed to spell out that “educational establishments may still rely on the fair dealing provision ... despite that a licensing scheme is available authorizing the copying in question.”

<sup>6</sup> 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 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.

## **Other Legislative Issues**

**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 criminal 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 Report

### 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 21<sup>st</sup> 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, without conditioning the term extension on registration or similar formalities.
- **Technological protection measures (TPMs):** Current laws (the Copyright Act and the Anti-Unfair Competition Law) do not fully meet Japan's obligations under the WIPO Internet treaties to provide an adequate and effective legal regime against circumvention of TPMs. For instance, there are no criminal remedies (under the Unfair Competition Law) for trafficking in tools to circumvent access controls, and no civil remedies (under the Copyright Act) for dealing in copy control devices or services. These deficiencies should be remedied.
- **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 download unauthorized digital copies that can be easily re-disseminated, such as over peer-to-peer (P2P) 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 carefully monitor the impact of new

exceptions that take effect in June 2007 that could allow widespread unauthorized copying of scientific, technical and medical publications by pharmaceutical companies, patent applicants, and others, and should shelve further proposals to broaden the exception for pharmaceutical companies until that impact has been assessed. In both these areas, Japan should ensure that current 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:** In December 2006, Japan eliminated the exclusive rights of sound recording producers over simultaneous retransmission of their recordings over networks via IP multicasting. A compulsory licensing system replaced it for commercial multicasting, but rights were evidently totally eliminated in the case of non-commercial retransmission via multicasting. The new law represents a significant step backward away from a system of exclusive rights that should govern transactions and towards outdated and unnecessary forms of compulsory licensing. IIPA understands that unlike the existing exclusive rights, rights of remuneration established under the 2006 amendments will be subject to the application of material reciprocity. This abandonment of the principle of national treatment is also highly regrettable. Within the bounds of international norms, experimentation with different approaches to addressing issues related to technological advances is understandable; but the level of protection deemed appropriate should apply equally to domestic and foreign rightholders. The U.S. government should engage the Government of Japan in an effort to ensure that American producers and performers, and other foreign rightholders, are not discriminated against under Japanese law.
- **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, and welcome the progress toward that goal that has been achieved so far, with proposals now pending before the Cabinet.

Finally, Japan faces a serious and growing problem of online copyright piracy. Infringement via peer to peer (P2P) services is widespread. Recording industry estimates indicate that over 150 million tracks are illegally downloaded every year, which is ten times more than the size of the entire legitimate music download sector in 2005. An alarming and even more recent development is the proliferation of unauthorized services for downloading ringtones and other music and sound recordings to mobile phones, a form of infringement that is enabled by the rollout of third generation mobile phone receivers. Japanese consumers (particularly teenagers) flock to these free unauthorized services, directly threatening the growth of the JPY 50 Billion (US\$411 million) market in legitimate mobile music services. P2P piracy and other online piracy in Japan also has a significant impact across the copyright industries, including in the book and journal publishing, audio-visual and business software sectors.

Japanese authorities have been responsive to this growing threat in some cases. For example, over the past year, the developer of the “Winny” P2P file sharing system was criminally convicted for aiding and abetting infringement; a Tokyo court ordered three major Internet Service Providers (ISPs) to reveal the names and addresses of 19 people who had uploaded large quantities of digital music files for dissemination via P2P services; and an operator of a site where cell phone users were offered free unauthorized downloads was arrested. However, systematic changes are needed before Japan’s response to growing online piracy will be fully effective. Among other changes, Japan should consider instituting a more streamlined system of notice and takedown of infringing material from networks and from online auction sites; a faster and more reliable method of requiring ISPs to disclose contact information on subscribers who have been identified as using the networks to carry out infringements; and relaxation of the requirement for formal complaints before criminal proceedings can be commenced against those involved in piracy via P2P networks.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

## LAOS (LAO PEOPLE'S DEMOCRATIC REPUBLIC)

**Actions to be Taken in 2007:** 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. The government has indicated it wishes to enact laws to regulate equipment that can be used to illegally pirate, but denies that there is any optical disc production in the country.

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.<sup>1</sup> Thus, unfortunately, in 2005 and 2006, the fear of copyright owners has apparently become a reality. The motion picture industry 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, although an official from Laos indicated in March 2006 that a new draft IP law had been submitted to the National Assembly and that copyright implementing regulations had already been drafted and were ready to be introduced once the law passed.<sup>2</sup> According to the government, penalties under the new law will include three months to two years imprisonment and a fine of 500,000 Kip to 50 million Kip (US\$52 to \$5,190) for copyright infringement ("with intent to violate this law for its own gain").<sup>3</sup>

There is little enforcement activity in Laos, although the Department of Intellectual Property, Standardization and Metrology (DISM) is apparently tasked with coordinating training of enforcement officials, the Ministry of Education, as well as deciding, along with Customs (under the Ministry of Finance), Department of Interior Trade under the Ministry of Commerce, and the Department of Economic Police under the Ministry of Public Security, to respond to specific industry complaints and decide what course of action to take.<sup>4</sup>

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<sup>1</sup> 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](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.

<sup>2</sup> Ratsamy Phanthavong, Department of Intellectual Property, Standardization and Metrology, Country Report on Copyright Issues in Lao PDR, The ASEAN-3 Copyright Seminar, "APEC Anti-Counterfeiting and Piracy Initiative" and "New Trends in Copyright Related Cultural Industries," March 1-3, 2006, Tokyo, Japan (on file with IIPA).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The official cited did not indicate that right holders had come forward with complaints, although he did indicate that there is one right holder organization operating in the country (presumably this is a collecting society).



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.<sup>5</sup> 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),<sup>6</sup> 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 2007 is slim (the first meeting of the Working Party did not take place until October 2004).

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<sup>5</sup> The grant to Laos of Permanent Normal Trade Relations was part of the Miscellaneous Trade & Technical Corrections Act of 2004 signed by the President in December 2004.

<sup>6</sup> 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.

# **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

## **2007 SPECIAL 301 REPORT**

### **SPECIAL MENTION**

# **LATVIA**

IIPA specially mentions Latvia in this year's Special 301 filing due to a very recent and disturbing report about possible weakening Latvian Government support for police anti-piracy efforts.

In January 2005, the Ministry of the Interior established a dedicated IPR enforcement division within the Economic Police, specifically tasked with detecting and preventing violations of intellectual property rights. It was planned that there would be 22 staffers in this unit, and that under its supervision, there would be units in each region of Latvia. Notwithstanding those plans, the unit was assigned half of the originally anticipated staff and no units were established in regions of Latvia outside the immediate vicinity of Riga. The unit also lacked technical and logistical support, such as transport. Nonetheless, in spite of inadequate staffing and resources, the industries underscore the importance of a dedicated IPR unit and report that this unit engaged in valuable enforcement work in the greater Riga area during 2005 and 2006, although nationwide enforcement needed to be improved (in large part because regional partners for this unit were not established). In particular, this unit focused much needed attention on business software cases, because there was local industry presence to support such activities. However, this unit appears to be in jeopardy. Unofficial communication from Latvian police sources indicates that the Ministry of Interior Affairs may be proposing to disband this IPR squad. The business software industry in particular views this unit as an important vehicle to support anti-piracy actions in Latvia. If this squad is dissolved, the industry fears that its efforts in Latvia will be severely undermined. For the Government of Latvia to show its anti-piracy commitment to combat both traditional and digital piracy, and make IPR enforcement a priority among the various enforcement agencies, it should not only keep this IPR squad intact and in operation, but should move forward to fulfill its original staffing and regional unit goals for the IPR squad.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

## NEW ZEALAND

In December 2006, New Zealand's government unveiled the long-anticipated Copyright (New Technologies and Performer's Rights) Amendment. This extensive amendment to the New Zealand copyright law contains many valuable improvements, but a number of its provisions are quite problematic. IIPA makes this Special Mention submission to urge the U.S. government to engage actively with New Zealand to seek a satisfactory resolution of issues including the following:

1. Treatment of Technological Protection Measures (TPMs): New Zealand's efforts to update its existing law fall far short of meeting international minimum standards, as reflected in the implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) by nearly all of New Zealand's OECD cohorts. Among other problems with the new legislation:

- Narrow definitions risk excluding from coverage many technologies used by right holders to control access to their works (since only TPMs that are designed to prevent or inhibit infringement are covered). The definition of "TPM spoiling device" is also too narrow, and even a device "primarily designed or produced" for circumvention purposes would be legal if it had any other significant application. Coverage of circumvention services should also be broadened.
- The act of circumventing TPMs would never be prohibited, regardless of the circumventor's intent or motive, and even though the circumvention would leave a previously protected work "in the clear" for infringement by others.
- Liability for trafficking in "TPM spoiling devices" would require proof of knowledge that the device "will or is likely to be used to infringe copyright," a heavy burden that a clever defendant could make almost insurmountable by concocting a record that there might be non-infringing uses of works whose protection could be circumvented through use of the device.
- Traffickers would be permitted to supply libraries, schools or archives with circumvention devices or services, ostensibly for non-infringing purposes, and even for some others (such as software interoperability) regardless of whether they constitute infringement. These provisions risk in effect condoning the development of a public marketplace in circumvention tools.

2. Transient Copying Exception: The legislation proposes a new exception for incidental copying, but this should be limited to transient copies made in the course of a transaction authorized by the relevant rights holder. Careful crafting of this exception is needed, among other reasons, in order to maintain the proper balance of legal incentives for Internet Service Providers (ISPs), whose servers make unauthorized transient copies of copyright works

in the course of infringing communications, to cooperate with right holders to combat such infringements.

3. ISP Liability Limitation: The proposed language may sweep too broadly since it appears to immunize an ISP that receives a direct financial benefit from infringing activity on its network. The legislation also lacks a clear notice and takedown system.

4. Library Digital Dissemination: The conditions under which libraries would be allowed to provide digital remote access to materials in their collections must be narrowly circumscribed to avoid interference with the normal exploitation of those works and to meet the other criteria of the internationally accepted standards for exceptions and limitations on copyright (i.e., the “three-step” test codified in TRIPS Art. 13). It is questionable whether the provisions of the pending legislation achieve this.

5. Exception for Time-Shifting of Works Disseminated by Broadcast, Cable or Internet: While this provision is substantially narrower than in earlier iterations, it demands careful review, with particular regard to its enforceability and its interaction with other provisions of the law. For example, someone trafficking in tools for circumventing technological measures used in connection with streaming dissemination of copyright material could defend on the ground that his customers might use the tool in order to exercise this exception.

6. Computer Program Exceptions: Proposed new exceptions for, e.g., correcting errors in computer programs, must also be carefully analyzed for compatibility with the three-step test, bearing in mind once again the knock-on effect with respect to technological protection measures.

Since a parliamentary committee is slated to report the legislation by June, early engagement could help New Zealand ensure that the legislation provides useful tools for grappling more effectively with a growing digital piracy problem within the country, as well as to advance toward accession to the WCT and WPPT. The government should also take whatever steps are necessary to ensure that adequate legal prohibitions are in place 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.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

# OMAN

IIPA specially mentions Oman due to the growing threat of piracy of copyright materials through unauthorized broadcasts (or rebroadcasts) of satellite or cable (Pay TV) signals. Once a market entirely dominated by piracy, Oman turned the corner in the late 1990s, and by 2001, Oman had been removed from the Special 301 lists. Nonetheless, the Gulf region has always been susceptible to unauthorized transmission of broadcast signals, and unfortunately, in Oman, the copyright industries now increasingly suffer from the growing threat of cable piracy. Industry groups have raised this issue several times with the Ministry of Commerce over the years and have yet to see any action taken against the cable pirates, despite providing thorough intelligence. It has also come to IIPA's attention that the Omani government (particularly the military) has become involved in the unauthorized transmission of broadcasts over cable.<sup>1</sup> While the quality of reception appears to be very poor (causing some residents to subscribe to legal services notwithstanding the availability of the pirate hookup), they still get the benefit of Pay TV sports channels. As there are thousands of illegal hookups to our knowledge, this translates to significant losses due to lost subscriptions each year.

As the United States has ratified the U.S.-Oman Free Trade Agreement, thereby acknowledging the Omani government's obligations to fairly protect intellectual property rights,<sup>2</sup> the U.S. government should urge the Omani government not to let the signal theft issue become a thorn in the trade relationship. As with other piracy problems in the past, the signal theft issue can easily be addressed by the Omani government if they have the will to do so.

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<sup>1</sup> In this instance, an SMATV (Satellite Master Antenna Television) with a head end machine is re-distributed through a residential compound by coaxial cable over a distance of several miles. The residences then receive multiple channels (in this case 75 channels including free over the air and pay channels).

<sup>2</sup> IIPA does not here go into detail regarding the FTA implementation process, but notes that the Omanis have been working on implementing legislation throughout 2006.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301

### SPECIAL MENTION

## SINGAPORE

IIPA urges USTR to monitor developments in Singapore in 2007 with regard to the issues identified in this Special Mention filing.

### COPYRIGHT LAW AND RELATED ISSUES

**Implementation of FTA Provisions re Digital Audio Transmissions<sup>1</sup>:** 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, the treatment of certain non-interactive digital audio transmissions in the amendment places Singapore in violation of its FTA obligations.

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.

While the FTA permits Singapore to provide limitations with respect to non-interactive transmissions, it does so only “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.”

Section 107B of the Singapore Copyright Act exceeds the allowable discretion under the FTA by wholly exempting from protection certain non-interactive transmissions—notably, simultaneous retransmissions of a broadcast signal (so-called simulcasting). This exemption does not apply to a special case, and most certainly conflicts with the normal exploitation of a

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<sup>1</sup>See also the Dispute Settlement section of this Special 301 filing, at <http://www.iipa.com/rbc/2007/2007SPEC301SINGAPOREDISPUTSETTLEMENT.pdf>.

sound recording and prejudices the interests of the right holders. Interestingly, some of the principal beneficiaries of this gap in protection are state-owned entities (such as MediaCorp, which is in turn owned by Temasek Holdings, the Singapore Government's investment arm). MediaCorp relies on this provision to simulcast its radio broadcasts over the Internet to audiences all over the world, and as such refuses to obtain the multi-territory license for simulcasting. It is a matter of great importance that Singapore quickly addresses this FTA-incompatible provision.

**Parallel Imports:** Since Singapore's law does not protect against parallel imports, there has been an influx into Singapore of pirated product masquerading as legitimate imports, especially pirate music imports from China, which are sold in small retail outlets and makeshift stalls in public housing estates. 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 music products out of the market. These lawsuits are hampered by the requirement to prove that the retailer had the requisite knowledge that the discs were infringing, as well as the onus of proving infringement. Legislative proposals to shift the burden of proof in these cases were not included in the 2005 amendments. If Singapore persists in refusing to provide an exclusive right to authorize imports, it should act to reverse the burdens of proving knowledge in cases involving import piracy.

## **PIRACY AND ENFORCEMENT UPDATE IN SINGAPORE**

There is increasing evidence of pirate optical media production in Singapore for export, and serious concerns about the Singapore government's response to this evidence. There are 20 known optical disc plants in Singapore (with at least 99 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 and movie products seized in South Africa, among other countries, in 2003 and 2004. Despite evidence of piracy, state prosecutors did not charge the plants, but instead issued written warnings. (The authorities have also yet to prosecute the exporter.) Furthermore, after declining to prosecute the plants criminally, the authorities also refused to grant recording industry representatives access to records seized from the plants (including production records), thus frustrating the ability of right holders to seek civil redress and damages for the massive infringements that occurred. Ironically, recording industry investigators were responsible for gathering most of the evidence upon which the plant raids were conducted in the first place.

In September 2005, a seizure at the Trendisc Technology plant involved 400,000 pirated movie VCDs, most of them dubbed in French, and intended for export to Africa. While the individuals involved were prosecuted and sentenced to jail in March 2006, the fine imposed against Trendisc itself in September 2006 amounted to only S\$54,000 (about US\$35,000).

Optical disc piracy cases, especially those of this magnitude and importance, should be prosecuted vigorously, and deterrent sentences should be imposed. The authorities, including the Attorney General's Chambers, should provide better cooperation with right holders to provide access to evidence essential to support potential civil claims.

U.S. book publishing companies continue to suffer from illegal commercial photocopying. A few stores, located in the Queensway shopping center and well-known to the industry and to authorities, have become blatant repeat offenders. The industry needs more support from the Singapore Police in tackling the problems created by these sophisticated syndicates. Furthermore, a pervasive attitude of disrespect for copyright in books permeates Singapore's university campuses. The Intellectual Property Office of Singapore (IPOS) and the Ministry of Education need to continue to play an active role in addressing this problem.

Book publishers have also experienced difficulties with the Subordinate Courts relating to the granting of search warrants for enforcement actions. These courts have imposed unreasonable requirements for granting search warrants against photocopy shops on several occasions in recent months. Requirements for such warrants should be streamlined, transparent, consistently applied and reasonable.

IIPA is pleased with the government response in other areas, including 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%). Effective enforcement at the border and in retail and street markets has kept CD piracy in check. 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.<sup>2</sup> 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. Singapore's government also has taken strong action against significant online infringers of music and sound recordings, including prosecuting participants in illegal file sharing. Extensive media coverage of these cases has sent a clear message that such activity will not be tolerated.

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<sup>2</sup> There is a thriving legitimate market for this industry's products, with retail and mall piracy having been effectively addressed by the local authorities.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

## SOUTH AFRICA

### EXECUTIVE SUMMARY

IIPA specially mentions South Africa in this year's Special 301 filing, because of domestic piracy concerns, especially the proliferation of Internet download-to-burn (i.e., CD-Rs and DVD-Rs), straight CD-R and DVD-R "burning," end-user software piracy, and book piracy, among other concerns. Further, a court ruling handed down by Senior Magistrate Wessels in the Pretoria Commercial Crime Court that removed the Police's powers of arrest under the Counterfeit Goods Act seriously curtails South African authorities' abilities to effectively enforce copyright. Industry reports that piracy levels are getting worse largely as a result of the perception amongst consumers that piracy is a victimless crime. The impact of piracy in South Africa is devastating for legitimate right holders, legitimate distributors, and retail businesses (sale as well as rental), so much so that local copyright owners are mobilizing to take a stand against piracy.<sup>1</sup> Legitimate distributors have reduced employment levels, some rental outlets have reported year-on-year decreases in business in the region of 30%, and many rental outlets have actually closed.

### PRIORITY ACTIONS FOR 2007

- **Reinstate Police Powers Under Counterfeit Goods Act:** The Counterfeit Goods Act (CGA) should also be amended to clarify and simplify Police procedures, ease time limits, reinstate powers of arrest, and include complainant's right to submit evidence of economic damage for consideration in sentencing.
- **Run *Ex Officio* Raids, Leading to Prosecutions for Piracy (Not On-the-Spot Raids That Amount to a Cost of Doing Business)**
- **Pass Modern Copyright Legislation, and Join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty:** The government of South Africa was at one time considering copyright legislation that would have improved the enforcement landscape and brought the law fully into compliance with the TRIPS Agreement. Unfortunately, that legislation was not enacted. Such measures should be adopted, in addition to other modernizing measures including adequate protection of copyright materials on the Internet, notice and takedown (i.e., for ISPs to cooperate in fighting infringement).

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<sup>1</sup> See *First Anti-Piracy Concert to Kick Off in Joburg*, at <http://www.bizcommunity.com/Article/196/40/12012.html> (describing October 20, 2006 concert to kick off "Operation *Dudula*" – meaning "eradicate in isiZulu – spearheaded by "People's Poet" Mzwakhe Mbuli, to protest against the large number of pirate cassettes, CDs and DVDs flooding the local market; "[t]he vision behind these concerts is to create a crime-free society," explains Mbuli, who continued, "[i]f members of the public do not buy fake goods, they will render piracy unworkable, and artists will not be ripped off when they have worked so hard for their earnings"; other performers included Rebecca, Soul Brothers, Avante and Lundi).

- **Develop Joint IPR Enforcement Public Awareness Campaign:** The South African government needs to work with the copyright industries to devise a joint IPR enforcement public awareness campaign, including information on the detrimental effects of illegal downloading on South Africa's domestic creative community.

For more details on South Africa's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<b>SOUTH AFRICA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2002-2006<sup>2</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Business Software<sup>3</sup></b>	119.0	35%	116.0	36%	107.0	37%	87.0	36%	35.6	34%
<b>Motion Pictures</b>	NA	NA	NA	NA	35.0	40%	35.0	40%	30.0	30%
<b>Records &amp; Music</b>	NA	NA	8.5	70%	8.0	65%	3.0	55%	NA	25%
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>Books</b>	3.0	NA	2.0	NA	2.0	NA	2.5	NA	14.0	NA
<b>TOTALS</b>	<b>122.0</b>		<b>126.5</b>		<b>152.0</b>		<b>127.5</b>		<b>79.6</b>	

## PIRACY UPDATE IN SOUTH AFRICA

**Local Optical Disc Production/"Burning" (Link to Internet Piracy):** Local and international law enforcement actions have resulted in a noticeable decrease in the availability of imported pressed discs in South Africa.<sup>4</sup> The net result of this reduction in imports of pressed discs from Pakistan and Malaysia is the proliferation of home operators involved in burning pirated copyright materials (including films on DVD-Rs) from "masters" downloaded from the Internet or received from Malaysia in the post.<sup>5</sup> With the increasing availability of broadband through fixed and mobile applications, downloading to burn and sell is becoming more common and will continue to increase unless efforts to stop such activities are commenced forthwith. The proliferation of this type of piracy has been dramatic and quite sudden and presents new challenges to enforcement efforts. It should be noted that while there appears to have been a decline in the imports for some industries, pirated entertainment software products continue to be imported from Southeast Asia, particularly Malaysia.

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Kuwait under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in South Africa, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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.

<sup>4</sup> Flea markets continue to be a problem in South Africa, but increased law enforcement actions, public awareness campaigns and, in some cases, a willingness by landlords to evict tenants found to be trading in pirate copyright materials, are beginning to have a positive impact in this area.

<sup>5</sup> Local "burning" is carried out by stores and individuals owning a computer or by those who can afford a stack burner (that can make multiple copies of a disc in one run). Sales of pirated copies of TV series discs have proliferated according to the motion picture industry.

**Music Cassette Piracy:** In addition to optical disc piracy of music, cassette piracy remains probably the most devastating to the music and record industries in South Africa, as cassettes provide all kinds of music on a very cheap medium affordable to all. IIPA understands from industry that cassette players are sold by the same organized pirates providing the infringing music in cassette format (the warehouses discovered appear to provide proof of this).

**Internet Piracy, Including Misuse of Corporate Bandwidth:** Internet piracy is a growing concern in South Africa, although the Internet is still largely used to advertise burn-to-order services due to lack of bandwidth in general.<sup>6</sup> Internet piracy at present is generally comprised of illegal copies downloaded from other countries and not from websites or servers based in South Africa.<sup>7</sup> There is a general lack of cooperation from ISPs in taking action against pirate download sites even where the right holder provides proof of infringement (although one industry sector reports that cooperation from auction sites is very good). IIPA also notes for the first time significant problems with abuse of bandwidth by employees at offices. Companies should be warned not to permit their employees to engage in such infringements in the workplace, and, if necessary, should be charged for contributing to infringement.

**Exports and Transshipment:** South Africa's expansive and porous borders also continue to hamper efforts to stem the flow of pirated products between the countries that make up the Southern Africa Customs Union, namely South Africa, Botswana, Lesotho, Namibia and Swaziland. South African Customs authorities remain unwilling in many instances to stop pirate products in transit through its territory.

**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 harming the market for educational publishers. These illegally copied books are also being disseminated to students in neighboring countries, especially where those students are enrolled in distance education courses with South African universities. 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.

**Organized Crime Linkage:** There is increasing evidence of a linkage between piracy activities and other organized crimes.<sup>8</sup> The South African Police Service (SAPS) has taken on three specific cases in respect to organized groups involved in pirating of films, human

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<sup>6</sup> There are reportedly two legal music download service providers for but they are not performing well economically in part due to relative lack of broadband connectivity. Bandwidth is being liberalized but costs are still inhibiting rapid growth.

<sup>7</sup> On the occasion industry learns of a website selling pirate music, they have usually been able to quickly establish a physical address and take it down.

<sup>8</sup> See June 2006 IFPI Enforcement Bulletin, <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf> (describing the local record industry group-coordinated raids in 2006 which revealed thousands of pirate discs and cassettes, etc., including South African as well as Western artists, but which also revealed refugee application forms which were in the process of being falsified, and various legal warrants issued in some of the names mentioned in the application forms; in a separate raid in January 2006, death threats were made against a music artist and members of the local record industry group which requested backup of the South Africa Police Services when traders in counterfeit product became aggressive during an incident at a stall at the Montana Traders Square). One raid described occurred in China City, resulting in significant seizures. A criminal prosecution was launched and resulted in a conviction with a R300,000 fine or three years imprisonment, suspended for a period of five years, provided the accused is not found guilty of the same offense during the period of suspension.

trafficking, money laundering, tax evasion, and counterfeit bank notes. All organized groups identified concentrate on bringing people into South Africa and servicing the local market. Major groups are of Pakistani and Chinese origin.

## **ENFORCEMENT UPDATE IN SOUTH AFRICA**

**Court Case Sets Back Enforcement in South Africa:** Unfortunately, in 2006, a ruling handed down by Senior Magistrate Wessels in the Pretoria Commercial Crime Court dealt a serious blow to enforcement of copyright in South Africa. The decision essentially stripped the Police's powers of arrest under the Counterfeit Goods Act. This decision was handed down at the bail applications of 14 persons (illegal immigrants from Pakistan) arrested by the police under the Counterfeit Goods Act following a complaint by the anti-piracy and anti-counterfeiting organization, SAFACT. The Police and Prosecution Services have taken the ruling on appeal to the High Court and a decision is expected during the first quarter of 2007.

**Greater Numbers of Arrests and Criminal Convictions in 2006, But Problems Remain with Courts:** Notwithstanding this negative ruling by the Pretoria Commercial Crime Court, there was an overall increased commitment by law enforcement agencies to act against those trading in pirate copyright materials in 2006, as the number of arrests in 2006 was almost double that of 2005 and the number of criminal prosecutions has exceeded administrative fines ("admissions of guilt") when compared with 2005. Instances of bail being denied have become ever more common as well as a significant increase in plea bargains (which have to be approved by the complainant). Greater attention is being paid to piracy in 2006, and one high profile case involving two local South African films highlights the damaging nature of piracy to the South African economy, society, and people.<sup>9</sup>

Unfortunately, the criminal court system in South Africa remains overburdened, and it is difficult to move cases along at a reasonable pace and without unreasonable burdens and costs placed on the right holders. Prosecutors and judges in the non-specialized courts fail to view piracy as a serious crime (although this is being gradually offset with an increasing number of cases being referred to either the High Courts or the Specialized Commercial Crime Courts that have been established in Johannesburg, Pretoria, Durban and Port Elizabeth, Cape Town and Bloemfontein). A presumption of copyright subsistence remains lacking, and in some cases, defendants have been able to reverse the burden of proving ownership simply by placing ownership in issue during the proceedings. The entertainment software industry again reports that problems remain with respect to enforcement of judgments. Even after winning a case and being awarded costs, the chances of collecting from a defendant are almost none. Defendants all too often have already disposed of or transferred their assets and have left the country, thus leaving the right holder without recourse as to collecting the damages awarded in a judgment.<sup>10</sup>

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<sup>9</sup> Operations by the police assisted by SAFACT led to the discovery of massive numbers of pirate copies of the local movies "Mama Jack" and "Tsotsi" and revealed the original pirate operation to have been an "inside job" by workers at the post-production houses for those movies. Considerable media exposure has been given to the pirating of these two films, as well as the broader issue of film and copyright piracy. The pirating of films has also been raised in the National Parliament, and the Gauteng and Western Cape Provincial Legislatures. The original discovery has led to many actions against street vendors, flea markets, and home operators found to be trading in pirated copies of the two films.

<sup>10</sup> 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.

Thus, while theoretically, the award of damages might serve as a deterrent, as judgments remain unenforced (and uncollected), they serve as no deterrent at all.

**Special IP Prosecutors:** The appointment of two senior State Prosecutors with specific responsibility for prosecution of IP offences which will operate within the specialized Commercial Crime Court, is a positive development. This additional capacity will enable criminal cases involving pirating of copyright materials to be expedited, and will hopefully lead to an increased willingness of prosecutors to build more cases against repeat offenders to culminate in deterrent sentences that include imposition of prison sentences.

**Customs Issues:** Industry has developed good relationships with South African Customs officials, but the blanket indemnity they require is considered a problem for right holders. Customs authorities in South Africa are intercepting transit consignments at airports but uncertainty exists as to seaborne consignments. There have been past reports forensically linking optical disc plants in Singapore to pirate product seized in South Africa. Unfortunately, South African Customs has not been willing to seize this in-transit pirate product.<sup>11</sup> The entertainment software industry reports that imports of pirated optical disc products from Southeast 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, and there continues to be a lack of transparency as to what becomes of the seized products.

## **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.<sup>12</sup> These include:

- **End-User Piracy of Business Software 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, giving rise to questions about South Africa's TRIPS compliance under Article 61 (which requires criminalization of at least all copyright piracy on a commercial scale).
- **Civil Damages 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.

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<sup>11</sup> 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.

<sup>12</sup> Other issues in the current law exacerbate the piracy problem. For example, unauthorized imports (parallel imports) of products prior to local release dates simply ruin the market for the legitimate distributors, and since the shipments can often be mixed with pirate discs, the law should be amended to afford an exclusive importation right.

- **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. 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.

The Government of South Africa should amend its law to comply with the provisions of the WIPO "Internet" Treaties,<sup>13</sup> the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and should accede to these treaties as soon as possible.

**Counterfeit Goods Act:** Amendments to the Counterfeit Goods Act have long been in the works (they were drafted in 2004 to clarify and simplify procedures required to be followed by the Police, result in less onerous time limits, reinstate powers of arrest, and include a complainant's right to submit for consideration in sentencing evidence of economic damage caused by this crime). These proposals have been submitted to the Department of Trade and Industry without response. Further problems identified with the CGA include the fact that it provides for certain procedures to be followed within time frames that are too short for the cases reasonable to be able to be prepared for the courts. The procedures of the CGA are often not known to South African enforcement agencies or to public prosecutors, so they are unable to competently deal with matters under the law.

**Regulations on Harmful Business Practices and Proposed Amendment to Films and Publications Act, May Harm Right Holders:** Regulations are reportedly being promulgated under the Harmful Business Practices Act requiring specific notices to consumers to be displayed in respect to parallel imports by retailers. Further, proposed amendments to the Films and Publications Act impose registration and classification requirements on authorized distributors that do not apply to parallel imports or Internet downloads. These legislative acts should not be concluded precipitously without considering fully the potential negative impact they will have on legitimate right holders.

**Trade and Investment Cooperation Agreement (TICA):** With the SACU Free Trade Agreement talks suspended indefinitely,<sup>14</sup> USTR has commenced consideration of a "Trade and

<sup>13</sup> 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>.

<sup>14</sup> On April 18, 2006, USTR officially announced that SACU negotiations were on hold. Specifically, USTR noted "The United States and SACU have had differences on some core issues in the FTA. These issues will require detailed

Investment Cooperation Agreement (TICA)” with SACU members, including South Africa. IIPA has weighed in as part of a private sector working group as part of the “TICA.” IPR (specifically, copyright) should be addressed, including a detailed text if possible, but barring that, at least a commitment to fight piracy, including Internet, optical disc, book, and end-user software piracy, and a commitment to join and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

## **TRAINING/TECHNICAL ASSISTANCE**

The industries have established MOUs or informal understandings with enforcement authorities in South Africa, and the latter are generally quite receptive to training and receiving technical assistance (and have been for at least six years, with the last couple of years focused more on prosecutors). SAFACT, a local industry-driven enforcement group, is in almost daily contact with the various law enforcement agencies involved in combating the pirating of copyright materials and provides support capacity and guidance.<sup>15</sup> The record industry group similarly conducts training and provides technical assistance as well. The scope of such training/technical assistance includes training to Prosecutors, Customs Officials and Police Officers to assist in acquiring necessary investigative skills to seek practical application of the Copyright Act and Counterfeit goods Act,<sup>16</sup> plus procedures for successful convictions from raids through arrests, forensics, bail and trial. Technical assistance in 2006 included funding the new Commercial Crime Courts in Cape Town and Bloemfontein. SAFACT also participated in a UNESCO training for magistrates from the Southern Africa region.

## **MARKET ACCESS**

**Broadcast Quota:** In 2001-2002, the Independent Communications Authority of South Africa (ICASA), although acknowledging that South African broadcasters had overwhelmingly exceeded their quotas, tightened local content obligations by up to 15%, thus increasing overall content quotas for public broadcasters and private broadcasters to 55% and 35% respectively (and raised from 8% to 10% for Pay-TV services in 2006). Those quotas, upheld in a 2006 review of the rule, are articulated on the basis of service type (public, commercial, subscription channels) and program genre (South African drama, children's programming, etc.). The quotas, which apply to terrestrial, cable and satellite broadcasters licensed in South Africa, may be reviewed in 2009, three years after their coming into force (January 2006). IIPA believes market forces should determine programming allocation rather than discriminatory quota regimes.

**Foreign Ownership Restriction:** Foreign ownership in a broadcaster is presently capped at a maximum of 20%. This level is being reviewed, and may be increased to allow 33% foreign ownership in line with World Trade Organization (WTO) recommendations. Foreign investment restrictions are discriminatory, limit competition and inhibit the potential growth of the television industry. They should be abolished.

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examinations over the longer term.” While an FTA remains a stated long-term goal, the U.S. is launching a new joint work program on trade and investment issues with the SACU countries – a “framework [to] establish a basis and building blocks for pursuing the FTA over the longer term.” Given the realities involved with TPA set to expire mid-next year, conclusion of an FTA is not possible.

<sup>15</sup> SAFACT views its mission as putting together project motivations based on own intelligence to Police for establishment of projects aimed at significant criminal groups that assist the Police in obtaining resources necessary to effect prosecution.

<sup>16</sup> In 2006, product identification training (i.e., between pirate and genuine) was presented to all law enforcement agencies including municipal law enforcement personnel in order to address the problems caused by street vendors.



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

## SWEDEN

IIPA specially mentions Sweden due to widespread internet piracy (downloading and file-sharing) and difficulties in achieving effective enforcement against criminal copyright infringement. The situation is further complicated by society's high acceptance of filesharing which is echoed in the media and from the general public. Furthermore, there is little, albeit increasing, knowledge among politicians about the scope of the filesharing problem. The Minister of Justice has declared that she is against illegal filesharing. Copyright groups have held numerous meetings with local enforcement authorities and the industries look forward to working with the new Administration on ways to improve anti-piracy efforts and strengthen public awareness.

**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.<sup>1</sup> There has been an increase in users with access to broadband connection but the number of people downloading seems to stay relatively stable, albeit still quite high. There were 490,000 illegal movie downloads in the third quarter of 2006; up from 468,000 in the third quarter of 2005. After the first trial against an uploader went to court in Sweden (with significant media coverage), there was a measurable drop in people downloading according to a local study.

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 perhaps around 40% of the European sites of this type, are hosted in Sweden. The local Swedish anti-piracy group, APB (AntiPiratByran) claims it is aware of 26 topsites in Sweden. The country has the largest number of DirectConnect 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 also is 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. ThePirateBay was raided in mid-2006 by the Swedish police, and although the site is back up and running, it is expected that its prosecution will take place in the middle of 2007 (see discussion, below).

Although most ISPs used to forward cease and desist letters to alleged infringers, most of them ceased doing so after the public debate about peer-to-peer (P2P) piracy rose, claiming that that they are not obligated to do so by law. MPA reports that, according to two market research studies, there are approximately 12-15 million movies illegally downloaded every year in Sweden.

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<sup>1</sup> Pirates have even established a political party, The Pirate Party ("Piratpartiet"), which had about 0.63 percent of the votes in the September 2006 elections (much less than was expected).



**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.

**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. Local right holders have been tireless in presenting counter arguments to P2P 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.

In 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. The FBI, MPA, and AntiPiratByran (the umbrella organization for anti-piracy operations carried out on behalf of the film and games industries) participated in a training seminar for police on January 24, 2007. APB has continuously pressed for a special copyright unit to be created within law enforcement. This unit will be established in early 2007 and a special training will be provided on source piracy. The industries plan additional training and educational work with police officers and prosecutors in 2007.

During 2006, however, police and prosecutors generally failed to act effectively on the numerous complaints of Internet piracy made on behalf of the film and games industries by the Swedish Anti-Piracy Bureau (SAB) and APB. Although the Swedish police have occasionally proceeded with a criminal complaint, that has been only after tremendous pushing by local rightholders. The police take no *ex officio* action at all, even though they have the authority to do so. MPA reports that about 150 police reports have been filed against filesharers in Sweden, and of those, only eight have gone to trial so far --- seven were convicted and one acquitted. These few notable exceptions of concrete action also resulted in public backlash.

In June 2006, the Swedish police acted decisively against the PirateBay (which was created by "Piratbyrån" in 2003), the notorious BitTorrent facilitator of internet piracy whose prominence grew dramatically after successful actions were taken in 2005 to take down other popular pirate search engines (SuprNova, LokiTorrent). The PirateBay operators countered with their own public relations campaign and resurrected their service, by turning initially to a host site in Holland. A new political party, Piratpartiet (the Pirate Party) gathered sufficient support to be on the September 2006 ballot. In the fall of 2006, Swedish politicians from the ruling party and main opposition party openly supported the idea of a compulsory license to address unauthorized internet file sharing. This is a political response to the backlash against the recent raids of the PirateBay BitTorrent

tracker site in Sweden.<sup>2</sup> No concrete legislative proposals have been advanced to date. The copyright industries are deeply concerned about the potential of any compulsory license initiative, and are monitoring the situation closely.

On October 19, 2006, a Swedish court imposed the first fine on an individual for illegal music uploading. IFPI, representing the international recording industry, had reported 30 individuals to the Swedish police for making available large quantities of music to the general public through file-sharing via the internet without the consent of the rightsholders. On the date on which the report was made, IFPI had no knowledge of the people involved or where in Sweden they lived. In response to the first of IFPI's reports, the prosecutor decided to prosecute one person for making available four music files. That case was heard before Borås District Court on October 4, 2006, and the verdict was handed down two weeks later. An income-based fine of SEK 20,000 (US\$2,850) was imposed. The District Court wrote that the accused "shall now be sentenced for, on one occasion, having made four sound recordings available to the general public via the internet. This did not involve a commercial operation. He is sentenced to a substantial fine." However, the prosecutor and the convicted man are both appealing this decision; the prosecutor is seeking jail time. In January 2007, IFPI filed an additional complaint with the prosecutor's office against Pirate Bay for its ongoing activities.

**Legislation:** Various law reform efforts took place in the past two years, and more are underway in Sweden. Below is a summary reported by IIPA members.

EU Copyright Directive: The 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 had 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 Swedish 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. Proposed legislation from the Government might surface in the next few months. According to a statement from the Swedish under-secretary of State, the first step to a proposed legislation will not come until later this spring (industry guesses suggest late April 2007).

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.

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<sup>2</sup> Also apparently in reaction to the PirateBay action, another Swedish organization launched a "darknet" for 5 Euros a month to enable large scale piracy and file sharing. In August 2006, press reports indicated that the Swedish Pirate Party launched a new Internet service that lets anybody send and receive files and information over the Internet without fear of being monitored or logged. This "darknet" service allows people to use an untraceable address, where they cannot be personally identified. This gives users the advantage of a Swedish IP address from anywhere in the world. Reportedly, a portion of the subscription fees goes to support the Pirate Party's work in changing the copyright and privacy laws. See "Relakks: Swedish Piracy party Launches Massive Darknet," RealTechNews, August 14, 2006, posted at <http://www.realtechnews.com/posts/3376>.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

## SWITZERLAND

**Special 301 Recommendation:** IIPA specially mentions Switzerland in this year's Special 301 filing, but does not make a recommendation for listing at this time. However, IIPA does recommend that an out-of-cycle-review be conducted this year to evaluate the efforts of the Swiss Government to amend its copyright law, and specifically: the removal of proposed sweeping exemptions and compulsory licenses for broadcasting organizations for online use of content; the removal of right to circumvent technological protection measures for use of exceptions; and the introduction of legal source requirement.

### **EXECUTIVE SUMMARY**

Over the past year, IIPA and its members have expressed concern about the pending legislation to amend the Swiss Copyright Act and, if unchanged, its possible deleterious effect on the legitimate industries in the digital marketplace. We request that Swiss government officials and members of parliament take actions to amend the proposed amendments to the Swiss Copyright Act to address the concerns expressed in the copyright industries. The current proposals are incompatible with international copyright and related rights' conventions and obligations. We urge that the issues of copyright reform and the importance of effective copyright enforcement in both the offline and online environment continue to be addressed in the work program of the new Swiss-U.S. Trade and Investment Cooperation Forum.

### **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Copyright Law Reform:** The copyright industries remain quite concerned that the Swiss effort to implement the WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) would create a difficult legal environment regarding the protection of 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).<sup>1</sup>

The legislative reform process has been underway for almost three years. In October 2004, the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for

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<sup>1</sup> The EC Copyright Directive, which is being implemented by EEA Member States as well as a number of other European countries provides a standard level of copyright protection across Europe. While Switzerland is by no means obliged to implement every aspect 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.

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. 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. The bill was subsequently amended, approved by the Federal Council on March 10, 2006 and introduced to parliament. While the revised proposals come as an improvement in some respects, it is overall very problematic.

IIPA members report that the proposals thus far have been discussed in the Council of States ("Ständerat") both in the Legal Affairs Committee and the Plenary. Apart from an improvement of the draft with regard to preparatory acts concerning circumvention tools, the Ständerat has considerably worsened the proposals by introducing broadly phrased exceptions which are solely in the interest of broadcasters and are in violation of international agreements, including TRIPS standards and the WIPO Treaties that the Bill is meant to implement. Furthermore, the Draft still allows circumvention of technical measures for use of very broad exceptions, and the official Memorandum to the Draft now explicitly allows private copies made from an illegal source. The Draft as amended by the Ständerat will next be discussed in the "Nationalrat" (Federal Assembly) both in the Legal Affairs Committee and in Plenary. It is then likely that the legislation will go through reconciliation between the two Chambers. Hence it may be anticipated that the legislative procedure will continue through the Fall 2007. The Parliament so far does not understand that certain provisions of the draft will violate international treaties. Therefore, a special out of cycle review may help to get this important message across.

This bill was, at that time of its introduction, and remains problematic for copyright right holders and inconsistent with European and international norms in three key respects. IIPA members summarize the key problems, below:

**Technological protection measures (TPMs):** 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 Swiss bill would allow circumvention of technological measures "for the purposes of a use permitted by law" (Article 39(a)(4)); this provision would effectively eviscerate the legal protection of technological measures and would diminish 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 circumvention permissible even while the tools to circumvent would be illegal. While the industries understand that there are 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. Apparently, some of the circumvention activities that would be legal under civil law are penalized under Swiss Criminal Law. Hence for those cases, activities allowed under copyright law would be prohibited under criminal law. In view of the fact that the provisions in the Copyright Law are *lex specialis* to those in the Criminal Law and would be a *lex posterior* since they would have been adopted after the relevant provisions in the Criminal Code, it is more than questionable whether the criminal offences would even prevail.

**The Interface between TPMs and Exceptions:** A fair balancing of protection of technological measures with copyright exceptions is missing, even though some progress has

been made by replacing the obligations formerly imposed on right owners in Article 39b of the Draft with the establishment of a supervisory body which is to observe the impact of technological measures on exceptions. While this is a step in the right direction, it still does not ensure the development of new business models, such as on-demand and interactive services.

**Private Copy Exception:** The private copying 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 exception not only covers private copying, but all other uses made for private or personal ends as well. The scope of this private use exception clearly does not pass the three-step test which is the international standard to which all exceptions must conform (TRIPS Article 13). Article 19 of the Swiss law as currently drafted seems to permit transmission of copies to third parties and the official memorandum to the Draft now explicitly permits 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. The unfortunate fact is that the Explanatory Memorandum in the “Botschaft” to the draft dated March 10, 2006 issued by the Swiss Government states that there should be no distinction between unlawful and lawful sources in the private circle. Consequently, it could be argued on the basis of the Explanatory Memorandum that the making of copies from unlawful sources would be allowed. That position encourages copyright infringement on a massive scale, is inconsistent with international norms, and threatens the vitality of Switzerland’s digital environment.

The legal commission of the Nationalrat is expected to debate the draft sometime between February and April 2007. Thereafter, it will be debated in the Nationalrat. AudioVision Switzerland continues to lobby on behalf of the MPA, the IFPI, and the interactive game companies in order to abolish the right to circumvent TPMs for use of exceptions and to introduce a legal source requirement.

**Mandatory collective administration:** Lastly, it is important to bear in mind the Swiss legislators’ predilection for mandatory collective administration, particularly for the benefit of broadcasters which is also being pursued in the revised draft. Mandatory collective administration is particularly problematic in Switzerland, not only because it takes away from the right owner the decision to administer a right individually or collectively, but also in view of the serious consequences it has with regard to the level of remuneration: Article 60(2) of the Swiss Copyright Law limits the levels of remuneration to 10% for authors and 3% for related rights owners. As a result, particularly in the area of related rights, an appropriate income cannot be guaranteed where collective administration is mandatory. With Article 24b addressing certain acts of reproduction for the purposes of broadcasting, the Draft already seeks to introduce one additional instance of mandatory collective administration into Swiss copyright law. The provision is so broadly worded that it exceeds the scope of Article 11*bis*(3) of the Berne Convention and Article 15(1)(c) of the Rome Convention. In addition, two further broadly worded proposals for mandatory collective administration, primarily in favour of broadcasters, were tabled during the debate in the Council of States after strong lobbying by the public broadcaster SRG. Both concern aspects which have long been high on the agenda of broadcasters: the exploitation of archival productions and the use of so-called orphan works (Articles 22a and 22b of the draft as amended by the Ständerat). Provisions in this respect were already contained in the previous draft, but in view of the harsh criticism expressed, they were not taken on board in the Government Draft of March 10, 2006. The Ständerat thus re-introduced highly controversial provisions that are not only

detrimental for the music and audiovisual industries but are also unnecessary since they are not required for the implementation of the WIPO Treaties.

**Camcording Legislation:** The illicit recording of movies at movie theaters (“camcorder piracy”) is a major source of pirated motion pictures available over the Internet, as well as on street corners and flea markets around the world. Switzerland has been traced as a source for unauthorized camcording. In order to facilitate enforcement and prosecution of such piracy, anti-camcording legislation should be adopted in the Switzerland 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.”

## **COPYRIGHT PIRACY IN SWITZERLAND**

**Internet Piracy:** Peer-to-peer (P2P) file distribution is gaining in popularity as broadband penetration increases (Switzerland is the number two country in Europe for the percentage of households with broadband penetration). Piracy on P2P networks also contributes to optical disc piracy, since the films can then be used as masters for the production of DVD-Rs and CD-Rs. There are several portals sites operated from Switzerland but closely connected to the German piracy market.

**Signal theft piracy:** Switzerland, as it falls within the footprint of most European satellites, suffers from signal theft piracy typically via gray and pirate market smart cards. The country’s central location and linguistic diversity make it a prime market for such piracy. New anti-circumvention legislation covering commercial aspects of signal theft (manufacture, distribution, and sale) needs to be rigorously applied.

<b>SWITZERLAND</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2006<sup>2</sup></b>		
<b>INDUSTRY</b>	<b>2006</b>	
	<b>Loss</b>	<b>Level</b>
<b>Sound Recordings &amp; Musical Compositions</b>	NA	NA
<b>Business Software</b>	\$165.0	25%
<b>Motion Pictures</b>	NA	NA
<b>Books</b>	NA	NA
<b>Entertainment Software</b>	NA	NA
<b>TOTALS</b>	<b>\$165.0+</b>	

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). BSA’s 2006 estimates are preliminary, and MPAA does not have 2006 data available at the time of this submission; any updated figures will be posted on the IIPA website later in the year. For information on the IIPA’s prior 301 country reports, visit <http://www.iipa.com/countryreports.html>.

# **APPENDIX D**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2008) & IIPA'S 2009 SPECIAL 301 RECOMMENDATIONS**

# APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2006) AND IIPA 2007 SPECIAL 301 RECOMMENDATIONS

	IIPA UPDATE WITH Recommendation		USTR 301 PLACEMENT (as of April/May of each year)																
COUNTRY	February 2007	2006	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	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	DS									WL	WL	WL	WL						
Bangladesh	WL																		
Belarus	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO									
Belize		PWL	WL	WL															
Bolivia		WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO							
Bosnia and Herzegovina																			
Brazil	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei																			
Bulgaria	WL	WL	WL	WL						PWL	WL	OO	OO						
Burma (Myanmar)																			
Cambodia	SM																		
Canada	PWL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia		WL	WL	WL	WL														
Cyprus											OO	OO	OO	WL	WL	WL	WL		
Czech Republic								WL	WL	WL	OO								
Denmark								WL	WL	WL	WL								
Dominican Republic	PWL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt	PWL	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										OO									
European Union		WL	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	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Honduras										WL	WL	OO	OO	OO					
Hong Kong	SM								OCR	WL	WL	OO							
Hungary	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
Iceland																			



# APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2006) AND IIPA 2007 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA UPDATE WITH Recommendation February 2007	USTR 301 PLACEMENT (as of April/May of each year)																	
		2006	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	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	WL	PWL + OCR	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	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL	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	WL									
Japan	SM						OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan	DS								WL	WL	WL	OO	OO						
Kazakhstan (GSP)	WL		WL	WL	WL	WL	WL	WL		OO									
Kenya																			
Kuwait	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic							OCR												
Laos	SM																		
Latvia	SM	WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO									
Lithuania	WL	WL	WL	WL	WL	WL	WL	WL											
Luxembourg											WL								
Macau							WL	WL	PWL	PWL									
Macedonia																			
Malaysia	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	PWL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova								WL											
Morocco	DS																		
Netherlands										OO									
New Zealand	SM					WL	WL		WL							WL	WL		
Nicaragua										OO	OO								
Nigeria	WL																		
Oman	SM							WL	WL	WL	WL	WL	OO						
Pakistan	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority								OCR											
Panama										OO	WL	OO		OO					
Paraguay	306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL			
People's Republic of China	PWL	PWL + 306	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	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland	WL	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	WL	OO	OO	OO	WL						

## APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2006) AND IIPA 2007 SPECIAL 301 RECOMMENDATIONS

	IIPA UPDATE WITH Recommendation		USTR 301 PLACEMENT (as of April/May of each year)																
COUNTRY	February 2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Russian Federation (GSP)	PWL	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
San Marino											WL								
Saudi Arabia	PWL	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
Singapore	DS + 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	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain	WL							WL	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																			
Sweden	SM								WL	WL	WL								
Switzerland	SM																		
Taiwan	WL	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	WL											
Thailand	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Tunisia										OO									
Turkey	PWL	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	WL											
UAE							WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	PWL	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	WL											
Venezuela	PWL	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	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)  
 DS: Dispute Settlement

**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 2007

### ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List. See IIPA's 2007 report on Argentina at <http://www.iipa.com/rbc/2007/2007SPEC301ARGENTINA.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.

The same copyright-related issues have been on the 301 lists for many years. For example, 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 was noted in USTR's 2003 Special 301 Announcement, which cited "lax and ineffective enforcement against piracy . . . and counterfeiting," and enforcement efforts were 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 then 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, "enforcement of copyrights remains inconsistent, and the effectiveness of enforcement remains hampered by "inadequate resources, border controls, and slow court procedures." USTR continued to follow suit in April 2005, noting problems with Argentina's enforcement regime included the "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." In April 2006, USTR stated: "Copyright piracy also remains a significant problem in Argentina, with the U.S. copyright industry reporting that music piracy worsened in 2005, mainly in the areas of physical piracy (burned CD-Rs) and Internet piracy. Copyright piracy also continues in the areas of entertainment and business software and book publishing. Although the Argentine Government took some IPR enforcement actions during 2005, the United States encourages stronger IPR enforcement actions to combat the widespread availability of pirated and counterfeit products."

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 2005, \$616.6 million worth of goods from Argentina entered the U.S. under the GSP duty-free code, accounting for roughly 15.3% of its total imports. During the first 11 months of 2006, \$597.6 million worth of Argentine goods (or 16.7% of Argentina’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 7.5% increase over the same period in 2005.

## ARMENIA

Armenia does not currently appear on any of the USTR lists. IIPA did not make a submission on Armenia in 2007, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

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 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 and several CIS countries 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. Several years later, Armenia acceded to the WTO on February 5, 2003. On September 3, 2003, USTR announced that it had terminated Armenia’s GSP review. In 2005, \$27.1 million worth of Armenian goods entered the U.S. under the GSP duty-free code, accounting for 59.4% of its total exports to the U.S. During the first 11 months of 2006, \$25.6 million worth of Armenian goods (or 61.5% of Armenia’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 1.7% decrease over the same period in 2005.

## AUSTRALIA

Australia does not currently appear on any of the USTR lists. In 1994, Australia was named to the. 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. Since that time, the U.S. and Australia have entered into a Free Trade Agreement, which includes obligations on intellectual property rights and enforcement.

## AZERBAIJAN

In 2007, IIPA specially mentions Azerbaijan but makes no recommendation for inclusion on any 301 list. See IIPA's 2007 Azerbaijan report at <http://www.iipa.com/rbc/2007/2007SPEC301AZERBAIJAN.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, and USTR agreed, noting 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 again 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, and USTR agreed, that Azerbaijan remain on the Watch List. USTR stated that then that Azerbaijan had “yet to fully implement the 1995 US-Azerbaijan Trade Agreement and address deficiencies in its IPR law,” 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. In 2006, Azerbaijan joined the two WIPO Treaties (WPPT and WCT). Citing progress made in IPR enforcement, USTR removed Azerbaijan from the Watch List in April 2006.

## **BAHAMAS**

The Bahamas is currently on the Watch List. IIPA did not file on The Bahamas in 2007, but has in prior years; see IIPA country report page at <http://www.iipa.com/countryreports.html>.

To cap the 301 history, 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 decision, USTR kept the Bahamas on the Watch List, and indicated that another OCR would be conducted “to review actions in this regard.” (IIPA believes that OCR did not occur.) In its 2003 301 announcement, USTR cited the same problems, and elevated the Bahamas to the Priority Watch List, and The Bahamas remained there in the 2004 301 cycle. There, 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.” As recommended by IIPA, USTR chose to keep the Bahamas on the Watch List in 2006.

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 2005, \$111.3 million worth of Bahamian goods entered the U.S. under the CBI, representing 16% of the Bahamas’ total exports to the U.S. During the first 11 months of 2006, \$112.7 million worth of Bahamian goods (or 28.3% of the Bahamas’ total exports to the U.S. from January to November) entered under the CBI, representing an increase of 13% from the same period in 2005.

## **BAHRAIN**

In 2007, IIPA includes Bahrain in its “Dispute Settlement” section, specifically highlighting deficiencies under the U.S.-Bahrain Free Trade Agreement. See IIPA’s 2007 Bahrain country report at <http://www.iipa.com/rbc/2007/2007SPEC301BAHRAIN.pdf>.



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.. On December 15, 2005, Bahrain joined the WCT and WPPT. In January 2006, the U.S. legislation implementing the U.S.-Bahrain FTA was signed into law by the President. In June 2006, Bahrain enacted legislation intending to implement the substantive copyright obligations of the U.S.-Bahrain Free Trade Agreement. The legislation contains some FTA-incompatible elements that will need to be fixed or will leave Bahrain in violation of the FTA.

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 2005, \$66.4 million worth of goods from Bahrain entered the United States under the GSP duty-free code, accounting for 15.4% of its total exports to the U.S. During the first 11 months of 2006, \$700,000 worth of goods from Bahrain (or .12% of Bahrain’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 98.9% from the same period in 2005.

## **BANGLADESH**

IIPA recommends that Bangladesh be placed on the Watch List in 2007. Bangladesh currently does not appear on any USTR list. In 2005 and again in 2006, IIPA highlighted 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 2007 report on Bangladesh at <http://www.iipa.com/rbc/2007/2007SPEC301BANGLADESH.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 2005, \$21.4 million worth of goods from Bangladesh entered the United States under the GSP duty-free code, accounting for 0.8% of its total exports to the U.S. During the first 11 months of 2006, \$19.1 million worth of goods from Bangladesh (or 0.6% of Bangladesh’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a decrease of 5.4% from the same period in 2005.

## **BELARUS**

IIPA recommends that Belarus remain on the Watch List in 2007, where it has appeared since 1999. See IIPA’s 2007 Belarus country report at <http://www.iipa.com/rbc/2007/2007SPEC301BELARUS.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 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. In 2006, IIPA recommended that Belarus be retained on the Watch List. USTR agreed, and Belarus remained on the Watch List due to continued concern over failure to fulfill commitments under a bilateral agreement between the countries, and expressed its concern that

[IPR enforcement] remains weak, that piracy levels remain high, and that Belarus needs to take strong enforcement action against optical media plants that are producing pirated goods. The Belarus copyright law needs to be amended to provide adequate protection for sound recordings and pre-existing works, as well as to implement the WIPO Internet Treaties, which Belarus joined in 1998. ... [The U.S.] will continue to monitor (Belarus’) progress in strengthening its IPR regime, especially in the context of Belarus’ bid for accession to the WTO.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Belarus and several other CIS nations 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. Benefits were withdrawn from Belarus for reasons unrelated to intellectual property matters.

## **BELIZE**

IIPA did not make a submission on Belize in 2007, or in any prior years.

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.” In 2006 USTR raised Belize from the Watch List to the Priority Watch List, noting that piracy is widespread, and “concerns remain about the ability and willingness of authorities to conduct inspections, seize counterfeit and pirated goods, complete prosecutions and issue deterrent sentences. A continuing concern is the lack of IPR enforcement in

Belize's Corozal Commercial Free Trade Zone, through which infringing products are transshipped from Mexico to the United States and elsewhere."

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 2005, \$1.5 million worth of Belizean imports to the United States benefited from the GSP program, accounting for 1.5% of its total exports to the U.S. During the first 11 months of 2006, \$6 million worth of Belizean goods (or 4.3% 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 307.2% increase from the same period in the previous year. Under the Caribbean Basin Initiative (CBI), which has similar IPR criteria, \$40 million worth of Belizean goods entered the U.S. in 2005, accounting for 40.6% of total exports to the U.S. in 2005. During the first 11 months of 2006, \$39 million worth of Belizean goods (or 27.9% of Belize's total exports to the U.S. from January to November) entered under the CBI. Under the Caribbean Basin Trade Partnership Act (CBTPA), which has IPR criteria similar to CBI and GSP, \$14.8 million worth of Belizean goods entered the U.S. in 2005. During the first 11 months of 2006, \$31 million worth of Belizean goods (or 22.1% of Belize's total exports to the U.S. from January to November) entered the U.S. under the CBTPA, representing a 121.1% increase over the same period in the prior year.

## **BOLIVIA**

IIPA did not make a submission on Bolivia in 2007, but has in years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

To recap, 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.

After a several year hiatus, 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. IIPA recommended that Bolivia remain on the Watch List for 2006. USTR agreed, as there had been no notable improvements to its IPR regime, and noting that Bolivia's copyright laws are inadequate, IPR enforcement is weak, and "U.S. copyright industry

continues to report that music piracy in Bolivia is so rampant that all international recording companies have closed their offices in Bolivia.” The U.S. urged Bolivia “to increase its IPR enforcement efforts, including providing for civil *ex parte* searches, preventing unwarranted delays in civil enforcement, providing adequate civil and criminal damages in copyright cases, and strengthening border measures.”

With respect to other trade programs, 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 2005, \$26.8 million worth of goods from Bolivia entered the U.S. under the duty-free GSP code, accounting for 9.1% of its total exports to the U.S. Another \$157.4 million worth of Bolivia’s exports to the U.S. received benefits under the ATPA program, accounting for 53.7% of its total exports to the U.S. that year. During the first 11 months of 2006, \$19.8 million worth of Bolivian goods (or 6% 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 21.2% decrease over the same period in the previous year. Another \$151.9 million worth of Bolivian goods entered the U.S. under the ATPA in the first 11 months of 2006, representing an increase of 45.8% from the same period in 2005.

## **BOSNIA AND HERZEGOVINA**

IIPA did not make a submission on Bosnia and Herzegovina in 2007, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>.

Bosnia and Herzegovina have never appeared on a USTR Special 301 list. In 2005, \$3.9 million worth of goods from Bosnia and Herzegovina entered the United States under the duty-free GSP code, accounting for 5.6% of its total exports to the U.S. During the first 11 months of 2006, \$3 million worth of Bosnia and Herzegovina’s goods (or 12.7% 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 17.3% decrease over the same period in 2005.

## **BRAZIL**

For the second year in a row, IIPA recommends that Brazil be removed from the Priority Watch List and placed on the Watch List. See IIPA’s 2007 Brazil country report at <http://www.iipa.com/rbc/2007/2007SPEC301BRAZIL.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; USTR 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. In 2006, IIPA recommended that Brazil be moved from the Priority Watch List to the Watch List, and that an out-of-cycle-review (OCR) be conducted later in the year. In recognition of significant improvements, including the formation of a public-private National Anti-Piracy Council and development of a national action plan by Brazil’s National Council to combat piracy and IP crimes, USTR terminated a review of whether to remove Brazil’s benefits under GSP because of inadequate copyright enforcement. However, because piracy levels remain high and criminal prosecutions minimal (along with issues related to the patent industry), Brazil remained on the Priority Watch List for 2006.

In addition to 301 activities, the copyright industries over the years have invoked additional trade leverage, specifically, that of the GSP trade program. Five years ago, IIPA’s dissatisfaction with the 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, we noted that sustained and concrete results were still needed for reduce the high levels of copyright piracy and obtain deterrent criminal sentences. In 2005, \$3.6 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 2006, \$3.5 billion worth of Brazilian goods (or 14.2% 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 3.4% increase over the same period in 2005.

## BULGARIA

IIPA recommends that Bulgaria remain on the Watch List in 2007. See IIPA's 2007 Bulgaria country report at <http://www.iipa.com/rbc/2007/2007SPEC301BULGARIA.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 OCR, 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 OCR 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. Although improvements have been noted during 2005, IIPA recommended that Bulgaria remain on the Watch List in 2006. USTR agreed and retained Bulgaria on the Watch List in 2006. Further action is needed, including "sustained and consistent enforcement activities, devoting sufficient resources to combat piracy and counterfeiting, improving IPR legislation, and attacking the growing problem of Internet piracy. In particular, Bulgaria's Government should make judicial enforcement in the courts a priority."

In terms of GSP, in 2005, \$50.9 million worth of goods from Bulgaria entered the United States under the duty-free GSP code, accounting for 11.3% of its total exports to the U.S. During the first 11 months of 2006, \$55.9 million worth of Bulgarian goods (or 13.2% 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 22.9% increase over the same period in 2005. When it joined the European Union on January 1, 2007, Bulgaria's eligibility as a GSP beneficiary country ended.

## **BURMA (MYANMAR)**

Burma (Myanmar) has never appeared on any USTR list. IIPA did not make a submission on Burma (Myanmar), but has in previous years, and notes that the same issues pertain in 2007, and that in the Thailand report in particular, pirate imports from Burma (Myanmar) are noted. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

In 2005 and again in 2006, IIPA noted 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."



## CAMBODIA

Cambodia has never appeared on a USTR Special 301 list. In 2007, IIPA includes Cambodia in its Special Mention section since, due to its location, the potential for migration of more optical disc plants remains a possibility. See IIPA's 2007 report on Cambodia at <http://www.iipa.com/rbc/2007/2007SPEC301CAMBODIA.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." IIPA continued to include Cambodia in its Special Mention section in 2006, 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."

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 2005, \$4.3 million worth of goods entered the U.S. under the duty-free GSP code, accounting for 0.2% of its total exports to the U.S. During the first 11 months of 2006, \$4.5 million worth of Cambodian goods (or 0.23% of its total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 14.6% over the same period in 2005.

## CANADA

In 2007, IIPA recommends that Canada be elevated to the Priority Watch List. See <http://www.iipa.com/rbc/2007/2007SPEC301CANADA.pdf>.

For more than a decade, USTR has kept Canada on the Watch List 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 USTR in its Special 301 2005 announcement. Following the recommendations of IIPA, Canada remained on the Watch List in April 2006, and the United States announced that it would "conduct an out-of-cycle-review (OCR) to monitor progress on IPR issues under the leadership of its new government," Noting that it would be looking to the new government to make progress on IPR issues a priority in the coming year, including the ratification and implementation of the WIPO Internet Treaties and amendment of the copyright law to provide protection of copyrighted works in the digital environment. The United States encouraged Canada to "provide an adequate and effective IPR protection regime that is consistent with its international obligations and its advanced level of economic development, including improved border enforcement, ratification and implementation of the WIPO Internet Treaties, and strong data protection," On January 8, 2007, IIPA urged that USTR elevate Canada to the Priority Watch List in its OCR recommendation. Since USTR had not completed the OCR before the February 2007 Special 301 deadline, IIPA repeated the call to elevate Canada to the Priority Watch List.

## CHILE

In 2007, IIPA recommends that Chile remain on the Priority Watch List. See IIPA's 2007 Chile country report at <http://www.iipa.com/rbc/2007/2007SPEC301CHILE.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."

IIPA recommended that Chile be elevated to the Priority Watch List in 2006. USTR retained Chile on the Watch List for 2006, and stated that it would conduct an out-of-cycle-review (OCR) to monitor progress on IPR issues. "The copyright piracy situation in Chile has not improved since last year, and digital piracy is a growing problem. Significant amendments to Chile's IPR legislation are needed to bring Chile's IPR regime in line with its international and bilateral commitments." Greater efforts are needed "to meet standards set in the TRIPS Agreement, the United States – Chile Free Trade Agreement (FTA) and other international agreements." In the OCR, IIPA recommended that Chile be elevated to the Priority Watch List, and USTR did so, on January 8, 2007.

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.

## COLOMBIA

IIPA recommends that Colombia remain on the Watch List in 2007. See IIPA's 2007 Colombia country report at <http://www.iipa.com/rbc/2007/2007SPEC301COLOMBIA.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 (OCR) 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 OCR was whether or not the Colombian Government would issue licenses to cable TV operators. In 1999, USTR kept Colombia on the Watch List, noting that the although the Colombian Attorney General had initiated legal action against 108



television operators, “Colombia has still to resolve the major issue USTR highlighted in its December [1998] OCR — failure to license legitimate pay television operators and pursue pirate operators.” USTR also added a September 1999 OCR 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 OCR. 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 OCR 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 Colombia’s IPR regime were cited when USTR decided to retain Colombia on the Watch List in its 2005 Special 301 announcement. In 2006, IIPA again recommended that Colombia be elevated to the Priority Watch List, but USTR retained Colombia on the Watch List. Negotiations on the U.S.–Colombia Trade Promotion Agreement were concluded in February 2006, and the United States expects to see continued progress in implementation of its IPR commitments. Further improvements are needed in “addressing copyright piracy, conducting effective prosecutions, imposing deterrent sentences by courts and completing other IPR enforcement initiatives.” A congressional vote on this agreement is pending.

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. After the trade promotion agreement enters into effect, these benefits will end. One of the discretionary criteria of these programs is that the country provide “adequate and effective protection of intellectual property rights.” In 2005, \$188.9 million worth of Colombian goods entered the United States under the GSP program, accounting for 2.2% of its total exports to the U.S. \$4.7 billion worth of Colombian goods entered the U.S. under the ATPA program, accounting for 53% of its total exports to the U.S. During the first 11 months of 2006, \$170.1 million worth of Colombian goods (or 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 2.5% decrease over the same period in the previous year. \$4.5 billion worth of Colombian goods entered the U.S. under the ATPA program for the same period, accounting for a 9.8% increase from the prior year.

## **COSTA RICA**

IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2007, as was recommended in 2006. See IIPA’s 2007 Costa Rica country report at <http://www.iipa.com/rbc/2007/2007SPEC301COSTARICA.pdf>.

To recap this 301 story, 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 remained on the Priority Watch List. In 2002, IIPA recommended that Costa Rica remain on the Priority Watch List, until concrete results were obtained in the improvement of its enforcement regime. In its April 30, 2002 Special 301 Announcement, USTR downgraded Costa Rica, placing it on the Watch List. USTR noted Costa Rica’s “concerted government strategy for improving the enforcement of intellectual property rights [including] ... appoint[ing] specialized prosecutors, intensif[ying] training activity for officials involved in enforcement, and implement[ing] a decree focused on legitimizing software used by government agencies.” In its 2003 Special 301 Announcement, however, USTR pointed out several deficiencies, including “two amendments to improve penalties and enforcement infrastructures [that are] pending and an executive decree on data exclusivity [that] has yet to be signed.” These failures, along with other problems such as delays in judicial proceedings and lack of official investigators, necessitated Costa Rica’s continued placement on the Watch List. In 2004, IIPA highlighted copyright concerns in Costa Rica in its Special Mention section. That year, USTR kept Costa Rica 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. In 2006, IIPA recommended elevating Costa Rica to the Priority Watch List, but USTR kept Costa Rica on the Watch List, with USTR citing concerns of inadequate copyright protection, criminal and civil enforcement, and border enforcement. Costa Rica still has to ratify the U.S.-CAFTA-DR. Once the FTA enters into force in Costa Rica, it will cease to benefit from a variety of U.S. trade programs. In 2005, \$88.5 million worth of Costa Rican goods entered the U.S. under the GSP, accounting for 2.6% of its total exports to the U.S; under the CBI, Costa Rica had \$660.2 million worth of goods enter the U.S., accounting for 19.5% of its total exports to the U.S; under the CBTPA \$357.6 million worth of Costa Rican goods entered the U.S. accounting for 10.6% of its total exports to the U.S. During the first 11 months of 2006, \$106 million worth of Costa Rican goods (or 3% 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 28.6% increase from the same period in 2005; \$959.9 million worth of Costa Rican goods entered the U.S. under the CBI, representing an increase of 60.3% from the same period in 2005; \$321.7 million worth of Costa Rican goods entered the U.S. under the CBTPA.

## CROATIA

IIPA did not make a submission on Croatia in 2007, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>.

In 2005, IIPA highlighted copyright concerns in Croatia in IIPA’s Special Mention section. 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 were never 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. Again in 2006, Croatia remained on the Watch List due to limited progress on IPR issues. Of great concern is inadequate border enforcement, contributing to the "growing importation of pirated goods into Croatia."

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 2005, \$152.9 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 35.6% of its total exports to the U.S.). During the first 11 months of 2006, \$132.4 million worth of Croatian goods entered the U.S. under the duty-free GSP code (or 40.6% of its total imports from January to November), representing a 4.3% decrease over the same period from the prior year.

## CYPRUS

Cyprus does not currently appear on any of the USTR lists. IIPA did not make a submission on Cyprus in 2007, but has in years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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. In 2006, IIPA included Cyprus in its Special Mention section as a result of high piracy in the audiovisual, sound recording, and entertainment software sectors.

## CZECH REPUBLIC

The Czech Republic currently does not currently appear on any of the USTR lists. IIPA did not file on the Czech Republic in 2007, but has in prior years; see IIPA country report page at <http://www.iipa.com/countryreports.html>.

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. IIPA recommended that the Czech Republic be placed on the Watch List in 2002 and 2003, but that did not happen. 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. In 2006, IIPA highlighted copyright concerns in the Czech Republic in the Special Mention section of its 301 submission to USTR.

## DOMINICAN REPUBLIC

IIPA recommends that the Dominican Republic be elevated to the Priority Watch List in 2007, as was recommended in 2006. See IIPA's 2007 Dominican Republic country report at [http://www.iipa.com/rbc/2007/2007SPEC301DOMINICAN\\_REPUBLIC.pdf](http://www.iipa.com/rbc/2007/2007SPEC301DOMINICAN_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, one of the key criteria of both programs. IIPA's petition was accepted by USTR in February 2000 and hearings were held in May 2000 and again in October 2003. In July 2004, USTR announced that it had closed the review, citing "positive steps taken by the [Dominican Republic] in conjunction with the recently concluded U.S.-Central American FTA (CAFTA), which includes binding . . . intellectual property provisions." That review was, in fact, the second GSP IPR review brought by the copyright industry. In June 1992, the Motion Picture Association (MPA) filed a GSP petition against the Dominican Republic for its failure to afford adequate and effective copyright protection to U.S. copyright owners of motion pictures due to the unauthorized retransmission of U.S. films and television programming by broadcasters and cable system operators. USTR accepted that petition, and in 1993 the Dominican Republic took a number of initial steps to address those serious problems. Although piracy remained a serious concern, the Dominican Government made promises for improvement, and MPA withdrew its GSP petition in September 1994.

With respect to Special 301 placements, USTR placed the Dominican Republic on the Special 301 Other Observations list in 1996 to encourage it to address the shortcomings in its intellectual property regime. In its 1997 Special 301 decisions, USTR elevated the Dominican Republic to the Watch List because of persistent piracy problems, especially involving broadcast and cable piracy. In February 1998, IIPA recommended elevating the Dominican Republic to the Priority Watch List for its continued and persistent failure to improve enforcement to address widespread piracy and to engage in legal reform. In 1998, USTR followed IIPA's recommendation, and elevated the Dominican Republic to the Priority Watch List.

The Dominican Republic has remained on the Priority Watch List every year since then. In the April 30, 2001 Special 301 Announcement, USTR noted that "[t]here have been substantial improvements in the copyright area, especially with the passage of TRIPS-conforming law and the impressive efforts on the part of the National Copyright Office (ONDA). Nonetheless, there continues to be concern with respect to the enforcement of the new copyright law, and enforcement coordination between ONDA and the police remains poor." In 2002, IIPA recommended that the Dominican Republic stay on the Priority Watch List in



order that there be continued progress on effective implementation and enforcement of the copyright law. In its April 30, 2002 Special 301 Announcement, USTR kept the Dominican Republic on the Priority Watch List, noting enforcement difficulties and the “widespread sale of pirated materials.” USTR’s 2003 Special 301 Announcement revealed that the Government of the Dominican Republic (GODR) took several important steps in 2002-2003. As part of its aggressive campaign against piracy, the GODR “initiated inspections of two television stations and submitted evidence of piracy to the Attorney General for prosecution, and initialed action against a third station.” Furthermore, GODR appointed an intellectual property rights committee to review the patent law and bring it into compliance with TRIPS. The changes made by the committee were then announced in an executive decree. These steps were sufficiently progressive for USTR to move the Dominican Republic from the Priority Watch List to the Watch List. In 2004, IIPA recommended that the Dominican Republic be elevated to the Priority Watch List, noting the problems surrounding the “government’s questionable commitment to effective and transparent copyright enforcement.” In keeping the Dominican Republic on the Watch List, USTR reported in its 2004 Special 301 Announcement that in “March 2004, the Dominican Republic concluded an FTA with the United States that will require the Dominican Republic to upgrade considerably the level of intellectual property 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.” 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.”

In 2006, IIPA recommended that the Dominican Republic be elevated to the Priority Watch List. Due to “slow progress on a range of IPR issues,” USTR notes, “(t)he United States encourages the Dominican Republic to focus its efforts on combating broadcast piracy, deterring copyright and trademark infringement, and ensuring an expeditious resolution of pending civil and criminal IPR cases.” The Dominican Republic remained on the Watch List for 2006, and the “United States will continue to work with the Dominican Republic on the implementation of its IPR obligations to ensure that it meets its international and CAFTA-DR commitments.”

The U.S.-CAFTA-DR Agreement was ratified by the Dominican Republic in September 2005. 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 2005, \$150.7 million worth of Dominican goods entered the U.S. under the duty-free GSP code, accounting for 3.3% of its total exports to the U.S. During the first 11 months of 2006, \$122 million worth of Dominican goods (or 2.9% 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 10.8% decrease from the same period in the prior year. In 2005, \$869.8 million entered under the CBI, accounting for 18.9% of its total exports to the U.S. During the first 11 months of 2006, \$948.4 million worth of Dominican goods entered under the CBI, representing an 18.8% increase over the same period in the prior year. In 2005, \$1.6 billion worth of Dominican goods entered under the CBTPA. During the first 11 months of 2006, \$1.3 billion worth of Dominican goods entered under the CBTPA, representing a 9.4% decrease over the same period in the prior year.

## ECUADOR

IIPA did not make a submission on Ecuador in 2007, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>

Ecuador appeared on the Special 301 Watch List 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 (OCR) later in 1997. By the time of that OCR, 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 OCR, 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. 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, USTR retained Ecuador on the Watch List in its 2005 Special 301 Announcement.

In agreement with the recommendation of IIPA, Ecuador remained on USTR’s Watch List for 2006. Concerns include high piracy levels in the business software and recording industries, and inadequate enforcement of its IP law. “Ecuador has not yet established a specialized IP court, as it was required to do under its 1998 intellectual property law, and many Ecuadorian courts appear unwilling to enforce the IP law.” The United States “urges Ecuador to strengthen IPR enforcement and will closely monitor Ecuador’s efforts to address IPR concerns, particularly through the U.S. – Andean Trade Promotion Agreement negotiations.”

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 2005, \$57.7 million worth of goods from Ecuador entered the U.S. under the duty-free GSP code, accounting for 1.0% of its total exports to the U.S. During the first 11 months of 2006, \$65.4 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 27.5% increase over the same period in the previous year. In 2005, \$4 billion worth of goods entered under ATPA, accounting for 69.3% of its total exports to the U.S. In the first 11 months of 2006, \$4.7 billion entered under the ATPA, representing a 27.7% increase from the same period in 2005.

## EGYPT

IIPA recommends that Egypt remain on the Priority Watch List in 2007. See IIPA’s 2007 Egypt country report at <http://www.iipa.com/rbc/2007/2007SPEC301EGYPT.pdf>.

As early as 1985, IIPA targeted Egypt as a major copyright offender, and because of its leadership role in the Middle East, pressed it to adopt a model law for the region. Seven years later, after long and frustrating delays, USTR placed Egypt on the Priority Watch List (in April 1992) and Egypt finally passed amendments to its law (in June 1992). These amendments fell short of internationally accepted standards. In April 1993, Egypt was kept on the Priority Watch List and an out-of-cycle review (OCR) was scheduled for December 1993. In June 1993, because Egypt had not made corrective amendments to its

law, IIPA filed a petition, which was accepted for consideration 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 which improved copyright protection in general and dealt with certain sectorial issues of concern (e.g., protection of computer programs), Egypt was moved to the Watch List on April 30, 1994, and another OCR was scheduled for October 1994. On July 1, 1994, the GSP investigation was successfully concluded, but Egypt was retained on the Watch List as a result of the OCR in October 1994. Egypt remained on the Watch List in 1995 and 1996 largely 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 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 once again 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."

In 2006, IIPA recommended that Egypt remain on the Priority Watch List. Echoing previous concerns, USTR agreed, stating

Improvements in IPR enforcement are needed, particularly in the areas of fighting copyright piracy for book publishing, entertainment software, and business software. In addition, the Egyptian court system continues to operate inefficiently, resulting in a lack of satisfactory resolutions of copyright and trademark cases, difficulty obtaining deterrent sentences, and a lack of transparency.

In addition, the United States encouraged Egypt to "accede to and implement the WIPO Internet Treaties," and expressed its hope to see improvements in Egypt's IPR regime that will "strengthen trade and investment ties between the two countries."

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 2005, \$65.1 million worth of Egyptian goods entered the U.S. under the duty-free GSP code, accounting for 3.1% of its total exports to the U.S. During the first 11 months of 2006, \$65.4 million worth of Egyptian goods (or 3% of Egypt's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

## EL SALVADOR

El Salvador does not currently appear on any of the USTR lists. IIPA did not make a submission on El Salvador in 2007, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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 (OCR) 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 took place on a rolling basis in 2006. Entry into force with El Salvador was March 1, 2006. Once the FTA enters into force in El Salvador, it will cease to benefit from a variety of U.S. trade programs. During the first 11 months of 2006, \$9.9 million worth of Salvadoran goods (or 0.6% of El Salvador's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an 81% decrease from the same period in the previous year. During the first 11 months of 2006, \$14.6 million worth of Salvadoran goods entered the U.S. under the CBI, representing a 77.2% decrease from the same period in the previous year. In 2005, \$1.1 billion worth of Salvadoran goods entered the U.S. under the CBTPA. During the first 11 months of 2006, \$139.5 million worth of Salvadoran goods (or 8.3% of El Salvador's total exports to the U.S. from January to November) entered the U.S. under the CBTPA, representing an 86.7% decrease from the same period in the previous year.

## ESTONIA

Estonia does not currently appear on any of the USTR lists, and has not, since 1998. IIPA did not make a submission on Estonia in 2007, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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 though 2004, IIPA recommended that Estonia be placed on the Watch List, pointing to the country's piracy problem and the absence of deterrent penalties. 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. IIPA did not make a submission on Georgia in 2007, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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 (OCR) of Georgia in December 2001. On February 12, 2002, USTR announced the result of its OCR 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 2005, \$10.1 million worth of Georgian goods entered the U.S. (or 6.7% of Georgia's total exports to the U.S.). During the first 11 months of 2006, \$34.3 million worth of Georgian goods (or 31% 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 331.5% increase over the same period a year before.

## GERMANY

Germany does not currently appear on any of the USTR lists, and has not since 1998. IIPA did not make a submission on Germany in 2007. 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, USTR 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.

## GREECE

For the second year in a row, IIPA recommends that Greece be placed on the Watch List in 2007. See <http://www.iipa.com/rbc/2007/2007SPEC301GREECE.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. Then 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. USTR removed Greece from the 301 lists in 2003.

## GUATEMALA

IIPA did not make a submission on Guatemala in 2007, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>. Guatemala has been on the Watch List since 2001.

To recap, 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. Although Guatemala has worked with the U.S. to implement CAFTA-DR, it again remained on the Watch List for 2006. “The United States hopes that the continuing implementation of CAFTA-DR will result in a stronger IPR legislative regime in Guatemala, an effective enforcement system, and a significant reduction of piracy and counterfeiting.”

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner took place on a rolling basis; entry into force for Guatemala was accomplished on July 1, 2006. Once the FTA enters into force in Guatemala, it will cease to benefit from a variety of U.S. trade programs. In 2005, \$66.6 million worth of Guatemalan 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 2006, \$46.4 million worth of Guatemalan goods entered the U.S. under the duty-free GSP code, representing a 14% decrease from the same period in the previous year. In 2005, \$345.8 million worth of Guatemalan goods entered the U.S. under the CBI, accounting for 11% of its total exports to the U.S. During the first 11 months of 2006, \$203.8 million worth of Guatemalan goods entered under the CBI, representing a 32.7% decrease from the same period in the previous year. In 2005, \$898.9 million worth of Guatemalan goods entered under the CBTPA, accounting for 28.8% of its total exports to the U.S. During the first 11 months of 2006, \$449.1 million entered under the CBTPA, representing a 46.3% decrease for the same period in 2005.

## HONG KONG

In 2007, IIPA includes Hong Kong in its Special Mention section. See IIPA’s 2007 report on Hong Kong at [http://www.iipa.com/rbc/2007/2007SPEC301HONG\\_KONG.pdf](http://www.iipa.com/rbc/2007/2007SPEC301HONG_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 (OCR) 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 OCR 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 OCR, but Ambassador Barshefsky added a September 1999 OCR to assess Hong Kong’s intellectual property progress.

On December 17, 1999, USTR announced that as a result of the September OCR, 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 OCR “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.” In 2006, IIPA highlighted copyright concerns in Hong Kong in its Special Mention section, and requested that an OCR 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.

## HUNGARY

IIPA recommends that Hungary remain on the Watch List in 2007, where it has appeared since 2003. See IIPA’s 2007 Hungary country report at <http://www.iipa.com/rbc/2007/2007SPEC301HUNGARY.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, noting poor enforcement of its copyright law, which has led to high piracy rates. 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. Although USTR praised Hungary for making improvements with its IPR protection in its 2005 Special 301 Announcement, Hungary was retained on the Watch List to monitor continuing issues. In 2006, IIPA once again recommended that Hungary stay on the Watch List, where it remained in 2006. USTR noted legislative improvements, while concerns remain with growing copyright piracy, “prosecutorial delays, judicial imposition of low fines or weak sentences, and weak border enforcement.”

## ICELAND

IIPA did not make a submission on Iceland in 2007, but has in one prior year (2005), noting concerns over Internet piracy, particularly through peer-to-peer (P2P) networks. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>. Iceland has never appeared on a USTR list.

## INDIA

In 2007, IIPA recommends that India remain on the Priority Watch List. See IIPA's 2007 India country report at <http://www.iipa.com/rbc/2007/2007SPEC301INDIA.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 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.

In 2006, IIPA recommended that India again remain on the Priority Watch List. USTR agreed, keeping India on the Priority Watch List and citing the numerous problems that have plagued its IPR regime for years. USTR urged India to address deficiencies in its copyright law and its enforcement system, and "welcomes deeper cooperation with India, as envisioned in statements issued by our leaders to 'work together to promote innovation, creativity and technological advancement by providing a vibrant intellectual property rights regime...'"

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 2005, \$4.2 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 22.3% of its total exports to the U.S. During the first 11 months of 2006, \$5.1 billion worth of Indian goods (or 25.8% 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 35.2% increase over the same period in 2005.

## INDONESIA

IIPA recommends that Indonesia remain on the Watch List in 2007, to which it was lowered in November 2006 (as the result of an out-of-cycle review, in which IIPA recommended that it be lowered), and that another out-of-cycle review (OCR) be conducted (to be concluded by September 2007) to ensure that the Indonesian Government sustains the progress made to date in combating optical disc piracy, follows up with deterrent arrests and successful prosecutions of the main perpetrators of these piracy operations (i.e., plant managers and owners, not mere employees), and improves enforcement against photocopy piracy (mainly on and near university campuses), print piracy, and unauthorized translations, end-user software piracy (where piracy levels are among the worst in the world), and signal theft piracy, among other piracy concerns. See IIPA's 2007 Indonesia country report at <http://www.iipa.com/rbc/2007/2007SPEC301INDONESIA.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.” USTR decided in its Special 301 2005 Announcement to keep Indonesia on the Priority Watch List and conduct an 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.

In February 2006, IIPA recommended that Indonesia remain on the Priority Watch List. While commending Indonesia for taking steps to fight production and retail piracy, as well as re-establishing a Ministerial-level National IP Task Force, USTR noted that serious concerns remained and retained Indonesia on the Priority Watch List for 2006, with an OCR to assess progress. USTR urged Indonesia to enforce “its IPR laws effectively and in a deterrent manner against piracy and counterfeiting,” by “conducting seizures of pirated goods and the machinery used to make them, by arresting and prosecuting IPR infringers, and by ensuring that courts impose jail sentences for IPR crimes and that offenders actually serve such sentences.” On September 15, 2006, IIPA recommended that Indonesia be lowered to the Watch List, with the condition that, should the Indonesian Government fail (a) to follow up these raids with arrests and successful prosecutions of main perpetrators of these piracy operations (i.e., managers and owners, not mere employees), and (b) to make improvements in enforcement against: book piracy, namely, photocopy piracy (mainly on university campuses), print piracy, and unauthorized translations; end-user software piracy (where piracy levels are the third worst in the world); and signal theft piracy, that Indonesia should once again be moved to the Priority Watch List in the 2007 Special 301 cycle. In November 2006, USTR lowered Indonesia to the Watch List concluding:

[T]hat throughout 2006, Indonesia bolstered implementation of its regulations designed to stop illegal production of pirated optical discs such as CDs and DVDs by controlling the licensing of factories and conducting raids against pirate optical disc production facilities. Indonesia’s authorities also conducted numerous raids on retail outlets selling pirated goods.

The United States indicated in its announcement that it would closely monitor Indonesia’s progress and notes that “sustained efforts and continued progress on key IPR issues will be essential to avoid a future return to 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 2005, \$1.6 billion worth of Indonesian goods entered the U.S. under the duty-free GSP

code, accounting for 13.4% of its total exports to the U.S. During the first 11 months of 2006, \$1.8 billion worth of Indonesian goods (or 14.6% of Indonesia's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 21.4% increase over the same period in 2005.

## IRELAND

Ireland does not currently appear on any of the USTR lists. IIPA did not file a 2007 submission on Ireland. Ireland first appeared on a Special 301 list in 1996 when USTR accorded it Special Mention status for patent law deficiencies. IIPA recommended Ireland for the Watch List in its February 1997 filing and highlighted at that time its significant enforcement deficiencies and high levels of piracy, particularly in the software and video areas. IIPA also included Ireland in its Priority Practices section in that February 1997 submission because its outmoded law (and its enforcement regime) were hopelessly out of compliance with its TRIPS obligations, which became effective in Ireland on January 1, 1996. USTR agreed with IIPA's recommendation and placed Ireland on the Watch List in April 1997. Simultaneously, Ambassador Barshefsky announced that USTR would commence a TRIPS case in the near future. During 1997, following a series of bilateral negotiations with Ireland, it became clear that the Irish Government had no intention of introducing and adopting a TRIPS-compatible law within any reasonable time. As a result, USTR commenced the TRIPS case on January 9, 1998. In early February 1998, following the commitment of the Irish Government to "accelerate its implementation of comprehensive copyright reform legislation," USTR decided not to bring the case before a dispute settlement panel, though it reserved the right to do so if the timetables were not met. Ireland remained on the Watch List in 1998, 1999 and 2000. USTR noted in the May 1, 2000 Special 301 Announcement that "Ireland's commitment to enact comprehensive copyright legislation has not been met. We understand recent progress has been made toward finalizing this legislation and expect it will be enacted by Parliament before its summer recess." Ireland enacted new IPR legislation in June 2000. IIPA 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 in 2007, where it has been since 2005. . See IIPA's 2007 Israel country report at <http://www.iipa.com/rbc/2007/2007SPEC301ISRAEL.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 (OCR) 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 OCR 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.

IIPA recommended that Israel remain on the Priority Watch List in 2006 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. USTR agreed, noting that the “United States urges Israel to provide national treatment for U.S. right holders in accordance with its international obligations, including those under the 1950 United States – Israel Bilateral Copyright Agreement.”

## ITALY

IIPA recommends that Italy remain on the Watch List in 2007, where it has appeared since 2001. See IIPA’s 2007 Italy country report at <http://www.iipa.com/rbc/2007/2007SPEC301ITALY.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 OCR 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.” In 2006, IIPA once again recommended that Italy remain on the Watch List. USTR agreed, noting that while progress has been made with increased enforcement actions, piracy remains extremely high and there is “inadequate judicial enforcement, and a lack of judicial imposition of deterrent fines and jail sentences for criminal copyright and trademark infringers.”

## **JAMAICA**

Jamaica has been on the Special 301 Watch List since 1998. IIPA has not filed on Jamaica in the 301 process. 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 remained on the Watch List in 2006 due to its continued failure to fulfill its obligations noted above.

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.” During the first 11 months of 2006, \$11.5 million worth of Jamaican goods (or 2.7% of Jamaica’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 55.1% increase from the same period in the previous year. Also during this same timeframe, \$177 million worth of Jamaican goods (or 41.1% of Jamaica’s total exports to the U.S. from January to November) entered under the CBI, representing a 92.4% increase over the same period in the previous year, and an additional \$43.6 million worth of Jamaican goods (or 10.1% of Jamaica’s total exports to the U.S. from January to November) entered the U.S. under the CBTPA.

## **JAPAN**

In 2007, IIPA includes Japan in its Special Mention section. See IIPA’s 2007 Japan country report at <http://www.iipa.com/rbc/2007/2007SPEC301JAPAN.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 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. In 2006, IIPA highlighted copyright concerns and included Japan in its Special Mention section.

## JORDAN

In 2007, IIPA includes Jordan in its “Dispute Settlement” section, specifically highlighting deficiencies under Jordan’s implementation of the U.S.-Jordan Free Trade Agreement. See IIPA’s 2007 Jordan country report at <http://www.iipa.com/rbc/2007/2007SPEC301JORDAN.pdf>.

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.

In addition to benefits it receives under the FTA signed in 2000, Jordan continues limited participation 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 2005, \$11.7 million worth of Jordan’s imports to the United States benefited from the GSP program, accounting for 0.9% of its total exports to the U.S. During the first 11 months of 2006, \$14.4 million worth of Jordanian goods (or 1.1% 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 be placed back on the Watch List in 2007, from which it was removed in April 2006. See IIPA’s 2007 Kazakhstan country report at <http://www.iipa.com/rbc/2007/2007SPEC301CIS.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. USTR terminated its GSP IPR review of Kazakhstan in April 2006. In 2005, \$206.4 million worth of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 19.1% of its total exports to the U.S. During the first 11 months of 2006, \$473.1 million worth of Kazakh goods (or 48.8% 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 154.6% 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." While IIPA recommended that Kazakhstan remain on the Watch List, it was removed in 2006 due to "progress on copyright enforcement."

## KENYA

IIPA did not make a submission on Kenya in 2007, but has in prior years; see IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

In 2006, IIPA identified 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." 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 2005, \$6.1 million worth of Kenyan goods entered the U.S. under the duty-free GSP code, accounting for 1.8% of the country's total exports to the U.S. During the first 11 months of 2006, \$6.8 million worth of Kenyan goods (or 2.1% 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 29.1% increase over the same period in 2005. Kenya also participates in the African Growth Opportunity Act (AGOA) which, like the GSP, has an intellectual property component. In 2005, \$272.1 million worth of Kenyan goods entered the U.S. under the AGOA, representing 78.3% of the country's total exports to the U.S. During the first 11 months of

2006, \$243.8 million worth of Kenyan 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 2% decrease over the same period in 2005.

## KUWAIT

IIPA recommends that Kuwait remain on the Watch List in 2007. See IIPA's 2007 Kuwait country report at <http://www.iipa.com/rbc/2007/2007SPEC301KUWAIT.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 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 USR 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.

In 2006, IIPA recommended that Kuwait be lowered from the Priority Watch List to the Watch List. USTR agreed, indicating its hope to see continued progress in Kuwait's IPR regime by ensuring that

law enforcement officials are engaged in combating piracy and counterfeiting, that judicial authorities impose deterrent penalties for IPR violations, and that necessary legislation is passed to strengthen its IPR regime. The United States is concerned that several key pieces of IPR legislation (including amendments in the areas of copyrights, trademarks, geographical indications, patents, data protection, and enforcement) have been pending for many years, and hopes that Kuwait will expeditiously enact and implement such legislation in the near term.

## KYRGYZ REPUBLIC

The Kyrgyz Republic does not currently appear on any of the USTR lists. IIPA did not make a submission on the Kyrgyz Republic in 2007, but has in various years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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 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 (OCR) on the Kyrgyz Republic. On February 12, 2002, USTR announced the result of its OCR 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)

In 2007, IIPA includes Laos in its Special Mention section. See IIPA's 2007 report at [www.iipa.com/rbc/2007/2007SPEC301LAOS.pdf](http://www.iipa.com/rbc/2007/2007SPEC301LAOS.pdf).

In its 2003 through 2005 submissions, IIPA noted Laos in its Special Mention section, citing optical disc piracy concerns. In 2006, IIPA also included 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."

## LATVIA

In 2007, IIPA calls special attention to the situation in Latvia. See IIPA's 2007 report at [www.iipa.com/rbc/2007/2007SPEC301LATVIA.pdf](http://www.iipa.com/rbc/2007/2007SPEC301LATVIA.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." 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. Again in 2006, USTR concurred with IIPA's recommendation and retained Latvia on the Watch List, noting that: "...some key IPR issues remain in need of attention, including copyright piracy, especially on the Internet, and the lack of effective border enforcement. The United States encourages Latvian customs officials to take increased action to inspect and seize transshipped pirated and counterfeit goods coming into Latvia from Russia and exported to Lithuania, Poland, and other EU countries." USTR also said it would conduct an out-of-cycle-review (OCR) in 2006 to monitor further progress; as of the date of this 2007 submission, USTR had not yet issued any announcement regarding an OCR result.

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

IIPA recommends that Lebanon be lowered to the Watch List in 2007. See IIPA's 2007 Lebanon country report at <http://www.iipa.com/rbc/2007/2007SPEC301LEBANON.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.<sup>1</sup> 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 2005, Lebanon imported \$32.7 million worth of products into the United States duty-free, or 37.8% of its total imports into the U.S. In the first 11 months of 2006, Lebanon imported \$30.4 million worth of products into the United States duty-free, or 38.1% 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 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 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.

In 2006 IIPA once again recommended that Lebanon remain on the Priority Watch List and, noting that Lebanon fails to meet the criteria for benefits under the GSP trade program, recommended that the GSP benefits be immediately suspended. Reiterating the continuing concerns from earlier years including

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<sup>1</sup> 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).

cable piracy, copyright piracy, and ineffective judiciary, USTR kept Lebanon on the Priority Watch List. USTR further states, "The United States urges the Lebanese Government to continue its efforts to address these problems and to ratify and implement the WIPO Internet Treaties" and will "monitor the IPR situation in Lebanon closely, particularly under the GSP petition for inadequate copyright protection."

## LITHUANIA

IIPA recommends that Lithuania remain on the Watch List in 2007, where it has appeared since 2000. See IIPA's 2007 Lithuania country report at <http://www.iipa.com/rbc/2007/2007SPEC301LITHUANIA.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 (OCR) "to assess Lithuania's enforcement efforts." On October 31, 2001 USTR announced the outcome of its OCR 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." 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. 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. IIPA once again recommended, and USTR agreed, that Lithuania remain on the Watch List for 2006, with USTR noting that "despite some IPR improvements this past year, numerous IPR issues remain."

## MACAU

Macau does not currently appear on any of the USTR lists. IIPA did not file a report on this country in 2007. Macau first appeared on a Special 301 in 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 (OCR). 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 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. IIPA did not file a report on this country in 2007. 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 2005, \$7 million worth of Macedonian goods entered the U.S. under the duty-free GSP code, representing 13.8% of the country’s total exports to the U.S. During the first 11 months of 2006, \$7 million worth of Macedonian goods (or 17.4% of the country’s total exports to the U.S. from January to November) entered the U.S., representing an increase of 9.1% from the same period in 2005.

## MALAYSIA

In 2007, IIPA recommends that Malaysia remain on the Watch List, where it has appeared since 2002. See IIPA’s 2007 Malaysia country report at <http://www.iipa.com/rbc/2007/2007SPEC301MALAYSIA.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 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 OCR. 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 OCR 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 OCR 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 OCR 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 OCR 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 OCR 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.”

Again in 2006, IIPA recommended that Malaysia remain on the Watch List and that USTR conduct an OCR. Despite significant improvements, USTR retained Malaysia on the Watch List to monitor continuing progress. “The United States urges Malaysia to continue its enforcement efforts,” and “will work with Malaysia to make progress on these pressing IPR issues through the upcoming U.S.-Malaysia Free Trade Agreement negotiations.” It was added that “Malaysia should address several deficiencies in its copyright law to fully implement the WIPO Internet Treaties, and should join the WCT and WPPT.”

## MEXICO

IIPA recommends that Mexico be elevated to the Special 301 Priority Watch List in 2007. See IIPA’s 2007 Mexico country report at <http://www.iipa.com/rbc/2007/2007SPEC301MEXICO.pdf>.

In 1998 and 1999, IIPA urged the U.S. Government to place Mexico on the Priority Watch List but 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.” IIPA recommended that, in 2006, Mexico remain on the Watch List and that “high-level engagement continue to combat the very high levels of piracy in that marketplace.” Although commending Mexico for drafting new IPR legislation, USTR retained Mexico on the Watch List and noted that these laws need to be enacted and implemented. Additionally, Mexico is encouraged to “follow its commendable raids with aggressive prosecutions and deterrent penalties, to improve domestic cooperation efforts on enforcement, and also to encourage cooperation between Mexican Customs and the PGR to stem the flow of infringing items before they reach the markets.”

## **MOLDOVA**

Moldova does not currently appear on any of the USTR lists. IIPA did not file on this country in 2007. 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 2005, \$1.4 million worth of Moldavian imports to the United States benefited from the GSP program, representing 2.8% of its total exports to the U.S. During the first 11 months of 2006, \$2 million worth of Moldavian goods (or 5.6% 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 73% over the same period in 2005.

## **MOROCCO**

In 2007, IIPA includes Morocco in its “Dispute Settlement” section, specifically highlighting deficiencies under the U.S.-Morocco Free Trade Agreement. See IIPA’s 2007 Morocco report at <http://www.iipa.com/rbc/2007/2007SPEC301MOROCCO.pdf>.

In 2006, IIPA highlighted Morocco in its Special Mention section, noting that Morocco 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.”



## NEW ZEALAND

In 2007, IIPA specially mentions New Zealand; see <http://www.iipa.com/rbc/2007/2007SPEC301NEW-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 (OCR) 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. In 2006, IIPA highlighted copyright concerns with New Zealand in its Special Mention section.

## NICARAGUA

Nicaragua does not currently appear on any of the USTR lists. IIPA did not file a country report on Nicaragua in our 2007 301 submission. 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 took place on a rolling basis; entry into force with Nicaragua was April 1, 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." During the first 11 months of 2006, \$42.1 million worth of Nicaraguan goods entered the U.S. under the CBI, representing a 65.9% decrease from the same period the prior year. Nicaragua also receives benefits under the Caribbean Basin Trade Partnership Act, which contains very high levels of IPR obligations, and during the first 11 months of 2006, \$68.9 million worth of Nicaraguan goods benefited from the CBTPA program, representing a decrease of 70.6% over the same period in 2005.

## NIGERIA

In 2007, IIPA recommends that Nigeria be placed on the Watch List. See IIPA's 2007 Nigeria country report at <http://www.iipa.com/rbc/2007/2007SPEC301NIGERIA.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. In

2006, IIPA included 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.”

Nigeria currently participates in the Generalized System of Preferences (GSP) trade program, which requires eligible beneficiary countries to provide “adequate and effective” protection of intellectual property, including copyright. In 2005, \$565,000 worth of Nigerian goods entered the U.S. under the duty-free GSP code. During the first 11 months of 2006, \$1.1 million worth of Nigerian goods entered the U.S. under the GSP code, representing an increase of 131.7% over the same period in 2005. Nigeria also participates in the African Growth Opportunity Act (AGOA) which, like the GSP, has an intellectual property component. In 2005, \$22.5 billion worth of Nigerian goods entered the U.S. under the AGOA, representing 94.1% of the country’s total exports to the U.S. During the first 11 months of 2006, \$23.9 billion worth of Nigerian goods entered the U.S. (or 92.9% of the country’s total exports to the U.S. from January to November) under the AGOA, representing a 19.1% increase over the same period in 2005.

## OMAN

In 2007, IIPA includes Oman in its Special Mention section. See IIPA’s 2007 report on Cambodia at <http://www.iipa.com/rbc/2007/2007SPEC301OMAN.pdf>.

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 2005, \$59 million worth of Oman’s exports to the United States benefited from the GSP program, accounting for 12.2% of its total exports to the U.S. During the first 11 months of 2006, \$59 million worth of Oman’s goods (or 7.7% 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 12.2% from the same period in 2005.

## PAKISTAN

IIPA recommends that Pakistan remain on the Watch List in 2007, to which it was lowered in 2006, and that an out-of-cycle review (OCR) be conducted in September 2007 to assess Pakistan’s progress in (1) undertaking significant action against pirate booksellers, often located in Urdu bazaars, namely, FIA-led enforcement followed by prosecutions of cases leading to significant penalties; (2) ensuring that the National Book Foundation ceases all activity considered infringing under international norms; (3) making the Intellectual Property Organization a more meaningful and effective organization, functioning to allow

input from government officials and private sector representatives alike, and staging a comprehensive plan for tackling Pakistan's outstanding piracy issues; (4) beginning the prosecution of the optical disc manufacturing pirates that were arrested over a year ago; (5) stepping up enforcement against retail piracy; and (6) improving border enforcement against the growing number of pirate imports from Malaysia and other countries. See IIPA's 2007 Pakistan country report at <http://www.iipa.com/rbc/2007/2007SPEC301PAKISTAN.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..." IIPA recommended that Pakistan be lowered to the Watch List in 2006, and that USTR conduct an OCR. Citing "notable progress on IPR issues during the past year," Pakistan was lowered to the Special 301 Watch List. Noting significant improvements, USTR also indicated that piracy rates remained a concern and that the United States would work with Pakistan to "achieve further improvements in its IPR protection and enforcement regimes."

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, 2005, 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 2005, the United States imported \$96.8 million worth of products into the United States duty-free, or 3% of its total imports to the U.S. During the first 11 months of 2006, \$116.7 million of products from Pakistan were imported into the U.S. duty-free, representing 3.4% 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 did not file a 2007 report on the Palestinian Authority. IIPA filed its first Special 301 comments on the Palestinian Authority in



1999, over concerns about the rapid growth of optical media and video piracy in the West Bank and Gaza Strip. IIPA recommended that USTR signal its engagement with the Palestinian Authority by placing it on the Watch List. In addition to recommending a Watch List designation in 1999, IIPA also recommended that USTR conduct an out-of-cycle review (OCR) to monitor the anti-piracy and legal measures undertaken by the Authority. The Palestinian Authority did not appear on any Special 301 lists in 1999. In 2000, raising increasing concerns over pirate production for export, IIPA recommended that the Palestinian Authority be placed on the Priority Watch List. On May 1, 2000, USTR announced that it would conduct an OCR of the Palestinian Authority. The scheduled review has not yet occurred, due to unrest in the area. In 2001, noting continuing unrest, the IIPA recommended that USTR conduct an OCR of the area when conditions permit. USTR did not place the Palestinian Authority on any list in 2001 or 2002.

The West Bank 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 2005, \$795,000 of products imported from the West Bank benefited from the GSP program, representing 70.1% of the Palestinian Authority’s total exports to the U.S. During the first 11 months of 2006, \$815,000 of products (or 26.5% 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 an 11.8% increase over the same period in 2005.

## PANAMA

Panama does not currently appear on any of the USTR lists. IIPA did not file on this country in 2007. 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 OCR in October 1997, USTR decided to remove Panama from the Watch List, given “visible progress” made since its placement on that list. In 1998, Panama was elevated to the Other Observations list amid USTR’s concerns that “inadequate enforcement continues to be a major problem.” Because of progress made in Panama during that year, USTR terminated the GSP review on October 26, 1998. Panama has not appeared on any Special 301 list since 1998. In 2006, Panama was included in IIPA’s Special Mention section, where it was noted that the ongoing negotiations of the Free Trade Agreement offers the opportunity to encourage compliance with other evolving international trends in copyright and enforcement standards.

Panama and the U.S. completed negotiations for a Free Trade Agreement (FTA) in December 2006, and Congressional approval is pending. After the FTA enters into force in Panama, it will cease to benefit from a variety of U.S. trade programs. During the first 11 months of 2006, \$23.4 million worth of Panamanian goods entered the U.S. under the duty-free GSP code, representing a 47.4% increase from the same period in the previous year. For the same 2006 time period, under the Caribbean Basin Initiative (CBI), \$31.9 million worth of Panamanian goods entered under the CBI, and an additional \$321,000 worth of Panamanian goods entered the U.S. under the CBTPA.

## PARAGUAY

In 2007, IIPA recommends that Paraguay remain under Section 306 monitoring; see IIPA’s 2007 Paraguay country report at <http://www.iipa.com/rbc/2007/2007SPEC301PARAGUAY.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." IIPA and USTR agreed that continued Section 306 monitoring was needed in 2006, with USTR reiterating the lack of improvement in IPR protections and enforcement. The second IPR MOU expired at the end of 2005 and has been extended for two years.

Paraguay 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 2005, \$30.6 million worth of Paraguayan imports to the United States benefited from the GSP program, accounting for 51.9% of its total exports to the U.S. During the first 11 months of 2006, \$22.8 million worth of Paraguayan goods (or 47.9% 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 19.7% decrease from the same period last year.

## PEOPLE'S REPUBLIC OF CHINA

In 2007, IIPA recommends that USTR maintain China on the Priority Watch List. See IIPA's 2007 People's Republic of China country report at <http://www.iipa.com/rbc/2007/2007SPEC301PRC.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 (OCR) 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 OCR, 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 OCR 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 OCR 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]."

Once again, citing piracy rates that continue to be the highest in the world (at 85-95%, depending on the industry), IIPA recommended that China remain on the Priority Watch List in 2006. IIPA noted China's failure to follow through on its JCCT commitments and the fulfillment of its TRIPS obligations, urged it to join WCT and WPPT by the date promised and to provide meaningful, deterrent criminal prosecutions with deterrent penalties IIPA stated that "[f]ailure 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." USTR agreed with IIPA's recommendation, noting that "[i]nadequate IPR enforcement is one of China's greatest shortcomings as a trading partner." China remained on the Priority Watch List, and remains subject to Section 306 monitoring. "Faced with only limited progress by

China in addressing certain deficiencies in IPR protection and enforcement,” USTR continues to consider its “WTO dispute settlement options.”

## PERU

IIPA recommends that Peru remain on the Watch List, where it has appeared since 2001. See IIPA's 2007 Peru country report at <http://www.iipa.com/rbc/2007/2007SPEC301PERU.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. In 2006, IIPA recommended that Peru remain on the Watch List, citing ineffective administrative and criminal enforcement as the primary concern. USTR reports that the United States is “pleased at the signing on April 12, 2006 of the United States-Peru Trade Promotion Agreement (PTPA) and looks forward to stronger IPR protection and enforcement in Peru.” Peru remains on the Watch List, and the United States encourages the Government of Peru to strengthen its IPR protections in order to “meet its international and PTPA commitments.”

Peru and the U.S. signed a Trade Promotion Agreement in April 2006, and a Congressional vote is pending. 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 2005, \$174.8 million worth of Peru's imports to the United States benefited from the GSP program, accounting for 3.4% of its total exports to the U.S. During the first 11 months of 2006, \$160.8 million worth of Peruvian goods (or 3.0% 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 0.7% over the same period in 2005. An additional \$1.3 billion worth of Peruvian products benefited from the ATPA in 2005, accounting for 25.8% of total exports to the United States. In the first 11 months of 2006, an additional \$1.5 billion worth of Peruvian goods entered the U.S.

under ATPA, representing a 24.8% increase in ATPA benefits from the same period in 2005.

## THE PHILIPPINES

IIPA recommends that the Philippines remain on the Watch List, and because of the lack of criminal convictions against pirate plant owners and mall owners, general ineffectiveness of the courts hearing piracy cases, the continued prevalence of book piracy, optical disc piracy, Pay TV piracy, and the unknown final disposition of pirate goods and materials and implements found in various raids, IIPA calls for the U.S. Government to conduct an out-of-cycle review (OCR) to determine whether the Philippine Government has taken adequate steps to address these concerns. See IIPA's 2007 Philippines country report at <http://www.iipa.com/rbc/2007/2007SPEC301PHILIPPINES.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 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 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 OCR 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 2006, IIPA recommended that the Philippines remain on the Priority Watch List pending the outcome of a review. In February 2006, USTR announced the results of the OCR, and lowered the Philippines to the Watch List, noting “substantial improvements in IPR protection,” but also noted that “there is much work to be done.” USTR noted:

[The Philippines is encouraged to increase IPR enforcement actions, including inspections and raids of OD plants, seizure of pirate and counterfeit products and the machinery used to produce infringing products, arrests and convictions of pirates and counterfeiters, imposing deterrent sentences against criminal IPR infringers, and ensuring the destruction of seized goods and equipment. The United States will use the bilateral Trade and Investment Framework Agreement to engage the Government of Philippines on strengthening its IPR regime.

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 2005, \$1.0 billion worth of Philippine imports to the United States benefited from the GSP program, accounting for 10.9% of its total exports to the U.S. During the first 11 months of 2006, \$1.1 billion worth of Philippine goods (or 11.8% 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 12.7% from the same period in 2005.

## POLAND

IIPA recommends that Poland remain on the Watch List in 2007. See IIPA’s 2007 Poland country report at <http://www.iipa.com/rbc/2007/2007SPEC301POLAND.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 (OCR), 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 OCR “to ensure that progress continues in Poland on both enforcement and legislative reform.” IIPA recommended that the 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 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 were not made available. The 2003 USTR Special 301 Announcement commented that the situation in Poland (including the Warsaw Stadium market) had 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 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 OCR 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, "... 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. IIPA recommended that Poland remain on the Watch List in 2006. USTR agreed, and despite "some progress" in 2006, including increased raids and seizures of pirated goods and "improved coordination with private industry" Poland was retained on the Watch List. Reiterating concerns from previous years, "the United States encourages Poland to continue...progress by committing its resources and attention to IPR enforcement,,,"

In addition to Special 301 oversight, Poland's intellectual property rights practices were also subject to 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 did not file on this country in 2007. 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 remain on the Watch List in 2007. See IIPA's 2007 Romania country report at <http://www.iipa.com/rbc/2007/2007SPEC301ROMANIA.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 placed on 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 remains on the Watch List in 2006, as recommended by IIPA. USTR notes some improvements this year, including designation of a national coordinator for IPR enforcement and "increased dedication of resources for IPR enforcement." The United States will continue to monitor Romania for needed progress in its IPR regime, particularly in the prosecution, conviction, and effective sentencing of IPR infringers.

In 2006, Romania participated 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 2005, \$283.3 million worth of Romania's imports to the United States benefited from the GSP program, accounting for 24.3% of its total exports to the U.S. During the first 11 months of 2006, \$247.5 million worth of Romanian goods (or 23.3% of Romania's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 0.5% decrease over the same period in 2005. When it joined the European Union on January 1, 2007, Romania's eligibility as a GSP beneficiary country ended.

## RUSSIA

In 2007, IIPA recommends that Russia remain on the Priority Watch List, that an out-of-cycle-review (OCR) be conducted, and that Russia's GSP benefits be suspended. See IIPA's 2007 Russia country report at <http://www.iipa.com/rbc/2007/2007SPEC301RUSSIA.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 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. In its 2002 announcement, USTR noted provisions in Russia's enforcement regime that "appear to be inconsistent with the TRIPS Agreement and the intellectual property rights provisions of the 1992 U.S.-Russian Federation Trade Agreement."<sup>2</sup> USTR also pointed to other problems such as weak enforcement and "[l]ack of an effective OD law."

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

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<sup>2</sup> This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

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 OCR would be conducted, but it appears this was not conducted.

In 2006, IIPA recommended that Russia be designated as a Priority Foreign Country, and once again urged USTR to withdraw or suspend GSP duty-free benefits. USTR retained Russia on the Priority Watch List, citing continuing concerns in multiple areas of its IPR regime. It will continue to closely monitor Russia's progress, through the "ongoing review of whether to remove Russia's benefits under the Generalized System for Preferences due to inadequate copyright enforcement, WTO accession discussions, and the United States-Russia Bilateral IPR Working Group." In November 2006, the United States and the Russian Federation signed its bilateral WTO Protocol which was then followed by a Side Letter on Intellectual Property Rights committing Russia to take specific enforcement steps to halt, in particular, OD piracy for export. The agreement includes specific deadlines for such actions to be taken which must be before full accession to the WTO.

IIPA also filed a GSP petition against Russia's copyright practices more than six years ago and that investigation is still open. 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. 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 2005, \$738.2 million worth of Russia's imports to the United States benefited from the GSP program, accounting for 4.8% of its total exports to the U.S. During the first 11 months of 2006, \$471.3 million worth of Russian goods (or 2.6% 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 32.1% decrease from the same period in 2005.

## SAUDI ARABIA

In 2007, IIPA recommends that Saudi Arabia be elevated to the Priority Watch List. See IIPA's 2007 Saudi Arabia country report at <http://www.iipa.com/rbc/2007/2007SPEC301SAUDI 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 Culture and 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 OCR 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 OCR 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 its OCR submission, 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.

In its 2006 Special 301 submission, IIPA recommended that Saudi Arabia remain on the Watch List, but with an OCR to monitor Saudi Arabia’s implementation of new transparency and enforcement commitments made in early 2006. USTR kept Saudi Arabia and agreed to an OCR as recommended by IIPA. USTR recognized progress made since Saudi Arabia joined the WTO in 2005, and encouraged increased transparency of its IPR regime, improved border enforcement measures, continued raids and inspections to combat piracy, judicial transparency and the imposition of deterrent sentences against criminal IPR offenders. In October 2006, in its OCR submission, IIPA recommended that Saudi Arabia be elevated to the Priority Watch List, due to its complete lack of progress in remedying the enforcement and other deficiencies noted in February, and in order hopefully to spur long promised action by the Saudi Government.

## **SERBIA AND MONTENEGRO**

Serbia and Montenegro have never appeared on a USTR Special 301 list. In 2006, the countries split into separate nations. IIPA did not file on either country in 2007. However, in prior years (2005 and 2006), IIPA recommended that Serbia and Montenegro be placed on the Watch List, noting unacceptably high

piracy levels, inadequate legislation, and ineffective enforcement remedies. 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. In 2005, \$7.2 million worth of Serbian goods benefited from the GSP program, accounting for 13.5% of Serbia and Montenegro’s total exports to the U.S. During the first 11 months of 2006, \$26.8 million worth of Serbian goods (or 42.8% 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, an increase of 377.2% over the same period in 2005.

## SINGAPORE

In 2007, IIPA includes Singapore in its “Dispute Settlement” section and also in its Special Mention section, noting both enforcement problems as well as deficiencies in implementing the U.S.-Singapore Free Trade Agreement. See IIPA’s 2007 Singapore dispute settlement section at [www.iipa.com/rbc/2007/2007SPEC301SINGAPOREDISPUTESSETTLEMENT.pdf](http://www.iipa.com/rbc/2007/2007SPEC301SINGAPOREDISPUTESSETTLEMENT.pdf), and the Special Mention report at [www.iipa.com/rbc/2007/2007SPEC301SINGAPORE.pdf](http://www.iipa.com/rbc/2007/2007SPEC301SINGAPORE.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. In 2006, IIPA included 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.



## SLOVAK REPUBLIC

The Slovak Republic is currently on the Special 301 Watch List, primarily due to patent issues, where it has been since 2001. IIPA did not file on this country in 2007.

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 the Slovak Republic 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

In 2007, IIPA includes South Africa in its Special Mention section. See IIPA’s 2007 report on South Africa at [www.iipa.com/rbc/2007/2007SPEC301SOUTH\\_AFRICA.pdf](http://www.iipa.com/rbc/2007/2007SPEC301SOUTH_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 OCR, 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. In 2006, IIPA included South Africa in its Special Mention section to highlight several copyright piracy, enforcement and legislative concerns

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 2005, \$1.0 billion worth of South Africa’s exports to the United States benefited from the GSP program, accounting for 17.4% of its

total exports to the U.S. During the first 11 months of 2006, \$957.3 million worth of South Africa's exports to the United States (or 13.9% of South Africa's total exports to the U.S. from January to November) benefited from the GSP program, representing an increase of 1.7% over the same period in 2005. South Africa also participates in the African Growth Opportunity Act (AGOA), another trade program which contains a basic intellectual property rights protection component. In 2005, \$455.3 million worth of South Africa's exports to the United States benefited from the AGOA program, accounting for 7.8% of its total exports to the U.S. During the first 11 months of 2006, \$656.4 million worth of South Africa's exports (or 9.5% of the country's total exports to the U.S.) benefited from the AGOA program, representing an increase of 54.4% over the same period in the previous year.

## **SOUTH KOREA**

IIPA recommends that South Korea remain on the Watch List in 2007, and that an out of cycle review (OCR) be conducted. See IIPA's 2007 South Korea country report at [http://www.iipa.com/rbc/2007/2007SPEC301SOUTH\\_KOREA.pdf](http://www.iipa.com/rbc/2007/2007SPEC301SOUTH_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 OCR, 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 OCR in the Fall. Having concluded the OCR 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 OCR, 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.

In January 2006, IIPA recommended that South Korea be placed on the Watch List, with an OCR to determine whether publishers’ and music industry issues have been adequately addressed.

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.

In its 2006 Special 301 Report, USTR retained Korea on the Watch List, while noting that the “United States is pleased that Korea established the Copyright Protection Center and increased enforcement against institutions using illegal software by establishing a Standing Inspection Team.” Although noting that progress has been made, the United States “urge[d] Korea to accelerate its efforts to combat piracy of DVDs, computer software, and books, as well as to decrease street vendor sales of pirated and counterfeit goods and infringing activities on university campuses.”

## SPAIN

IIPA recommends that Spain be added to the Special 301 Watch List in 2007. See <http://www.iipa.com/rbc/2007/2007SPEC301SPAIN> . 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. In both 2005 and 2006, IIPA highlighted copyright concerns in Spain in the Special Mention section of its Special 301 Report.

## SWEDEN

In 2007, IIPA calls special attention to the situation in Sweden. See IIPA's 2007 report at [www.iipa.com/rbc/2007/2007SPEC301SWEDEN.pdf](http://www.iipa.com/rbc/2007/2007SPEC301SWEDEN.pdf). Sweden currently does not appear on any USTR list.

## SWITZERLAND

In 2007, IIPA again calls special attention to the situation in Switzerland. See IIPA's 2007 report at [www.iipa.com/rbc/2007/2007SPEC301SWITZERLAND.pdf](http://www.iipa.com/rbc/2007/2007SPEC301SWITZERLAND.pdf). Switzerland currently does not appear on any USTR list.

## TAIWAN

In 2007, IIPA recommends that Taiwan remain on the Watch List and an out of cycle review (OCR) be conducted. See IIPA's 2007 Taiwan country report at <http://www.iipa.com/rbc/2007/2007SPEC301TAIWAN.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 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. 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 OCR 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 OCR 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 OCR 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 OCR 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 OCR 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.

In 2006, IIPA recommended that Taiwan remain on the Watch List. While noting positive progress, including the first conviction for Internet copyright infringement, USTR kept Taiwan on the Watch List for 2006. The United States commended Taiwan for its efforts to improve its IPR regime, and reiterated the need for key Internet-related legislative improvements and continued effective enforcement.

## TAJIKISTAN

IIPA recommends that Tajikistan remain on the Watch List, where it has appeared since 2000. See IIPA's 2007 country report at <http://www.iipa.com/rbc/2007/2007SPEC301TAJIKISTAN.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. IIPA recommended that Tajikistan remain on the Watch List in 2006, stating that “over ten years after pledging to do so, Tajikistan does not even provide the basic rights or protections for U.S. or other foreign works or sound recordings.” USTR noted once again that IPR obligations under the U.S.-Tajikistan Bilateral Agreement have not been fulfilled, and retained Tajikistan on the Watch List. The United States urges Tajikistan to “take necessary steps to bring its IPR regime into conformity with the TRIPS Agreement as part of its ongoing efforts to join the WTO.”

## THAILAND

In 2007, IIPA recommends that Thailand be elevated to the Priority Watch List. See IIPA’s 2007 Thailand country report at <http://www.iipa.com/rbc/2007/2007SPEC301THAILAND.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 Royal 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 (OCR), 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. USTR 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.”

Negotiations between Thailand and the U.S. on Free Trade Agreement started in June 2004, but stalled in 2005 (and appeared to be doomed due to the coup in September 2006). In February 2006, IIPA again recommended that Thailand be elevated to the Priority Watch List. Noting “some progress in strengthening its IPR regime during 2005, including some enforcement efforts to combat piracy and counterfeiting,” USTR retained Thailand on the Watch List. USTR noted that “[c]oncerns remained regarding high piracy and counterfeiting rates,” and noted the “proliferation of optical disc pirate production at plants ... especially in light of comparatively weak optical disc legislation” passed in 2005. USTR indicated that the U.S. Government would “continue to work with Thailand to address these significant concerns regarding its intellectual property laws and enforcement.”

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 2005, \$3.6 billion in Thailand’s exports to the United States benefited from the GSP program, accounting for 18.1% of its total exports to the U.S. During the first 11 months of 2006, \$3.9 billion worth of Thai goods (or 19% 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 21.1% over the same period in the previous year.

## **TURKEY**

In 2007, IIPA recommends that Turkey remain on the Priority Watch List. See IIPA’s 2007 Turkey country report at <http://www.iipa.com/rbc/2007/2007SPEC301TURKEY.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.

IIPA recommended that Turkey remain on the Priority Watch List in 2006. USTR agreed and retained Turkey on the Priority Watch List in its 2006 Special 301 Report. USTR indicated that the U.S. Government

encourages Turkey ... to address the following IPR concerns: continuing enforcement against book, retail, and optical disc piracy; increasing judicial efficiency and reducing backlogs of court cases; addressing the growing problem of Internet piracy; increasing customs’ *ex officio* inspections and seizures of pirated and counterfeit goods; and ensuring the seizure and destruction at pirate optical disc plants of pirated goods and the equipment used to produce them.

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 2005, \$1.1 billion worth of Turkey's exports to the United States benefited from the GSP program, accounting for 20.9% of its total exports to the U.S. During the first 11 months of 2006, \$1.0 billion worth of Turkish goods (or 20.3% of Turkey's total exports to the U.S. from January to November) entered the U.S. under GSP, representing an increase of 3.2% over the same period in the previous year.

## **TURKMENISTAN**

IIPA recommends that Turkmenistan remain on the Watch List in 2007, where it has appeared since 2000. See IIPA's 2007 Turkmenistan country report at <http://www.iipa.com/rbc/2007/2007SPEC301TURKMENISTAN.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."

In 2006, IIPA recommended that Turkmenistan remain on the Watch List for “failing to enact the necessary legal reforms it obligated itself to adopt over ten years ago.” USTR retained Turkmenistan on the Watch List, noting concerns about its “lack of progress in IPR issues during the past year and its lack of fulfillment of its IPR obligations under the United States-Turkmenistan Trade Agreement.” Turkmenistan is urged to strengthen its IPR regime and to adopt legal reforms that will bring it into compliance with its obligations under the bilateral United States-Turkmenistan Trade Agreement.

## UKRAINE

IIPA recommends that Ukraine remain on the Priority Watch List in 2007. See IIPA’s 2007 Ukraine country report at <http://www.iipa.com/rbc/2007/2007SPEC301UKRAINE.pdf>.

Over the past decade, Ukraine has been subject to intense trade engagement under both Special 301 and the Generalized System of Preferences (GSP) review process. In 1998, USTR agreed with IIPA’s recommendation and placed Ukraine on the Watch List. In 1999, Ukraine was elevated to 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. Instead, 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 several CIS countries, including Ukraine, be commenced under the Generalized System of Preferences (GSP) trade program for their failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. In February 2000, the administration announced that it accepted IIPA’s petition for review of Ukraine (and others), and hearings were held on May 12, 2000. 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 was 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 (OCR) 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 OCR 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 the reinstatement of GSP benefits for Ukraine on January 23rd. In the first 11 months of 2006, \$20.2 million worth of Ukrainian goods benefited from the GSP program, accounting for 1.3% of the country’s imports to the U.S.

In its February 2006 Special 301 Report, IIPA recommended that Ukraine remain on the Priority Watch List, applauding the significant amendments adopted to Ukraine’s optical disc laws and their agreement to cooperate with copyright industries on enforcement. 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.” USTR retained Ukraine on the Priority Watch List for 2006, stating,

Although Ukraine is no longer a major producer of pirated optical discs, it remains a transshipment point and storage location for illegal optical media produced in Russia and elsewhere. The United States encourages Ukraine to further improve border enforcement efforts and to impose deterrent criminal penalties for unauthorized production and export of pirated products...Although the United States recognizes Ukraine’s marked improvements in IPR protection, it will continue to monitor closely Ukraine’s further progress on IPR protection and enforcement.

## UNITED ARAB EMIRATES

The UAE does not currently appear on any USTR lists. IIPA did not file a report on this country in 2007. 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 does not appear on any Special 301 list. IIPA did not file a 2007 report on this country, but has in prior years; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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 (OCR) 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.” In 2006, citing “progress on copyright enforcement,” USTR removed Uruguay from the Watch List. That same year, a Bilateral Investment Treaty between Uruguay and the U.S. entered into force.

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 2005, \$60.6 million worth of Uruguay’s exports to the United States benefited from the GSP program, accounting for 8.3% of its total exports to the U.S. During the first 11 months of 2006, \$47.4 million worth of Uruguayan goods (or 9.8% of Uruguay’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 14.8% decrease from the same period in 2005.

## UZBEKISTAN

IIPA recommends that Uzbekistan remain on the Watch List, where it has appeared since 2000. See IIPA’s 2007 Uzbekistan country report at <http://www.iipa.com/rbc/2007/2007SPEC301UZBEKISTAN.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 2006, IIPA recommended that Uzbekistan remain on the Watch List for “failing to adopt the necessary legal reforms it obligated itself to adopt over ten years ago.” USTR agreed due to concerns over “lack of significant progress on IPR issues this past year,” and Uzbekistan remains on the Watch List in 2006. Although Uzbekistan joined the Berne Convention in April 2005, its reservation to Article 18 denies protection for pre-existing works and must be withdrawn. Additionally, Uzbekistan “appears to be out of compliance with its intellectual property commitments under the United States-Uzbekistan Trade Agreement, particularly with respect to copyright protection and enforcement.” With these and the many concerns noted in prior years, the United States “will continue to work together with Uzbekistan on these outstanding IPR issues through discussions related to Uzbekistan’s bid for WTO accession.”

In 2005, \$12.1 million worth of Uzbek exports to the United States benefited from the GSP program, accounting for 12.7% of its total exports to the U.S. During the first 11 months of 2006, \$1.7 million worth of Uzbek exports to the United States (or 1.1% of Uzbekistan’s total exports to the U.S. from January to November) benefited from the GSP program, representing a decrease of 85.0% from the same period in 2005.

## VENEZUELA

In 2007, IIPA recommends that Venezuela remain on the Priority Watch List, where it has appeared since 2005. See IIPA’s 2007 Venezuela country report at <http://www.iipa.com/rbc/2007/2007SPEC301VENEZUELA.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 2005, \$744.4 million worth of Venezuela’s exports to the United States benefited from the GSP program, accounting for 2.3% of its total exports to the U.S. During the first 11 months of 2006, \$630 million worth of Venezuelan goods (or 1.9% 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 7.3% decrease from the same period in the previous year.

In 1999 and 2000, Venezuela remained on the Watch List, as recommended by IIPA. In 2001, IIPA recommended that Venezuela remain on the Watch List. USTR agreed, noting in its April 30, 2001

Special 301 Announcement that “Venezuela continues to present a mixed record of success with respect to its protection of intellectual property rights, although in some respects it is gradually moving in the right direction.” IIPA recommended that Venezuela remain on the Watch List in 2002, citing continued high piracy rates, lengthy judicial delays, and the failure to impose deterrent penalties. In its April 30, 2002 Special 301 Announcement, USTR kept Venezuela on the Watch List, noting that “limited resources and a lack of IPR enforcement by Venezuela customs have hampered the government’s efforts to lower copyright piracy levels.” USTR’s 2003 Special 301 Announcement commented that Venezuela’s commitment to protection of intellectual property rights appeared to be decreasing in 2002. Piracy and counterfeiting increased, while deterrence and prosecution levels stayed low. USTR kept Venezuela on the Watch List in 2003, adding that it intended to review the country’s progress later in the year. 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.”

IIPA recommended that Venezuela remain on the Priority Watch List in 2006. USTR agreed, citing “minimal progress” in the past year, and retained Venezuela on the Priority Watch List. The one positive note was the adoption of a regulation allowing *ex officio* seizures of pirated and counterfeited goods; this was countered by the rise in already high levels of copyright piracy and the proposal of legislation that would “severely undercut the existing Venezuelan copyright law, as well as bilateral and international standards of IP protection.”

## VIETNAM

In 2007, IIPA recommends that Vietnam remain on the Watch List. See IIPA’s 2007 Vietnam country report at <http://www.iipa.com/rbc/2007/2007SPEC301VIETNAM>.

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."

In 2006, IIPA recommended that Vietnam remain on the Watch List, and USTR agreed in the 2006 Special 301 Report. In its announcement, USTR indicated that the U.S. Government "commends Vietnam for its improvements in IPR protection, including Vietnam's passage of a comprehensive IPR law in November 2005, but notes some remaining deficiencies and ambiguities." USTR also noted, "IPR infringement remains rampant in Vietnam, with reports from the U.S. copyright industry that in some cities, 100 percent of the CDs, VCDs, and DVDs sold are pirated." USTR indicated that the U.S. Government would continue to work with Vietnam to address outstanding IPR issues during WTO accession discussions. Vietnam became the 150th member of the World Trade Organization on January 11, 2007.