



IIPA's 2009 Special 301 Report on Copyright Protection and Enforcement

**Submitted to the U.S. Trade Representative
on February 17, 2009 by the
International Intellectual Property Alliance®**



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February 17, 2009

Mr. Stanford McCoy
Assistant U.S. Trade Representative
for Intellectual Property and Innovation
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Special 301: Identification of Countries Under Section 182 of the
Trade Act of 1974: Request for Public Comment ("Special 301"), 74
Fed. Reg. 4263 (January 23, 2009)

Dear Mr. McCoy:

This filing responds to the Request for Written Submissions appearing on January 23, 2009 in the Federal Register which invites public submissions on policies and practices that should be considered in identifying countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection pursuant to Section 182 of the Trade Act of 1974, 19 U.S.C. §2242 ("Special 301"). Specifically, in the following submission and appendices, the International Intellectual Property Alliance (IIPA) describes the key challenges and initiatives that define the copyright industries' agenda for the coming year, discusses the types, levels, and costs of copyright piracy, evaluates best enforcement practices to reduce piracy, and reports on 48 countries or territories, including 39 of which should be ranked on the Special 301 Priority Watch List or Watch List, or monitored under Section 306 of the Trade Act.

OVERVIEW OF THE IIPA 2009 SPECIAL 301 SUBMISSION

Economic Challenges and the Copyright Industries as the Driver of Growth: With the health and competitiveness of the U.S. economy in dire straits, the U.S. copyright industries remain one of the few industry sectors capable of outpacing the rest of the economy in producing new jobs and returning revenue to our country when it needs it most. Through the 1990s and this first decade of the 21st century, the "core" U.S. copyright industries have added new workers to our economy at two to three times the rate of the economy as a whole. One out of every 20 workers is now employed in the copyright industries, and more than one in 10 workers are in jobs that are in, or depend on, the "core" copyright industries. Most of these industries generate over half their revenue from outside the U.S. and that revenue contributes to the creation of U.S. jobs. Notwithstanding this success, the copyright industries suffer enormous losses around the world as a result of the theft of their works. This substantially reduces their revenue, directly impacting U.S. employment.

Theft of U.S. Creative Content is a Global Problem: This report highlights the ways in which U.S. intellectual property is stolen all over the world. Motion pictures, music, business software, books, and entertainment software each confront serious piracy problems, but the source of the threat is not always the same. For several industries, perhaps most immediately movies and music, the fastest growing problem – and a problem to which we devote much attention in this report – is Internet piracy, through unauthorized file-sharing, streaming, and uploading of content onto sites that make it available instantaneously worldwide. The entertainment software industry has seen recent and dramatic growth in P2P piracy, including across traditionally strong markets in Western Europe. Piracy of movies and music via mobile phones and other mobile devices is also rapidly appearing, prejudicing possibilities for legitimate commerce in a world in which entertainment will be immediately available on a device that fits in your pocket or purse. The software industry, whose birth was in this country and which is the largest of all the copyright sectors, is damaged most by piracy from the unauthorized use of software applications by commercial businesses and even government agencies.



But while piracy of physical product has declined as a percentage of the market over the last 20 years, due to effective use of many of the trade tools described in this submission, it is still a massive problem for the copyright industries. Factory production of optical disc products, CDs, DVDs, etc., is still prevalent in some countries, including exports which distort the targeted market. However, this industrial production is quickly being overtaken by local “burning” of CDs and DVDs, often with content obtained from the Internet. The wholesale commercial printing, commercial photocopying and electronic reproduction of books and journals remain huge problems for the publishing industry, most notably occurring in and around universities or other educational institutions. For the movie industry, one of the major sources of pirate product, in the physical and online world, is the surreptitious “camcording” of films just as they open or prior to their opening theatrically and the distribution of copies via the Internet or other means to eager consumers who do not want to wait, or pay, for the home video version. Factory piracy of entertainment software in cartridge format primarily in Asia afflicts the entertainment software industry. All these various types of piracy and the many countries in which they occur, and the means to combat them, are described in this report.

U.S. Trading Partners Must Improve their Enforcement Systems: The primary problem is that many of our trading partners have not yet, or will not, establish and employ effective and deterrent enforcement mechanisms to combat piracy. The key contributing factors to massive copyright piracy losses and high piracy levels include: (1) the failure to provide expeditious, non-burdensome, and non-costly enforcement procedures, (2) the failure to provide deterrent remedies and sanctions, whether civil, administrative, or criminal; (3) the failure to provide modern legal structures to provide tools to law enforcement and the judiciary to effectively enforce their laws in order to deter piracy; and, in some cases; and (4) the denial of effective market access for copyright products on an open and non-discriminatory basis.

The Bottom Line: The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. 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 for copyright, and significantly more effective policies and tools to enforce that protection. To meet the constantly evolving threats to copyright worldwide, our country’s response must remain flexible, innovative and committed.

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 — business applications software; entertainment software (interactive games for video game consoles, handheld devices, personal computers, and the Internet); theatrical films, television programs, home videos and digital representations of audiovisual works; musical compositions, recorded music, 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 industries¹ 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 (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.

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



Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading many other major industry sectors, including chemicals and related products; motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products. IIPA is in the process of updating our economic survey to reflect 2007 data, which is the most currently available information; we expect to issue this new report in mid-2009.

The study discussed above looked at the impact of the copyright industries on GDP and employment. Another study, also done by Stephen Siwek, sought to measure the losses suffered by the U.S. copyright industries and the U.S. economy from global piracy. In a report prepared for the Institute for Policy Innovation (IPI), *The True Cost of Copyright Industry Piracy to the U.S. Economy*,² Siwek gathered data that reflected the piracy losses incurred in 2005 by four of the major U.S. copyright industries: motion pictures, sound recordings, business software and entertainment software/video games (the study did not include book publishing). The report estimates these losses conservatively at \$25.6 billion. Using a widely accepted mathematical model, the study further measured the lost economic output, jobs and employee earnings that are the economic consequences of copyright piracy. The study concluded that, in that year, copyright piracy from motion pictures, music and sound recordings, and business and entertainment software generated losses to the U.S. economy of \$58.0 billion in total output, cost American workers 373,375 jobs and \$16.3 billion in earnings, and cost federal, state, and local governments \$2.6 billion in tax revenue.

B. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2009

IIPA's submission aims to provide information that will assist governments to improve copyright protection, reduce global piracy levels, and open markets to works protected by copyright. Strong and effective copyright protection benefits every country by providing incentives for creativity and innovation, promoting economic, cultural and scientific development, and fostering cultural diversity. Over the past quarter century, the U.S. government has effectively employed a panoply of trade policy tools that have stimulated many positive changes in the global environment for the protection of intellectual property. Today's challenge is to identify and strengthen the tools that will be most effective in meeting new threats to that environment.

In the early 1980's, 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 subsequent 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 threats to U.S. creators and the U.S. copyright industries remain grave and are growing. These threats emanate largely from the growth of digital and online piracy; the increased organization and sophistication of commercial pirates; and most importantly, the failure of governments to adequately enforce their new laws against the rampant piracy of 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 many foreign governments to enforce effectively their existing copyright and related laws, threatens to outpace the fight to combat it. The trade tools and enforcement expertise exist to make significant progress on the following objectives in 2009. What is needed is the political

² *The True Cost of Copyright Industry Piracy to the U.S. Economy*, by Stephen E. Siwek of Economists, Inc., prepared for the Institute for Policy Innovation, IPI Policy Report #189, October 2007, posted at www.ipi.org.

will for governments to take the actions necessary to address piracy meaningfully and to lower piracy rates locally and globally.

The following objectives are not necessarily listed in order of priority, since different issues may demand priority attention in different countries.

Internet Piracy, Electronic Commerce and the WIPO Internet Treaties

The Scope of the Problem: Electronic commerce is integral to the emerging business models of the copyright industries and their continuous efforts to respond to diverse and evolving consumer demands. IIPA places a high priority on ensuring that this critical means of commerce is not undermined by the unauthorized distribution of content online or jeopardized by discriminatory regulations. Unfortunately, online and digital copyright piracy have exploded over the past several years. IIPA places the highest priority on securing both the legal and practical tools necessary to protect intellectual property rights in the digital age thereby fostering legitimate electronic commerce.

All of the copyright industries are offering consumers exciting and diverse legal ways to enjoy their content and products. The motion picture industry works with well over 275 legitimate websites around the world, providing high quality video-on-demand content to consumers. There are sites that cater to every manner of consumer viewing including ad-supported viewing, rental viewing, download-to-own purchase, and subscription viewing. In the United States, there are over 50 such sites, including sites offering on-demand catch-up on television shows whether by streaming, rental and/or download-to-own. There are also numerous social networking sites, such as Bebo, Gaia, MySpace, peer-to-peer companies Bittorrent.com and Vuze, that provide movies legitimately. In 2008 alone we have seen major developments like the launch of new video streaming aggregator, Hulu, and its increasing number of partner sites; rental and download-to-own films on Apple's iTunes; ad-supported streaming of films on Disney, Hulu and Jaman; record viewing of online videos of the Olympics on NBC, as well as new announced efforts by sports leagues like the NBA and NHL.

On-demand, full-length television shows and films from the major studios are now being provided to consumers by all the major mobile operators. Apart from streaming to mobile devices, studios are also working to make content available to load onto those devices through media like SD flash memory cards, similar to those used in digital cameras. These are sold pre-loaded, and may soon be used to download content from in-store kiosks.

For the music industry, growth in the market for digital sales of music is essential to an industry suffering significant declines in the overall market for recorded music due to piracy. In 2008 the legitimate online music market grew 25% to \$3.7 billion in revenues. The U.S. is the world leader in digital music sales, accounting for 50% of the legitimate global music market. Even with extremely large unauthorized downloading around the world, digital platforms now account for 20% of recorded music sales globally, up from 15% a year earlier.

Book and journal publishers have exploded onto the electronic commerce scene in recent years. Professional and scholarly journal publishers have largely led the way, long offering electronic access to a wide variety of academic and professional journals for individual and institutional users worldwide. E-books of all kinds are growing by the day, including a proliferation of services offering electronic access to academic textbooks, reference materials and trade bestsellers. In October 2008, publishers and authors joined Google in announcing a proposed new partnership to facilitate greater access to electronic versions of books through the Google Book Search program, resolving an earlier legal dispute.³

Notwithstanding the impressive efforts by the copyright industries to rapidly develop and roll-out new online business models, copyright theft continues to undermine, and in some cases prevent, the development of legitimate markets for electronic commerce in copyrighted materials. The Internet and other networks linking mobile devices are being employed as highly efficient, low-cost networks for infringing activity, reaching any part of the world with ease regardless of where infringing material first enters the system. 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.

³ See <http://books.google.com/booksrightsholders/>. The proposed agreement awaits court approval.

Protection in this global online network is only as strong as its weakest link. In the United States, for example, access to pirated products is often facilitated through the operation of “tracker sites” or repositories of pirated content housed in other countries. To meet the challenge of online piracy, enhanced international norms, more effective enforcement of those norms, and law enforcement cooperation must be top priorities. Moreover, securing greater inter-industry cooperation in the fight against online and mobile piracy is imperative to curb the theft of online content.

The online piracy threat is fact, not fiction. For example, IFPI estimates that there were 40 billion unauthorized downloads globally in 2008, and that the piracy rate was an estimated 95%, well above that prevailing in the United States. This translates into billions of dollars in lost revenue at a time when the sales of physical products are also declining. The sound recording industry also reports that in 2008, it removed 3 million infringing web links, up from 500,000 in 2007, thus stopping potentially hundreds of millions of unlicensed downloads.

The online piracy threat is instantly global, not just local. The entertainment software industry undertook a study to estimate the number of copies made of 13 game titles through the BitTorrent and EDonkey networks during December, 2008.⁴ Copies were estimated to have been made by users across 223 separate countries and territories. The total number of game downloads made from these 13 titles during this one-month period was 6,429,279,⁵ with year-round impact obviously being many times greater. The countries with the heaviest unauthorized downloading by volume were Italy (17%), Spain (15.1%), France (7.9%), Germany (6.9%), and Poland (6.1%). The heaviest pirate downloading countries per capita were Israel, Spain, Italy, Portugal and Poland. Network resources provided by Telecom Italia (Italy) were implicated in 11.6% of these downloads, followed by Telefonica de Espana (Spain) (7.8%); France Telecom (France) (3.9%); Polish Telecom (Poland) (3.6%); Deutsche Telecom AG (Germany) (2.6%); IUnet (Italy) (2.1%); Neuf Cegetel (France) (1.6%); Jazz Telecom S.A. (Spain) (1.57%); Free SAS (France) (1.56%) and Uni2 (Spain) (1.53%).

While Internet piracy’s global economic impact on legitimate business models is undeniable, and will threaten their very existence unless piracy is brought under control, quantifying those economic losses and allocating them to particular countries is an extremely challenging problem. Because of this challenge, IIPA’s estimates of piracy levels and of trade losses due to piracy do not yet fully take into account online piracy. Affected industries are seeking to improve their abilities to measure the prevalence and impact of online piracy. What is clear, however, is that displaced sales of legitimate products and services are occurring and that an urgent response is needed.

IIPA and its members urge governments to adopt laws that will prevent and punish online piracy, and to enforce those laws vigorously. An environment that will facilitate the growth of legitimate online delivery of copyrighted materials entails not only the establishment of adequate rights and remedies under copyright, but also rules that compel all entities involved in the transmission of copyright materials to implement reasonable practices. A focused and comprehensive strategy, as outlined below, is required.

The Legal and Enforcement Solutions: 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. The WTO TRIPS Agreement contains a technology-neutral obligation to provide “expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements” (Article 41). The enforcement tools described in TRIPS must be applied against online piracy.

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), have been in force since 2002. Effective implementation of the global legal minimum standards embodied in the WCT and WPPT is critical in the fight against online piracy, and is a key element of the “adequate and effective” copyright protection that is demanded under the Special 301 program. These standards include clarifying

⁴ Therefore, these results do not reflect downloads of other game titles made during that period, nor do they reflect game downloads made through other file sharing networks (Ares, Gnutella, Direct Connect) or other web protocols (websites, cyberlockers, IRC, blogs, etc.).

⁵ The total number of completed downloads made of the two most popular titles during this one-month period was 4,787,441.

exclusive rights in the online world, and specifically prohibiting the production of or trafficking in tools that circumvent technological protection measures (TPMs) used by right holders to protect copyrighted works, coupled with criminal prohibitions that effectively deter commercial circumvention activities.

Ever since the WIPO Treaties were adopted, 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. Sixty-nine (69) countries now belong to the WCT, sixty-eight (68) have joined the WPPT, and the momentum continues to build, with 14 original EU member states expected to join Belgium (which already joined) by ratifying both treaties in the near future. Ensuring that these standards are effectively embodied in national law is critical. 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 U.S., which was one of the first countries to implement these changes in its laws more than a decade ago, should continue to make it a priority to encourage other countries to follow this path.⁶

In addition, the Free Trade Agreements between the US and a number of its trading partners specify and clarify the standards in the TRIPS Agreement and the WIPO Treaties. The binding obligations that the FTAs create should form the underpinnings of the online enforcement systems in these countries, and eventually in all countries.

In parallel with the physical world, there is no substitute for vigorous enforcement of the new and existing laws against digital and online piracy. To protect the revenue streams and millions of new jobs created by the copyright industries, governments must be agile in dealing with a medium that is constantly shifting and evolving. Laws and practices of nations must be designed to secure broad cooperation among all relevant parties to prevent piracy in the first place; to quickly locate and bring down infringing Internet sites or content; and to pursue actions against offenders. 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. 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, is another key element of a successful strategy.

These law reform and enforcement measures are critical to deter pirates from destroying the promising new tools for making copyrighted products available globally. IIPA members, and their member companies, have stepped up to the challenge of online piracy. They devote increasing resources and technical expertise to ferreting out online piracy and taking action against it. But the success of these efforts depends to an increasing extent on obtaining the cooperation of other parties, including network operators and the manufacturers and distributors of access devices. All these parties have a vital stake in building a robust legitimate marketplace for electronic commerce in copyrighted works. However, the incentives and disincentives provided by the laws have not always kept pace with these realities.

Practical, fair and understandable regimes of secondary liability for online infringement are essential to motivate all participants to cooperate in implementing the reasonable practices that will make the online marketplace less hospitable to infringers. Voluntary arrangements among copyright owners, service providers and equipment manufacturers are a critical component of the fight against online piracy, the U.S. government should also urge all its trading partners to adapt and refine their secondary liability regimes to reflect the current technological realities, or to adopt modern, flexible systems where they do not exist. The goal must be to encourage responsible conduct on the part of all parties involved in the transmission of copyrighted materials. This includes swift and cost-effective ways to achieve takedowns of infringing content and services and mechanisms to ensure that repeat infringers find no safe harbor on the Internet.

Finally, 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 enable such uploading for the purpose of

⁶ The U.S. implemented the WCT and WPPT by enacting Title I of the 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.

encouraging infringement. As we know from our own experience here in the U.S., new legal online services for delivery of copyrighted material can succeed only if they are not undermined by unfair competition from unauthorized sources.

It is critical that governments, educational institutions and similar enterprises that provide broadband connections to their employees, students or others develop and enforce strong internal policies (such as official memoranda, decrees, or executive orders in the case of governments) to prevent illegal file sharing of copyrighted materials, including through the use of peer-to-peer technologies. When their networks transmit only authorized copyrighted material, they are also helping to ensure the security of their networks against unauthorized incursions or other potentially crippling interventions into their systems.⁷

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.

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 and deterrent enforcement, as required by the WTO TRIPS Agreement, the WCT and WPPT, and the various Free Trade Agreements (FTAs) which the U.S. has negotiated, can this goal be met.

The industries and the U.S. government have been engaged for over twenty years in many countries to try to bring piracy down to acceptable levels. But many still have not meaningfully upgraded their enforcement systems to meet their international obligations by adopting effective remedies and imposing deterrent penalties. In a growing number of countries, police agencies are more able, and often more willing, than in the past to conduct raids against pirate producers, wholesalers and retail sites. But all too often the legal system fails to follow through. For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) must impose penalties that remove the monetary incentives that drive the pirate trade. Small fines will not deter pirates who stand to gain hundreds of thousands to millions of dollars. Deterrence requires substantial prison sentences in these cases. Again and again, in country after country, major pirates either manipulate the system to evade conviction (often as a result of systemic delays or corruption), or suffer only small monetary fines that utterly fail to discourage them from continuing in their illegal business, or others from following their example. Again and again, raided stores reopen quickly with new pirate product, online pirates move their servers or take on a new online identity, 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.

Ultimately countries undertake effective reform because they understand that it is in their own interest. It is essential that the U.S. government continue to take steps that will bring about such an understanding. Those steps should be supplemented by actions that increase the capacity of willing governments to take effective action. Among the strategies that could be employed are:

- Continuing to coordinate enforcement training, including localized training and capacity-building that demonstrates the benefits of deterrent enforcement.

⁷ 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.



- Fostering further coordination among and between U.S. agencies, industry, and international organizations with training resources.
- Creating “best enforcement practices” models, including legislative provisions and specific and practical reforms at the police, prosecutorial and judicial levels. These would be based on the TRIPS text and the U.S. FTA models, but with far greater detail to assist the enforcement authorities. These could include recommendations for “zero tolerance” policies against retail piracy and specific actions to be taken in the area of online piracy. These should also include model sentencing guidelines that would help the authorities assess what penalties will actually deter pirates.

IIPA and its members applaud USTR for spearheading an international effort to forge an “Anti-Counterfeiting Trade Agreement” (ACTA) among like-minded trading partners. This effort, announced on October 23, 2007, recognizes the critical importance that effective enforcement now plays in improving the global trading environment in IPR-based products. The U.S. was joined by key trading partners in making this announcement, including Japan, the EU, Mexico, Switzerland, Canada, Korea and New Zealand. It is essential, however, that such an agreement, if negotiated, set out the very highest standards of effective enforcement to which the rest of the world should aspire.

The Special 301 process must specifically target enforcement in a direct and clear way. 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 that actually *reduce* piracy rates (and, conversely, that they will see a change in placement when such actions are in fact undertaken).

Optical Disc Piracy

Piracy of optical disc (OD) products continues to cause major losses to most copyright industries. Increasingly, many 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), DVD-Recordables (DVD-Rs), universal media discs (UMD), and newer, high definition formats such as BluRay. 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.

In recent years, the problem of industrial production of pirate OD product in factories has to a great extent been overtaken by more decentralized, smaller-scale operations that use blank recordable optical media and OD “burners” to make unauthorized copies on a commercial basis. Whether “burned” or factory-produced, pirate CDs, VCDs, CD-ROMs and DVDs, CD-Rs and DVD-Rs containing protected music, sound recordings, audiovisual works, business software, entertainment software and books and journals have decimated the market for legitimate U.S. products.

Optical Disc Piracy – Factory Production: For 2009, IIPA identifies the key optical disc piracy factory production trouble spots as: China, Nigeria, Russia and to a lesser extent Indonesia and Malaysia. These are markets where immediate actions should be taken by the governments to curtail pirate production. The optical disc factory piracy problem confronting the copyright sectors, now familiar to governments worldwide, has demanded new and creative legislative and enforcement solutions. 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, Nigeria, Oman, the Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, and are under consideration in Bahrain, India, Vietnam, and other countries. Increasingly, pirate optical disc production is migrating from jurisdictions with optical disc

production regulatory regimes to countries that have not adopted these regulatory tools or do not enforce them, such as Bangladesh, Nigeria, Vietnam, and many others mentioned in this submission.

Above all, the regulations put in place to combat OD piracy must be aggressively enforced. Governments must have the authority to conduct surprise inspections of optical disc production facilities – and they must use it. Deterrent penalties, including license revocation, confiscation of equipment and raw materials, and heavy fines and imprisonment, must be consistently and efficiently imposed.

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.

Optical Disc Piracy – Commercial “Burning”: As regulatory regimes have been put into place and enforced, pirates have taken advantage of technological developments, and moved production increasingly from the “factory” locus to smaller, more mobile venues that are often more private and harder to police. Using cheaper and more portable consumer “recordable” technology, pirates with a very small investment can easily and cheaply burn thousands of CD-Rs and DVD-Rs of copyrighted material 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 sometimes even in the same locations as the factory equipment. Increasingly around the globe, seizures of pirate optical disc product in 2008 were overwhelmingly of “burned” product. Commercial “burning” has probably become the biggest piracy threat in the “hard goods” optical media market.

This 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. More countries should do the same.

Piracy by Organized Crime Syndicates

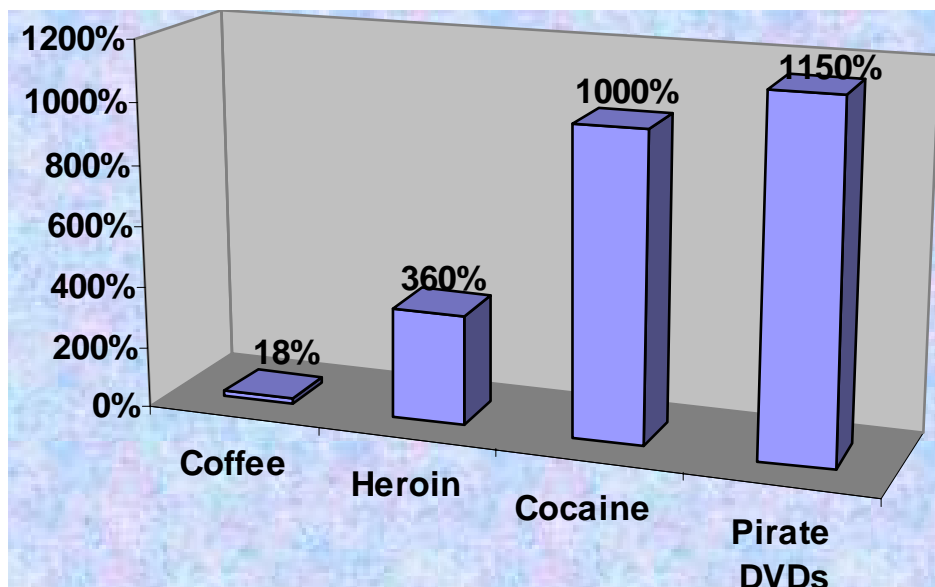
Because of the immense profits that can be garnered by producing pirate optical disc products, this illegal business has been taken over in many countries by organized crime syndicates, making it even more difficult for local authorities to combat the problem. These criminal syndicates are highly organized,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

The kinds of large-scale piracy operations run by syndicates are a global threat, as the lucrative funds from piracy fund other illegal activities, like drug trafficking, gun running and even terrorism. These syndicates operate worldwide. 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, many syndicates began moving their illegal trade into local CD-R and DVD-R “burning” and to the Internet in response to improved local enforcement against factory pirate production.

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.⁸ The following table from that same study shows graphically that the

⁸ Motion Picture Association, *Optical Disc Piracy v. Illegal Drug Trafficking*, October 2005, at 2. At about the same time, MPA released another study, *Organized Crime & Motion Picture Piracy*, from which some of the examples in the text are taken.

mark-up for DVD piracy is higher than that for cocaine and heroine, with the risk of getting caught and receiving deterrent punishment significantly less.⁹



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.

Some recent examples of the involvement of organized crime on a global basis include:

- In February 2009, Polish police raided an organized criminal syndicate that produced and distributed pirate music and films on an industrial scale. The pirate operation distributed an estimated nine million albums, making it what is believed to be the largest copyright infringing disc operation ever shut down by police action in Europe.
- In December 2008, Australian police executed five search warrants across South Western Sydney uncovering an estimated one million pirate Asian movie and music discs. The seizure is the largest ever of pirate music and Asian movies in Australia.
- In November 2008, Brazilian officials discovered a smuggling ring importing blank optical discs from Uruguay to sell in the pirate markets of Brazil. Investigators uncovered the blank discs in the duty free shops of the border town of Rivera in Uruguay. The smugglers sourced blank discs from the free port of Montevideo and used the duty free shops as distribution points.
- In November 2008, the Argentine coast guard raided the notorious La Salada market and seized enormous amounts of counterfeit product. The authorities have already identified some organized criminal syndicates that operate in the market.
- In October 2008, Mexican customs officials seized 8.7 million blank discs imported from Taiwan in two major border operations. The organization that brought them into the country had used the Free Port of Panama as an onward shipment point.
- In September 2008, Royal Thai Police and industry cracked a piracy ring believed to be run by Malaysian mafia in the heart of Bangkok. They raided an abandoned warehouse, the front of which was disguised as a junk garage, hiding an air-conditioned back area housing one DVD replicating line, one printing machine, and 2,400

⁹ *Id.*, at 3

kilograms of polycarbonate used to produce pirate optical discs and “stampers” of major U.S. motion pictures for export to Malaysia.

- In August 2008, Mexican law enforcement authorities raided 70 warehouses and 15 laboratories around the infamous market of Tepito in Mexico City. The area is a well-known distribution point for pirated music and film in Mexico. A force of 375 police and 10 prosecutors from the Attorney General's office (PGR) carried out the raids. According to the authorities, the organization targeted in the raids supplied pirate music and film product throughout the country.
- In June 2008, Turkish authorities ran raids against 86 locations in Istanbul in operation “Yarasa,” targeting an organized criminal group involved in the manufacture and distribution of pirate discs in various districts of Istanbul. The raids resulted in the seizure of more than 4 million inlay cards, 200,000 burned disks, and 112 disc burners. Turkish law enforcement officials were among the 46 persons arrested for selling confidential information about planned raids and for reselling seized pirate discs back to the pirates.
- In May 2008, Rome Fiscal Police arrested 12 members of an organized criminal gang involved in the distribution of pirate CDs and DVDs. The arrests took place in Naples and Milan. A series of raids uncovered six illegal pirate factories, five in Naples and one in Milan, which contained 350 burners.
- In May 2008, Brazilian police conducted a major raid in the town of Presidente Prudente which led to the dismantling of a network of illegal replicating facilities in a city regarded as a major distribution point for pirate CDs and DVDs. The Regional Organized Crime Unit of the Military Police (GAECO) in the State of Sao Paulo conducted the operation in the town, some 300 miles from city of Sao Paulo, on 29th April 2008.
- In April 2008, the Australian Federal Police busted an international music piracy ring operating from Sydney which exported pirate music. The organized gang in Australia is alleged to have manufactured tens of thousands of re-mixed compilation albums for distribution through a complex network throughout Australia, New Zealand and the Pacific.
- In February 2008, Russian police raided a warehouse near Moscow and seized 500,000 infringing optical discs. The Moscow City Police's Economic Crime Department undertook the raid acting on intelligence of organized criminal activity.
- In January 2008, Polish border police arrested eight people involved in the smuggling and manufacture of pirate CDs and DVDs. Officers seized illegal firearms, including handguns, a machine gun and a sawn-off shotgun; contraband cigarettes and tobacco; as well as € 50,000 in cash. The border police smashed the organized gang which smuggled music and films believed to be produced in Russia and Ukraine as well as producing their own counterfeit discs.
- In December 2007, Saudi Arabian police ran raids against four warehouses seizing close to 500,000 units of pirated music and video cassettes, VCDs and DVDs. The police also found a large cache of explosives and weapons and arrested 15 people.

The private sector is not equipped to fight organized crime. This is a job for law enforcement authorities. Company representatives and counsel have in some countries experienced threats on their lives or physical intimidation, and have even been injured when their investigations began to make progress. In some cases, this has prevented any enforcement activity by the private sector.

To assist national governments, even INTERPOL has recognized that there is an urgent need for national and international enforcement authorities to coordinate their efforts and cooperate with the IP right holders in the private sector.¹⁰ Back in 2000, the INTERPOL General Assembly approved the addition of IP crime to the Organization's official mandate. Later the INTERPOL Intellectual Property Action Group (IIPCAG) was formed as a public-private partnership.

¹⁰ See INTERPOL IPR page at <http://www.interpol.int/public/financialcrime/intellectualproperty/default.asp>. For more information on recent 2008 activities, see INTERPOL Intellectual Property Rights Programme Review 2008, posted at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/IPNewsletter.pdf>. For example, in February 2008 INTERPOL launched its Database on International Intellectual Property (DIIP) Crime. The Third INTERPOL Intellectual Property Crime Training Course brought together participants from police forces and the private sector all over the world was held in Italy on October 2008. This was co-hosted by the Italian Guardia di Finanza in partnership with police and member organizations of the INTERPOL IP Crime Action Group. Numerous operations were conducted throughout the year, working with both public government agencies as well as private sector organizations.

The U.S. government should take a leadership role, both bilaterally and in multilateral fora, to place the issue of effective copyright piracy enforcement on the agenda of agencies dealing with organized economic crime. It should encourage countries with existing laws and special investigative procedures against organized crime 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 2008 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, over 100 countries/territories provide 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 have not 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 in practice – even though their TRIPS obligations require both.

End-user piracy is of course not limited to business 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. In addition, internet café piracy in several countries continues to plague the entertainment software industry. While entertainment software publishers are increasingly making available specialized licensing terms for these establishments, the lack of government oversight or incentives for legitimizing use only emboldens internet café owners in their use of pirated or unlicensed product.

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 countries/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. 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, and electronic files containing book text are now routinely seized as part of enforcement actions against copy shops. This shift from physical copy machines to electronic files—allowing shops 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. Publishers also suffer from unauthorized institutional or business-related photocopying for commercial research (often accompanied by failure to compensate rights holders through collective means or otherwise for copies made).

In addition, the U.S. publishing industry continues to suffer 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 South Korea, Egypt, Thailand, Pakistan, India, China and other countries with large printing capacity. While many pirated copies are rife with errors or obviously of inferior quality, in some cases 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 trademark misuse. Unauthorized and unlicensed compilations abound in the academic context as well, in the form of course packs or even “original textbooks” that consist of sections of U.S. publishers’ material, in English or in translation.

These types of piracy call for the same kind of aggressive enforcement techniques discussed throughout this submission, accompanied by robust efforts to legalize the practices of universities and other educational institutions, especially those that are government-supported. Governments must 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.

Camcorder and Videogame Cartridge Piracy

Camcording as “source piracy” has grown exponentially over the last few years, tracking the development of camcorder technology that makes detection difficult and copies near perfect. MPAA analysis of counterfeit copies seized throughout the world reveals that more than 90% of illicit recently released movies on DVDs can be sourced back to theatrical camcording. For example, in 2007, more than 530 cases of illegal camcording were detected from theaters around the world and most of these films were stolen within 24 hours of their theatrical release. They were then uploaded to the Internet, replicated in optical disc plants, and burned to discs, affecting markets around the world. This trend continued through 2008.

It is evident that camcorder piracy migrates to those markets where enforcement is weak. With the passage of the U.S. Family Entertainment and Copyright Act, which made camcording a federal offense, and similar state laws, as well as diligent efforts by local police, the U.S. is taking the necessary steps to provide adequate and effective remedies against camcorder piracy. Progress has also been made globally on this critical issue and IIPA calls upon the U.S. government to continue to seek legislative changes that make unauthorized camcording a criminal offense.

While the motion picture industry recognizes that anti-camcording legislation is critical to stopping the rapid increase in camcording, it also recognizes that there are critical steps that it and its business partners in the film industry must undertake on their own. As a result, it has and will continue to expend significant resources in undertaking various measures to mitigate the level of unauthorized camcording activity. Despite industry efforts, it is clear that if camcording is not made a

criminal offense and deterrent penalties are not applied, this crippling source piracy will continue, migrating to territories where enforcement is weak.

In addition to optical disc piracy, factory piracy of entertainment software in cartridge format also afflicts the entertainment software industry. Pirate videogame cartridges easily find their way into numerous countries around the world. Absent sustained enforcement actions against these factories engaged in illegal production and export, and the prosecution of their owners and financiers, there will be little progress in curtailing this piracy problem.

Using FTAs to Improve Global Standards of Copyright Protection and Enforcement

The negotiation of bilateral and regional free trade agreements (FTAs) over the past fifteen years has proven to be of great value to the U.S. copyright industries. These negotiations have provided an important opportunity to persuade our trading partners to take on enforceable obligations to modernize their copyright law regimes and to improve enforcement procedures. The agreements have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries – a true win-win for both parties.

IIPA urges the Obama Administration to build on the momentum that has built over the past three presidencies. FTAs hold a critical place in U.S. trade policy – particularly for the copyright industries. 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, FTAs with Singapore, Chile, Australia, Jordan, Morocco, Bahrain, Oman, the six nations in the Central America-the Dominican Republic-U.S. FTA, and Peru, had entered into force. Negotiations with South Korea, Colombia and Panama have been concluded. We urge Congressional approval of these FTAs. Unfortunately, negotiations with the United Arab Emirates and Thailand have stalled and negotiations with Malaysia have slowed. IIPA strongly supports the renewal of Trade Promotion Authority (TPA) “fast track” negotiating authority and urges the new Congress to renew it in 2009 and for the new Administration to conclude existing negotiations and commence new FTAs with key trading partners.

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. We commend the U.S. for laying the groundwork for a possible Trans-Pacific Partnership FTA with Singapore, Chile, New Zealand, Brunei, Australia, Peru and Vietnam, and we would welcome the extension of FTA benefits to all of these countries. In these negotiations, industry 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 in particular on the Internet, with expeditious and deterrent civil and criminal remedies. We encourage the Administration to use these opportunities to secure high levels of protection and enforcement that are critical to the development and sustainability of robust e-commerce.

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. Denial of effective market access for copyright industries is an integral part of the Special 301 process.

Our experience shows that where there are restrictions 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 void 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 when 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 pirated 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 overseas 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. Specifically, foreign 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 (such as for health and safety) uniformly, including against vendors of piratical product, and consider the creation of enhanced penalties for non-compliance by pirate operations.

The country reports we submit today highlight many of the most damaging market access barriers that copyright industries face. We urge USTR to continue to monitor these countries' progress along these lines. The U.S. government and foreign governments should consider market-opening policies as an additional tool to combat piracy, and to promote economic and technological competitiveness.

C. IIPA RECOMMENDATIONS FOR THE 2009 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 48 countries/territories, and has recommended 39 of them for placement on the Priority Watch List or Watch List, or for monitoring under Section 306 of the Trade Act. We also mention specific issues in nine additional countries/territories that deserve increased U.S. government attention. As in prior years, IIPA's submission contains several separate sections. Included in this year's submission are the following:

- This letter, which summarizes the submission and outlines IIPA's recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2009.
- Appendix A, which compiles IIPA's country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy. As indicated in the chart below, IIPA recommends that 13 countries be placed on the Priority

Watch List and 25 be placed on the Watch List. We also recommend that out-of-cycle reviews be conducted later this year for Spain, Malaysia and Saudi Arabia, and that Paraguay remain under Section 306 monitoring.

- Appendix B, which describes IIPA members' methodologies for calculating estimated trade losses and piracy levels.
- Appendix C, which includes all the country surveys.¹¹ In most country reports, 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.

PRIORITY WATCH LIST	WATCH LIST	SECTION 306 MONITORING	OTHER COUNTRIES/ TERRITORIES DESERVING SPECIAL MENTION
Argentina Brunei Canada Chile Egypt India Indonesia Mexico Pakistan People's Republic of China Philippines Russian Federation (GSP) Thailand	Belarus Brazil Bulgaria Costa Rica Greece Hungary Israel Italy Kazakhstan Kuwait Lebanon (GSP) Malaysia (OCR) Peru Poland Romania Saudi Arabia (OCR) South Korea Spain (OCR) Sweden Tajikistan Turkey Turkmenistan Ukraine Uzbekistan (GSP) Vietnam	Paraguay	Azerbaijan Bangladesh Colombia Hong Kong Japan Jordan Nigeria Switzerland Taiwan

- Appendix D, which provides an historical chart of countries/territories' placement on Special 301 lists by USTR 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."¹² Under these criteria, these 15 countries/territories named by

¹¹ Country surveys were prepared by counsel to the IIPA, 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 thank Kristen Schumacher for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

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

IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 20 years that Special 301 has been in existence.

- Appendix E, which contains the Special 301 histories of countries/territories that 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 that have never appeared on a USTR list but which deserve special attention.

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.¹³ This submission details copyright developments in 8 of the top 12 countries that received benefits from the GSP program in 2008, specifically: India (\$3.96 billion of U.S. imports under GSP), Thailand (\$3.53 billion), Brazil (\$2.75 billion), Indonesia (\$2.16 billion), Argentina (\$1.4 billion), Turkey (\$916 million), the Philippines (\$913 million) and Russia (\$593 million). As of February 17, 2009, 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. It is imperative that the Administration use this program to hold beneficiary countries accountable to the IPR obligations in the statute.

D. 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.

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

¹³ 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.

APPENDIX A

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

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

APPENDIX A

IIPA 2009 "SPECIAL 301" RECOMMENDATIONS

2007 and 2008 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2007-2008 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software ¹				Records & Music ²				Motion Pictures				Entertainment Software ³				Books		Totals	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007
PRIORITY WATCH LIST																				
Argentina	265.0	222.0	75%	74%	75.1	84.7	60%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	340.1	306.7
Brunei	NA	NA	NA	85%	2.4	2.4	100%	99%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	2.4	2.4
Canada	742.0	696.0	32%	33%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	742.0	696.0
Chile	109.0	103.0	66%	66%	21.0	29.6	66%	44%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	130.0	132.6
Egypt	81.0	72.0	59%	60%	NA	15.0	NA	75%	NA	NA	NA	NA	NA	NA	NA	NA	NA	32.0	81.0	119.0
India	1060.0	1013.0	66%	69%	36.2	13.8	55%	55%	NA	NA	NA	NA	NA	129.9	NA	89%	NA	38.0	1096.2	1194.7
Indonesia	302.0	226.0	86%	84%	20.0	20.2	95%	92%	NA	NA	NA	NA	NA	NA	NA	NA	NA	32.0	322.0	278.2
Mexico	497.0	460.0	60%	61%	419.7	527.0	80%	71%	NA	NA	NA	NA	NA	273.0	NA	88%	NA	41.0	916.7	1301.0
Pakistan	77.0	63.0	85%	84%	NA	25.0	NA	100%	NA	NA	NA	NA	NA	NA	NA	NA	NA	55.0	77.0	143.0
People's Republic of China	2940.0	2999.0	79%	82%	564.0	451.2	90%	90%	NA	NA	NA	NA	NA	NA	NA	95%	NA	52.0	3504.0	3502.2
Philippines	105.0	88.0	70%	69%	117.0	88.3	83%	80%	NA	NA	NA	NA	NA	NA	NA	NA	NA	49.0	222.0	225.3
Russian Federation (GSP)	2773.0	2268.0	70%	73%	NA	313.0	NA	58%	NA	NA	NA	NA	NA	NA	NA	79%	NA	42.0	2773.0	2623.0
Thailand	295.0	257.0	76%	78%	17.8	21.7	65%	50%	NA	NA	NA	NA	NA	91.4	NA	77%	NA	37.0	312.8	407.1
WATCH LIST																				
Belarus	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0
Brazil	1068.0	889.0	60%	59%	117.1	151.6	48%	48%	NA	NA	NA	NA	NA	NA	NA	91%	NA	18.0	1185.1	1058.6
Bulgaria	53.0	38.0	70%	68%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	53.0	38.0
Costa Rica	15.0	13.0	60%	61%	14.8	14.5	60%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	29.8	27.5
Greece	127.0	109.0	57%	58%	NA	NA	60%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	127.0	109.0
Hungary	92.0	75.0	43%	42%	NA	20.0	NA	35%	NA	NA	NA	NA	NA	15.9	NA	79%	NA	NA	92.0	110.9
Israel	72.0	57.0	32%	32%	NA	NA	NA	50%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	72.0	57.0
Italy	1242.0	1067.0	49%	49%	350.0	45.0	25%	23%	NA	NA	NA	NA	NA	817.0	NA	64%	NA	20.0	1592.0	1949.0
Kazakhstan	63.0	61.0	77%	79%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	63.0	61.0
Kuwait	43.0	37.0	63%	62%	NA	10.0	NA	75%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	43.0	47.0
Lebanon (GSP)	28.0	24.0	74%	73%	3.0	2.8	70%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	31.0	26.8
Malaysia (OCR)	180.0	156.0	60%	59%	26.2	16.0	60%	45%	NA	NA	NA	NA	NA	NA	NA	83%	NA	9.0	206.2	181.0
Peru	52.0	41.0	74%	71%	57.2	58.5	98%	98%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	109.2	99.5
Poland ²	438.0	348.0	55%	57%	100.0	28.0	27%	36%	NA	NA	NA	NA	NA	76.0	NA	60%	NA	NA	538.0	452.0
Romania	115.0	91.0	70%	68%	10.0	15.0	40%	65%	NA	NA	NA	NA	NA	NA	NA	89%	NA	NA	125.0	106.0
Saudi Arabia (OCR)	126.0	97.0	54%	51%	NA	25.0	NA	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	126.0	122.0
South Korea	284.0	302.0	40%	43%	NA	NA	NA	NA	NA	NA	NA	NA	NA	461.9	NA	66%	NA	44.0	284.0	807.9
Spain (OCR)	624.0	542.0	42%	43%	13.4	16.7	20%	20%	NA	NA	NA	NA	NA	510.0	NA	35%	NA	NA	637.4	1068.7
Sweden	227.0	194.0	25%	25%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	53%	NA	NA	227.0	194.0
Tajikistan	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0
Turkey	239.0	201.0	65%	65%	NA	22.0	NA	80%	NA	NA	NA	NA	NA	NA	NA	NA	NA	23.0	239.0	246.0
Turkmenistan	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0
Ukraine	308.0	222.0	85%	83%	NA	35.0	NA	60%	NA	NA	NA	NA	NA	NA	NA	80%	NA	NA	308.0	257.0
Uzbekistan (GSP)	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0
Vietnam	123.0	120.0	83%	85%	NA	NA	95%	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	17.0	123.0	137.0
SPECIAL 306 MONITORING																				
Paraguay ²	7.0	7.0	81%	82%	NA	128.0	NA	99%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	7.0	135.0

APPENDIX A

IIPA 2009 "SPECIAL 301" RECOMMENDATIONS
2007 and 2008 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2007-2008 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software ¹				Records & Music ²				Motion Pictures				Entertainment Software ³				Books		Totals	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007
SPECIAL MENTION																				
Azerbaijan	41.0	28.0	92.0	92%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	41.0	28.0
Bangladesh	56.0	55.0	92.0	92%	NA	NA	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	56.0	55.0
Colombia	85.0	70.0	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	85.0	70.0
Hong Kong	140.0	134.0	50%	51%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	77.8	80%	NA	4.0	140.0	215.8
Japan	941.0	876.0	21%	23%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	941.0	876.0
Jordan	11.0	11.0	58%	60%	NA	NA	90%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	11.0	11.0
Nigeria	67.0	63.0	81%	82%	NA	55.0	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	67.0	118.0
Switzerland	207.0	182.0	24%	25%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	207.0	182.0
Taiwan	122.0	118.0	39%	40%	4.4	4.9	22%	21%	NA	NA	NA	NA	NA	NA	202.9	94%	NA	16.0	126.4	341.8
TOTALS	16442.0	14695.0			1969.3	2239.9			NA	NA			NA	2655.8			NA	529.0	18411.3	20119.7

Endnotes:

¹ BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in each country, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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 2007 piracy statistics were preliminary at the time of IIPA's February 11, 2008 Special 301 filing and were finalized in June 2008 (see <http://www.iipa.com/statistics.html>) and are reflected above.

² RIAA reports that its estimated losses to the music industry in 2007 in Paraguay include both domestic piracy and estimated losses caused by transshipment.

³ ESA does not have 2008 data available. ESA's reported dollar figures for 2007 reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The value of pirate product in the market in Poland reflects only the value of pirate product for personal computers.

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

"OCR" means IIPA has requested that an out-of-cycle review be conducted by USTR later in 2009.

IIPA's members' methodology is described in Appendix B of IIPA's submission.

APPENDIX B

METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES AND PIRACY LEVELS

APPENDIX B: METHODOLOGY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Estimated losses due to piracy are calculated by IIPA's member associations. While it is impossible to gauge losses for every form of piracy, we believe that our members' reported estimates for 2008 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries. Not all of the IIPA members were able to provide 2008 estimated data for this Special 301 submission this year.

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.

For the February 2009 submission of the IIPA's report to U.S. Trade Representative, BSA's statistics for 2008 are preliminary. Final data for 2008 will be released later in 2009 and will be posted on the IIPA website, www.iipa.com.

ENTERTAINMENT SOFTWARE

The Entertainment Software Association (ESA) bases its estimates on local surveys of market conditions in each country and other factors bearing on the presence of pirated 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 pirated 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. 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 pirated product in circulation.

ESA relies on prior year's reporting as a methodological check on newly-acquired data, and test overall results with the opinion of experts. 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 does not include pirated games that may be in use on business computers.
- The methodology accounts only for consoles estimated 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.
- The methodology assigns the localized pirate price to game downloads in lieu of assigning the average price paid, which is often zero and which would result in significant underestimations in high-volume download countries.

Because the reported figures reflect only the value of pirated product present in the market, it does not measure, and thus vastly understates, the overall harm done to rights holders and the industry in countries engaged in mass factory overproduction for export. However, the dollar figures may nonetheless be taken to reflect a sense of the relative harm done to software developers, publishers, distributors and retailers through the loss of potential sales opportunities. 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.

SOUND RECORDINGS AND MUSIC

The Recording Industry Association of America (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 numbers produced by the music industry in most cases 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 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. Also, where RIAA has sufficient information relating to estimated 2008 losses due to Internet piracy in a particular market, that information will be identified as well.

BOOKS AND JOURNALS

The book and journal publishing industry relies on local representatives to determine losses. These representatives base their estimates on the availability of pirated books and journals, especially those found within or near educational institutions. 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.

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, the windows between release of a product into various media (theatrical, video, pay television, and free television), and the level of market access. Piracy in one form can spill over and affect revenues in other media forms. For example, a camcord stolen from a theater can be uploaded to the Internet, burned to optical disc, and distributed around the world, affecting not just the market where that film was originally stolen but markets across the globe.

In recent years, the Motion Picture Association of America (MPAA) has been in a process of updating reviewing how it measures piracy. Country-specific data is not available for the years 2006, 2007 or 2008.

METHODOLOGY FOR 2005 DATA:

Prior loss calculations reported by MPAA 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.

APPENDIX C

COUNTRY SURVEYS

PRIORITY WATCH LIST

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2009.

Executive Summary: Improved effective enforcement and copyright law reform are long overdue in Argentina. Widespread Internet and optical disc piracy (primarily CD-burning) continues to grow in Argentina, threatening the copyright industries' legitimate markets. Piracy of hard goods, especially those found at street fairs (such as the public market in the Greater Buenos Aires area known as "La Salada") and at the retail level remains high. Unauthorized photocopying flourishes on and near university campuses. Although the copyright industries appreciate the continued cooperation of the police with enforcement raids in 2008, only a small number of criminal cases resulted in final judgments with deterrent sanctions, thereby undermining the impact of these police operations. Civil infringement actions remained ineffective because of the lack of a statutory damages remedy and extensive court delays. The Argentine government should review its agencies' use and procurement of computer software in order to ensure that legal software is being used. On the legislative front, implementation of the WIPO Treaties' obligations into statutory law has not moved forward over the past decade, and strengthened criminal sanctions and remedies to protect copyrighted materials in the digital age are sorely needed. In addition, the limited protection term for sound recordings of 50 years jeopardizes the stability of a music industry battered from physical and Internet piracy. The copyright industries believe that a comprehensive national strategy aimed at protecting and enforcing the Argentine copyright law is necessary to address and solve these longstanding problems.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Argentina in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Commit, at the highest levels of the Argentine government, to develop and implement a coordinated anti-piracy campaign as a matter of national priority.
- Require that the federal and Buenos Aires provincial governments take appropriate measures to halt the distribution of pirate and counterfeit merchandise at the "La Salada" Fair and other large, public markets that deal in these unauthorized products.
- Provide more resources for police Internet crime units in order to address the problem of illegal downloading.
- Promote the cancellation of municipal operating licenses to any establishment or locale selling pirate products.
- Create a special public prosecutors' office devoted to all sectors of intellectual property, including copyright.
- Instruct Argentine prosecutors and courts to make copyright piracy cases a priority and press for the expeditious resolution of the piracy cases.
- Take steps to encourage the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers. As an immediate first step to achieving this objective, the government should convene meetings of affected sectors to discuss ways to work cooperatively toward halting the transmission of illegal copyrighted materials on telecommunications networks.
- Improve border enforcement. In particular, forge partnerships at the tri-border region with counterpart Brazilian and Paraguayan officials by establishing a program to inspect goods in-transit for potential pirate product.

Legislation

- Reinvigorate efforts to revise Argentina's 1933 copyright law and implement its WIPO Treaties' obligations by addressing the following issues: (1) 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; (2) implement protection and remedies/sanctions for technological protection measures (TPMs) and rights management information (RMI); (3) extend the scope of reproduction right to explicitly protect temporary copies; (4) extend the term of protection for sound recordings to 70 years from publication as well as extend the term for juridical persons; (5) increase the minimum penalty for piracy (currently 1 month) up to at least 2 years in order to apply deterrent sanctions; (6) create statutory damages provisions in civil infringement cases; (7) provide clear guidelines regarding liability for ISPs (Internet service providers), and include notice and takedown provisions, and, (8) adopt provisions on border measures to provide for *ex officio* actions.



- Reintroduce and enact legislation to increase criminal sanctions for copyright piracy.
- Support efforts to issue an executive decree that would require government legalization of current business software programs within a balanced and neutral system to select the technical solutions and improve procurement practices.
- Support legislative vehicles that would create and fund specialized intellectual property prosecutors.

ARGENTINA Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ²	75.1	60%	84.7	60%	82.0	60%	69.5	60%	41.5	55%
Business Software ³	265.0	75%	222.0	74%	182.0	75%	109.0	77%	63.0	75%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	318.0	90%	30.0	45%
Books	NA	NA	NA	NA	4.0	NA	4.0	NA	4.0	NA
Entertainment Software ⁵	NA	NA	NA	NA	NA	65%	NA	NA	NA	80%
TOTALS	340.1		306.7		268.0		500.5		138.5	

Argentina has been a beneficiary country of the U.S. Generalized System of Preferences (GSP) trade program which provides Argentina with preferential market access. Notably, the GSP program requires beneficiary countries to provide "adequate and effective" protection to U.S. copyrighted materials. During 2008, \$1.4 billion in Argentine products entered the U.S. under the GSP duty-free code.

COPYRIGHT PIRACY IN ARGENTINA

Internet piracy: Internet piracy in Argentina has grown dramatically in recent years. Argentina now has over 2.6 million broadband connections and 20 million Internet users. Argentina's Internet penetration is twice as high as the world average, and the Argentine broadband market is one of the most developed in South America, with penetration second only to Chile. With the increased availability of broadband in homes, Internet cafés, and public telephone call center/LAN houses, Internet piracy is having significant prejudicial consequences on the sale and distribution of legitimate materials. Increased broadband penetration has altered Argentina's Internet piracy landscape, making the rapid proliferation of peer-to-peer (P2P) file-sharing sites (including BitTorrent and eDonkey), hash link sites and sites offering links to download movies from Free File Hosting sites more problematic than traditional hard goods websites.

The recording industry reports that file sharing in Argentina using P2P networks is the most predominant form of Internet piracy affecting its industry operations. For example, the recording industry reports that a third party survey performed between 2006 and 2007 places the total level of illegal downloads in Argentina at about 600 million songs per year (up by 50% from 400

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on Argentina under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more on IIPA's global issues, see IIPA's 2009 cover letter to this 301 submission at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² RIAA reports that the estimated levels of pirate product in 2004, 2005 and 2006 are based on a third-party survey to improve accuracy of the statistics.

³ BSA's 2008 statistics are preliminary and represent the U.S. software publishers' share of software piracy losses in Argentina. 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. and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org.

⁴ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

⁵ 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."

million songs discovered in a similar survey performed at the beginning of 2005). A survey carried out by Knack Consulting at the request of the local industry group showed that about 38% of all downloads are taking place at cybercafés. The 600 million illegal downloads dwarfs the legitimate distribution of an estimated 150 million songs, taking into account both physical and online deliveries.

Argentina remains notorious for “home delivery” of all kinds of pirated copyrighted products. For example, the motion picture industry reports that hard goods piracy, burned from copies originally downloaded from the Internet, continues to be a serious problem in Argentina, representing approximately 20-25% of local film piracy.

For the business software industry, the Internet offers local packages of pirated and counterfeit software, including compilations containing dozens of computer programs. The Business Software Alliance (BSA) notes that, in general, most of the local ISPs help to stop these kinds of offers from the various e-commerce websites, but for every site removed, more appear. Argentina plays an important role as a distributor of subtitled and dubbed films for the rest of Latin America; in fact, some of the top visited websites in Argentina are subtitle sites.

Hard goods piracy, including street piracy and local burning: Blank optical media products, mostly from Southeast Asia, continue to enter the Argentine market via Uruguay or Paraguay. This media serves as the basis for the local “burning” of copyrighted materials on these discs, a widespread phenomenon that adversely affects the legitimate markets of almost all the content industries. According to official statistics provided by Argentine Customs, in 2008 over 46.1 million CD-Rs and 105 million DVD-Rs entered the country.

Thousands of street vendors sell locally burned CD-Rs. A most notorious street location is the “La Salada Fair.” This market area is about 2 million square feet, and approximately 50,000 consumers visiting daily. Some industry representatives fear that La Salada is coming close to the organization and size of Ciudad del Este’s piracy and counterfeiting. There are organized groups operating around La Salada, providing raw materials for piracy and recording, storing and distributing pirate products. This problematic situation is well known by the police but the local government and the flea market administrators simply do not cooperate with private sector on raiding actions and refuse to close this market. The Motion Picture Association (MPA) reports that the situation for pirate audiovisual products in La Salada worsened in 2008. Furthermore, 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. MPA reports that in 2008 some newspaper stands started distributing pirate DVDs and music with street vendors and small black markets have increased their presence.

The largest concentration of pirate product for the motion picture and recording industries is in the greater Buenos Aires district, but the industries face serious challenges in larger cities throughout the provinces. According to a study by the American Chamber of Commerce, DVD piracy increased by 16% in 2008 over 2007 and the local video board estimates that 68% of the video market is pirate. Pirates often have new film releases more than a month before local theatrical release and, on average, more than 6 months before the official home video release in Argentina. Unfortunately, video rental stores are also an important distribution channel for pirate products, especially in smaller cities. Furthermore, unauthorized photocopying of compilations and full academic works continues on and around major university campuses.

The recording industry reports that although physical piracy in the form of burned CD-Rs continues to plague the Argentine music market, the most harm comes from Internet piracy. The level of physical music piracy was 60% in 2008, causing an estimated \$75.1 million in losses due to piracy. The most recent estimate shows about 25 million units of pirate product in the market, representing close to 60% of all sale units. The local legitimate recorded music market is declining; unit sales decreased by 12% in 2008 compared to a 5% increase in 2007.

BSA reports that there was no major improvement in the software piracy situation in Argentina during 2008. It is still easy to find hardware dealers selling computers with illegal OEM versions or simply illegal copies pre-installed on computer hard disks. Piracy of business software programs among end-users, the most damaging form of piracy, remains quite high, especially in small and medium-sized organizations. This problem involves the federal, provincial and municipal government offices as well as a number of private companies. The industry continues to support any effort by the Argentine federal, provincial or municipal levels of government to legalize business software programs currently installed on government computers and improve their procurement practices.⁶

⁶ According to a January 2008 report issued by BSA-IDC called The Economic Benefits of Reducing PC Software Piracy, the information technology sector’s contribution to the Argentine economy could be even bigger if Argentina’s PC software piracy rate were to be lowered 10 percentage points over

Academic book publishers continue to suffer from unauthorized photocopying of materials in and around university campuses. Copyshops convenient to campus copy entire books or unauthorized compilations of chapters from different books, at student or teacher request, decimating the market for academic publishers. Steps should be taken to encourage use of legitimate products on campuses, crack down on for-profit copyshops and foster appropriate licensing agreements for academic compilations.

COPYRIGHT ENFORCEMENT IN ARGENTINA

The music, film and business software industries all report continued good cooperation with the Argentina's police forces, particularly the Gendarmerie (the national police agency) and border officials. While there has been significant support from the Federal Police Cyber Crime division on Internet cases, few prosecutions are pursued and few criminal cases reach final judgment. This same problem with few prosecutions continues to occur with hard goods cases. Federal and state police forces still lack sufficient resources to provide expert reports on seized product, which delays processing of cases. Furthermore, there is no dedicated police force to handle piracy cases. In addition, civil infringement actions, often brought by the business software community, also faced roadblocks with long delays and non-deterrent damage awards.

Actions in the Internet space: The recording industry has been active in Internet piracy enforcement in Argentina. The 2008 anti-piracy campaign conducted by APDIF Argentina (the local organization of the recording industry) produced the following results from January to December 2008: 20 Cyber-cafes raided, 22 home delivery operations taken down, 3,390 pre-release products removed, 86,076 cyber-lockers-links removed, 4,427 web pages/forums taken down, and 329 pirate products removed from auction sites. MPA reports that by year's end, it had achieved the following Internet actions: take-downs of 325 linking sites, 464 cyberlockers, 3,505 auction sites and 1 P2P servers (1), plus the issuance of 1,847 cease and desist notices.

Another new problem is the development of social sites allowing registered users to post links to illegal music files. This is a growing problem and the police cyber crime unit should take action against those social networking sites that have some commercial purpose (such as selling advertising). An example of this phenomenon is the site "Taringa" where thousands of users post complete albums to be downloaded for free. The site "Taringa" was already notified by APDIF Argentina about the illegal activities performed by its registered users and there have been no positive actions taken to resolve this problem.

Inter-industry cooperation on Internet piracy cases: Local ISPs are slowly beginning to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. In this aspect, the recording industry reports that cooperation with ISPs on specific actions did improve during 2008.

There is, however, much room for improvement. Over a year ago, the local recording industry, led by APDIF Argentina, approached CABASE (Argentine Trade Organization of ISPs) to establish a voluntary framework to fight the Internet piracy problem. Unfortunately, CABASE refused to cooperate. In early 2008, APDIF filed for preliminary injunctions against two ISPs in Buenos Aires, asking the judge to order the ISP to adopt technical measures (port blocking) to impede the exchange of music files using P2P networks. Both injunctions were granted but the ISPs appealed the first instance decisions and the injunctions got stuck in the judicial system, leaving no remedy in force. The government should promote a climate that incentivizes meaningful cooperation between the parties, and that encourages negotiations between rights holders and ISPs to reach and implement robust solutions to this problem. A roundtable of the various stakeholders organized by the Secretary of Communications would be a first step in this important effort.

The sound recording and film industry sectors also have been trying to get broader voluntary cooperation with Argentine ISPs on Internet piracy matters, but to-date this undertaking has been challenging and little progress has been made.

Criminal actions involving hard goods: The industries active in anti-piracy enforcement report good cooperation with law enforcement authorities conducting raiding operations.

four years. This would create an additional 3,900 jobs, \$630 million in local industry revenues and \$81 million in additional tax revenues for federal, regional, and local governments. This report is posted on BSA's website at <http://www.bsa.org/idcstudy>.

The film industry worked with police authorities in Mar del Plata in October 2008 to conduct a major raid against a downtown business that sold, copied, and distributed pirate movies to street vendors. Approximately 3,500 pirate DVD-Rs were found, ready for distribution, and over 20 DVD burners, plus computers and other equipment were seized. Each pirate copy had a street value of US \$7-10. MPA reports the following results for 2008. Working with the police, raids were conducted against the following number of targets: burner labs (11), optical disc distributor (2), Internet site operator–hard goods (3), Internet café (4), street vendor (41), retailer (29), rental store (94). These actions resulted in the following volume of seizures: burned discs (321,210), burners (80), computers (39), printers (18), art inlays (5,038,487). Criminal actions/charges were filed against the following: burner lab operators (9), optical disc distributor (2), Internet site operators–hard goods (2), Internet cafés (3), street vendors (37), retailers (26), and rental store operators (68). Last year, courts issued convictions in 56 of MPA's cases, specifically: burner lab operator (1), Internet site operator – hard goods (1), street vendor (14), retailer (7), and rental store operators (33). In fact, one of the convicted street vendors was sentenced in June 2008 to 10 months in jail (a long sentence in Argentina).

The recording industry (IFPI–APDIF) also has taken aggressive actions against street piracy. For example, in mid-October 2008, the Economic Crime Unit of the Coast Guard executed search warrants on several warehouses in the La Salada market area. This year-long investigation targeted imported products entering the Port of Argentina using false invoices and undervalued goods. In this action alone, over 5 million album covers of music and film product, 175 thousand music and film CD-Rs/DVD-Rs, 63 burners, 2 industrial printers and 200 master plates used to replicate album covers were seized. The recording industry reports that the number of raids decreased significantly from 2007 to 2008 (832 versus 523). The number of seized products also dropped in 2008 to 3.2 million units (down from 4.6 million). Last year 53 criminal piracy cases were initiated, resulting in three arrests and indictments; there was only one conviction in a music piracy case in all of 2008.

BSA reports that the various agencies (including the Federal Police, Gendarmería, etc.) are improving their technical capacities to support the courts in the investigation of computer crimes (including piracy) and the provision of technical reports, which is useful evidence in judicial cases. BSA does not generally use the criminal process in Argentina because criminal copyright enforcement in software cases has consistently proven to be ineffective. In smaller provinces, the police are not trained in computer crimes. However, preliminary injunctions and searches performed by court officers and the police under instructions from civil courts have been effective to obtain the legalization of the commercial software used as well as the payment of damages by a number of end-user companies.

Slow prosecutions and non-deterrent judgments: Argentina's current criminal provisions for copyright infringement are totally inadequate to address the piracy problem. The minimum penalty is only one month (per Article 72*bis* of the Criminal Code); this minimum penalty should be increased to a minimum of two years (see legal reform discussion below). While certainly some criminal sentences have been issued, the industries are not aware of any major, deterrent sentences issued last year. The recording industry reports that no convictions for music piracy were issued in 2008, only the few criminal cases that received decisions were suspended because of the low level of penalties. MPA reported one 10-month sentence (see above).

Furthermore, the average criminal piracy case takes two to four 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. MPA notes that although the Argentine criminal system is slow and unsatisfactory (most cases take no more than three years), there seemed to be some slight improvement in speeding up the process in 2008.

Border enforcement: The Argentine customs, through the unit called "Fraude Marcario", has seized shipments of blank CDs; these activities are directed to act against tax evasion. During 2008, Customs seized 2.4 million blank optical discs, a 140% percent increase over 2007. During 2008, Argentine Customs (*Administración Nacional de Aduanas*) authorities have been more supportive and alert to piracy and blank media imports. Customs has provided a useful forum for exposing each month the problems of the private sector with the importation of blank media.⁷

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. Finally, given the depth of the problem involving piracy and counterfeiting in the triborder area, Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in-transit for potential pirate product.

⁷ The government's customs website (AFIP - La Administración Federal de Ingresos Públicos) is <http://www.afip.gov.ar/aduana/foro/foroMarcario.asp>.

Delays and weak damages in civil infringement cases: During 2008, the business software industry continued to rely on civil enforcement in Argentina, given the systemic problems with criminal enforcement. Even so, there remain significant problems, especially with procedural delays in obtaining and conducting civil searches in business piracy cases. While this situation has improved in the courts of the city of Buenos Aires, civil actions are still weakened by the lack of statutory damages and extensive delays. BSA has achieved some positive results despite the problems with enforcement, relying primarily on the process of mediations required by the civil procedure, which facilitates the resolution of cases. Another problem is caused by the unavailability of deterrent civil damages; this important problem could be corrected if Argentina were to introduce an effective statutory damages system (see discussion in legal reform, below).

Industry trainings and public awareness efforts: MPA provides training to law enforcement authorities around the country on a regular basis. Film industry training focuses on how to apply the existing law to cases of infringement and how to identify pirate product. In 2008, this training was expanded to include anti-camcording training to cinema employees. Orientations were provided on how to identify camcording and how to gather the evidence necessary to contribute to successful prosecutions. Last year, the recording industry (IFPI / APDIF) gave 11 training courses to judicial and enforcement authorities in Buenos Aires, Córdoba, Misiones, Entre Ríos, Santa Fe and Tucuman, all of which are focused on digital piracy cases and the identification of illegal material. This industry also has participated in the creation of a handbook for the Judicial Power called *Conocimientos Teóricos y Prácticos en material de marca y propiedad intelectual en la República Argentina*, which was also coordinated by the U.S. Department of Justice.

COPYRIGHT LAW REFORM AND CERTAIN MARKET ACCESS ISSUES IN ARGENTINA

1993 Copyright Act, as amended: Argentina's Copyright Act has been under review for many years and full implementation of the WIPO Treaties is still needed into national legislation. For example, legal deficiencies in the copyright law include:

- express protection for the "communication to the public" and "making available" rights;
- explicitly extend the scope of the reproduction right to clearly cover temporary copies;
- protect against the circumvention of technological protection measures and removal or alteration of electronic rights management information;
- increase criminal penalties for piracy (the current minimal penalty is only 1 month, and this should be increased to a much more deterrent level, such as a minimum of 2 years);
- establish *ex officio* border measures;
- establish statutory damages;
- explicitly provide for the seizures of infringing equipment;
- establish provisions on ISP liability and procedures for notice and takedown;
- extend the term of protection for phonograms to 70 years from publication. This also would include making the term of protection uniform for all genres of copyrighted materials;
- provide equitable and balanced treatment for all rights holders, including those who are juridical entities.

Efforts to amend the Copyright Law to increase sanctions and expand infringements: Legislative efforts to strengthen criminal enforcement measures in Argentina have not gained much traction in recent years. Several years ago a bill (Bill 1546-S-05) to amend the criminal chapter of the Copyright Act was introduced in the Senate, but it lost legislative status at the end of 2007.

The recording industry resubmitted a new bill in 2007 (1987-S-2007) which was pending in the Senate Judiciary Committee on Criminal Justice. In the fall of 2008, the motion picture and recording industries met with Senate staffers to recommend that additional provisions on criminal conspiracy be added to the copyright amendment package. However, this bill did not gain the approval of the General Legislation Commission so it too lost legislative status at the end of 2008. This bill was aimed at addressing the following issues; for example, it would have:

- provided for criminal sanctions for the circumvention of technological protection measures (TPMs) and the modification or suppression of digital rights management (RMI);
- created statutory damages (in Article 4) by creating a minimum (1,000 pesos, US\$285) and maximum (1,000,000 pesos, US\$285,600) level for each infraction, depending on a number of factors;

- clarified the existing remedy of preliminary injunctions by eliminating the onerous requirement to produce evidence before presenting a full case based on arguments of merit;
- empowered the courts' process to impose fines to force the execution of the sentences issued.

Bill creating a IP prosecutor: Two years ago, a bill proposed to create a special public prosecutor devoted to trademark protection. At that time, the copyright industries believed that a similar proposal should be developed for copyright, or at least that pending current bill should have been expanded to include the copyright sector. Reports seem to indicate that this bill (5509-D-2006) has since lost its legislative status. Argentina should support the development of specialized IP prosecutors.

Government software legalization: With respect to government legalization efforts, the business software industry continues to call upon the Argentine government (in particular, the *Subsecretaría de la Gestión Pública*—the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several “standards” have been issued by the *Subsecretaría*, the Argentine government has not taken action toward legalizing its software inventories.

Customs duties affecting audiovisual works: The Argentine Customs Valuation Code requires that all audiovisual works, excluding computer software, must pay an ad valorem customs duty based on the value of the “authors’ rights”, that is, on the potential royalty generation of the film, rather than solely on the value of the physical materials which are being imported. MPA opposes this burdensome practice, which is a form of double taxation since royalties are subject to remittance, withholding and income taxes. Customs duties should be based on specific fees, such as weight or length, or, if *ad valorem*, be based on the value of the carrier medium only. Because of this duty, MPA member companies import negative prints on a temporary basis and copy positive prints locally. There have been no new developments in this matter in 2008.

Withholding taxes and royalties on computer software: The software industry continues to report a problem regarding the withholding that local licensees must perform when wiring royalties to foreign licensors. The local tax collection authority, AFIP, refuses to apply the special rules that the Income Tax Law provides for “authors rights” international transfers. AFIP contends that the legal nomenclature “author” is limited to physical persons, and that a legal person (e.g. a corporation) cannot be an author and, as a result, cannot hold these “authors rights.” Only two cases so far have been presented to courts: in one case, the Court agreed with AFIP, and in the other, the Court rejected AFIP’s position. Both cases are at Federal Supreme Court (*Corte Suprema de Justicia de la Nación*) level now; pending of final resolution. This creates much uncertainty, and could create high economic liability for taxpayers if the AFIP position prevails. This problem could be solved by amending the Income Tax Act to establish a concrete withholding rate for software license payments, similar to what was done for music and motion pictures several years ago.

Proposed Broadcast Law: The Executive Branch circulated a draft “Law on Audiovisual and Communications Services” bill in 2008 that would have superseded the current Radio and TV Law. The content of the bill was never revealed and the administration became abandoned its announced plan of achieving expedited approval of the bill in Congress. However, it is widely believed that the bill included an objectionable TV screen quota for locally produced content, limits on advertising, and other potentially damaging measures. In late 2008, government officials resumed public discussion of this bill, and signaled that it would be a high agenda item in 2009.

BRUNEI DARUSSALAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Brunei Darussalam should be placed on the Priority Watch List.

Executive Summary: While having the seventh highest per capita income in the world (purchasing power parity of \$51,600 as of 2007),¹ piracy still dominates this small country, costing the copyright industries virtually the entire market there. Piracy levels remained among the highest in the world in Brunei. Reports indicate that, despite repeated requests by legitimate industry (and the U.S. government) for remedial action, the situation worsened in 2008, with more retail stores engaging in piracy (at least 52 compared with 46 in 2007) and export piracy to Malaysia. Both factory optical discs and "burned" CD-Rs are readily available throughout the country. The government in Brunei has done little in response to the problem despite full knowledge of it. Brunei boasts Internet penetration of more than 46%, thus, the problem of Internet piracy has grown, with service providers doing little to cooperate to ensure people are using legitimate product. The United States has announced that it will negotiate a free trade agreement with Brunei, as part of the Trans-Pacific Strategic Economic Partnership Agreement. To demonstrate its commitment as a good trading partner deserving of the benefits of a free trade agreement with the United States, the government of Brunei Darussalam should take needed steps to ensure that this highly developed and prosperous country can overcome its label as a piracy haven.

Priority Actions Requested in 2009: IIPA requests the government in Brunei to take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

- Have the Commercial Crime Unit (CCU) commence a sweep of the pirate retail markets in Brunei, including *ex officio* and *ex parte*, and develop capacity in a core of officers responsive to industry concerns and complaints lodged by right holders.
- Have the Attorney General's chambers, in conjunction with CCU and Police, develop target cases for court against those engaged in commercially damaging pirate activity.
- Develop a cohesive course of action with cooperation between the Police, Customs, licensing authorities and other government bodies to enable swift and targeted action against pirates.
- Establish effective enforcement practices for the Internet. This should include amendments to the Electronic Transactions Order (2000) to provide for service provider responsibility for copyright infringements and therefore to promote service provider cooperation with right holders to halt illegal activity in the online space.
- Initiate education programs to apprise students and businesses of their obligation to respect intellectual property rights. This should include support from the Ministry of Education for programs in the schools to promote IP awareness.

¹ See *World Factbook*, Brunei, at <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.

BRUNEI DARUSSALAM				
Estimated Trade Losses Due to Copyright Piracy (<i>in millions of U.S. dollars</i>) and Levels of Piracy: 2007-2008 ²				
INDUSTRY	2008		2007	
	Loss	Level	Loss	Level
Business Software	NA	NA	NA	85%
Motion Pictures	NA	NA	NA	95%
Records & Music	2.4	100%	2.4	99%
Books	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA
TOTALS	2.4		2.4	

PIRACY CHALLENGES IN BRUNEI DARUSSALAM

Retail Optical Disc Market Virtually 100% Pirate: Pirate optical discs containing music are openly offered for sale in retail outlets. Despite meetings and correspondence between industry and the Attorney General's Chambers and the Royal Brunei Police beginning in June 2008, the number of retail outlets identified selling pirated audio products has grown to 52, up from 46 in 2007. Local (Malay) and international repertoire are widely available in the music stores in Brunei, and as a result, local record companies in Brunei report no revenue – a completely lost market due to piracy and lack of enforcement. For all optical media products, an estimated 75 to 200 retail shops sell pirate product at fixed locations throughout Brunei. The capital, Bandar Seri Begawan, and its metropolitan area, host the largest number of these shops. The Brunei music market is 99.9% pirate – this includes both physical and digital (Internet and mobile music) formats. Recent checks by the Recording Industry of Malaysia (RIM), which also represents American record companies in Brunei, reveal that there are no legitimate RIM members' physical music products available in the Brunei market. The loss to the local industry due to retail piracy alone is estimated at \$1.71 million. In particular, the cities and main towns covered in the survey included Bandar Seri Begawan, Tutong and Kuala Belait. The local Brunei press has recently reported on the growing magnitude of this problem.³

Pirate DVD-Rs and VCDs locally "burned" on recordable discs are ubiquitous. Certain titles have been offered in the same shop in three different formats: cellophane sleeved CD-Rs for B\$3 (approximately US\$2.00), boxed DVD-5s offered for B\$8 (slightly more than US\$5.00) and high-quality deluxe packaged DVD-9s for B\$20 (slightly more than US\$13). Compression technologies have resulted in multiple title DVD compilations (e.g., 4-in-1) becoming more common.

Growing Internet and Mobile Device Piracy: Brunei boasts Internet penetration of 46.2%, as over 176,000 of its nearly 381,000 inhabitants now have Internet access.⁴ With slightly over 11,000 broadband users, major Internet piracy by the populace has slowly emerged. For example, all digital music used in Brunei, including by downloads and ringtones, is to our knowledge entirely illegal. There were more than 400,000 mobile subscribers at the end of 2008 based on estimates provided by the two major cellular communications companies in Brunei. Lost mobile revenue to the music industry, based on an estimated 7.5% of total mobile subscribers purchasing monthly ring back tone subscriptions for 2008, was US\$700,000. RIM also remains unaware of any legal site offering Malay or international repertoire for sale. A new project to provide broadband via underwater cabling will bring greater connectivity in the future.⁵ The Authority for the Info-Communications Technology Industry (AiTi)⁶ should ensure that with the development of broadband comes an increased awareness of the need to enforce rights in the online space. In addition, to date, Brunei Internet service

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Brunei. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Brunei Darussalam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

³ Faez Hani, *Deluge of Pirated DVDs Wipes Out Original Stuff*, Brunei Times, February 2, 2009, at http://www.bt.com.bn/en/home_news/2009/02/02/deluge_of_pirated_dvds_wipes_out_original_stuff.

⁴ See *Internet World Stats*, at <http://www.internetworldstats.com/asia.htm#bn> (information sourced to Brunei's Authority for Info-communications Technology).

⁵ Hadi Dp Mahmud, *Wider Broadband Wireless Access Soon*, The Brunei Times (online), November 25, 2008.

⁶ The Chairman of AiTi is also the Permanent Secretary of the Ministry of Communications, Hj Alaihuddin Pehin Orang Kaya DiGadong Seri Lela Dato Seri Utama Hj Mohd Taha.

providers have not cooperated with right holders, in part likely due to the fact that they are quasi-government entities related to AiTi.

Pirate Exports: Of great concern, RIM discovered from joint operations with Malaysian authorities that pirates in Brunei produce discs for export, transported by road to the towns of Miri and Limbang in Sarawak, Malaysia (on the island of Borneo). Thus, not only is the Bruneian market wholly controlled and operated by infringers, but it also contributes to the availability of pirated products in neighboring markets such as Malaysia.

ENFORCEMENT CHALLENGES IN BRUNEI DARUSSALAM

Lack of Government Will: The government of Brunei has heretofore not succeeded in solving the piracy problem mainly due to the apparent lack of government will to do so. The chief enforcement offices in Brunei, the Royal Brunei Police (principally responsible for enforcement of copyright), the Royal Customs and Excise Department (enforcement jurisdiction over imports and exports), and the Attorney-General's Chambers (jurisdiction to take criminal prosecutions), are all well aware of the piracy situation, and know the names and addresses of the key pirate enterprises. Police can technically take actions *ex officio* as well as *ex parte* under the law but simply choose not to do so. This inaction has resulted in an increase in the number of pirate outlets in Brunei over the past year. All enforcement avenues do not get explored to eradicate piracy from the markets; for example, in addition to the Copyright Ordinance, the authorities could employ the licensing authority laws to revoke licenses of the shops providing pirate materials. Despite assurances of support, the Bruneian authorities have shown a complete unwillingness to undertake criminal enforcement actions even when complaints have been made.⁷ In addition, a plan proposed by the Brunei authorities to persuade shop owners to convert to legitimate product has produced no results.

Another abiding problem has been the unresponsiveness of the government to industry attempts at communication and cooperation. In 2008, the Attorney General's Chambers took four months to acknowledge receipt of RIM's complaints against specific piracy targets. Pursuant to advice from the government of Brunei, RIM issued warning letters to all known pirate outlets, with copies to the Attorney General's Chambers. However, there has been no response from the Attorney General's Chambers or the Police regarding these warning letters. Letters sent to the Brunei government by fax or email (with the local music industry contact person and particulars clearly stated) regularly receive delayed responses – it is commonplace for the government of Brunei to respond by regular air mail more than a month after receipt of an industry complaint sent by fax or e-mail. Industry remains hopeful, however, that the channels of communication can remain open and should be sped up significantly for an improved relationship of greater mutual cooperation. Past cooperative efforts between industry and the Police and Attorney General's Office toward joint raids against identified targets were effectively compromised by unduly excessive delays and the suspected leaks of information to the targets, all of whom were either closed or cleared of pirate product by the time the warrants were put into effect.

On a brighter note, in September 2008, cooperative efforts between industry, the Police and the Attorney General's Chambers brought about the first ever raid against corporate end-user piracy in Brunei. While the raid was apparently successful, there has yet to be any announcement regarding prosecution of the alleged offenders. IIPA looks forward to appropriate follow-up in this case.

Government Role in Piracy: There are allegations that the pirate syndicates which own and run pirate retail outlets have links or close ties with the government of Brunei, further complicating enforcement efforts. The compromised raids noted above create a possible inference that such issues are at play, and IIPA believes any such issues that exist must be overcome to successfully defeat piracy in the country. In the Internet environment as well, it appears that Internet service providers believe that they are well-situated and need not cooperate with right holders. At the same time, to the

⁷ The Attorney General, Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli, has claimed that "sufficient resources have been allocated to combat piracy, in the enactment of appropriate laws and the provisions of dedicated officers in the police force and customs to meet current needs," but that since "few copyright holders are present in Brunei Darussalam," there are "evidential and procedural problems to relevant enforcement agencies and prosecutors wishing to initiate appropriate action." See Hadi DP Mahmud, *Piracy: AG Explains Weak Enforcement*, Brunei Times, March 19, 2008, at http://www.bt.com.bn/en/home_news/2008/03/19/piracy_ag_explains_weak_enforcement. Industry may not be permanently present in Brunei, but has on many occasions indicated a willingness to be there for the AG for purposes of assisting with evidence and procedure as needed to bring prosecutions.

extent illegal actors are willing to legitimize their business practices and go legitimate, industry supports such efforts, and the government's position should be to require legalization of all copyright practices or face stern enforcement.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Ordinance and Related Legislation: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect May 2000. The Ordinance provides the necessary tools to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. The Ordinance also addresses key Internet issues (such as those in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), like temporary copies, a WIPO treaties-compatible definition of "communication to the public" including an interactive "making available" right, and prohibitions against trafficking in devices which circumvent technological protection measures (TPMs), although the TPM provisions do not fully implement the WCT and WPPT requirements.

Brunei has a content review law administered by the Board of Review which empowers the Board with *ex officio* authority to impose severe penalties against anyone who issues a theatrical film or work intended for public performance without authorization of the Board. The law, however, is presently limited to films (and other works/performances) that are intended for public exhibition and does not presently extend to home video products.

Trans-Pacific Free Trade Agreement (TransPac FTA) Negotiation Launched: In late September 2008, U.S. Trade Representative Susan C. Schwab and Ministers of the Trans-Pacific Strategic Economic Partnership Agreement (known as the P-4 Agreement), including Brunei Darussalam, Chile, New Zealand, and Singapore, announced the launch of negotiations for the United States to join the comprehensive Trans-Pacific Strategic Economic Partnership Agreement.⁸ In November, Peruvian media reported that Peru and Australia announced their intention to join in the Trans-Pac FTA negotiation, and Vietnam has reportedly also expressed an interest in joining.⁹ The Ministers agreed to hold the first round of Trans-Pac FTA in March 2009. In March 2008, the U.S. began limited negotiations with the P-4 partners on the outstanding Financial Services and Investment chapters. Opportunities will arise to introduce intellectual property standards similar to those included in the free trade agreements (FTAs) negotiated between the United States and several trading partners, including (among the group) Singapore, Chile, Australia, and Peru. IIPA supports this process and hopes that the government of Brunei (as well as that of New Zealand) will be prepared to negotiate FTA standards on intellectual property similar to those in force in Singapore, Chile, Australia, and Peru. IIPA expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date.

Electronic Transactions Ordinance Should be Amended to Foster Service Provider Responsibility: The Electronic Transactions Order, 2000 provides a near-total exemption from civil or criminal liability for a service provider that provides infringing materials over its services. Under Section 10 of the Order, "A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on ... the infringement of any rights subsisting in or in relation to such material." Section 10 leaves open the possibility of a contractual arrangement to take down infringing materials, or a "written law or by a court to remove, block or deny access to any material." The Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to make service providers responsible for infringements transmitted over their networks where they fail to act responsibly and should also provide mechanisms to foster cooperation including notice-and-takedown.

TRAINING AND PUBLIC AWARENESS

Several training activities were carried out in 2008 to build capacity in Brunei government officials on the issue of piracy, and to raise awareness about the severity of the problem:

⁸ United States Trade Representative, *Trans-Pacific Strategic Economic Partners and United States Launch FTA Negotiations*, September 22, 2008, at http://www.ustr.gov/Document_Library/Press_Releases/2008/September/Trans-Pacific_Partners_United_States_Launch_FTA_Negotiations.html.

⁹ U.S., Peru, Australia to Join TransPac Free Trade Talks, November 22, 2008, at http://news.xinhuanet.com/english/2008-11/22/content_10394641.htm. See also *Trans-Pacific FTA: Australia, Peru, Vietnam Want to Join the Mega Trade Pact*, ASEAN Affairs.com, September 24, 2008, at http://www.aseanaffairs.com/page/trans_pacific_fta_australia_peru_vietnam_want_to_join_the_mega_trade_pact.

- On June 7, 2008, the United States government sponsored a training session in Brunei at the Kyoto Theatre of the Royal Customs and Excise Department. Participants from the government of Brunei included the Acting Controller of Customs and Excise, and nearly 50 officers from the Attorney General's Chambers, the Royal Brunei Police Force, the Ministry of Communications, the Ministry of Health, the Ministry of Foreign Affairs and Trade, and the Royal Customs and Excise Department. Local music industry representatives participated as well, covering topics such as border measures, how to identify pirate product, and how to run a successful enforcement action in Brunei.
- On June 24, 2008, the Business Software Alliance conducted a training entitled "Business Optimisation with Good Governance and Staying Compliant with Software Asset Management," in cooperation with the Attorney General's Chambers, the Authority for Info-Communications Technology Industry (AiTi), the Ministry of Communications, the Royal Brunei Police Force and the Brunei Darussalam International Chambers of Commerce and Industry. At the conference, a BSA representative disclosed that 66% of all software used on Brunei PCs is pirate, with the industry hardest hit by small and medium sized businesses that use unlicensed software, and consumers and resellers who engage in "hard disk loading."
- The "Commonwealth" judicial system in Brunei opened its "Legal Year" in March 2008 with a ceremony in the capital, Bandar Seri Begawan, at which the Attorney General "encouraged right holders in the sultanate to use border enforcement measures to deter imports on infringing materials," but at which many advocated for more educational programs and public awareness programs.¹⁰
- An informal website poll conducted by The Brunei Times in November 2008 revealed that a majority of Bruneians (78% of respondents) believe strict enforcement and more public awareness is needed in the country to fight piracy.¹¹ The poll also revealed that most respondents believe there is a moral dimension to piracy in Brunei, and equate it with theft, which they believe is wrong and should be eradicated.

¹⁰ Hadi DP Mahmud, *Border Enforcement to Fight Piracy in Intellectual Properties*, The Brunei Times, March 24, 2008, at http://www.bt.com.bn/en/home_news/2008/03/24/border_enforcement_to_fight_piracy_in_intellectual_properties.

¹¹ *Locals Call for Measures to Curb Piracy in Brunei*, The Brunei Times, December 2, 2008, at <http://www.fmprc.gov.cn/ce/cebn/eng/wlxw/t524563.htm> (e.g., "[p]iracy, said many locals, can erode the country's status from a place of natural beauty to one that sells cheap DVDs")

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada be elevated to the Special 301 Priority Watch List in 2009.

Executive Summary: As we enter the thirteenth year following negotiation of the WIPO Internet Treaties, in which Canada played an important and positive role, Canada, virtually alone among developed economies in the OECD, remains almost entirely out of compliance with the global minimum world standards embodied in the Treaties. In 2008, its government finally tabled a bill (Bill C-61) that would do part of the job of meeting global standards; but Parliament was dissolved for new elections before any action was taken. While significantly flawed, particularly with regard to the role of service providers in combating online piracy, Bill C-61 is likely to provide a starting point for future consideration of copyright reform in Canada, and we discuss a number of elements thereof in this submission. Canada should be encouraged to enact a new version of the bill, with major improvements in several areas, this year. This will entail introduction of a new bill no later than this spring. Canada's enforcement record also falls far short of what should be expected of our neighbor and largest trading partner, with ineffective border controls, insufficient enforcement resources, inadequate enforcement policies, and a seeming unwillingness to impose deterrent penalties on pirates. Canada's Parliamentary leadership and government, at the highest levels, have acknowledged many of these deficiencies, but have done very little to address them. As a consequence, the piracy picture in Canada is at least as bleak as it was a year ago. Only two of America's top 10 trading partners (China and South Korea) surpass Canada's record of appearing continuously on a Special 301 list every year since 1995. To underscore U.S. insistence that Canada finally 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 2009.

ACTIONS WHICH THE CANADIAN GOVERNMENT SHOULD TAKE IN 2009:

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 liability for those who knowingly facilitate, encourage or contribute to infringement (such as illicit file-sharing services)
- Create criminal liability and penalties for counterfeiting offenses commensurate with what is provided in the Copyright Act.

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 without a court order.
- Amend proceeds of crime legislation to include proceeds from the distribution, sale and importation of pirated goods.
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada
- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (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 deterrent penalties against those convicted of these crimes.



COPYRIGHT LEGAL REFORM AND RELATED ISSUES

IIPA regrets to report that its statement in the 2007 Special 301 report remains, disappointingly, true today: “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.” The main legislative and policy challenges that Canada confronts, all of them aggravated by its years of delay in facing them, fall into three main categories: bringing its laws into full compliance with the globally accepted benchmarks for modern copyright legislation (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)); making the necessary legislative changes to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border; and dedicating sufficient resources and establishing adequate policies to ensure effective copyright enforcement efforts within the country. In only one of these three areas did Canada take any step forward during 2008, and even that forward motion was immediately reversed.

In last year’s report, IIPA narrated how several developments within Parliament and the Government during 2007, including a specific commitment to “copyright reform” in the October 16, 2007, Speech from the Throne, gave rise to hopes that the Canadian government would finally begin to translate into reality its oft-stated commitment to modernize its copyright laws and border controls.¹ We also explained how those hopes were dashed when the Canadian government let a mid-December deadline pass without tabling any copyright legislation whatsoever, and without announcing any decision of an Interdepartmental Working Group tasked to address widely acknowledged and serious shortfalls in enforcement.

Finally, in June of 2008, the Canadian government tabled Bill C-61, a lengthy and complex bill to amend Canada’s Copyright Act. The preamble to C-61 identified as one of the legislation’s main aims to bring into Canadian law “internationally recognized norms,” such as those embodied in the WCT and WPPT, which it acknowledged “are not wholly reflected” in that law now. C-61 was clearly a serious attempt to do so, and if it had been enacted it would certainly have brought Canada’s laws considerably closer toward alignment with the WCT and WPPT standards. However, the bill also retained some of the serious flaws of the predecessor government’s proposal, Bill C-60, and proposed some new provisions which were equally troubling in terms of their likely impact on enforcement against infringement in the digital, networked environment.

No action was taken on Bill C-61 before Parliament was dissolved for elections. No copyright reform legislation is currently pending, and continuing political turmoil in Ottawa has made it difficult to determine what direction the debate on copyright reform will take. On February 9, the Minister of Canadian Heritage told a Parliamentary committee that it was “likely” that copyright reform legislation would not be tabled until the fall, which would make it nearly impossible to enact this year. If there is to be any hope of enacting long-overdue copyright reforms this year it is imperative that the Government introduce a bill this spring. Despite this disappointing news, and on the supposition that C-61 may provide a starting point for whatever legislation is tabled this year, we discuss some of the issues it addressed, and offer the following recommendations for legislation to be enacted in 2009.

Technological Protection Measures (TPMs): When Canada signed the WCT and WPPT more than 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 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. This is not a mere theoretical lapse of academic interest: it has already had concrete consequences. In the absence of strong prohibitions to the contrary,

¹ The Speech from the Throne that opened the November 2008 parliamentary session included a similar commitment to “modernize Canada’s copyright laws and ensure stronger protection for intellectual property.” See also the two Parliamentary committee reports released in 2007, from the Standing Committee on Public Safety and National Security, see <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/secup10/secup10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

Canada now finds itself one of the world's epicenters for the distribution and export of several 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 criminal 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, which are illegal in those markets. 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 both the Canadian market and the markets of its trading partners.

Sound copyright reform legislation should comprehensively protect TPMs, both insofar as they manage access to copyright works, and in their use to prevent unauthorized copying and the exercise of other exclusive rights. It is particularly important to deal effectively with trafficking in devices aimed at circumventing TPMs, or the provision of circumvention services; and should define violations without imposing onerous intent requirements. The bill should also provide a reasonable regime of civil and criminal remedies, both for acts of circumvention and for trafficking in circumvention devices or offering circumvention services, while also recognizing some reasonable exceptions to the prohibitions. Bill C-61 was a step in the right direction. Canada should build on this good beginning in the next proposal for copyright reform.

Online Piracy: It is a matter of the greatest priority that copyright reform legislation in Canada address the pervasive problem of Internet piracy. Any liability limitations for Internet Service Providers (ISPs) should be conditioned on affirmative cooperation with copyright owners in combating online infringements. Unfortunately, Bill C-61 fell far short in this regard, since it brought forward, virtually unchanged, the unsatisfactory approach taken in Bill C-60, tabled in 2005.

For example, most other developed countries have put in place a procedure for “notice and takedown” to deal more efficiently with the problem of pirate material being hosted by ISPs. A 2004 decision of Canada's Supreme Court (SOCAN v. CAIP) observed that enacting such a procedure would be an “effective remedy” for the problem.² But the current Canadian government – and its predecessors – appear to be steadfastly opposed to the procedure. Bill C-61 continued this unfortunate trend, confining itself to the same “notice and notice” regime proposed by the Canadian government years ago. One approach is not a substitute for the other. Requiring ISPs to forward notices from copyright owners to infringing end-users, and to preserve identifying information on those end-users for six months, has value, particularly in the peer-to-peer (p2p) environment. But a “notice and takedown” regime is needed to provide an expeditious means of removing or disabling access to infringing content hosted online. Particularly if coupled with an obligation to terminate the accounts of repeat or serious infringers, combining these approaches could be a useful part of a system that gives ISPs strong incentives to “take down” or otherwise effectively address the distribution of infringing materials.³

Bill C-61 not only failed to address online piracy effectively; it could in fact have exacerbated it, because it 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. By immunizing service providers against liability even when they had actual knowledge of infringement and the power to restrict or prevent it, the bill would have provided safe harbors to far more than just innocent intermediaries. Such an approach seems inconsistent with the stated intentions of the legislation's drafters, and can hardly be said 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.”⁴

² *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, available at <http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>.

³ There are also a number of unanswered questions about the “notice and notice” provisions of proposed section 41.25 in Bill C-61, such as how the statutory damages of \$5000-10,000 (which would be the exclusive remedy against an ISP that fails to forward the notice or preserve the identifying data) is to be assessed in the typical p2p situation in which a right holder gives notice simultaneously about hundreds or thousands of infringements of multiple works. Of course, the most effective deterrent against non-compliance with “notice and notice” would be to reduce or eliminate protections against infringement liability for recalcitrant ISPs.

⁴ See WCT, Art. 14.2; WPPT, Art. 23.2.

Bill C-61 also did nothing to clarify liability under Canadian law for those who in the Internet context intentionally facilitate massive infringements (for example, illicit p2p service). In step with the international trend, exemplified by successful lawsuits in Australia, Korea, Taiwan and the U.S. against p2p services that were facilitating massive worldwide infringement, the Copyright Act should be amended to enable rights holders to obtain effective remedies against those who intentionally encourage, induce or materially contribute to the infringement. Clear rules on this topic would allow copyright infringement to be dealt with at the source instead of at the point of consumption, thus facilitating the avoidance of litigation against users of illicit p2p services as direct infringers.

A unique 'made in Canada' approach to online infringement liability (as the Canadian government has touted its "notice and notice" regime) could offer a significant contribution, but it must be consistent with international copyright norms, and must encourage ISPs to play a more constructive and cooperative role in the fight against online piracy. Bill C-61 failed both tests, and we urge Canada's government to take a different approach in new copyright reform legislation.

Statutory Damages: One of the most progressive features of current Canadian copyright law is Section 38.1, providing copyright owners who have been victimized by infringement with the option to choose statutory damages, to be set by the court within a range provided by the statute. Bill C-61 would have taken a step backwards, by limiting statutory damages to \$500 for all infringements carried out by an individual defendant for his or her "private purposes."⁵ Another provision, proposed section 38.1(1.3), would have allowed even this meager award to be made only to the first copyright owner to proceed to judgment against a given defendant; statutory damages would be entirely eliminated for all other infringements carried out by that defendant, of any copyright works, prior to the date that the first copyright owner's lawsuit was filed. While the real-world impact of these limitations may turn largely on how the undefined term "private purposes" is applied, the likelihood is that Bill C-61's provisions would have effectively eliminated the statutory damages option where it is most needed: in the online environment, including in p2p cases. Where a defendant uploads a work to the Internet without authorization, or places an unauthorized copy in her "shared folder" on a p2p service, it may be extremely difficult to calculate actual damages, since logs of how many people downloaded infringing copies as a result may be unobtainable or non-existent. Statutory damages fills this gap, and allows the courts at least to approximate the fully compensatory and deterrent damages award which Canada, as a WTO member, is obligated to make available. See TRIPS, Art. 41. If these infringing activities are treated as having been undertaken for "private purposes," the gap will rapidly reopen. Since Canadian courts already have the full authority to limit statutory damages, based on the facts of the case, to \$500, or even less in some circumstances, Bill C-61's proposed amendments to section 38.1 appear entirely unnecessary, or at a minimum far broader than required.

Educational/library exceptions: Proposed section 30.04 of Bill C-61 immunized nearly anything done "for educational or training purposes" by an educational institution or its agent with respect to "a work or other subject matter that is available through the Internet," so long as the Internet site or the work is not protected by a TPM (or a "clearly visible notice" that prohibits the specific act that gave rise to infringement). This provision seemed to allow infringement of a work offline so long as it is available somewhere online without a TPM. The breadth of this exception must be re-examined in drafting a new bill.

Section 30.1.1.c would have been amended by Bill C-61 to allow libraries, archives or museums to format-shift items in their collection (at least for "maintenance and management" purposes, as current law provides) if a person acting under the authority of the institution "considers" that the format "is becoming obsolete." Since every electronic format could reasonably be considered as starting to "become obsolete" the day it is released, if not before, this could prove to be an exception that swallows the rule.

Bill C-61 also brought forward from its legislative predecessor several other 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 a significant

⁵ Under Bill C-61, statutory damages are barred altogether for violations of the TPM provisions carried out for private purposes, see proposed Section 41.1(3)

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.

Sound recordings: The proposed codification in Bill C-61 of the exclusive making available right for sound recordings (proposed section 15.(1.1)(d)) was commendable. However, it is disappointing that the bill failed to address the scope of the private copying exception for sound recordings. While IIPA hopes that further judicial interpretation of Canada's current law (section 80) will more clearly establish that the private copying exception applies only to individuals who make copies for their own use from legitimate sources, 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. Indeed, Bill C-61 even omitted a provision of Bill C-60 that spelled out that unauthorized uses of non-infringing private copies (e.g., any distribution or public performance) constitute infringements. This clarification should be restored in future legislation.

In sum, 2009 opens as yet another year in which Canadian law enforcement officials are denied the legal tools and the resources needed to secure Canada's borders against pirate imports and to crack down effectively on infringing activities being carried out by organized criminal groups within its borders. 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. The two parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy recommended this reform, along with other essential changes, including:

- allowing seizure of income and property derived from copyright piracy;
- providing the Royal Canadian Mounted Police (RCMP) and the Department of Justice with adequate resources for enforcement against piracy;
- adding criminal penalties for counterfeiting violations along the lines of those provided for copyright infringements;
- establishing a copyright enforcement policy that effectively targets piracy and counterfeiting; and
- increasing damages and penalties.

These recommendations should be acted upon promptly, to repair long-standing defects in Canadian law and provide the legal framework necessary for effectively addressing piracy.

COPYRIGHT PIRACY AND ENFORCEMENT

The piracy problem within Canada continues to get worse, not better, and is causing serious problems for markets in other countries, including the U.S.

The biggest void in Canada's enforcement effort is online. Canada has gained a regrettable but well-deserved reputation as a safe haven for Internet pirates. A number of the world's most notorious and prolific BitTorrent sites for online piracy are hosted or have operators based in Canada. Multiple, and often connected, Internet sites in Canada are used as a massive international distribution vehicle for pirated audio-visual material. No other developed country is farther behind the curve in combating copyright infringement in cyberspace. No Canadian enforcement authority currently has adequate resources, training and legal tools to tackle the problem effectively. Meanwhile, most copyright industry sectors report serious offline piracy problems as well.

MPAA reports that the market for infringing DVDs is concentrated in the greater Toronto area, and specifically in the Markham region to the northeast. Organized crime groups control importation (roughly 1/3 of the pirate inventory is imported from Asia), production, distribution and retail sales of these pirate products. Multiple stores in at least three major "malls and six flea markets openly advertise, display, and sell pirate DVDs, with thousands of copies available on a typical

day. In the largest anti-piracy action of its kind, investigators acting for MPAA members took action through a sustained presence in the Markham malls in the last quarter of 2008. Through surrenders, they apprehended more than 375,000 pirate DVDs, yet the sale of pirated product continues. The criminal operations in these malls view the relinquishment of pirated product as simply an occasional cost of doing business and are undeterred by any civil action. This is a criminal problem that will continue to grow unabated without adequate criminal law enforcement.

In 2008, the Entertainment Software Association investigated numerous piracy operations in Quebec, British Columbia, and Ontario. Pirates openly advertised these operations on the internet through their own websites and/or online classifieds such as Craigslist. Many pirates also operated stores full of pirated materials, often found in malls, among the most notorious of which are located in the Markham region's Pacific Mall. Popular pirated materials sold by these operations included burned optical discs and memory sticks containing hundreds of illegal copies of videogames for numerous gaming platforms including the Wii, PlayStation 2, Xbox 360, DS, PSP, and personal computer; consoles housing hard drives pre-installed with numerous pirated copies of games; and circumvention or modification devices (including installation services). During 2008, ESA's enforcement activities resulted in the seizure of over 10,000 pirated games and hundreds of mod chips. Although several repeat offenders were identified and investigated, then referred to law enforcement, very few criminal cases were brought, with lack of resources the oft-cited reason.

The estimated 2008 piracy rate for business software in Canada of 33% far exceeds that of the U.S. or of many Western European countries, and has not improved for the past several years. Servers at universities continue to act as digital storage facilities for large quantities of pirate intellectual property, including games, music and movies.

Book publishers report worsening piracy problems in Canada with regard to infringements such as high-volume photocopying, unauthorized uploading and downloading (especially of textbooks), and illegal importation of hard copies.

Internet music piracy appears to be on the increase in Canada, aided by the uncertain legal environment and serious shortfalls in enforcement. These factors contribute to the formidable propensity of Canadians to patronize illegal online sources of copyright material, thus stunting the growth of legal alternatives. For instance, although channels such as digital downloads, online subscription services and delivery of music to mobile devices account for nearly 30 % of the legitimate U.S. market for recorded music, the comparable figure for Canada is only 12%; and the estimated number of unauthorized downloads (1.3 billion) swamps the number of legitimate downloads (20 million) by a factor of 65:1.⁶ These statistics bear out the OECD's 2005 conclusion that Canada has the highest per capita incidence of unauthorized file-swapping in the world.⁷

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 example, 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 that 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 key 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

⁶ "Nielsen SoundScan Figures Confirm Canada's Weak Digital Music Market and the Sharp, Ongoing Decline in Overall recorded Music Sales," Jan. 4, 2008, at http://www.cria.ca/news/08-01-08_n.php.

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

counterfeit products as they enter Canada. Unless a court order has been previously obtained⁸, 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. Perhaps the parliament's Committee on Public Safety and National Security was correct when it identified "a lack of strong leadership" as a major "obstacle to the development of an effective Canadian strategy to fight counterfeiting and piracy." Whatever the explanation for Canada's years of policy paralysis in this area, 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.⁹

Similar legal deficiencies 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.

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 too often falls short. While Canadian authorities may say that combating copyright piracy is an important objective, some of 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 still 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. 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.¹⁰ Nevertheless, there are a few encouraging signs. In June 2008 the RCMP, in concert with a number of parties, engaged in a cross-Canada educational initiative to raise awareness and combat counterfeiting and copyright piracy.¹¹ Additionally, in the past few months there have been some well-publicized seizures of pirated goods.¹² Over the course of 2008 the business software industry was contacted by the RCMP on a few occasions as they were seeking assistance from rights holders with respect to seizures of pirated goods. Undeniably, though, the RCMP's efforts are held back by a lack of resources.

⁸ 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.

⁹ Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

¹⁰ The reports of both parliamentary committees called for the government to devote increased resources to, and to require better coordination and information sharing between, CBSA and RCMP.

¹¹ See <http://www.rcmp-grc.gc.ca/qc/nouv-news/com-rel/2008/080604a-eng.htm>.

¹² See, e.g., http://www.rcmp-grc.gc.ca/on/press/2009/09-01-30_tn_fes_e.htm, and <http://www.rcmp-grc.gc.ca/qc/nouv-news/com-rel/2008/081219-eng.htm>.

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. While this may be attributable to the Canadian government's failure to provide RCMP with adequate enforcement resources, its record of cooperation with right holders to attack piracy remains spotty. Although the RCMP has now listed intellectual property crimes among its top stated priorities, its actions in the past have not reflected adherence to this commitment. The open sale of pirated and counterfeit products in the Markham area (Toronto) has continued unabated for years, with a lack of action even against recidivists. Various local authorities have chosen not to pursue at least ten piracy operations uncovered in 2007, even after confiscating the pirated materials in some of the cases. 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.¹³ Moreover, there is a demonstrated link between those who sell, manufacture and distribute in these malls and organized criminal operations.

When government authorities refuse to pursue criminal investigations or initiate prosecutions against retail pirates, copyright owners are left with only civil remedies to pursue, and pirates are not deterred. There have been some important recent successes. For instance, in early 2009, RCMP and the Toronto Police Service successfully raided game piracy operations in Quebec and Ontario, seizing several thousand pirated games, hundreds of circumvention devices, and dozens of burners, as well as arresting two individuals. On the whole, though, the Canadian law enforcement commitment to enforcement against retail piracy remains inconsistent and generally under-resourced.¹⁴

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 some 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.¹⁵ An illustrative example is the story of Chui Lau, a well known seller of pirate DVDs 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 at then-current exchange rates) 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 told a parliamentary committee in 2007, "[t]he current criminal penalties imposed by courts pose little deterrence. It is not unusual to charge the same groups multiple times for IPR crimes, as they see the fines simply as the cost of doing business."¹⁶ For example, despite the fact that a vendor of pirated entertainment software products was charged by the Richmond RCMP, pled guilty to twenty-six fraud-related charges, and was fined C\$25,000, he resumed selling pirated materials just weeks after his sentencing.

¹³ RCMP continues to take actions against some producers of high volumes of pirate optical disc products, most recently in raids in Montreal in December that targeted a major producer of pirate DVD versions of television series. Tens of thousands of DVD-Rs involving 350 different titles were seized, as well as 200 DVD burners and other equipment, and some 2500 shipments of the counterfeit product were intercepted, in the largest enforcement operation of its kind in Canada.

¹⁴ The Industry, Science and Technology Committee report called for a higher priority for enforcement at the retail level, while the Public Safety and National Security Committee report proposed that knowing possession of counterfeit or pirate goods for purposes of sale be criminalized.

¹⁵ While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so.

¹⁶ See Public Safety and National Security Committee report, at 12. RCMP has been saying this consistently in policy assessments going back at least 9 years. See RCMP, "An Assessment of Commercial Scale Criminal Copyright Piracy and Trade-mark Counterfeiting in Canada", 2000 ("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"); see also, RCMP, "A strategic intelligence assessment of Intellectual Property Crime in Canada", 2004; RCMP, "Intellectual Property Crime in Canada – Hazardous and Costly," 2005.

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. 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.¹⁷

¹⁷ Numerous recommendations of the parliamentary committees echo these concerns.

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2009.

Executive Summary: The copyright industries unfortunately have very little positive news to report on copyright legislative developments and piracy issues in Chile during 2008. Chile was the first U.S. trading partner in Central and South America to sign a Free Trade Agreement (FTA), which provides high level copyright and enforcement obligations. The deadlines for Chile's implementation of its copyright and enforcement obligations all have passed and implementation is nowhere near complete. Chile has been working for almost two years on copyright enforcement legislation, but initial drafts contained numerous FTA-incompatible proposals. A Senate joint committee has started to hold hearings to consider a plethora of proposed amendments and the copyright sectors continue to work locally to improve this legislation. Meanwhile, copyright piracy levels remain high, with hard goods piracy at steady levels and Internet piracy increasing. Although industry cooperation with Chilean criminal enforcement authorities continues to be very good, both with street raids and online actions, the system breaks down as few prosecutions ever reach deterrent sentencing, due largely to inadequate minimum penalties in the law. The Chilean government needs to significantly elevate national attention to copyright enforcement and develop specific actions to significantly reduce hard goods and Internet piracy.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Chile in order to improve the adequate and effective protection of copyrighted materials there:

Fully implement its FTA copyright legislative-related obligations to:

- (1) Amend the copyright bill to fully satisfy FTA IPR obligations (the deadline of which was December 31, 2007). This would include addressing the industries' longstanding calls to implement key issues such as:
 - * Establishing ISP liability provisions to meet its FTA obligations, including notice and take down procedures;
 - * Increasing the level of deterrent civil and criminal sanctions for copyright infringement;
 - * Providing an effective civil *ex parte* search remedy; and
 - * Establishing statutory damages.
- (2) Take immediate steps to complete and fully implement its 2001 government software legalization decree, and adopt appropriate provisions to regulate the acquisition and management of software by government agencies.
- (3) Generate new legislation to implement its FTA obligations regarding technological protection measures (TPMs) and the enforcement (both criminal and civil) against their circumvention (the FTA deadline was December 31, 2008). Rights holders must be informed of progress on any legislative initiative and be able to provide input based on their considerable expertise on this issue.

Improve criminal enforcement: Concerted enforcement efforts by the Chilean government should include:

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Iquique, 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;
- Pursue more criminal actions against illegal downloaders of copyrighted content;
- The police should coordinate their investigations and actions with customs officials at international airports, seaports and border areas, as well as with Finance Ministry officials;
- Pursue more prosecutions and impose deterrent-level criminal sentences;
- Initiate more raids 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 both in the law (without TRIPS-incompatible procedures) and in-practice.

Improve border enforcement: Chilean Customs should establish a system to track blank optical media imports and coordinate with rights holders 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. The free port of Iquique continues to be a significant point of entry for blank media that is then sent to the capital city of Santiago as well as Peru and Bolivia. Customs generally applies WTO standards when evaluating the legitimacy of declared values of goods. There is no effort towards a register of importers, but this information is relatively easy enough to obtain through existing sources, including the Central Bank, the privately operated database DICOM, and the Chamber of Commerce.

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.

COPYRIGHT LAW ISSUES IN CHILE

The U.S.-Chile FTA:¹ IIPA and its members have long urged Chile to fully and promptly comply with its FTA and international obligations. The Chile FTA IPR chapter contains various transition periods (ranging from two to five years) which delayed the significant benefits that immediate implementation of the two WIPO Treaties' obligations (WCT & WPPT) would have brought to the copyright industry and to both the U.S. and Chilean economies. While Chile did timely amend its copyright law to implement much of the first set of the FTA's substantive copyright obligations (those due upon the FTA's entry into force on January 1, 2004), the series of transition periods anticipated that additional law amendments were necessary for Chile to meet its bilateral obligations. The FTA transition deadlines on all copyright law and the copyright enforcement-related obligations have now passed, making Chile non-compliant with its FTA obligations. Meanwhile, Chile continues to benefit from the U.S.' implementation of its obligations.

Chile had a two-year transition period to provide protection to temporary copies (Articles 17.5.1 and 17.6.1). Although there appears to be no express protection for temporary copies in the law, the reproduction right is very broad. The fact that pending legislation may create certain exceptions to temporary copies indicates that this issue requires continued surveillance in order to ensure the FTA obligations are not compromised.

On the enforcement side, the FTA contains a four-year transition period (due January 1, 2008) for Chile to implement the following enforcement obligations:

- Adopt provisions on limitations of liability for Internet Service Provider (ISP) liability and notice and takedown provisions (Article 17.11.23);
- Provide for a right of communication to the public and non-interactive digital transmissions (Article 17.6.5);
- Provide for legal remedies for rights management information (Article 17.7.6);
- Provide for pre-established damages (statutory damages) in civil judicial proceedings (Article 17.11.9);
- Provide civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (Article 17.11.12);
- Provide for various border measures (Articles 17.11.17 through 17.11.21).

Finally, Chile has a five-year transition period (due January 1, 2009) to implement its already existing WCT & WPPT obligations regarding protection against circumvention of technological protection measures (TPMs) in accordance with the FTA (see FTA Articles 17.7.5.a and c). IIPA foreshadowed in our February 2008 Special 301 filing that Chile had not yet even begun to draft legislation on this TPM issue, and we are not aware that any drafting efforts on this issue took place in 2008.

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

The copyright bill is still under consideration: Chile has been working on legislation to amend its copyright law (Law No. 17336) for almost two years to address the FTA issues cited above. The process has been slow and arduous, and is not yet complete.

In 2007, the Chilean Administration proposed legislation aimed at implementing the remaining FTA copyright and enforcement obligations (but not TPMs). That package, Bill No. 5012-03, was drafted primarily by the Ministry of Culture, and was introduced in Congress by the Administration in May 2007. Despite concerns raised with Chilean officials and Members of Congress by local copyright industry colleagues and by IIPA members through the U.S. Government, this bill passed the Chamber of Deputies on October 10, 2007. The bill moved to the Senate, where it was voted out of the Education Commission on December 5, 2007, and forwarded to the Economic Commission on December 11, 2007.

In 2008, it was decided that a joint Senate committee comprised of officials from the Culture, Education, Technology and Economy Committees, would be created to review this copyright package. Over 200 more amendments from legislators and the private sector were submitted to this Senate joint committee. Hearings were held in late 2008, and the copyright industries' representatives spent much the rest of the year attending hearings and meeting with Chilean legislators in Valparaíso as well as meeting with ministry officials in Santiago. The committee decided to review all these amendments from the start, and is now taking into consideration previous modifications and amendments that had been proffered to strengthen the 2007 text of the bill. As of the end of December 2008, the joint committee had only held hearings that addressed proposed provisions affecting libraries. The equally problematic provisions of ISP liability, criminal sanctions and mandatory arbitration on collective management of rights cases (discussed below) have not yet been discussed. Reports indicate that the joint committee suspended most of its formal work for three months (until March 2009). Several meetings were held in January 2009, but there are no reports of meaningful progress. Some in the Chilean government indicate optimism that the Senate may vote on the bill in early 2009, though given the amount of proposals not yet discussed, it might be premature to be optimistic. There is a concern that the Ministry of Culture may be excluding some of the copyright industry rights holders from the reform discussions; it is hoped that the expertise of all rights holders would be encouraged in order to promote Chile's proper implementation of its FTA obligations.

Below is a summary of the copyright industries' key issues and concerns in the ongoing legislative package. As mentioned above, the industries' representatives have participated in the legislative reform process in Chile, and the U.S. government has also engaged the Chilean government on these issues. For example:

- Provisions regarding the **liability of Internet Service Providers** are essential to ensure the distribution and enforcement of legitimate content over the Internet. The 2007 bill failed in many respects to track the FTA. These provisions, as originally drafted, would have effectively created incentives for Internet service providers (ISPs) to refuse to cooperate with copyright owners rather than achieve the kind of cooperation and flexibility that is demanded by the current strains on copyright protection. The entire section contains troubling language, especially on notice and takedown procedures. The most glaring problem is that the 2007 bill required rights holders to request and obtain a court order to remove the infringing content, a process totally out-of-step with international practice. Rights holders would have to petition a civil court, which then has 48 hours to issue an order for the ISP to withdraw or block the infringing content. This section appears to afford a huge liability loophole for ISPs, not a limitation on liability. Voluntary cooperation from the ISPs is limited only to hosted content, which is no longer the predominant way in which pirates distribute content and would not cover actions needed in peer-to-peer piracy (P2P) situations.
- Many of the proposed **exceptions to copyright protection**, especially for libraries in the digital environment and those involving computer software, are incompatible with the FTA. For example, provisions on reversed engineering are far too broad; the proposed exception is not limited to the circumvention of TPMs, does not cover research and development activities within that exception, and does not restrict such to achieve interoperability (which is the FTA standard). The exceptions involving libraries are also far too broad; they would potentially allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Furthermore, the business software industry is very concerned about the proper FTA implementation of the reverse engineering exceptions proposed in the original bill, and has been working to educate officials on the issue and its appropriate resolution. In addition, the specific tri-partite language in the FTA must appear as a chapeau for the entire new chapter on limitations/exceptions, thereby clearly applying to all the enumerated exceptions. An objectionable proposal on ephemeral copies serving as a limitation to the reproduction right has been submitted to this committee.

- While the overall restructuring of the **civil and criminal sanctions** section in the original bill appeared to reflect some improvement, several provisions omit key FTA language which would ensure appropriate criminal remedies for copyright infringement. Proposed provisions on statutory damages and actual damages require clearer drafting. The bill does not increase the minimum sanctions for infringements; as a result, industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions and there will be no improved deterrence applied in copyright cases (efforts in a separate legislation (discussed below) may go part of the way toward implementing more deterrent criminal sanctions for piracy). Provisions regarding the destruction of infringing copies should be expanded to include the instruments and other equipment used to commit the infringements. Sanctions should clearly apply in cases involving Internet piracy, especially involving those who upload protected copyrighted materials. Any proposals that suggest that a “profit” motive is required in piracy cases should be stricken, as that is neither an FTA- nor TRIPS-compatible standard.
- Another issue of concern involves new proposals requiring mandatory arbitration on performance rights rates. These proposals (Articles 100 and 100*b/s*) on mandatory arbitration would jeopardize the right of the collecting societies to establish their own rates.
- Finally, the current bill does not include any provisions on **technological protection measures**, which are FTA obligations that were to be implemented by the end of 2008. Some wonder whether the Chilean government might be considering including these measures in this comprehensive reform package.

Separate illegal commerce and piracy legislation: A bill on Illegal Commerce and Piracy (Bill 5458 of June 2007) was passed in the Constitutional Committee of the Senate, and it provides for sanctions and fines up to 800 UTMs (monetary units), especially in cases of repeat offenders. An important feature of the bill is that it would apply the concept of “criminal association,” as defined in Article 293 of the Penal Code, for cases of copyright piracy, and provide for gradually increasing fines according to the gravity of the infringement and to the hierarchical level within the criminal organization of the defendant. Penalties would range from 61 days to 5 years (this is the same minimum as the current law, but the maximum has been increased from 3 years under current law up to 5 years). More importantly, under this new legislation, the penalty under Article 293 of the Penal Code for criminal association would result in an additional sentence. Another key feature of this law is that it allows for “controlled delivery” of pirate products, similar to the mechanism that exists under anti-drug trafficking legislation. On November 12, 2008, the Senate approved the bill and made some modifications, and the bill was sent back to the lower house. On December 3, the lower house rejected some of the modifications added by the Senate, and this led to the formation of a Joint Committee (5 Congressmen and 5 Senators) that will review the project and draft a “consensus text.” The timeframe for this review is not yet known. It is hoped that the bill, if it remains with acceptable provisions, could be adopted by mid-2009.

Municipal fines for street piracy: A regulation issued by the Santiago municipal government in 2007 establishes fines for those who acquire illegal goods from street vendors. The name of the measure is “Plan Santiago Seguro” (“Safe Santiago Plan”). Local police are enforcing this measure, levying fines against pirate shoppers. This is a positive development and should dissuade potential consumers from purchasing pirate products. All members of the national anti-piracy committee (CONAPI) support the plan.

2005 laws affecting judicial processes: The Chilean Congress passed legislation aimed at streamlining judicial processes by changing the criminal procedure code and was related exclusively to the Industrial Property law. It increased fines for offenders and cleared the way for civil actions to be taken against infringers. It also gave judges greater freedom to order preventive incarceration, and also gave the police the authority to search locations without a warrant in the case of a flagrant crime. In essence, it created a more agile relationship between prosecutors and judges. Although it gives judges greater freedom and police the right to search locations without a warrant in certain cases, it appears that, in general, the police prefer to act with a written court order when conducting raids of labs and copyright facilities. Most rights holders continue to file specific complaints with the police based on the “public action” nature of this crime. As a result, police can request search orders from prosecutors. This process is working, the police respond adequately to the complaints filed by the rights holders. The *ex officio* tool however, is limited because police still cannot search closed premises without a judicial order, and they are reluctant to search even open locations without a formal complaint by the rights holder. When the police find a target they believe warrants searching, they approach the rights holders and seek a formal complaint upon which to proceed. (Police act *ex officio* outside Santiago; in the capital they may ask rights holders to file a complaint on some major cases.)

Trans-Pacific Strategic Economic Partnership: In September 2008, USTR announced that it will launched negotiations to join the Trans-Pacific Strategic Economic Partnership, a comprehensive Free Trade Agreement (FTA) concluded by Brunei Darussalam, Chile, New Zealand and Singapore, as a means toward advancing Trans-Pacific wide economic integration. The U.S. and its partners will negotiate the terms of U.S. participation in this Agreement (formerly called the "P-4 Agreement"), which entered into force in 2006. As the talks move forward, IIPA expects that the U.S. will support the introduction of the high standards already in place in the IPR Chapters that the U.S. has negotiated to date, such as one with Chile.

CHILE Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ²										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ³	109.0	66%	103.0	66%	82.0	68%	55.0	66%	49.0	64%
Sound Recordings & Musical Compositions ⁴	21.0	66%	29.6	44%	29.6	44%	22.7	51%	24.8	50%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	10.0	35%	2.0	40%
Entertainment Software ⁶	NA	NA	NA	NA	NA	20%	NA	NA	37.9	70%
Books	NA	NA	NA	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	130.0		132.6		112.6		88.7		114.7	

COPYRIGHT PIRACY IN CHILE

Optical disc piracy and street piracy: Widespread "street piracy" in Chile continued unabated during 2008. Street vendors ("*ambulantes*") cover their pirate wares with big towels printed with the cover image of movies, games, music or software. The buyer asks for the product, the seller makes a phone call, and in a few minutes a runner appears with the pirated product. Police actions against the street vendors are frequent but do not produce permanent changes in the street piracy situation.

The film, music and the business software industries report another kind of piracy, called "in-house piracy." People who work in companies, offices and educational institutions are asked to sell pirated materials (usually CDs with films, games, software). These in-house vendors use catalogues distributed by email or in paper, receive the requests, fulfil the order and then receive payment from the distributor.

Chile is a major port of entry for blank optical disc media coming from Asia. The illegal importation and smuggling of pirate goods from Perú seriously affects the northern cities of Arica, Iquique and Antofagasta. Some products are imported through the Port of Iquique, falsely identified and re-exported to other countries.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For the history of Chile under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2009 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

³ BSA's 2008 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Chile, following the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁴ Estimates for the recording industry in 2006 were 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.

⁵ MPAA's 2005 statistics used a methodology that analyzed both physical/"hard goods" and Internet piracy.

⁶ ESA's reported 2004 dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

Business software piracy: The Business Software Alliance (BSA) reports that piracy accomplished mostly by burning machines is still its most pressing problem in Chile. Retailers who prepare computer hardware for clients as well as in-house and external IT advisors often load unauthorized copies of software to computers and business networks. 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 been able to reduce 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. Adopting appropriate provisions to regulate the acquisition and management of software by government agencies is a critical solution, and one required by the FTA. The software legalization provisions of the 2001 Decree⁷ have still not been implemented nor enforced in any measurable way. In 2009, BSA plans to increase the number of cease and desist letters it issues and also run more judicial raids at commercial and educational organizations in order to produce more awareness about the need to protect software and halt piracy.

Piracy of music and sound recordings: The recording industry, led by IFPI Chile, reports that the level of physical piracy for recorded music in Chile was 66% of the total market in 2008. Simply put, widespread piracy of music and sound recordings, primarily in the form of pirate CD-Rs and DVD-Rs, continues to wreak havoc in Chile. CD-R and DVD-R piracy is the predominant form of piracy. Street vendors in Santiago are a very common image in main avenues but the amount of product offered is mixed with burned DVD's with movies. Some blank CD-Rs enter Chile (as contraband, undervalued items or even legally), but the major problem comes when the unauthorized reproduction of music takes place locally using CD-R burners. Last year there was a 38% drop in the amount of legal physical music products sold in Chile. Sales of some legitimate digital music products helped to mitigate the drop in CD sales such that the overall music market decline was 30% last year. However, Internet piracy (especially illegal downloads of music) is growing and severely hurting the music market.

Audiovisual piracy: The Motion Picture Association (MPA) reports that audiovisual piracy is still a large problem in the Chilean market, representing approximately 50% of the market. New theatrical releases obtained through the Internet can be found on the streets, and this pre-release piracy inflicts major harm across the entire film entertainment sector in Chile. These titles are copied in clandestine labs and then distributed in strategic regions of Chile's major cities. Pirated DVD-Rs are still the main source of hard goods piracy, both on the street and through hard goods sales over the web. Despite the fact that street vendors are a considerable problem, Internet piracy is becoming more critical every day. Last year MPA also conducted trainings for theater employees on how to spot illegal camcording in theaters.

Book piracy: Use of photocopies of textbooks and reference books continues to concern the book publishing industry, primarily at the university level. Private copy shops are conveniently located near universities, copying in some cases entire books at the request of students and teachers. In other cases, shops create unauthorized "coursepacks," containing extensive excerpts from different works on a common subject. Enforcement and education officials should take a more active role in ensuring that campus areas do not become piracy havens. In addition, commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors.

Internet piracy is growing: Chile has one of the highest broadband penetrations in the region. There were 1.4 million broadband connections in Chile as of June 2008, a 17% increase from June 2007, and most (84%) of these were home broadband connections. Chilean ISPs have increased by 100% the broadband capacity for home use (up to 8MB), and this will likely prompt users to more easily download infringing materials. There are approximately 7.4 million Internet users in Chile, representing 45% of the population (according to www.internetworldstats.com) All the copyright sectors believe that the Internet-based piracy will grow in the future because of the expansion of broadband Internet connections.

Peer-to-peer (P2P) filesharing is the most predominant form of Internet piracy in Chile, with the ARES and GNUTELLA networks being the most popular. Another growing problem is the cyber links posted on forums and social sites. A clear example of this is the site "Chilewarez", one of the most popular social communities in the Internet in Latin America, which allows registered users to post and exchange thousands of music files. The recording industry's national group (IFPI Chile) has already submitted the case to the competent authorities and are waiting for concrete action to stop this significant problem.

⁷ In May 2001, President Lagos issued an executive order called "Instructions for the Development of the Electronic Government" (Decree No. 905 of 11 May 2001), which included a guideline for the executive branch to properly license software. In order to confirm that all government agencies use computer software only as authorized, the U.S.-Chile FTA requires that the parties adopt appropriate provisions to actively regulate the acquisition and management of software by government agencies (e.g., inventories of software present on agencies' computers and inventories of software licenses).

The recording industry reports that Internet piracy is its biggest piracy problem in Chile, now exceeding the hard goods problem significantly. The local recording industry estimates that over 400 million songs of local and international repertoire are now being downloaded annually in Chile (this is a sharp increase from the 220 million reported in a third party survey in 2005). Pirated copies on the Internet are readily available for download and are used as source materials to burn CDs/DVDs for distribution in the streets. The recording industry estimates that about 25% of all downloading and burning is done in Internet cafés. 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.

MPA also acknowledges that Internet piracy is becoming more critical every day and is engaged in public campaign against the sale of pirated hard goods over the Internet. The recent creation of cyberlockers and hyperlinks, located on national and international sites, allows direct downloading from hosting sites (Rapidshare, etc.), over P2P sites. MPA has identified Chilean citizens who have been uploading illegal camcordings (video and audio) to the Internet. Santiago, Valparaíso, Concepción, Antofagasta, Arica and Iquique are the most affected cities in connection with Internet piracy.

COPYRIGHT ENFORCEMENT IN CHILE

The local anti-piracy coalition (known as CONAPI, Comisión Nacional Anti-piratería) was created in 2001 and is composed of members of both the private sector and public agencies. Its 20+ members include the sound recording, software, publishing and audiovisual industries, and maintain a close relationship with the local chamber of commerce. Tax and customs authorities participate as non-voting observers in order to remain current on industry concerns.

Criminal Enforcement: There remains two overwhelming problems in getting effective criminal enforcement in Chile. First, the national police (Carabineros), the Prosecutor's Office and the Judicial Police, all of whom do good work, suffer from a lack of sufficient human resources. Second, the Chilean copyright law – whether in its current form or as proposed in the October 2007 amendment bill – provides relatively low penalties (the mandatory minimum range of sanctions is very low) and, as a result, judges do not impose higher sanctions in-practice.

Industry cooperation with Chilean criminal authorities continued to be very good in 2008. The Carabineros, particularly the organized crime investigations department, continue to be a major support for anti-piracy actions in Chile. Furthermore, the industries' working relationships with the Specialized IPR Prosecutors Unit created within the Judicial Police in January 2008 and the Economic Crime Prosecutors are also excellent. The audiovisual and recording industries have active criminal anti-piracy campaigns. The business software industry did not bring criminal actions in Chile in 2008, but they are working with police and tax officials to educate them on software issues in anticipation of possible future criminal cases.

The recording industry's anti-piracy group (IFPI Chile) assisted police in identifying pirate locations and carrying out 108 raids during 2008, resulting in seizures of one million blank CD-Rs, 233,433 recorded CD-Rs/DVD-Rs plus other equipment. 65 people were arrested. IFPI Chile reports that raids continue to be focused in Santiago and Valparaíso. 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. The recording industry also took actions in the Internet space (see below).

The motion picture industry reports that both the police and customs authorities continue to take *ex officio* actions, and do seek MPA support at both the raids (seizures) and at trial. MPA held several seminars and training sessions for these authorities in order to keep them updated on new piracy methods. During 2008, this cooperation resulted in improved relationships, especially with the police and the Specialized IPR police unit. MPA reports that during 2008, the motion picture industry achieved the following results. Raids were conducted against 35 burner labs, 8 optical disc distributors, 6 Internet site operators selling hard goods, 522 street vendors, 5 retailers and 1 rental store. Seizures resulting from these actions included 270,866 burned discs, 237 burners, 125 computers, 14 printers and 41,140 art inlays.

Work with prosecutors improved but few deterrent sentences are issued by courts: Both MPA and IFPI-Chile report that their work with Chilean prosecutors, especially with those charged with the investigation of IP crimes, improved during 2008. Investigations and prosecutions involving hard goods piracy were solid. Further improvement is necessary regarding

Internet piracy cases; this should be easy to achieve as Chile already conducts investigations on other Internet-related crimes like child pornography and identity theft.

MPA reports that prosecutions did take place in 2008. Of the raids detailed above, criminal actions/charges were filed against the following kinds of defendants: burner lab operators (37), optical disc distributors (8), Internet site operator–hard goods (3), street vendors (511), retailers (5), and rental store operator (1). Convictions were achieved in 9 cases (involving 1 Internet site operator–hard goods, 5 street vendors, 1 retailer, and 1 rental store operator). MPA indicates that, in general, the minimum sanction of a 61-day suspended sentence was applied, as most defendants were first-time offenders. The recording industry reports that 108 raids were carried out during the year and over 1.2 million units of blank and recorded CD-Rs as well as 700 burners were seized in the operations. Forty-four (44) people were indicted for various crimes connected to music piracy.

The historical problem in Chile is that it is difficult to secure deterrent penalties in-practice. Although the distribution of pirated material is theoretically punishable by incarceration of up to 540 days (a low term compared to the rest of the region), it is difficult to secure convictions and adequate sentencing. In the few cases that do reach judgment, sentences are suspended for an undetermined period. Legislative reform is needed and the sanctions in the pending copyright bill must be placed at a deterrent level. This is why pending legislative efforts to require higher mandatory minimum sentences are essential to be included in the pending copyright reform package.

Inadequate civil *ex parte* actions and slow civil cases: BSA continued to bring only civil actions in Chile last year. Inadequate preparation and training on intellectual property issues for most judges and their staff remains a major problem, along with weak civil provisions. BSA has to constantly explain the nature of its requests to judges. BSA does acknowledge that, over the years, this problem seems to have diminished slightly as judges become more familiar with the relevant legal issues, but there is much room for improvement. BSA believes that this incremental improvement is due to continued training and public awareness that all the industries are providing in Chile, as well as better information among Chilean agencies about their international and bilateral trade and intellectual property obligations.

During 2008, BSA performed 38 civil raids in Chile. Civil *ex parte* actions are a critical remedy for the business software community. BSA reports that in 2008, Chilean judges continued to improve their response to civil complaints and accepted more BSA requests for *ex parte* raids, and this is a commendable achievement. However, despite this progress, BSA is still struggling with a very difficult provision of Chilean law regarding *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.

Internet piracy and cybercrime cases: Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes, which has generally performed well during 2008. The Cyber Crime Brigade has been very active and helpful on many Internet anti-piracy actions.

During 2008, the recording industry's anti-piracy team was able to take down over 85,000 cyberlinks to illegal files, 335 permalinks to blogs were eliminated and 1,340 virtual auction users were prevented from continuing to sell pirate physical products. The principal actions against Internet pirates were taking down four Direct Connect (DC) Hubs that helped to direct P2P users to illegal files. Also in 2008, the recording industry ran an operation against Internet cafés that covered 21 locations, mainly in Santiago, where law enforcement authorities seized over 50 computers.

Despite these successes, the recording industry sees the lack of concerted attention from the Government to Internet cases like *Chilewarez* as a major obstacle. The most predominant form of Internet piracy is the P2P exchange of illegal music files using the most popular networks available, ARES and Gnutella. The recent actions against Direct Connect Hubs were possible thanks to a well conducted investigation entirely done by the local recording industry group (IFPI Chile). The impact of the actions against these Hubs resulted in a significant decrease in the P2P exchange in the DC network. Unfortunately, those actions are not producing any impact on the most popular networks ARES and Gnutella because of its decentralized structure. The Government needs to start conducting its own internet investigations.

Cooperation with ISP on Internet cases: Chilean law currently does not have any specific provisions regarding the limitations of liability on ISP providers, though as discussed above, this is an issue that is part of Chile's FTA obligations and is

being discussed in the copyright law reform efforts. The local recording industry group is trying to call the attention of Chilean Government in order to set up a roundtable negotiation with ISPs and hopefully reach an agreement that may settle major differences raised during the copyright law reform process. For example, several copyright groups are participating in two such roundtable groups: (1) the "Public/Private Commission," with members from all copyright industries, Ministry of Foreign Affairs, Ministry of the Interior, police and tax authorities, and (2) the Ministry of Culture's Working Group, established at the request of the Senate to develop suggested language for copyright reform legislation. These groups both met on a regular basis throughout 2008 and are expected to continue their work in 2009.

Industry reports that Chilean ISPs do tend to cooperate in those situations that involve hosted content. For example, the music industry specifically notes that they have achieved a certain level of cooperation from major Chilean ISPs. There is a notice and take down procedure in place for web pages and blogs (where the content is stored on the ISP server). In contrast, that same level of ISP cooperation with rights holders does not exist on cases involving P2P file-sharing; there, cooperation is very sporadic or none is offered. Much of the infringing content is found on foreign websites. It is believed that the local ISPs are waiting for the outcome of the copyright law reform to see what the scope of the "safe harbors" provisions will be as a result of FTA implementation (the FTA itself is very clear on the specific safe harbors). According to local counsel, it is assumed that ISPs are currently subject to general liability principles in the Civil and Criminal Codes.

Inadequate border enforcement: The northern cities of Arica, Iquique and Antofagasta often serve as an entry point for blank optical disc media that is coming from Southeast Asia. MPA took five border actions in 2007, seizing approximately 4,500 DVDs, none of which were major actions. The recording industry reports that in one major operation with intelligence provided by the local anti-piracy team, authorities seized over 1 million blank CD-Rs and DVD-Rs. The recording industry notes that some prosecutors, such as in the port city of Iquique, have shown a lack of interest in pursuing border cases.

To better track imports of blank media, 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. The creation of an importers' register would also improve disclosure; such a system should also involve rights holders. There was no effort in 2008 towards a register of importers, but as noted earlier, MPA reports that this information is easy enough to obtain through existing sources, including the Central Bank, the privately operated database DICOM, and the Chamber of Commerce. MPA is in frequent contact with Customs officials and provides training on intellectual property, with a focus on the importation of blank media.

EGYPT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Egypt be elevated to the Priority Watch List.

Executive Summary: In Egypt, what should be a shining economic success story of ingenuity and creativity in Egypt's rich creative industries, instead is a nightmare market for right holders, stunted by piracy, difficult bureaucracy, and almost unparalleled market access hurdles. Trade losses and piracy levels worsened in 2008 for most industries in Egypt.¹ Local Egyptian and U.S. right holders are equally hampered by piracy and other barriers, as the experiences of authors such as Alaa al-Aswany,² and the local Egyptian film market duopoly of the Arabic Company for Production and Distribution Group (ACPD or "El Arabiya") and El Mottahida (which suffer from piracy, cultural burdens, narrow theatrical windows, and a dearth of screens in the country)³ can attest. Due to a lack of return on investment, the music industry in Egypt faces job losses and lower output. In addition to the usual physical piracy that harms the markets for legitimate right holders, Internet usage exploded in Egypt in 2008, and technologies and techniques used for online piracy (including circumvention technologies) have made Internet piracy one of the key concerns for industry. The Intellectual Property Unit at the Information Technology Industry Development Agency has finally taken over matters related to business and entertainment software, a hopeful sign, and ITIDA has been helpful in pursuing actions against perennial piracy targets. Nonetheless, cases pursued at court are still marred by procedural and bureaucratic hurdles and unreasonable requests, and cases usually result in non-deterrent fines, and almost never imprisonment. The Ministry of Culture, which still has enforcement purview over books, motion pictures, and music, has been much less active, leaving book piracy, retail piracy of films, and recorded music piracy virtually unchecked in Egypt.

Priority Actions Requested in 2009: IIPA requests that the government of Egypt take the following actions in 2009, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Obtain effective court results in key cases, by expediting handling, decreasing bureaucratic hurdles and impossible documentary demands, and imposing deterrent judgments, including jail sentences served and deterrent fines.
- Develop a specialized cadre of IP prosecutors and judges to more effectively handle copyright cases.
- Build capacity to handle Internet piracy cases, including cybercrime police to deal with infringing sites, whether hosting, deep linking, peer-to-peer, bulletin board, or cyber locker.
- Stop pre-raid leaks and other irregularities among officers engaging in enforcement, including by securing pre-raid practices (i.e., not divulging location of raid, removing mobile devices from officers, etc.).
- Tackle book and journal piracy, both illegal reprints and photocopying, by taking sustained enforcement actions and ensuring universities adopt policies to use only legal copies of publications.
- Allow right holders to participate in anti-piracy investigations, including post-raid identification of pirated product.
- Establish at Egyptian Customs an effective mechanism to seize piratical imports at the point of entry, without guarantee amounts that are prohibitively expensive.

Legislation and Market Access

- Ease onerous market access restrictions, which pirates do not have to contend with, including *ad valorem* duties on films imported into Egypt; *ad valorem* duties on sound recordings and entertainment software; sales taxes on imported goods; censorship certificate release fees imposed on foreign films only; a 10% sales tax on imports, and a 20% box office tax for theatrical motion pictures; a requirement that all song lyrics on locally manufactured releases be translated into Arabic; the absence of trading rights for foreign-invested enterprises; a discriminatory and GATT-

¹ The independent Creative and Innovative Economy Center (CIEC) estimated motion picture piracy in 2007 to be between 90% and 95% and losses to be as much as US\$90 million to that sector. Bertrand Moullier et al, *IP and Economic Challenges in the Egyptian Film Industry*, Creative and Innovative Economy Center (CIEC) at George Washington University, October 2007, at <http://www.law.gwu.edu/NR/rdonlyres/B1EDABB1-E920-4C22-AF94-CB1A0E295C0.pdf>.

² See Abdallah, *Alaa El Aswany*, Egypt Today, August 2004, Volume # 30 Issue 02.

³ See Moullier et al, note 1.



inconsistent entertainment tax on foreign films; and a *de jure* discriminatory cap of five film prints for theatrical distribution for U.S. films.

- Amend the copyright law to remove burdensome registration and deposit requirements, which may violate the Berne Convention and TRIPS.
- Amend the copyright law and implementing decree to cure other TRIPS deficiencies and resolve ambiguities.
- Fully implement and accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Establish mechanisms for service providers to cooperate with right holders against Internet piracy, including an expeditious way to remove infringing content, block piracy websites, and enforce against illegal file sharing.

EGYPT ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2004-2008 ⁴										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	81.0	59%	72.0	60%	49.0	63%	45.0	64%	28.0	65%
Books	NA	NA	32.0	NA	31.0	NA	30.0	NA	30.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	14.3	85%	NA	90%
Records & Music	NA	NA	15.0	75%	12.0	70%	9.0	60%	7.5	40%
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	81.0		119.0		92.0		98.3		65.5	

PIRACY CHALLENGES IN EGYPT

Internet Piracy: Egypt now has 10.5 million users, representing 12.9% of the population, and 427,000 broadband connections, representing more than half of one percent, as of March 2008 (according to the International Telecommunications Union). Internet connectivity increased by 57% and broadband connectivity more than doubled in the past year, because of increased availability of services and lowering of subscription prices for Internet service. Thus, it is no surprise that Internet piracy has become a major issue in Egypt. Internet piracy comes in all forms, from websites advertising physical pirate product, to illegal download sites, deep link sites, peer-to-peer file sharing services, cyber-lockers, and bulletin board or forum websites. The music industry reports that 97% of all digital distributions of music in Egypt are pirate.

Book and Journal Piracy: Book and journal publishers continue to struggle in Egypt, with print piracy and illegal photocopying creating a difficult climate for legitimate sales. English language higher-education textbooks, English language teaching materials and books in translation fall prey to pirates routinely. Pirated higher-education textbooks, reference books and professional books are sold at stalls set up near university campuses, and the institutions are all too often complicit in the process, either through lecturers who encourage illegal photocopying or through bureaucratic and nontransparent adoption processes that give pirate enterprises the perfect cover. 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. 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. Local Egyptian publishers (like Sphinx, Shorouk, and Ahram), authors, and distributors are negatively affected almost to the same extent as foreigners.

Retail Piracy Remains Severe, Including Some Imports: All the industries continue to report that physical piracy in retail shops and street stalls remains a major problem in most major cities in Egypt, including Cairo, Alexandria, Giza, Mansoura, and Asyut. For example, the music industry reports that over 60% of physical distributions are pirate copies. The result for that industry is a 50% decrease in 2007 in sales volume, meaning record production companies decreased the number of artists they promoted, several record companies in Egypt went out of business, and of those

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Egypt. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Egypt's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

staying in business, only 14% released new albums in 2007. Pirates typically purchase only one legal version of the product and then make a huge number of illegal copies to sell. Illegally copied materials are sold in public places, like kiosks, shops, and on the sidewalks. Retail establishments selling computers continue to offer illegal business and entertainment software unchecked. Imports of pirate software have become a serious concern, passing freely through the borders into Egypt. Egyptian Customs authorities have not established an effective mechanism to seize such goods at the point of entry. Resellers of pirate software advertise these illegal products openly in trade magazines.

Mobile Device Piracy: Like Internet connectivity, mobile connectivity exploded such that by mid-2008, Egypt boasted 46% connectivity (according to Budde Communication).⁵ Therefore, mobile device piracy has become an issue, in which downloaded music or other content is transferred directly to handheld devices, like MP3 players, memory sticks, iPods, and the like. The music industry also reports large-scale ring-tone piracy on the Internet, where ring-tones and “ring-tunes” are illegally made available for downloading.

False Distribution Licenses: The problem of pirates operating under the guise of being legally-licensed distributors persists as an issue in Egypt. This problem especially affects the entertainment software industry. In such cases, the pirate distributor obtains the pirated “product” from overseas, complete with fraudulent seals of approval and “license” documents purporting to prove the legitimacy of the product being imported. The Ministry of Culture has in the past even blessed such documentation, granting government sales licenses to the pirate based upon false documentation. This has occurred, notwithstanding that the U.S. right holder produced unassailable evidence proving that the pirate distributor had no rights. Progress against this form of piracy has been made, as the Ministry of Culture now refuses to approve and grant new distribution licenses, particularly to a notorious entity that has long been the subject of inquiry. However, in cases brought against often wily pirates, excessive and redundant documentation demands are being made of right holders (in anticipation of likely defenses). It is hoped that pending court cases involving false licensing will be dealt with in a proper manner, and that the key pirates utilizing this modus operandi will finally be put out of the piracy business.

Business Software Piracy Rate Too High: End-user piracy and retail piracy continue to harm the business software industry in Egypt. Retail establishments selling computers continue to offer illegal business and entertainment software unchecked. Imports of pirate software have become a serious concern, passing freely through the borders into Egypt. A study released in January 2008 by International Data Corporation demonstrated that a 10 point reduction in software piracy by 2011 would deliver nearly 1,747 new jobs in Egypt, US\$153 million in economic growth, and an additional US\$8 million in tax revenues for the governments of Egypt.⁶

ENFORCEMENT CHALLENGES IN EGYPT

Key Cases Result in Non-Deterrent Fines or Remain Unresolved: IIPA has been monitoring several important cases in Egypt involving copyright piracy. Unfortunately, in IIPA’s experience, most copyright cases decided favorably to date in Egyptian courts have resulted in non-deterrent fines. For example, in what was reportedly the first lawsuit regarding Internet piracy in Egypt, a preliminary court decision was handed down in 2007 ordering the defendant to pay EGP10,000 (US\$2,700). Other cases for the business software industry and the recorded music industry remain pending.

IIPA welcomes the new spirit of cooperation exhibited by the Head of ITIDA, and notes that ITIDA appears to be actively pursuing cases involving entertainment software products with a newly found vigor. However, the cases brought so far, some which date back four years or more, have created some procedural hurdles which the right holders (the victims in these criminal cases) are finding it burdensome to overcome. In particular, ITIDA has become involved in a case industry has been watching over the past several years, arising out of actions initiated in 2005 against a distributor believed to be responsible for a substantial percentage of pirated entertainment software products in the Egyptian market. ITIDA is engaged in efforts to help in finally bringing the case closer to prosecution, but unfortunately, the prosecutors handling the case continue to make unreasonable demands for documents proving that the defendant company is not

⁵ See Budde Communication, *Egypt - Mobile Market - Overview & Statistics*, at <http://www.budde.com.au/Research/2854/Egypt - Mobile Market - Overview Statistics.aspx?r=51>.

⁶ Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Egypt*, January 2008, at http://www.bsa.org/~media/Files/idc_studies/bsa_idc_egypt_final%20pdf.ashx.

authorized to distribute the subject entertainment software products in Egypt. The latest development is a request to register distribution contracts (of legitimate distributors) in accordance with Article 185 of the Intellectual Property Law No. 82/2002 of Egypt (Copyright Law), and the government has indicated that failure to register the distribution agreements with the legitimate distributors will prejudice its case. Not only is the question of who does hold legitimate distribution rights irrelevant to the question of whether the defendant has distribution rights, but the victim company has already provided documentation on numerous occasions proving that it owns valid copyrights in the products in question, and that without dispute, the defendant has no right to distribute entertainment software anywhere in the world, much less in Egypt. Moreover, the issue of the defendant's purported distribution rights is not relevant in a case in which the right holder has shown proof of copyright ownership, and mere product examination clearly confirms that the products are pirated. Finally, the Berne Convention's no formality rule requires copyright protection not to be contingent on meeting any formality. If this case cannot go forward without registering the victim's distribution contracts, it may be questioned whether Egypt's laws comply with the longstanding Berne no formality rule.

IIPA is encouraged to see ITIDA so actively involved, but is troubled by the latest requests. IIPA looks forward to continued progress on the pending cases. At the same time, IIPA must point out that victim right holders continue to encounter challenges in enforcing and protecting their copyrights.

Deposit and Registration Formalities: In several infringement cases, ITIDA has noted that a victim company's failure to file formal deposit copies of the works involved and other documentation in line with Article 184 of the Copyright Law of Egypt is inconsistent with Egyptian law. As has been noted in previous IIPA submissions (and as discussed below), Article 184 outlines onerous deposit requirements, whereupon failure to deposit can lead to imposition of administrative penalties. In these cases, it is apparent that ITIDA would have preferred for the victim/rights holder to deposit copies of the works at issue, and notes that without so doing the rights holder risks the merits of the case. We understand that the Egyptian government has taken the position that deposit under Article 184 is not a prerequisite for copyright protection. However, if failure to adhere to these deposit formalities impacts criminal enforcement of the copyrights at issue, this could invoke Egypt's international obligations under the Berne Convention and the TRIPS Agreement.

Special Prosecutors and IP Judges Should be Enlisted in Egypt: The court system in Egypt has been difficult to navigate for right holders for many years, with slow-moving cases characterized by bureaucratic hurdles, non-expert prosecutors or judges, and in general, non-deterrent sentences. IIPA urges the government to consider developing a specialized core of prosecutors familiar with intellectual property rights cases, and a specialized core of judges to handle such cases. This core of prosecutors and judges would understand the urgency with which copyright piracy matters must be dealt, to avoid leaks or disappearance of evidence, which has become increasingly easy given the advent of digital technologies. As for Internet piracy cases but also for other cases, the judicial system should encourage the use of IP or IT specialists or experts. In a recent case involving a right holder seeking preliminary injunctive relief to stop clear-cut piracy, the judge failed to refer to an expert and failed to impose a deterrent result due to his lack of understanding of the nature of the violation and the remedy needed. Most cases that do result in positive judgments end with non-deterrent results, usually a fine of EGP5,000 (US\$1,350), although in some rare instances, the proper penalty of EGP5,000 per work is being meted out. In many cases, judges simply think a criminal fine is inappropriate in a copyright violation case. A specialized core of IP prosecutors and judges would, IIPA believes, help resolve this problem of lack of awareness and consideration for the seriousness of piracy as an offense against the state. Another problem that could be resolved by a new core of IP trained judges is the lack of transparency in the court system. To date, court decisions simply have not been published expeditiously. The transparency problem is worse in cases initiated by the government, as there is simply no means to follow the progress of such cases. IIPA understands that a new Law on Economic Courts was adopted and enters into force in early 2009. IIPA is unaware whether this law, which apparently does relate somewhat to intellectual property cases, will accomplish any of the proposed improvements or resolve any of the problems mentioned herein.

Internet Enforcement Mechanisms Need to be Developed and Implemented: To date, service providers in Egypt have not cooperated well with right holders seeking to protect their rights. Since Internet usage has now exploded in Egypt, it is time that the government implemented mechanisms to ensure such cooperation. First, service providers should be reminded that they can be held liable for copyright infringement occurring over their services if they directly infringe. Second, it should be established that service providers have responsibilities that extend beyond their own direct conduct to those of their subscribers. If necessary, the Copyright Law should be amended holding service providers accountable for

direct infringement or facilitating the infringement of third parties, and setting into place a structure to promote responsibility among ISPs, such as a requirement to comply with notices to take down infringing materials, and mechanisms to ensure service providers assist right holders seeking to enforce their rights against subscribers who may be engaged in activities like peer-to-peer file sharing, deep linking, uploading, downloading, providing access to cyber lockers, and the like. Mechanisms should be in place to provide information to right holders wishing to pursue action against specific instances of Internet piracy. As with other crimes, the information will normally be in the hands of the service providers so it is important that they be made to cooperate with investigations into Internet piracy. Given the seriousness with which the government of Egypt takes the issue of cybercrime, and that Egypt was the host of the convention which adopted the November 27, 2007 Cairo Declaration on Cybercrime (see discussion below), it should be possible to implement a workable approach. IIPA makes note of the activities of the Information and Internet Crime Department at the Ministry of Interior, and that peer-to-peer file sharing is already an activity prohibited by the Copyright Law.

Book Piracy Efforts Should be Aimed at Legalizing University Practices in Addition to Traditional Enforcement: IIPA notes that, in order to truly tackle the unlawful print reproduction and photocopying that are supplying Egypt's university campuses, the Ministries of Education and Higher Education should make a point of launching a campaign to legalize published materials used on college campuses in 2009. It is inexcusable that state-funded universities would allow pirate businesses to run unfettered under their watchful eyes. IIPA notes that at present, public state-funded universities are taking no responsibility for renting out space to stores that turn into pirate enterprises. Indeed, industry reports indicate that the University of Cairo has raised rents in the past two years, such that only pirate enterprises could afford to stay. Public university employees and staff proved to be involved in soliciting pirated or illegally photocopied books also do not fear or suffer any consequences. There are apparently even employees of the universities that provide the shops with the books, informing them of the number of students, and helping them to sell the pirate copies at the university.

Need to Include Right Holders in Investigation to Avoid Tainted Results: There have been instances in which clearly pirate material has been deemed "genuine" by the Ministry of Culture simply because right holders were not given the opportunity to inspect the goods, in which case it would easily have been determined that the product was pirated. ITIDA and MOC should regularly invite copyright owner assistance in ascertaining the legitimacy of suspect product. In addition, as documented above, in some cases, the question may come down to the authenticity of documents purporting to identify particular companies as the authorized distributor of copyright products in the country. Again, in such cases, right holders should be consulted as a matter of course.

Business Software Raids Commence: The Business Software Alliance has noted some good cooperation of the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior in carrying out raids against retail establishments that offer pirated business software. The industry has reported that MOI runs raids based on complaints by right holders and sometimes on an *ex officio* basis. BSA also reports that ITIDA raids have targeted business software as well.

MARKET ACCESS ISSUES

Market access barriers in Egypt make it one of the most restrictive and uninviting markets in the world for legal copyright businesses. The Egyptian government imposes an incredible array of market access barriers on legitimate businesses.⁷ Pirates and counterfeiters do not have to contend with such restrictions, so legitimate right holders are further disadvantaged in the market. These market access barriers should be removed so that legitimate businesses have a better chance in the battle against piracy in Egypt. These include:

- **Discriminatory *ad valorem* Duties:** The copyright industries have historically faced discriminatory *ad valorem* duties upon importing their products into Egypt. For motion pictures, the *ad valorem* duty has been 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 have reportedly also been similar *ad valorem* duties imposed on sound recordings and entertainment

⁷ To the extent any of these problems has, in the opinion of the government of Egypt, been resolved, the government should be urged to provide proof, such as any written regulations or other measures resolving the issue raised.

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).

- **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.
- **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.
- **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. Specifically, 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 Film Print Cap:** Only five prints of any major U.S. film title may be imported into Egypt for circulation around Egypt. IIPA understands from a recent report that in some rare instances, this cap has been relaxed to eight or nine prints, but compared with the unlimited number of prints allowed for Egyptian films, this relaxation does little good for film distributors trying to enjoy the market in Egypt. The film print cap is further exacerbated by the narrow time window for theatrical distribution of films in Egypt, due to frequent theater closures for holidays, etc.

TRAINING AND PUBLIC AWARENESS

Capacity building must continue for Ministry of Interior officials, prosecutors, and judges, in training on copyright law and basic enforcement issues such as preservation of evidence, preparing dossiers for prosecutors, and running the criminal case. IIPA suggests that programs such as those funded by U.S. government should include judicial training, targeting each phase of preparing a criminal copyright case. IIPA also recommends that programs like those formerly offered under the auspices of USAID grants should raise awareness of Egyptian enforcement officials, Customs officials, prosecutors and judges of the great commercial harm caused by piracy, raise awareness of Internet piracy issues, the relation to cybercrime, and the importance of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. Such programs should also provide technical assistance in terms of establishing a core of specialized IP prosecutors and judges. In 2008, IIPA members continued to be involved in awareness campaigns and planning of a series of seminars, training sessions and broadcasting of specialized programs aimed at training relevant government officials and raising public awareness.

COPYRIGHT LAW AND RELATED ISSUES

Amend Law to Remove Burdensome Registration and Deposit Requirements, Which May Violate Berne Convention and TRIPS: A major problem faced by the industry recently involves the burdensome registration requirements under Articles 184 and 185 of the Copyright Law. ITIDA had previously indicated that these deposit requirements, though not necessary for copyright protection to attach, are nevertheless useful, presumably for enforcement purposes. However, the information sought under the registration/deposit procedure is too burdensome. For example, under the current law, a right holder has to deposit two copies of the product, a printout in the case of computer software (whether business or entertainment) and the last ten pages of the source code, a printout of the main or initial screens of the program upon boot up, a description of the program, its characteristics, programming language and operating systems necessary to run it. In addition, under the statute, the right holder must also submit all contracts related to the licensing or authorization for commercial exploitation by a third party. All of this information must be submitted translated into Arabic. These deposit requirements seem to go beyond the required essential information to clearly identify the owner of the copyright in the work, and in seeking non-essential information, impose unnecessary burdens on right holders seeking to protect their rights in Egypt. Further, while the government insists the requirement is not a bar to

copyright protection as such, to the extent failure to meet these requirements eviscerates right holders' legitimate interests, the requirements may rise to the level of a prohibited formality under the Berne Convention and the TRIPS Agreement. As noted above, several of the cases recently decided or still pending are being affected by these onerous requirements.

2006 Decrees Established ITIDA Jurisdiction Over Business and Entertainment Software, But Some Lack of Clarity Remains: On May 11, 2006, Decree No. 3286/2006 was issued by the Ministry of Justice, indicating that the Intellectual Property Unit at the Information Technology Industry Development Agency is the enforcement authority which is empowered to take immediate action in case of software copyright infringements, including entertainment software as well as business software. ITIDA placed an advertisement in the press subsequent to the issuance of the Decree, announcing they were responsible for 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. ITIDA, as noted above, has become engaged in conducting raids involving vendors of pirated entertainment software products and in working on some important cases.

2002 Law and Implementing Regulations Leave Some Gaps in Protection: Copyright law in Egypt is governed under the Intellectual Property Law No. 82/2002 of Egypt (Copyright Law), and the 2005 Implementing Decree, Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005). The Copyright Law and the Implementing Decree, while suitable to enforce against copyright piracy in general, left unresolved some TRIPS deficiencies, other ambiguities in protection, and important gaps for protection recommended by IIPA in order to modernize protection. In addition, while the Copyright Law partially implemented the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, the government should now seek to fully implement and accede to those treaties, following along with many of its regional neighbors. The following recounts some of the key deficiencies.

- **Criminal Remedies:** The Copyright Law 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\$1,350 to \$2,700). 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 supposed to be imposed "per work" or "per title," and that in a couple of cases, this calculation method has been employed. Fines should be increased, and, for example, should be 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 provides for 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 considering a test in the courts, but in the meantime, the law should be amended to expressly provide for the availability of this vital measure.
- **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 is out of step with Article 46 of TRIPS, which 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."

- **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.⁸
- **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.⁹
- **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.¹⁰
- **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 must be deleted.
- **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. The 2005 Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.
- **Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.

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

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

⁹ The 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.

¹⁰ 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.

- **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. IIPA understands that a new customs law is being drafted or under review.
- **Article 171 Exceptions.** The law contains exceptions to protection which are 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 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).
- **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.
- **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.
- **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.
- **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.¹¹ 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.

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

¹¹ 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.”

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.

Cairo Declaration against Cybercrime 2007: In late November 2007, the Council of Europe convened an Arab regional conference on cybercrime, at which 400 participants from around the region and other countries discussed using the COE Convention on Cybercrime as a model to guide the development of national legislation on cybercrime.¹² One of the end-results was adoption of the Cairo Declaration on Cybercrime, dated November 27, 2007. IIPA hopes that the Declaration will result in Egypt leading the way to adopt legislation to meet the requirements of the COE Cybercrime Convention (2001).¹³ The Declaration:

- Expresses appreciation for “efforts underway in Egypt and other countries of the Arab region with regard to the strengthening of cybercrime legislation,” and notes that “Egypt and other countries of the Arab region may want to consider accession to this treaty in order to allow them to fully cooperate against transnational cybercrime.”
- States that “[t]he Budapest Convention (2001) on Cybercrime is recognized as the global guideline for the development of cybercrime legislation ... Countries of the Arab region are encouraged to make use of this model when preparing substantive and procedural laws.”
- Notes that “[c]riminal proceedings against cybercrime require specific skill and resources,” that “[c]ountries of the region are encouraged to set up specialized units for cybercrime investigations, as well as ensure that prosecutors and judges are sufficiently trained,” and that “[l]aw enforcement need to cooperate with service providers in the investigation of cybercrimes [and] service providers and law enforcement need to develop procedures, routines and capabilities to cooperate effectively with each other within clearly defined limits.”

Customs Decision Proposed in 2007: Decision No. 770/2005 issued by the Minister of Foreign Trade & Industry to enforce provisional measures for copyright was reportedly being revised last year. The Ministry and the Customs Administrative realized that the guarantees provided for (25% of the shipment value) in order to be granted a seizure order were too high. IIPA is unaware of whether the revised Decision was issued.

GENERALIZED SYSTEM OF PREFERENCES

Egypt currently participates in the GSP trade program, offering duty-free imports of certain products into the United States from developing countries. In order to qualify for such unilaterally granted trade preferences, the United States Trade Representative must be satisfied that Egypt meets certain discretionary criteria, including that it provides “adequate and effective protection of intellectual property rights.” During 2007, \$61.5 million worth of Egyptian goods, or 2.5% of Egypt’s total imports into the United States, enjoyed duty-free treatment under the GSP code. During 2008, almost \$56.8 million worth of Egyptian goods, or 2.4% of Egypt’s total imports into the United States, enjoyed duty-free treatment under the GSP code. Egypt must meet the discretionary criteria in this U.S. law if it expects to enjoy favorable treatment for these imported goods.

¹² The Conference was held under the auspices of HE Prof. Dr. Ahmed Fathy Sorour, Speaker of Parliament of Egypt, and opened by HE Dr. Tarek Kamel, Minister of Communication and Information Technology. It was organized by the Egyptian Association for the Prevention of Information and Internet Crimes and supported by the Information Technology Industry Development Agency (ITIDA), the Council of Europe, the United Nations Office on Drugs and Crime, Microsoft, Ain Shams University, IRIS, EASCI and other partners.

¹³ Article 10 of the COE Cybercrime Convention (2001) (“Offences related to infringements of copyright and related rights”) provides,

1 Each Party shall adopt such legislative and other measures as may be necessary to 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 willfully, on a commercial scale and by means of a computer system.

2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed willfully, on a commercial scale and by means of a computer system.

3 A Party may reserve the right not to impose criminal liability under paragraphs 1 and 2 of this article in limited circumstances, provided that other effective remedies are available and that such reservation does not derogate from the Party’s international obligations set forth in the international instruments referred to in paragraphs 1 and 2 of this article.

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2009.

Executive Summary: Piracy — physical, Internet and over mobile devices — worsened in 2008. While pockets of some progress can be seen in the enforcement system, it remains ineffective to deter piracy. Police should increase the number of *suo moto* raids; and reforms at every level are needed to root out corruption, reduce huge court backlogs, eliminate procedural hurdles, and address endless court delays that result in rare convictions and even rarer damage awards in civil cases. There has been little progress on any of these fronts in 2008. Further, anti-piracy enforcement remains fragmented and the enforcement agencies lack training to undertake Internet piracy cases. Nor has there been progress in completing the process of implementing and ratifying the WIPO Internet treaties — the copyright amendment process has been stalled for ten years with little word that it will be revived soon. Both optical disc and anti-camcording legislation are needed. With strong copyright industries and fast growing Internet and broadband penetration, India should take action immediately to redress these deficiencies before they become more serious problems.

Priority actions to be taken in 2009: IIPA requests the following actions by the government of India, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Establish specialized IP courts or IP judges, increase the speed of adjudication of criminal and civil cases, and increase deterrence through higher fines and imprisonment
- Create a national anti-piracy task force
- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources and establish specialized IP prosecutors
- Train police authorities to be more effective in addressing rapidly growing mobile chip piracy
- Increase the number of *suo moto* raids
- Legalize use of books and journals at educational institutions
- Empower customs to effectuate seizures and destruction of pirate goods

Legislation

- Adopt a system of statutory damages in civil cases; allow compensation to be awarded in criminal cases
- Adopt an optical disc law
- Enact Copyright Law amendments consistent with the WCT and WPPT
- Adopt an anti-camcording criminal provision

For more details on India’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>

INDIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	36.2	55%	13.8	55%	52.7	55%	56.4	57%	67.3	50%
Business Software ³	1060.0	66%	1013.0	69%	574.0	71%	255.0	72%	239.0	74%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	NA	29%	80.0	60%
Entertainment Software ⁵	NA	NA	129.9	89%	85.6	86%	65.2	86%	59.5	86%
Books	NA	NA	38.0	NA	40.0	NA	42.0	NA	38.0	NA
TOTALS	1096.2		1194.7		752.3		418.6		483.8	

UPDATE ON PIRACY IN INDIA

Most copyright sectors report that piracy worsened in India over the last year. Physical piracy, particularly at the retail level (and corporate end user piracy for the software industry), is still the biggest problem, with mobile device and Internet piracy growing.

Optical Disc Piracy: There were a reported 36 OD factories in India in 2007. In 2005, the Ministry of Information & Broadcasting (MIB) tasked FICCI (the Indian Chamber of Commerce) with drafting an optical disc law. IIPA provided its draft model OD law for use in this drafting process. A draft law was made public in 2007 but there was no progress made by MIB in 2008. The delay is being caused by objections from the largest OD factory in India, Moser Baer, which opposes the inclusion of blank disc licensing in the bill. The recording and motion picture industries continue to press for passage.

Local factory pirate production is reported to be increasing. As reported in past years, imports of pirate discs, from Malaysia, Pakistan, Bangladesh and some southeast Asian countries, continue to be a problem. However, the predominant form of optical disc piracy in Indian markets today consists of burned discs, with content including music compilations in MP3 formats, pre-release music (lots of Indian titles and some international repertoire),⁶ 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), and CD-ROMs and DVDs of business software and books/reference materials. Publishers continue to report, for example, cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less.

A survey of the market for pirated PC games found that the bulk of the pirated product was limited to informal markets and kiosks, and not found in larger retail stores or chains. Pirated PC game product continues to be primarily burned CD/DVD discs, cheaply finished with handwritten titles, in a clear plastic sleeve with a badly photocopied cover

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at <http://www.iipa.com/pdf/2009spec301methodology.pdf>. For information on the history of India under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission.

² The recording industry's loss figures include \$5 million in losses due to mobile chip piracy.

³ BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in India, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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.

⁴ MPAA's trade losses and piracy levels for 2006, 2007 and 2008 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

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

⁶ 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. Unfortunately, enforcement actions, despite violation of many other laws, is almost entirely conducted by state police under the copyright law.

slipped in with the disc. The pirated PC game products available in the market appear to be copied from pirated versions produced in Southeast Asia. Pirated console games, on the other hand, appear to largely be in pressed CD format. Pirated games continue to be played on console hardware that has been modified ("chipped") to allow them to be played. Circumvention devices or "mod chips" are available freely on the Internet and in retail stores and kiosks, or the consoles are sold already modified. Pirated PC and console games are widely available in smaller retail establishments that make no attempt to conceal their sale.

Retail piracy: The pirate retail trade is vast throughout all big cities in India. Factory-produced, imported and burned discs are sold openly. Storage media for mobile phones, fueling piracy of music and sound recordings, are sold in cell phone retail shops, computer shops and other retail outlets. As discussed further below, the pirate book trade is also alive and doing well. Video piracy has been so prevalent for so long that India now has thousands of shops renting pirate videos at very low prices. As a result there is virtually no rental market in India and pirate rental libraries are ubiquitous. Software piracy at the retail and wholesale level is also prevalent, including hard disk loading and the open sale of pirate software in pirate markets throughout India.

Corporate end-user piracy of business software: Corporate end-user piracy (unauthorized use of business software in a business setting) continues in both large and small Indian companies. Trade losses to the software industry from this and all other types of piracy increased in 2008, to US\$1,060 million, while the piracy rate fell from 69% to 66%. BSA welcomed the partnership of the State Government of Karnataka in a software legalization campaign initiated in late 2008 that continued into 2009 and hopes that this is just the first of many public-private partnerships to come to educate businesses on managing software as an asset.

Pirate printing and photocopying of books: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry, despite the fact that prices for legitimate titles in India are among the lowest in the world. All varieties of pirate books, from poor quality cover-to-cover photocopies and obviously pirated cheap reprints, to hardbound, high quality copies of medical reference volumes, remain readily available. The marketing of trade books at stoplights in New Delhi has reached epidemic proportions, despite repeated complaints to the Delhi authorities. These pirated copies sell even when more expensive than the legitimate books.⁷ A circular issued from the Crime Branch of the Economic Offence Wing to the Delhi police units seems to have had little to no effect. On the positive side, publishers report that Delhi seems to have no centralized, designated marketplace for the sale of pirated books, and that retail piracy of trade books has diminished in Cochin, Chennai and Mumbai.

Photocopying remains a severe problem for the academic and professional sectors of the industry. Increasingly sophisticated techniques are allowing photocopy shops to tap into high end medical markets more than ever before. Raids in 2008 revealed use of high-quality scanning techniques to produce color copies of medical titles, printed straight from the electronic file created on the shop's computer. This allows for clearer reproduction of drawings and figures for students, and such reproductions have been marketed to medical colleges in Madhya Pradesh, Marahashtra, Karnataka, Rajasthan, Delhi, Mumbai and elsewhere. Copying continues at educational institutions as well, sometimes even condoned by the institutions.⁸ Wholesale copying of entire books is increasingly complemented or replaced by use of unauthorized compilations in the form of coursepacks, or "self instructional material" (SIM). These are used both for classroom teaching and distance learning, with the materials for the latter sometimes found in electronic form. IIPA has received reports of unauthorized compilations by the distance learning departments of universities such as Maharishi Dayanand University, Rohtak and the Institute of Management Technology, Ghaziabad. In addition, some publishers report web sites or student-run blogs offering hundreds or thousands of books for download, especially in the scientific, technical and medical sectors.

In 2006, the Ministry of Human Resource Development (HRD) committed to issue a government order/circular (proposed by the U.S., UK and Indian publishing industries) to all educational and research institutions to combat illegal photocopying on university campuses. HRD has still not issued this circular and the problem remains acute. There is no

⁷ A major trade publisher reports pricing a bestseller at 95 rupees to boost legitimate sales, only to find the pirated versions selling like mad at 150 rupees!

⁸ Publishers recently found a notice on the board of a prominent college, espoused by the department head, offering photocopying services for students in a particular course. This notice was removed upon publisher complaint.

excuse for having failed to take this very small step toward trying to raise awareness of the devastating effects of illicit copying on the academic publishing industry. HRD should take a much more active role in facilitating use of legitimate materials on India's campuses and in the country's distance learning programs, encouraging universities to develop and implement action plans to quell this problem. Much more must be done in 2009.

On a positive note, the industry reports stellar cooperation in preventing export of South Asian editions of books to neighboring or international markets. Export of these editions without authorization by the copyright holder is illegal under Indian law. 2008 saw several notable seizures of outward bound shipments by Indian Customs as well as good cooperation from courier and postal services in this respect.⁹ This incredibly positive development, if continued, will help to ensure the continuation of the immense investment that foreign publishers have made in the Indian market.

Internet and mobile device piracy: There were an estimated 81 million Internet users in India at the end of 2007.¹⁰ Broadband subscriber statistics are more current and were estimated at 5.45 million, still low by Asian standards, but with a growth rate of over 100% from the end of 2007 to December 2008.¹¹ India was the fastest growing market in the world for mobile phones, with total users at 346.9 million at the end of 2008, up almost 50% from 2007.¹² While Internet piracy was reported as a growing concern by all copyright industries, only the software industry counted it as a significant one. The Indian recording industry reported that mobile chip piracy¹³ was, after physical piracy, its biggest problem. For that industry mobile phone technology is making possible steadily increasing revenues from legal downloads of primarily ringtones but also recorded music, with India expected to become second to South Korea in developing a major market for cell phone downloads.¹⁴ This growth path is severely stunted, however, by widespread mobile chip piracy. Piracy losses to the music and recording industry from mobile chip, physical, Internet and public performance piracy were US\$36.2 million in 2008, with piracy levels at 55%. Losses from mobile chip piracy are estimated to be about US\$5 million.

The motion picture industry reports that sites like rapidshare.com, megaupload.com and gigashare.com are the most popular with pirate download sites, but that P2P sites are also being used. Recently, illicit high compression files have been found, indicating that the viewing and downloads to mobile phones is growing. E-bay India continues to be a point of sale for pirated PC games. BSA reports that online software piracy is becoming more open and blatant. In one case pamphlets were being distributed with the morning newspaper offering pirated software and referring readers to the website www.cd75dvd150.20m.com to place orders. BSA worked with the police in September 2008 to cut off this site and a criminal case was commenced.

BSA has sent over 1,500 takedown notices to ISPs and the Indian recording industry association (IMI) has sent over 1000. IMI reports that pirate content has been taken down despite the lack of a formal notice and takedown system in the Indian copyright law.

Signal Theft and Public Performance Piracy: Piracy of cable and satellite broadcasting signals remains a major problem, mainly through significant under-declaration of subscribers to rights holders. It is estimated that India's cable companies declare only 20% of their subscribers and that the piracy level in this market is at 80% with significant losses. Small video parlors in small and medium sized cities often show pirated film product. These parlors are often licensed by the state governments and compete with legitimate theaters. Public performance piracy is widespread also for the recording industry and, at this point in time, causes greater losses than Internet piracy.

⁹ The Ministry of Communication issued a circular in September 2006 directing the India Speed Post not to accept parcels bound for other regions that contain books meant for sale only in India or South Asia.

¹⁰ <http://www.itu.int/ITU-D/ICTEYE/Indicators/Indicators.aspx>

¹¹ <http://telecom.broadbandindia.com/>

¹² <http://in.reuters.com/article/companyNews/idINDEL38927620090121>

¹³ This type of piracy occurs in retail establishments selling or offering for free flash cards or other storage devices for mobile phones. These are sold either preloaded with music to customers, given away to purchasers of mobile phones or the shop lets the customer load the chip with music stored on a hard drive, laptop or desktop. Music is originally sourced either from CDs or is downloaded from pirate websites or through P2P filesharing services.

¹⁴ Karthik Subramaniam, "Music Business Bounces Back, Thanks to Mobile Phones," The Hindu, March 25, 2007.

UPDATE ON ENFORCEMENT IN INDIA

Criminal Enforcement: In IIPA's 2008 submission, we reported a disappointing drop in *suo moto* (e.g., *ex officio*) raids in 2007. Unfortunately, the lower level of raids continued through 2008 (after having increased throughout 2005 and 2006). As in 2007, the raids that did occur were principally in the south of India (Kerala, Tamil Nadu and Bangalore) and only on rare occasions in Mumbai and New Delhi. When the police act only on complaint, it becomes necessary for a witness for the complainant to be available for all court hearings. Typically, this process can take up to several years after the raid has occurred and is sometimes an airplane trip's distance away. This ends up making criminal enforcement substantially more expensive and often results in the dismissal of the case if the complainant's witness cannot be, or is no longer, available. *Suo moto* raids, where the police involved become the witnesses, result in expedited trials and more actual convictions (though usually under Article 52A of the Copyright Act, see discussion below).

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). IIPA reported in its 2008 submission that there have been few criminal convictions under the criminal copyright piracy provision of the Copyright Act (Section 63) since January 1, 2000 – reportedly only six for movie piracy (including a 2007 conviction with a seven month prison sentence and a Rs. 55,000 fine (US\$1,332)), and none for software or book piracy. However, that conclusion must now be corrected since, as a result of the police in Tamil Nadu conducting *suo moto* raids, 2007 saw an additional 59 convictions for video piracy, but not under Article 63 but under Article 52A, which criminalizes failure to use the required certificate on videos or sound recordings. Article 52A carries a much smaller maximum fine, the offense is easier to prove, but fines actually imposed are usually very low and rarely exceed \$1000. In the 15 years (through 2007) that IIPA has been working on Indian copyright issues, it has been able to count no more than 16 Article 63 piracy convictions. This appears to be changing, however. The Indian recording industry association, IMI, reports that in 2008 they obtained 60 convictions under Article 63 (and a larger number under Article 52A). IMI also reports that over 2,800 raids were run throughout India in 2008 (2,200 of which were in the south of India), with 193 convictions, most under Article 52A. By contrast, only 63 raids were run in New Delhi, where *suo moto* raids are rare. These raids resulted in the seizure of over 3 million units of pirate ODs. The recording industry also reported increased penalties imposed under Section 52A and Section 63 in 2007, although most still involve small fines and only a few have involved jail time. IMI reports that relationships with the police have improved in 2008 and that 300 criminal cases were commenced.

IMI also was able to work with the police to secure 327 raids against mobile chip piracy. This proved difficult to achieve, however, given the police's lack of awareness and training, and piracy rates in this area continue to grow.

MPA counted 453 raids taken nationwide in 2008. Two raids were made involving Internet piracy and there are 4 Internet piracy cases now pending with the police (from 2006).

Statistics show clearly the problems with the Indian judicial system. MPA has over 3,500 pending criminal cases, the publishing industry 126 cases, the recording industry (mainly Section 52A cases) over 8,000 cases, and BSA has 16 cases. Despite the few convictions for piracy, pretrial detention and permitted one year maximum detentions under the Goondas Act in Tamil Nadu continue to result in some deterrence.

BSA reports again for 2008 that the criminal system has not worked for software piracy. There has never been a criminal conviction for software piracy in India. In 2008, BSA conducted a criminal enforcement action in Bangalore on September 10, 2008 against an individual who was in the business of burning/replicating software of BSA member companies and then selling them at cheap prices to consumers. The modus operandi of this individual was to circulate pamphlets/leaflets in newspapers listing out various software programs and the prices at which they could be purchased from him. He had also provided his mobile number on the pamphlet so that potential consumers could contact him. The impunity with which he was operating is indicated by the fact that he clearly stated on the pamphlet that he was in the business of providing pirated software to those who could not afford genuine software. BSA contacted the Central Crime Branch at Bangalore and informed them of this illegal activity. The Police then agreed to conduct a criminal action against the target based on BSA's complaint.

The publishing industry reports good cooperation from authorities in smaller cities such as Jabalpur, Gwalior and others, with less even cooperation in the major metropolitan areas (Delhi, Mumbai, Kolkata, etc.). Long delays between complaints and action result too often in information leaks or distribution of pirate stock prior to enforcement action. In Mumbai in particular, the industry notes that the IPR section of the police is affiliated with the Social Service Branch, which has other priorities and thus is putting little effort into copyright enforcement. *Suo moto* raids have been almost nonexistent, with Bangalore being the occasional exception.¹⁵ Enforcement on university campuses is rare, especially outside New Delhi. Overall, the industry has seen a decline in the resources and priority given to enforcement against domestic pirate enterprises, and has still not seen a single conviction for domestic piracy. This contrasts sharply with the remarkable cooperation the industry has gotten from Customs officials in preventing export of South Asian editions of books. In June 2008, Customs authorities at Nhava Sheva, Navi Mumbai confiscated and prosecuted a case of export in violation of the copyright law, imposing a fine of Rs 12 lakhs (US\$24,707) on the defendants.

In order to deal with the lack of training and political will of local police, India created a total of 19 IP cells in 2002. However, many of these have stopped functioning as separate units. They continue to exist in certain cities -- IMI reports that the cells that function most effectively are in Tamil Nadu and Kerala (and they conduct many *suo moto* raids). BSA reports that they work with the cells in Delhi and Mumbai, as well as with those in Bangalore, Chennai and Hyderabad.¹⁶ However, even these are under-resourced and incapable of raiding larger production and distribution 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.

Court procedures are overly burdensome; courts are severely backlogged and there are major delays in bringing criminal (and civil) cases to final judgment implicating TRIPS Articles 41, 41(2), 42 and 61. Not only are the penalties imposed woefully inadequate but there are continuing 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 pirates higher up in the supply chain, 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 or otherwise fail to appear, which only further delays the trial. By the time of trial, evidence is often missing or unusable.

What is desperately needed in India, and particularly for the Indian copyright industries, is a national anti-piracy strategy at the central government level, with the ability to link in the State governments (IPR enforcement is a state, not central government, responsibility) in a meaningful, enforceable way. Such a strategy could start with a National Anti-Piracy Task Force with a membership that includes judges, prosecutors and police coupled with significant technical training. Most challenging, however, would be judicial reform. Piracy levels will remain essentially unchanged in India without the creation of efficient and deterrent judicial remedies. Recommendations would certainly include the need for reinvigorating the IP cells, setting up special IP prosecutors in each state and establishing specialized IP courts or appointing specialized IP judges.¹⁷ The principal objectives of such courts or judges would be to:

- ease backlogs (IP judges or courts should begin free of backlogs);
- enforce deadlines for adjudication/resolution of piracy cases, and prevent unjustified continuances;
- encourage completion of a set number of "model" cases with deterrent penalties to deliver a message to the Indian public about piracy;
- adopt case management techniques (we understand progress has been recently made on this and on instituting plea bargaining); and,
- treat piracy as a serious economic crime.

¹⁵ Even then, problems remain with incorrect procedures being followed in the filing of the First Information Reports.

¹⁶ http://www.mumbaipolice.org/%5Cspecial%5Corg_fun5.htm. The Mumbai police have both a copyright cell, dealing with OD and other piracy and a cybercrime cell which deals with software piracy. See also http://indiaedunews.net/Delhi/100_Delhi_Police_officers_get_training_in_Cyber_Crime_at_IP_University_5386/

¹⁷ BSA reports that a criminal and civil IPR court (e.g. the appointment of judges to handle IP cases) was set up in Bangalore in June 2008.

Civil enforcement: The business software industry uses civil litigation as the preferred enforcement route, given the difficulties in the criminal system. The motion picture industry has also used the civil route in certain areas, like cable and satellite broadcast piracy. In 2008, the software industry scaled up its enforcement activity and took 26 civil end-user actions – the most ever. BSA reports that the Delhi High Court has been good at issuing *anton pillar* orders (*ex parte* search orders). In July 2008, that court issued a seminal decision establishing a reasonableness test on what type of information it is necessary to present to show the existence of pirate software at a particular location. As a result of these cases, injunctions have been issued and good settlements reached. BSA is also pressing for the courts to allow the grant of John Doe orders to allow court-appointed commissioners to enter the premises of any suspected infringer whose name is unknown and therefore not named in the complaint and collect evidence of infringement. On the negative side, however, 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 right holders with an alternative to proving actual damages. India should also consider awarding restitution (e.g. damages) to right holders in criminal cases on the basis of per unit seized, given the ineffective civil system in India.

MPA had 16 civil actions pending at the end of 2008 and has had some success over the years in using the civil system to obtain preliminary injunctions against some of the estimated 40,000 pirate cable systems that transmit U.S. films and TV programs without authorization. These preliminary orders against entire cable networks have had some deterrent effect, even though these cases rarely, if ever, come to judgment with damages awarded. Even contempt proceedings brought for violation of such injunctions rarely, if ever, are concluded. Moreover, some networks continue to operate in contravention of the law and in violation of these specific court orders. Proceedings to enforce these injunctions are costly and time-consuming.

A promising development has been the engagement of the courts in a judicial reform process, which has brought some progress in civil cases through alternative dispute resolution and reports are that “plea bargaining” may be instituted in some criminal courts. If the latter is the case, this would greatly help in clearing backlogged dockets and in expediting the criminal process.

Enforcement at the Border: 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) continue the good action taken in 2008 to prevent the export of pirate and low-cost India editions of textbooks, including to the U.S. Customs must develop a database of pirates and counterfeiters, link port information and conduct *suo moto* actions against infringing imports and exports, given the vast import and export problem.

COPYRIGHT LAW AND RELATED ISSUES

Proposed copyright amendments remain deficient: India generally has a good copyright law. IIPA detailed the positive and negative provisions in that law in its 2003 submission.¹⁸

IIPA reviewed the new draft copyright amendments that were placed on the Copyright Office’s website in 2005.¹⁹ In its submissions made prior to 2005, 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 when the Copyright Office in HRD announced that it had completed its work (after at least 6 years in preparation) and was finally opening up the process for full public comment. However, since that time, there has been absolutely no word of further developments and the draft seems completely stalled within HRD.

¹⁸ See IIPA’s 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

¹⁹ The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>. These long-delayed amendments were drafted by a “core group” of Indian government officials and selected Indian private sector and academic experts beginning in 1999-2000.

IIPA reviewed the draft in its 2007 submission and noted 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). Because of the importance of revising this draft to fully implement those treaties, we summarize that analysis again this year:

- **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;²⁰ (b) overbroad exceptions for copying of computer programs, including a provision allowing such copying for any "noncommercial personal use" beyond the usual making of a back-up copy; (c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself; (d) an overbroad exception permitting the performance of films in educational contexts and in "clubs"; (e) an overbroad exception with respect to 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.²¹ 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 directly referenced in the Treaties (though required, IIPA believes, under the Treaties enforcement obligations), the issue of secondary liability of ISPs and exceptions to such liability, has been dealt with in the laws of most countries implementing them. Clarity on such issues is indispensable to the fight against online piracy. 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 again 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.

Most countries in the region (and over 100 countries globally) have implemented the WIPO treaties in domestic law. Given its size and the importance of its copyright industries to economic and job growth in India, it should no longer delay establishing the legal infrastructure for a functioning system for electronic commerce.

²⁰ 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 the copies 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 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.

²¹ 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 enable the pirate libraries to circumvent the law.

India should adopt an optical disc law: With 36 optical disc factories, India should adopt an effective optical disc law. FICCI has been engaged in the drafting process and IIPA has presented a draft to it and the government as well. The lack of progress to date is not justified. Many countries, and most of India's neighbors, have adopted optical disc laws which also cover blank discs -- Hong Kong, Indonesia, Macau, Malaysia, Philippines, Thailand, Turkey, Bulgaria, Montenegro, Ukraine and Nigeria. There has been no evidence that coverage of blank discs in such laws has posed any hardship on companies that are subject to them. Moreover, without such coverage, commercial optical disc burning in large or small venues would not be subject to the law, creating a major loophole that the law should prevent.

Pending criminal procedure amendments on arrest: It has been reported that there is a Code of Criminal Procedure (Amendment) Bill, 2006, which has been passed by the Lok Sabha and the Rajya Sabha and is awaiting presidential assent. It contains a disturbing amendment that would allow for issuance of written warnings instead of arrests for crimes with punishments less than seven years. The amendment leaves the decision of arrest or warning to the investigating officer's discretion. This amendment could have a devastating impact in India by undermining an already weak system of deterrence by sparing defendant's even the hassle and embarrassment of being arrested and having to produce bail.

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 theater, 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 pirates 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 separate legislation, in addition to copyright law amendments, that specifically makes it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre, without the need to establish the ownership or subsistence of copyright in the motion picture. Legislation passed in the U.S. and other countries 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.

TRAINING

IIPA member associations continued to conduct training in 2008.

MPA conducted a training in Bangalore for approximately 70 judicial magistrates in 2008. It launched a Hindi language anti-piracy movie trailer in Mumbai in 2007 that was dubbed into many local languages. It produced a 23-minute documentary on creativity and copyright, which was distributed to students.

The local recording industry association (IMI) conducted more than 75 police training programs throughout the country in 2008. It also sponsored a public relations campaign on piracy for radio, television and the print press.

BSA participated in a Judges Round Table organized by the Tamil Nadu Judiciary Academy and FICCI in July, 2008. Thirty-five judges from the State High Court and judicial officers from the District Courts participated and covered a range of topics on IP protection, information technology, piracy and their impact on the country. BSA also partnered with the Karnataka Center for E-Governance to launch a campaign "Karnataka -- a Leader in Software Asset Management" in November 2008. In April 2008, BSA sponsored and participated in a FICCI/Department of Industrial Policy and Promotion (DIPP) and Ministry of Commerce and Industry seminar on "Harnessing Intellectual Property for National Development." At the seminar, the Minister of State for Industry launched a year long (April 2008-March 2009) campaign, including seminars, workshops and specialized training programs, on the full range of IPR, judicial and enforcement issues in India.

Along with launching the co-branded program with the Karnataka Government mentioned above, BSA also sent out 700 educational mailers to small and medium enterprises in the IT/ITES sector in Karnataka as well as conducted an in-depth educational seminar on the benefits of Software Asset Management in Bangalore.

BSA conducted 2 in-depth tutorials for CIOs from leading Indian private and public sector companies in partnership with the Computer Society of India in Mumbai on the principles of effective Software Asset Management.

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 2008, \$3.96 billion worth of Indian goods entered the U.S. under the duty-free GSP program.

MARKET ACCESS

Many market access barriers in 2008 continue to hinder copyright owners' abilities to participate fully in the market in India.

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 27 to 36%, and constitutes a significant disincentive to the much-needed cinema construction in India. MPA, in association with the Film Federation of India, continues to encourage the federal and various state governments to rationalize the high taxation levels and the Government of India has also stepped in to persuade various state governments to impose a uniform entertainment tax not exceeding 60%. On a positive note, Delhi entertainment taxes have been lowered from 30% to 20%. Citing revenue considerations, however, most other states are reluctant to conform.

In addition, the Indian government regulates uplink and downlink of satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, licensed by the government, and pay prescribed fees per channel beaming into India. In August 2006, the Ministry of Information and Broadcasting released a draft Broadcast Services Regulatory Bill, established a Broadcast Regulatory Authority (BRAI) tasked with setting policies on programming codes, licensing conditions, content regulation, and censorship. The MPA made a submission urging careful consideration of the existing restrictive nature of the marketplace, noting that further restrictive provisions in the draft Bill such as content quotas, foreign ownership limitations would have a significant impact on the growth and expansion of the industry.

Also in August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated "U" can be broadcast on TV channels, reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only "U" rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.

In January 2007, the Telecom Regulatory Authority of India (TRAI) issued regulations prohibiting broadcasters from granting exclusive contracts with any distributors and obligating broadcasters to provide channel programming to all requesting distributors on a non-discriminatory basis. The exclusive contract prohibition, along with "must provide" requirements, eliminates all potential for competition and any incentive to develop programming or buy any "rights." The MPAA presented nine submissions over the past three years, opposing restrictions in the functioning of India's cable and satellite market, arguing that the draft regulation would remove private parties' ability to negotiate standard free market transactions and opining that any restriction on exclusivity limits the quality and quantity of content available to consumers. These recommendations were summarily disregarded. Consultations on tariffs for non-CAS areas remain pending.

Additionally, the MIB amended the Direct to Home (DTH) Guidelines to include, among other things: prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard.

The U.S. motion picture industry faces numerous other market access barriers, including foreign ownership restrictions. Impermissible customs valuation practices that reference projected royalties resulting from the distribution and exhibition of the work, rather than the value of the physical medium on which the work is recorded, are worse than ever and home video and theatrical products are continually held up in customs for several months at a time. Customs continues to demand proprietary and financial documents for the past five years to determine supposedly delinquent taxes, refusing to release products into the market.

Entertainment software publishers' experience with the Indian market is one hindered by the existence of high tariffs on PC game products (with the applied duty rate currently at 30 percent), console game products (tariffs also as high as 30 percent), and game console hardware. Information from companies active in the market suggests that these rates are actually closer to 35 percent. Additional taxes compound to create an environment where legitimate commerce in game consoles is virtually non-existent, and where penetration rates of unauthorized (grey market) consoles are only a fraction of what they would be under less restrictive market conditions. There is also excise duty assessed on PC and other locally replicated products. The current duty rate is at 8.24 percent of the wholesale price, or about 5 percent of the MRP. With tariff rates at this level, the ability of legitimate publishers to compete in the market and establish legitimate distribution channels will continue to be severely hampered.

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.

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia be elevated to the Priority Watch List.

Executive Summary: Piracy problems in Indonesia, including mall piracy, CD-R and DVD-R burning, mobile device piracy, book piracy, end-user piracy, illegal camcording, optical disc piracy, and pay TV piracy, remain severe, and the Internet has emerged as the latest frontier for pirates in Indonesia. As a result, piracy levels in Indonesia remained among the highest in the world in 2008. Piracy robs authors of their rights to a livelihood in Indonesia, and places illegal proceeds in the hands of organized criminals who have no regard for rights, and have been detected of engaging in other organized criminal behavior, such as trafficking in persons, illegal logging and illegal gambling. Promising enforcement efforts continued in 2008, particularly against end-user piracy of software and optical disc pirate production. Unfortunately, other problems remained unchecked. Lack of transparency in enforcement, and corruption in the enforcement process, e.g., leaks, payments by pirates, and interference in the prosecutorial process, mar enforcement efforts. The court system also remains largely unworkable due to a generally inexperienced judiciary and systemic failures which slow cases down or doom them to unsuccessful conclusions (with some exceptions). The government continues to place barriers in the way of legal copyright business, including a new unfortunate requirement to locally manufacture film prints and home videos in Indonesia. The U.S. and Indonesia have a Trade and Investment Framework Agreement (TIFA) through which all of these issues should be more readily addressed and the U.S. Department of Justice presence in Indonesia has carried out helpful capacity building programs to foster better enforcement against copyright piracy in Indonesia.

Priority Actions Requested in 2009: IIPA requests that the government of Indonesia take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Strengthen enforcement aimed at eradicating rampant retail and mall piracy, including landlord liability for mall owners, so that actions taken can have the desired deterrent effect.
- Effectuate enforcement efforts aimed at mobile device piracy.
- Tackle camcording piracy in movie theaters.
- Take actions against book piracy, to protect local and foreign publishers from illegal photocopying on and near university campuses, print piracy, and unauthorized translations.
- Take actions against corporate end-user piracy, to protect local and international business software industry from the use of unlicensed business software for any commercial purpose.
- Address corruption and transparency issues.
- Improve judicial processes, including capacity building to develop a cadre of well-qualified, IP-literate judges so that copyright cases move quickly through the system and result in needed deterrence.
- Expedite the establishment by the Directorate General of IPR (DGIPR) of a "Directorate of Investigation" so that Civil Servant Investigators are authorized to enforce all IP laws and not just handle IP applications and registrations.
- Broaden the work of the National IP Taskforce to include conducting enforcement raids against hard-goods, Internet, and piracy and corporate end-user piracy.

Legislation

- Immediately lift market access restrictions on the 1) alarming new requirement to locally replicate all theatrical prints and home video titles released in Indonesia; 2) direct distribution of audiovisual products; and 3) ban on the broadcast of most foreign programming in Indonesia.
- Enact a modern copyright law to provide for an effective enforcement system in Indonesia, including establishing liability on mall landlords, providing minimum criminal penalties, encouraging service providers to help enforce against Internet and mobile copyright piracy, criminalizing the act of camcording in cinemas, extending term of protection,

establishing special IP courts, establishing IP-related cybercrime provisions, and providing appropriate IP-related border measures.

- Ensure copyright infringement is included in list of crimes which are predicates for being treated as organized crimes, i.e., as grounds for broader criminal investigations, seizure/freezing of assets, deportation, etc.
- Make optical disc regulations more effective, including by 1) making inspections routine, unannounced and off-hours, 2) enforcing against SID Code violations, including gouging off SID Codes and/or total non-use of SID Codes, 3) providing transparency in raids and results, and 4) ensuring that the Department of Industry collects exemplar disks from each plant.

INDONESIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	302.0	86%	226.0	84%	191.0	85%	153.0	87%	100.0	87%
Books	NA	NA	32.0	NA	32.0	NA	32.0	NA	32.0	NA
Records & Music	20.0	95%	20.2	92%	17.2	91%	13.8	88%	27.6	80%
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	87%	32.0	92%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	322.0		255.2		240.2		209.5		191.6	

PIRACY CHALLENGES IN INDONESIA

Retail Piracy/Mall Piracy: In 2008, retail piracy in kiosks and malls remained open and blatant, including factory and burned-to-order CDs, VCDs, DVDs and CD-ROMs of music, movies (including pirate movies in BluRay format), software, and published materials, as well as mobile device piracy (loading illegal copyrighted files onto various mobile devices or carriers) and hard disk loading (in which computers are loaded with the latest software – all of it unauthorized – at the point of sale of the hardware). Major cities including Jakarta, Semarang, Makassar, Bandung, Jogjakarta, Pekanbaru, and Surabaya have hotspots replete with pirate materials (notorious spots include Ratu Plaza, Pinangisia Plaza, Glodok, and Ambassador Mall).

Highly Organized Criminal Syndicate “Burning” Operations: In 2008, pirate “burning” of content by syndicates onto recordable optical discs overtook factory production as the chief form of optical disc pirate production in Indonesia. All indicators suggest that criminal syndicates support illegal production and distribution, with some control by ethnic Chinese groups, and suggest that Singaporean, Hong Kong and Taiwan based operations have influence with several manufacturers in the country. Burned discs are less expensive to produce in non-industrial numbers and thus are an attractive vehicle for less technically proficient or wealthy investors to produce and sell for a lower price than factory-produced discs. Such home-based groups further decrease overhead costs, and many rental houses in Jakarta and other cities have been identified as “home industries” for optical disc burning.

Mobile Device Piracy: The unauthorized loading or preloading of illegal copyright content (songs, movies, TV shows, books and journals, ring tones, etc.) onto mobile devices such as mobile telephones, iPods, other MP3 players, and recordable media such as flash drives and memory sticks, has rapidly increased in Indonesia. Mobile device piracy is a highly organized and sophisticated criminal activity, with main business services even offering franchises to smaller vendors. In the ITC Roxy Mas retail mall, Blok M Plaza, and Blok M Mall, where the majority of shops sell handheld phones and handheld phone accessories, more than 90 stalls have been detected engaging in such uploading.² Similar

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Indonesia. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Market surveys in 2007 indicated that ITC Roxy Mas had 49 such stalls, Blok M Plaza had 2 stalls, and Blok M Mall had 39 stalls.

setups are seen in many shopping malls including Mangga Dua Square, and ITC Mall Kuningan. Shop owners use the illegal loading of copyright content onto these devices as a selling point. In addition, other devices, such as karaoke devices, either in the form of microphone tools or players, are being preloaded with massive numbers of songs without authorization. The Indonesian government started taking some targeted actions in 2007, which continued into 2008.

Book Piracy: Piracy of published materials, especially academic books and journals, in Indonesia remained a major issue in 2008. Significant problems included commercial-scale photocopying (mainly on and near university campuses), print piracy, and unauthorized translations. 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, where photocopied books not only flood the local market but are carried into Jakarta. Most copy centers provide catalogs to facilitate the very open business of copying academic texts for students, and increasingly shops are operating on a "print to order" basis to avoid stockpiling. Illegal operators also take orders from students on campuses and distribute their wares there, even in cases where they are not actually making the copies on campus. The problem is of significant magnitude, and growing. A February 2007 raid in Pondok Gede yielded thousands of photocopies, although the pirate in this case reportedly was arrested and tried, receiving a jail term of two years and seven months.

Camcording Piracy: Camcording piracy is a serious problem in Indonesia, aggravated by the absence of anti-camcording legislation. Seven cases in all were detected between 2007 and 2008 of illegal camcording, in which 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. This usually occurs very early in a movie's theatrical release window or may even occur prior to the film's release (e.g., at a promotional screening). Camcorder pirates 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 well before their intended legitimate debuts. The Indonesia experience demonstrates that at least some of the market for theatrical films is being lost due to camcording, and the government should quickly adopt anti-camcording legislation and implement the same to avoid becoming a haven for this harmful activity.

Business Software End-User Piracy and Government Legalization: The willful use of unlicensed or pirate software in the workplace continues to cause the greatest losses to business software companies in Indonesia. The software piracy rate in Indonesia improved slightly from 85% to 84% between 2006 and 2007, but still exceeds the Asia regional average of 59%. Failure to deal with software piracy harms Indonesia's local economy. A January 2008 study done by the International Data Corporation (IDC) with the Business Software Alliance concluded that decreasing Indonesia's software piracy rate by ten percent over a four year period to 2011 would add US\$1.8 billion to Indonesia's economy, create 2,200 new high-wage high tech jobs and generate an additional \$90 million in tax revenue. Failure to deal with software piracy in the government sphere sets entirely the wrong example. Thankfully, the government of Indonesia has promised to legalize the public sector's use of software, following through on the January 13, 2006 Indonesian Ministry of Communication and Information (MOCI) and Microsoft Memorandum of Understanding (MOU) to legalize government use of its products on government computers. Implementation of the MOU, and legalizing all government software usage, will strengthen the government and law enforcement's credibility when conducting IP education and enforcement efforts.

Internet Piracy: Internet usage in Indonesia has exploded over the past several years, and there are now roughly 25 million Internet users throughout Indonesia as of May 2008 (according to Asosiasi Penyelenggara Jasa Internet Indonesia, APJII, Indonesia's Internet service provider association), or roughly 10.5% of all Indonesians (by contrast, only 2 million Indonesians had Internet access as of 2000). While broadband penetration remains relatively low, at 241,000 broadband connections as of May 2008 (according to the International Telecommunications Union, ITU), this represents a 123% growth year on year. There are now 78 known illegal download sites of great concern to the industry, although some of these sites are located outside Indonesia. There are also some indications that Internet sites are being used to advertise the distribution of hard goods pirate materials. While industry reports that a new Cyber Law was just enacted, and that generally ISPs are cooperating with right holders, the Ministry of Communication and Information needs to devise a strategy to deal with growing Internet piracy in 2009, including mechanisms to ensure removal of infringing content and dealing with illegal P2P file sharing.

Optical Disc Plants: There remains production overcapacity in the two to three dozen optical disc factories.³ The government has been responsive to this problem with some significant raids, as highlighted below.

Signal Theft/Pay TV Piracy: Signal theft – the unauthorized transmission of broadcast or pay TV signals – has gradually worsened in Indonesia. For example, in 2008, the Cable and Broadcasting Association of Asia (CASBAA) estimates there are between 500,000 to 1,000,000 illegal connections, a significant increase over 2007. 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. There have been reports over the past couple of years that the Indonesian Broadcasting Commission (KPI) considered 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.

Unlicensed Use of Music/Videos in Karaoke Lounges: Most karaoke lounges use videos and music without authorization or proper payments to right holders.

ENFORCEMENT CHALLENGES IN INDONESIA

Copyright owners in Indonesia obtained mixed enforcement results in 2008 in Indonesia. On the one hand, industry continued to enjoy fairly good relationships with the local authorities, from MABES (Markas Besar); the Federal Police and their economic crime unit at Bareskrim, at MABES Jakarta Headquarters; the Trade and Industry Crime Unit, KRIMSSUS (Jakarta Metro Special Economic Crimes); and the Department of Industry, Downstream Chemical Division.⁴ These relationships, and some positive support from the U.S. Department of Justice's "International Criminal Investigative Training Assistance Program" (ICITAP) advisors, resulted in some targeted enforcement actions in 2008 against key problem areas. Right holders also began to obtain some clearer results in 2008 in the way of criminal convictions in cases involving optical disc factory production piracy, mobile device piracy, and end-user piracy of business software. Cases are pending against pirate "burning" operations. These are hopeful developments.

On the other hand, there has been relative inattention to many piracy problems, such as mall piracy (and imposing landlord liability), camcording piracy, and book piracy and legalizing use of academic materials at educational institutions. The judiciary remains a problem area for right holders, as judges are generally inexperienced in handling copyright cases, there is lack of prioritization of such cases, cases take an unusually lengthy period of time to adjudicate, and there is a general lack of transparency leading to less than ideal results in many cases. Finally, other systemic problems persist among police and prosecutors, including corruption, leaks prior to raids, payments by pirates, and other interference by pirates between the time of the raid and the decision by the public prosecutor to take action to criminal court. Another abiding problem is lack of resources, as Police in Indonesia have literally only a few dollars per case, which is woefully inadequate. Other issues include the lack of will from the Attorney General's Office in some cases to prosecute once a raid has been run, or prosecutors rejecting various aspects of the police case file.

Optical Disc Factory Raids Result in Seizures, But Improvements in Methods Sought:⁵ Anecdotal enforcement results for the record industry in 2008 include: 112 cases pending prosecution; 13 arrests; 78 stampers seized; almost 3.5 million pirate optical disks seized; 1,170 CD-R/DVD-R burners seized; 8 injection molding machines seized; 2 bonding machines seized; and 34 sacks of optical grade polycarbonate seized. In one case, an August 2007 raid on registered optical disc manufacturer, PT Multimedia Replikasi Plastikatama, resulted in the criminal conviction of the plant operator, who was sentenced to 30 months imprisonment in 2008. The integration of a new optical disc forensics lab installed at the National Police Central Forensic Laboratory (PusLabFor) will hopefully lead to more raids, and some have

³ Previous reporting indicates the existence of as many as 31 plants, with a potential to produce many hundreds of millions of discs per year. Indonesia has also been home to manufacturing facilities for "stampers" and masters used to mass produce discs. Past issues have included factory-sourced pirate product found in Indonesia and having been exported with source identification code (SID Code) gouged off to hide the identity of the plant, or product with no code at all. This is an issue that should be resolved by Department of Industry in its implementation (and revision) of the Optical Disc Regulations (2004).

⁴ MABES (Markas Besar), the Federal Police, and their economic crime unit, Bareskrim, at MABES Jakarta Headquarters, have been helpful on raids, including raids against end-users of business software. The Trade and Industry Crime Unit also works well with copyright owners, and have obtained some criminal convictions. KRIMSSUS (Jakarta Metro Special Economic Crimes) has been principally involved in conducting operations against pirate retailers. The Department of Industry, Downstream Chemical Division, is empowered to regulate optical disc plants and has "Plant Monitoring Teams."

⁵ In its 2008 Special 301 report on Indonesia, IIPA reported in detail "three significant optical disc factory raids" conducted by *Bareskrim*.

noted that raids have resulted in driving down prices for legitimate product and worsened the availability and quality of pirate products in the Indonesian market. IIPA has at the same time noted five areas in need of improvement: 1) factory visits must be routine, unannounced and at varying hours; 2) source identification (SID) code violations including obscuring or gouging of the SID code, and the non-use of SID code, are not being punished; 3) inspection actions are not being reported to right holders (lack of transparency); 4) notices of temporary suspension of licensed plants caught in the act should be made permanent, unless and until such time as the plant is adjudicated not to have violated the optical disc plant regulation; and 5) the Department of Industry should complete building a comprehensive library of exemplars of discs from the plants.

Several Raids Against Burning Operations Commence: According to recent reports, several CD-R and DVD-R burner operations were shuttered in 2008 (with at least one focused on software and games and another on movie and music titles). Specifically, in August 2008, the Special Crimes United of Jakarta's Metropolitan Police undertook three raids during a twelve-day period in and around Jakarta. Thousands of pirate movies were seized during the raids as well as more than 400 CD-R/DVD-R burners, with one target alone supplying 280 burners. The police detained 17 suspects during the raid and prosecutions are ongoing. While pirate "burning" operations remain in business in Indonesia, these raids represent a significant start toward driving the problem underground.

Targeted Enforcement Against Mobile Device Piracy Commences: In late 2007, *Bareskrim* in Jakarta took initial actions against operators engaging in mobile device piracy. In one set of raids in late 2007, law enforcement officers seized more than 60 computers, each holding an average of 28,000 illegal music files. In May 2008, following a survey on the availability of illegal music downloads conducted by the recording industry, the Indonesian police took enforcement actions against the largest operator called Download Mania in Roxy Mas Mall in Jakarta. Subsequently, three other franchises of the same company were raided. It was reported that on June 4, 2008, the operator, "Download Mania" was convicted of copyright infringement and sentenced to eighteen months in prison and had all the equipment involved in the infringing activities (including 40 computers) confiscated. IIPA members report one other conviction for mobile device piracy including a jail term, which is currently on appeal. IIPA welcomes the recent raids but notes that given the magnitude of the problem, even more activity will be required to get mobile operators in Indonesia to cease supplying pirate materials.

Government Proactive in Business Software End-User Piracy Raids: Some 37 raids against corporate end-user piracy ensued in 2008, resulting in three arrests, and the commencement of 15 criminal cases (24 cases in all remain pending according to the Business Software Alliance).⁶ Specifically, the Indonesian National Police proactively enforced the Copyright Law through various *ex officio* raids against end-user software piracy in business settings. Some regional police commands in certain provinces signed Memoranda of Understandings with the Business Software Alliance to run joint enforcement programs. Some big companies were targeted in 2008, including state-owned corporations and multinational companies, a major achievement. To increase public awareness and as part of their public relations campaigns, the police publicly announced raids run in 2008 by holding press conferences or media briefings. However, as noted below, lack of transparency remains an issue in Indonesia for the business software industry.

Book Piracy and Legalizing Use of Academic Materials at Educations Institutions Should be Addressed More Effectively: IIPA calls upon the government of Indonesia to take swift effective actions against book piracy, to protect local and foreign publishers from illegal photocopying on and near university campuses, print piracy, and unauthorized translations. As one step, the Indonesian government should work with rights holder groups, such as the local publishers group, IKAPI, to tackle this problem effectively and take steps to legitimize the use of published materials at schools and universities. Active roles should be taken by university administrations, including formal policies mandating use of legitimate materials on campus as well as campus based anti-piracy campaigns. In 2008, there were some improvements in faculty attitudes toward copying, and more must be done in this regard. A 2007 anti-piracy campaign by the University of Indonesia's business faculty set a good example that should be augmented and expanded. Publishers report that some lecturers at universities have continued to encourage students to use legitimate materials in their classrooms, and this should be encouraged through official channels. Especially commendable are efforts of particular

⁶ Industry reports there were two criminal convictions in 2008 in cases involving end-user piracy of business software.

campuses, departments and lecturers under the direction of Bina Nusantara University and Master of Management University of Gadjah Mada.

Judiciary Capacity Building Needed: As the number of criminal piracy cases before the courts increase, the judiciary must become more nimble and address some systemic concerns. It is imperative that steps be taken in 2009 to improve judicial processes, including capacity building to develop a cadre of well-qualified, IP-literate prosecutors and judges so that copyright cases can be decided justly and move quickly through the criminal system and result in needed deterrence. A website to report the status of cases in the system would allow right holders to assist and provide necessary transparency for right holders and deterrence against pirates in these cases. Trainings specifically focused on special problems in copyright cases could be helpful. Issues might include mobile device piracy, Internet based infringements, camcording piracy, end-user software piracy, “mod chip” or other circumvention device manufacture or distribution, and book piracy.

Transparency Issues Remain Unresolved: Lack of transparency in the enforcement system hinders effective enforcement and deterrence in Indonesia.⁷ For example, Customs regularly fails to inform right holders of instances of pirate imports. In many cases, right holders are not informed about raids when they happen, seizures at the borders, and even court decisions involving their products. As another example, in some jurisdictions, end-user software raids do not get reported to right holders, and there are no formal records of criminal convictions. In many instances, once the Business Software Alliance representative has assisted in the police investigation, the communication ends, with police frequently failing to notify BSA of the results of their investigations and simply dropping or closing the cases. This lack of transparency results in right holders not being able to assist in raiding preparations before they occur or help prepare case files after raids occur. These transparency issues should be resolved, so that the government of Indonesia can clarify its enforcement record, and increase deterrence.

TRAINING AND PUBLIC AWARENESS

Various Industry Trainings Provide Capacity Building Assistance in 2008: In 2008, as in previous years,⁸ the copyright industries conducted and participated in various training and public awareness activities in Indonesia. Throughout 2008, the local record industry group, ASIRI, held various trainings, including one on piracy investigations for the National Police Detective School. The recording industry group participated in anti-piracy campaign through mass media and by giving speeches in several seminars/workshops in 2008.

- In May 2008, the Business Software Alliance (BSA) jointly hosted a seminar with the U.S. Commercial Service for about 50 public prosecutors on software piracy.
- In June and July 2008 the BSA and Indonesian National Police hosted two capacity building events in Bandung, West Java, on corporate end user piracy. These seminars were attended by more than 225 participants, including police, prosecutors, judges and civil service investigators.
- In 2008, BSA lectured at the CID Training Center of the National Police for the second time on software piracy. This was attended by about 35 police where are taking courses on IP crimes.
- MPAA undertook two anti-camcording training exercises for theater personnel in Indonesia in 2008.

U.S. Department of Justice Training Assistance Brings Attention to Optical Disc Piracy Problem: IIPA members note some positive effects emerging from a pilot training program from the United States. Beginning in October 2006, the U.S. established as a pilot program the “International Criminal Investigative Training Assistance Program” (ICITAP). This program, comprising an anti-piracy enforcement initiative, and an optical disc piracy initiative, has led to some concrete positive results, in terms of facilitating better enforcement against copyright infringements, and building

⁷ For example, in the 2008 Special 301 report on Indonesia, IIPA reported, “the Police reported in 2007 that one of the operators of a factory raided in early 2006 by *Markas Besar* (MABES) had been prosecuted and jailed,” and “the *Krimsus* Jakarta Police have apparently processed many cases against pirate burner operators and pirate disc retailers” but without informing right holders. In addition, some IIPA members have not enjoyed significant cooperation with Indonesian Customs, which has not been transparent, as evidenced by the small number of seizures reported over the years.

⁸ Training activities in 2007 are highlighted in the 2008 Special 301 report on Indonesia, but included motion picture industry programs on illegal camcording in cinemas, record industry trainings on identifying pirate product and optical disc piracy forensics, and business software industry trainings on software asset management for businesses, capacity building for police, and general copyright matters for students in the “BSA Goes to Campuses” program.

capacity, mentoring, and providing technical assistance to optical disc factory inspection teams that include officials from the Department of Industry (DOI), Police, Customs, the Department of Trade and the Directorate General of Intellectual property Rights in implementing the provisions of the optical disc regulations. In particular, on the training side, ICITAP has conducted hundreds of man hours of training during 2006 and 2007, to hundreds of recipients, on topics ranging from methodologies of infringers, product identification addressing pirate optical disks; police operational training as a step-by-step guide on investigating, interdicting, prosecuting and reporting on intellectual property theft, database development for case management; and Department of Industry training on the use of digital photography equipment, sample collection, and the inspection of machinery and records at factories. IIPA appreciates all that has been done under the auspices of this program, and hopes that its benefits can be replicated in future years, and expanded to other countries in need of such training and assistance.⁹

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Implementing Regulations Still Lacking: Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) (effective July 29, 2003) (Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta). Regulations dealing with “rights management information” (RMI) were finalized in 2005, 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.¹⁰ Indonesia was the first country to join the WCT, on June 5, 1997 (in force March 6, 2002), and Indonesia joined the WPPT on February 15, 2005.

Amendments Needed to Modernize Protection: Reform of the Copyright Law has been in the works for a couple of years, and IIPA understands that a draft set of amendments emerged in 2008. IIPA encourages the Indonesian Government to ensure that any proposed changes are open for public consultation and comment. The following issues should be dealt with in any amendment, to ensure that the law meets the needs of the modern copyright system and keeps abreast of the latest in international and WCT and WPPT obligations:

- **Provide Rights for Producers of Sound Recordings, Including Those in Line with WPPT:** Producers of sound recordings must be granted exclusive rights to control the dissemination of their products over the Internet; these include an exclusive communication to the public right including all forms of wire and wireless transmissions (including broadcast) as well as exclusive distribution and public performance rights (see below regarding “publication” right). Producers also need the ability to authorize or prohibit importation into Indonesia of copies of phonograms, and the right to control the distribution of copies of phonograms.
- **Modernize Term of Protection:** Term of protection should be provided consistent with international trends and U.S. standards (e.g., life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years).
- **Provide TRIPS-Compatible Protection for Pre-Existing Works/Related Rights:** While Article 74 confirms that prior regulations shall remain in effect except where contradictory with the new law, and Article 75 confirms the continued validity of previously issued copyright registrations, provisions should be added in an amendment or regulation to provide Berne/TRIPS-compatible protection for existing works, as well as for producers of sound

⁹ Some of the assistance delivered under the program in 2008 included:

- The development of a database on the extent and availability of pirate optical disks in the Indonesian marketplace, collated through monthly market surveys, and regularly distributed to the Indonesian National Police, leading to some successful raid activities.
- The reported donation of specialized equipment for the integration of an optical disc forensic lab at PusLabFor (the Indonesian police's forensic testing facility), which should enable police, the Department of Industry and the Judiciary to positively identify the source of pirate product both in the domestic market and export shipments intercepted around the world.
- Commencement of a point of contact system for industry interaction with Police.
- Practical training in addition to classroom training. For example, during 2007, ICITAP reportedly assisted the Department of Industry with inspections of the then 30 registered optical disc factories that had been issued source identification (SID) codes. In all, 50 inspections were carried out, with 14 production lines being sealed for non-compliance.

¹⁰ 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.

IIPA is unaware of any articles that deal with TPMs in the Patent Law.

recordings and performers. (We note that Indonesia is already under a bilateral obligation to provide a TRIPS-compatible term to all pre-existing works of U.S. origin.)

- **Ensure Right of “Publication” Encompasses WCT and WPPT “Making Available” Concept:** The author’s right of “publication” in the Copyright Law explicitly includes an exclusive right of “dissemination of a Work, by utilizing whatever means including the Internet, or by any manner so that such Work is capable of being read, heard or seen by any other person.” It appears that the drafters intended this broad right, as applied to works, to satisfy the requirements of the WCT with respect to “communication to the public.” The phrase “read, heard, or seen by any other person” appears to be an attempt to express the “making available” concept and the government of Indonesia should confirm that this phrase covers the making available of a work so that it can be accessed “from a place and at a time individually chosen or selected” by the user. This provision should then be made applicable, *mutatis mutandis*, to related rights.
- **Limit Private Copy Exception to Single Lawfully Obtained Copy:** Article 57 of the Law provides an exemption for non-commercial possession (i.e., would exempt from civil liability anyone who possesses “any work,” as long as the person “obtain[s]” the work “solely for his own need and not using it for any commercial purposes and/or any interests related to commercial activities”), but may amount to an overly broad limitation on liability for copyright infringement, since there does not appear to be any limitation on the number of copies of the work, the format (i.e., analog versus digital), the method of obtaining (i.e., by importation, purchase, off the Internet). This exception must be limited to a single lawfully obtained copy.
- **Fix Adaptation Right Which is Curtailed in Indonesia Law (a Violation of the Berne Convention):** Authors have an adaptation right in Indonesia, but it is curtailed in Indonesia by Article 24(2) and (3) give the author (and the author’s heirs) the right to refuse to authorize *any* “changes” including any change to the “title” or “subtitle” of a work regardless of whether the copyright in that work has been assigned. This right violates the Berne Convention as it would impinge upon the ability to exercise (and to assign) the exclusive right of adaptation in Article 12 of the Berne Convention.
- **Provide for Landlord Liability:** Landlords that do not directly infringe but control infringement of tenants and financially benefit from such infringement should be held liable in Indonesia. This would ensure that all mall owners would be responsible to clean their premises of piracy. We understand the government may be considering something appropriate to hold landlords liable, and we would applaud this move.
- **Provide Minimum Criminal Penalties for Copyright Infringement:** There is a continuing need to provide a minimum criminal penalty clause, including for end-user piracy, and to maintain current maximum sentencing provisions. We understand there is a draft criminal code being considered, but IIPA has not been given an opportunity to review such a draft (and it may be that the minimum penalties will be dealt with directly in the copyright law).
- **Include Anti-Camcording Piracy Provisions:** 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). Preferably standalone legislation, but at least a provision in the proposed copyright amendments, should be enacted to define the act of camcording or recording in cinemas as a strict liability criminal offence. This would enable Indonesian authorities to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement.
- **Establish Statutory Damages.**
- **Maintain *ex officio* powers of authorities to act upon suspicion of infringements.**
- **Ensure Service Providers Fall Within Copyright Liability, and Provide for Notice and Takedown:** With Internet piracy, including P2P downloading, increasing in Indonesia, it is imperative that proper incentives be put into place to ensure service providers cooperate with right holders to curtail such infringing activities. Service providers need to be reminded of potential liability for infringements occurring over their networks, and mechanisms need to be available to ensure removal of infringing content, and ensure assistance to right holders in identifying and removing infringing content and P2P piracy. The new Cyber Law (see immediately below) apparently deals in part with service providers in a horizontal (non-copyright-specific) way.

New Cyber Law Enacted: The government of Indonesia has reportedly just enacted a new Cyber Law, which apparently contains some provisions related to service providers. IIPA has not had an opportunity to review this law, but looks forward to doing so to compare it against the Council on Europe Cybercrime Convention.¹¹ Reportedly, the law requires some technical implementing regulations including those related to ISP liability, although it is already apparently being employed to prosecute cases involving online pornography or distribution of false information through Internet media, although unfortunately not involving copyright piracy.

Need for Organized Crime Statute: It has been established that criminal syndicates behind pirate enterprises which manufacture and distribute optical disks are also involved in many other forms of crime such as trafficking in persons, illegal logging and illegal gambling. As such, the government of Indonesia needs to ensure that copyright infringement is included in litany of crimes which are predicates for organized crime law, i.e., grounds for broader criminal investigations, seizure/freezing of assets, deportation, and other remedies.

Implementing Regulations on New Customs Law: Law No. 17 of 2006 amended Law No. 10 of 1995 apparently improved border and customs measures in Indonesia. The government is apparently now reviewing implementing regulation on this law, which will cover intellectual property enforcement issues; IIPA would hope to be able to review such regulations prior to their issuance.

Electronic Information and Transactions Bill: The government has reportedly enacted the Law on Electronic Information and Transactions, No. 11 (2008) which may prove helpful to right holders. Specifically, Article 5 of the Law allows electronic material (e.g., screenshots, music files downloaded from the Internet, etc.) to be admissible as evidence in court. Implementing regulations remain pending.

Optical Disc Regulations Should be Strengthened and Made GATT/WTO-Consistent: The "Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs" (in force April 5, 2005) can be strengthened by:

- making inspections routine, unannounced and off-hours.
- expressly prohibiting the unlawful use of or manipulation of source identification (SID) code, and enforcing against SID code violations, including gouging off SID Codes and/or total non-use of SID codes.
- ensuring that the Department of Industry collects exemplar disks from each plant.
- provide for centralized licensing of production of prerecorded or blank optical discs.
- remove immediately the Regulations' requirement that imported, pre-recorded discs be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications.
- adequately covering stampers and masters.
- expressly covering exports of discs, equipment and raw materials.
- expressly authorizing forcible entry in an inspection in case a suspect target refuses entry.
- requiring the government to keep records of "permits" and raids run.
- expressly imposing 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,¹² and another on reporting by registered producers.¹³ 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 remains a fear that this importation Decree will be used as a tool

¹¹ 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."

¹² 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.

¹³ 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.

to keep legitimate copyright owners or authorized distributors from importing discs into Indonesia. The government of Indonesia should give assurances that such is not the case.

MARKET ACCESS ISSUES

Indonesia remains one of the most closed markets in the world to legitimate U.S. copyright businesses. The situation considerably worsened in 2008 due to the imposition of a new and totally unacceptable requirement – namely, a local manufacturing requirement for the replication of film prints and DVDs released in Indonesia.

Local Printing Requirement: On November 25, 2008, Indonesia's Minister for Culture and Tourism issued a regulation requiring all theatrical prints and home video titles (e.g., on DVD) released in Indonesia to be replicated locally with effect from January 1, 2009. The Motion Picture Association has met with and written to the Minister of Trade opposing this requirement. IIPA opposes this requirement in the strongest possible terms since it severely interferes with the industry's ability to engage in its business on free contractual terms. There are many concerns, chiefly among them being that existing local facilities are unable to handle both the volume and quality output requirements of the motion picture industry, and that the industry cannot be assured that all security issues have been properly identified and dealt with. The MPA has also met with the Director of the Ministry of Culture and Tourism, the Director of Film of the Ministry of Culture and Tourism, and has written to the Minister seeking another meeting to discuss this most serious issue.

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. IIPA notes the longstanding promise made by the government of Indonesia that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (such opening which occurred many years ago).

Broadcast Law Ban on Broadcasting of Foreign Programming: The "Broadcast Law"¹⁴ bans the broadcast of most foreign programming in Indonesia.¹⁵ The Independent Regulatory Commission (KPI) created by the new Broadcast Law has 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 was challenged as unconstitutional by KPI.¹⁶ Regardless of which regulations govern, the law is onerous and the various market access restrictions and bans on broadcasting should be lifted.

¹⁴ Law of the Republic of Indonesia, No. 32 Year 2002, Regarding Broadcasting (in force February 2003).

¹⁵ 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.

¹⁶ Of particular concern to foreign broadcasters is that the Kominfo regulations (issued on November 16, 2005) were reported to have a number of negative features, including a "made in Indonesia" requirement for pay-TV advertising, which would prohibit regional advertising pass-through. Article 24(5) of Government Regulation of the Republic of Indonesia No. 52 of 2005 Regarding Broadcasting Provided by Subscriber Broadcasting Institutions requires advertising to use a "domestic resource," although it is not clear if this requires the advertising to be made in Indonesia (e.g., it may simply mean Indonesian talent or resources had to be used). Article 24(6) required foreign advertising to be replaced by domestic advertising, and cross-media and foreign ownership restrictions. Support from members of Parliament for KPI's position is believed to have led to the postponement, and likely amendment, of the regulations.

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 2007, \$2.24 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 15.6% of its total imports to the U.S. During 2008, almost \$2.2 billion worth of Indonesian goods, or almost 13.8% of Indonesia's total imports to the U.S., 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.

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be elevated to the Priority Watch List in 2009. Mexico has been on the Watch List since 1999.

Executive Summary: Notwithstanding the generally positive attitudes of Mexican officials responsible for copyright issues, the sheer dimension of the piracy problems in Mexican markets remains severe with no improvement in 2008. Piracy involving hard goods, CD/DVD burning, piracy on the Internet, unauthorized camcording in theaters, street piracy, and unauthorized photocopying at universities continued at high levels last year. IIPA highlights, however, that the efforts of Mexican enforcement agencies have mostly been excellent, and there is a high level of cooperation between authorities and rights holder organizations. Both the criminal authorities (PGR) and administrative agencies (IMPI) worked well with certain rights holders and took significant actions last year, with the exceptions noted below with respect to game piracy. Despite the many raids taken by police, prosecutions remain very few as prosecutors are reluctant to push cases through the system and judges are quick to dismiss cases. Performance by the state governments remains unsatisfactory, with only a handful of state governments interested in combating illegal trade and piracy, and interest by municipal governments is lower. The work of the copyright office, INDAUTOR, was positive for the business software sector but has not fully addressed a key issue for the recording industry. We observe that the lack of results is not the result of lack of dedication on the part of key officials with IPR responsibility, but rather to the lack of adequate dedicated resources and the failure to implement a national anti-piracy plan that both enhances and coordinates federal and state activities. The Mexican Government must not only increase the resources allocated to its enforcement agencies, but it must also significantly enhance its coordination with state and municipal authorities. Judicial training must be intensified. Border measures need to be strengthened. There remains a long legislative agenda of which several critical bills (for example, amending the criminal code to grant *ex officio* authority) need to be addressed in 2009. Eager to find additional solutions to address the growing Internet piracy problem, a coalition of rights holders are meeting with Internet service providers to try to reach agreements on cooperative efforts to address infringing content on the Internet. The Mexican government should direct this discussion to ensure that a high level of cooperation is reached. In summary, the macro view of Mexico remains unchanged: despite commendable enforcement efforts, piracy remains high and there is no effective deterrence in curtailing this pervasive economic crime that harms both Mexican and U.S. creators.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Mexico in order to improve the protection and enforcement of copyrighted materials there which would in turn contribute to commercial benefits to both the U.S. and the Mexican copyright sectors:

Enforcement

- Develop a national campaign that addresses the well-known street markets (San Juan de Dios in Guadalajara) and distribution centers (such as Tepito and Plaza Meave 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 for consumer protection to stop piracy in street markets;
 - Insist that state and municipal governments take actions and be held accountable for fighting piracy at the street level.
- Work with copyright industries on Internet piracy-related investigations.
- Address illegal photocopying by copyshops on or near major university campuses, and involve universities in encouraging use of legal materials by students and lecturers.



- Improve police coordination between federal, state and municipal enforcement authorities, as well as coordination among the various federal agencies tasked with intellectual property protection and enforcement.
- Require the PGR's Organized Crime Division to work closely with the copyright industry and carry out systematic and effective investigations and actions against major pirate organizations involved with organized crime and have strongholds in piracy havens such as Tepito, Plaza Meave, and San Juan de Dios. In addition, this same group should also develop an intense enforcement plan against the Tepito market.
- Require police officials to proactively identify and arrest individuals who are responsible for the large-scale distribution and importation of pirated goods.
- Encourage police officials to authorize and conduct daytime raids in retail areas with high piracy rates which will lead to larger seizures, increased arrests, and greater deterrence.
- Augment the tax authorities (SAT) anti-piracy actions.
- Encourage prosecutors to act swiftly on complaints and recommend maximum sentences, including jail time, to the courts in order to improve deterrence.
- Provide IMPI with additional resources (including personnel) to conduct inspections, and allow IMPI's regional officers to conduct raids in their localities.
- Encourage IMPI to expeditiously issue its decisions and collect the fines.
- Provide INDAUTOR with more resources and facilities to increase its mediation capabilities (which has been useful in software cases), particularly by providing more mediators and mediation rooms.
- Require INDAUTOR to issue tariff rates for the public performance of sound recordings by TV and radio stations in Mexico, consistent with the Copyright Act and Mexico's international obligations.
- Issue deterrent sentences for criminal copyright infringement, including jail time.
- Encourage judges to act expeditiously on applications for search warrants in civil cases.
- Establish *ex parte* remedies (especially injunctive relief) for civil IPR infringement cases in order to fulfill its TRIPS obligations.
- Continue to provide, and expand on, IPR trainings for law enforcement officials, prosecutors and judges.
- Create specialized IP courts.
- Implement stricter Customs inspection of blank media in order to reduce the importations of blank optical media products aimed at the pirate market.
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.
- Implement a framework of responsibility for Internet Service Providers (ISPs), with appropriate incentives for ISP and copyright industry cooperation.

Legislation

- Support passage of bills which would amend the Criminal Code to: (a) give *ex officio* action in copyright infringement cases; (b) impose criminal sanctions for the unauthorized circumvention of technological protection measures; and (c) impose penalties for the unauthorized camcording of films in theaters.
- Support the passage of a bill to amend the Federal Copyright Act to provide technological protection measures for works and sound recordings (amendments here should track developments made on the criminal code, mentioned above).
- Request assistance from the World Intellectual Property Organization (WIPO) to conduct a review of the current copyright legislation in order to fully implement Mexico's WIPO Treaties' obligations. Any further review efforts also should include input from the copyright industries to address some longstanding inadequacies (including NAFTA deficiencies) in the current law.
- Implement legislative solutions to enhance administrative enforcement, such as: (1) end door closures, (2) establish a presumption of infringement in the event of door closures (this would codify the AOS Solutions case), (3) empower IMPI officers to allow officers to be able to amend inspection orders with respect to the address and other information identifying alleged infringer, at the time and site of the inspection, (4) eliminate the two witness requirement, (5) give public faith powers (this is similar to notary powers) to IMPI inspectors; (6) prosecute tax crimes associated with these

IP infringements, and (7) equalize the level of administrative sanctions between copyright infringement with trademark infringement (trademark currently is much higher)

- Support the removal of IP infringements from the Federal Law of Administrative Procedure in order to speed up processes.

<p style="text-align: center;">MEXICO Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008¹</p>										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ²	419.7	80%	527.0	71%	486.6	67%	376.5	65%	326.0	60%
Entertainment Software ³	NA	NA	273.0	88%	182.0	85%	137.7	75%	132.2	76%
Business Software ⁴	497.0	60%	460.0	61%	374.0	63%	263.0	65%	222.0	65%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	483.0	62%	140.0	70%
Books	NA	NA	41.0	NA	41.0	NA	42.0	NA	42.0	NA
TOTALS	916.7		1,301.0		1,083.6		1,302.2		862.2	

COPYRIGHT PIRACY IN MEXICO

Hard goods piracy (also known as physical piracy) of copyrighted materials remains firmly entrenched in Mexico. In recent years, Internet piracy has increased, and that has affected different sectors to different degrees. In order to reduce piracy in Mexico, it is essential to attack its manufacture, distribution, sale and importation.

Hard goods piracy, street piracy, and organized crime: Mexico has widespread, and well-entrenched, street piracy. The main distribution centers for optical disc piracy are well known to law enforcement authorities in the following cities: 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. Although Tepito and San Juan de Dios remain dominant sources for the manufacture and commercialization for different types of illegal products, Plaza de la Computación and Plaza Meave are increasingly becoming sources of pirated products. There remain at least 80 very large, very well-known, "black markets" in Mexico, many of which are well organized and continue to be politically protected. By some estimates, there are at least 50,000 points of sale involved with distributing infringing copyrighted materials. In many street locations, consumers can "rent" or exchange previously purchased pirated product (for films, this would be something like a video club with pirated products). Consumers can also order any catalog product or TV series, often with a 24-hour turnaround time. Raids in Tepito and other large pirate markets are only conducted at night, as it is unsafe for law enforcement to run

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on Mexico under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more on IIPA's global objectives, see our cover letter to this 301 submission at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>

² RIAA reports that the 2000-2005 estimated losses due to recording piracy in Mexico reflect losses experienced by the overall industry, including both U.S. and Mexican record companies. Those losses were calculated using a third-party survey to improve accuracy of the estimate.

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

⁴ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Mexico, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁵ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

actions during the day. Such raids are largely ineffective as the same shops reopen and simply continue their business. While the safety of law enforcement personnel is extremely important, there must be a fundamental shift in the manner in which these raids are conducted. Otherwise, it will remain an unending cycle of raids and seizures with no real impact on the prevalence of piracy in the market. The street markets should be subject to better local control, both at the municipal and state levels. It is very important the Mexican government devise and implement a high intensity enforcement plan for Tepito to systematically identify and prosecute criminal organizations operating in that market.

Because much of the pirated product in the Mexican market is locally manufactured, controlling blank optical media imports becomes very important. Mexico imports much of its blank media: 1.06 billion blank media units in 2007 (699 million DVDs plus 362 million CD-Rs) which increased to 1.3 billion units (715 million DVDs plus 622 million CD-Rs) in 2008, according to customs data. Most of the product comes from Taiwan and the main ports of entrance are in Manzanillo, Matamoros, Reynosa, and Laredo.

Furthermore, it is well known that pirate vendors are connected to criminal groups (Zetas and Familia Michoacana) in popular pirate markets like La Cuchilla in Puebla and Las Vías in San Luis Potosí. The street markets are very well structured, with discrete distribution chains, indicating in many cases that organized criminal syndicates are involved. In 2008, the recording industry identified major criminal organizations operating vertically from the smuggling of blank media to the production and distribution of recorded music and movies CD-Rs and DVD-Rs in areas like Tepito in Mexico City. There has been some positive progress on this element in the past year. According to newspapers in Mexico City, the main importer of DVDs and CD-Rs to Mexico, Ara Agaronian, was apprehended and accused of contraband, tax evasion and fraud, and counterfeiting of documents; the case is pending and the accused has been in jail since his arrest. Also, U.S. enforcement officials led by Immigration and Customs Enforcement (ICE) officers apprehended Jesus Arandona, the main distributor of disks in Tepito, in San Antonio, Texas. As a result of these two apprehensions, the price of raw materials (blank media) doubled in the pirate markets.

A study recently released by the local American Chamber of Commerce (Amcham) showed that 76% of those interviewed admitted to having purchased pirated products. The segment between the age of 16 to 18 has the largest incidence (83%) of such purchases.

Internet Piracy: Internet downloading in Mexico is growing rapidly. There are an estimated 23.7 million Internet users in Mexico, representing about 21% of the population (according to www.internetworldstats.com). The Internet poses two basic challenges in Mexico: (1) the sale of counterfeit/pirate hard goods and (2) the distribution of illicit new releases, subtitles, covers and dubbed versions of films, as well as music, software and books. Piracy exists in both the hosted environment and increasingly on peer-to-peer (P2P) filesharing programs, cyberlockers, and BitTorrent sites. Several pirate servers are suspected to be based in the city of Culiacan in the state of Sinaloa.

The recording industry reports that Internet piracy of music dominates about 90% of the total music market in Mexico. According to a third party survey (IPSOS-BIMSA in 2008), more than 4.7 billion songs were downloaded in Mexico during 2008. This figure represents an increase of 80% from 2007, fuelled in part to a 50% increase in the number of broadband connections in the country. P2P networks are the most predominant form of music piracy, with Gnutella and Ares at the top of the preference for users in the country. Most recently hyperlinks posted on blogs, social networks and forum became a big part of the problem. Although APCM (the Association for the Protection of Film and Music) implemented new tools to remove those links faster, the magnitude of this problem makes it impossible for the private sector alone to combat it.

Reports suggest that the Mexican Internet service providers (ISPs) cooperate with rights holders on infringing content on hosted websites, but cooperation is lacking with respect to infringing activity occurring through P2P protocols. In 2008, the Mexican authorities, led by the Ministry of Communications and Transportation and at the request of several copyright associations, formed a working group with the ISP community. This objective of this working group is to generate a policy that responds to repeat infringers and, if the resulting policy is not accepted by the ISPs, then to prepare an initiative to be presented to the Congress.

Audiovisual piracy: The Motion Picture Association (MPA) reports Mexico has the most prolific camcording piracy problem in Latin America. Thirty-two (32) films of MPA member companies have been stolen from Mexican theaters in the past twelve months. This is a 167% increase over 2007 of illicit camcords sourced from Mexico. Many of these films, such as *Speed Racer*, *Indiana Jones and the Kingdom of the Crystal Skull*, *Horton Hears a Who!*, were stolen from Mexican theaters only one day after their local theatrical release. *The Dark Knight* was stolen from several different Mexican theaters the very same day it was released in Mexico. Copies of these films are quickly distributed on the Internet and reproduced into illegal DVDs for worldwide consumption. Due to its proximity to the U.S. and the importance of Mexico's theatrical market (which is the fifth largest worldwide), the major blockbuster release dates are approaching those in the U.S. Therefore, Mexico has become a potential primary source of Spanish-dubbed or subtitled copies for other Spanish-speaking countries. Yet the main, most economically damaging piracy problem in Mexico for the film industry remains the huge hard goods distribution in the black markets and street vendors, and their association with organized crime; that piracy rate is estimated around 90%. The most noticeable impact has occurred in the independent rental market where studies made by distributors show a huge drop in the number of stores -- from over 6,000 video stores in 2005 to less than 2,400 by June 2008. As noted above, Internet piracy is also a growing concern and notably at Internet cafés where many proprietors are aware of illegal activity and encourage it by offering blank discs to users to burn copies of motion pictures and television programs. In sum, MPA believes that the physical piracy remains its top issue but acknowledges that Internet piracy is growing faster in Mexico for its products.

Piracy of sound recordings and musical compositions: The recording industry reports a substantial growth in Internet piracy in Mexico in 2008. Such piracy is mainly committed through P2P networks, and is impeding the growth of an online music business. As sales of "physical" music products continued its decline in 2008 (a 25% decline in value through November 2008), digital piracy increased dramatically, as mentioned above. Burned CD-Rs and DVD-Rs continue to be the format of choice for almost all pirates in Mexico. Major cities represent most of the street piracy and mobile flea markets ("tianguis") like Mexico, Guadalajara and Monterrey. The legitimate music market continues to be heavily hurt by piracy. The estimated level of music piracy for 2008 rose to 80% (around 120 million units) of the total physical music market, with estimated losses to the recording industry placed at \$419.7 million.

Business software piracy: The Business Software Alliance (BSA) reports that physical software piracy is still the main problem in Mexico, but Internet software piracy is growing rapidly. Local software creators are facing a considerable difficulty in commercializing their products, as the illegal market is gaining market share and power. Tepito and San Juan de Dios, which serve as manufacturing (burning labs) and selling points for pirated software. Lowering software piracy levels would significantly contribute positively to the Mexican economy.⁶ In addition, piracy from "white box" vendors (meaning small local assemblers or non-brand name vendors of computer hardware) continues to be a considerable source of software piracy (usually hard disk loading). BSA partnered with IMPI in 2007 to achieve a record number of inspections with wider geographical coverage, and similar results were obtained in 2008. In addition, BSA has worked with INDAUTOR on a high volume of conciliations (negotiated settlements), with good results, quantitatively and qualitatively. BSA believe that because of its continuing good public-private partnership with IMPI and INDAUTOR and continuing good intelligence work, software piracy is not worsening but remaining at a steady level. BSA reports that preliminary estimated trade losses due to business software piracy in Mexico were \$497 million in 2008, with an estimated piracy level of 60%.

Entertainment software piracy: Entertainment software piracy on all platforms remains at a very high level, remaining unchanged from previous years, despite the industry undertaking increased enforcement efforts in the country. The most damaging form of piracy is hard-goods, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges. Many of the well known markets, such as Tepito and Plaza Meave in Mexico City, are notorious production points and wholesale distribution centers of pirated games and circumvention devices. 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 vast network of retailers through a variety of means, including Mexican courier

⁶ According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Mexican economy could be even bigger if Mexico's PC software piracy rate were lowered by 10 percentage points over the next four years. This would create an additional 3,500 jobs, \$1.5 billion in local industry revenues and \$159 million in additional tax revenues for federal, regional, and local government. See The Economic Benefits of Reducing PC Software Piracy, released January 22, 2008, and available online at <http://www.bsa.org/idcstudy>.

companies. Local CD-burning is common for console and PC games. In addition, the sale of memory sticks containing hundreds of pirated copied of games downloaded from the Internet is on the rise. These memory sticks are used with handheld gaming platforms, which are very popular in Mexico. Further, counterfeit cartridges continue to be imported from Asia, often in component pieces which are then assembled in Mexico. In 2008, Mexican Customs seized over 21,000 counterfeit cartridges. In addition, Customs seized over 46,000 falsely labeled pirated optical discs originating from China, as well as a number of R4 circumvention devices that permit pirated games to be played on the Nintendo DS. Despite these significant seizures, it has been difficult to take action against Mexican importers as the shipped goods are typically accompanied by fraudulent documents, containing false information. Customs brokers appear to be involved in suspect shipments, shielding pirates from detection by law enforcement authorities. Such brokers should be held accountable for their role in facilitating the shipment of suspect goods. Circumvention activity continues to be a significant problem, and occurs openly in many markets. Circumvention is accomplished by the installation of "modification chips" in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated games, or modifying the game platform's operating system to "trick" the system into allowing the play of pirated games (so-called "soft modding"). 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.

Book and journal piracy: Illegal photocopying of academic materials remained a significant problem for the book and journal publishing industry in 2008. On-campus photocopy facilities, both commercial and noncommercial, are regularly used to make photocopies far exceeding permissible levels even under the deficient provisions of the copyright law. Copy shops in and around most major universities routinely undercut the market for legitimate texts. Universities too often condone, either directly or indirectly, infringing activity on campus, and lecturers are known to facilitate and request copying of course compilations consisting of unlicensed content in significant measure from a variety of publishers. 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 not a reliable source of revenue for legitimate companies, though some publishers report that payments have improved a bit. Recent years have seen some enforcement action, and a campaign by the Camara Nacional de la Industria Editorial Mexicana (CANIEM), along with CEMPRO, has been directed to raise awareness of the importance of copyright in these published products. These efforts should continue in 2009, supported by government partnership and action.

COPYRIGHT ENFORCEMENT IN MEXICO

Several federal agencies have been taking actions and working positively with rights holders on investigations and raids. Industries' cooperation with both the PGR (prosecutors, the Attorney General's Office) and IMPI (the industrial property office) is generally good, though the experience varies among industry sectors. For example, the game industry reported that it was not able to conduct raids against key pirate markets in Mexico City for most of the year, including during the critical holiday season. The relevant authorities were unresponsive to ESA's repeated requests for raids, despite evidence of ongoing pirate activity at these markets. INDAUTOR (the copyright office) has, in some limited circumstances, used its administrative authority to resolve some of its cases. All copyright industry sectors confront continued difficulties in achieving results in the Mexican courts. Only recently have the industries started to see some willingness by the federal courts to receive IPR training.

At the national level, copyright rights holders work with various Mexican agencies to support the National Anti-Piracy Agreement, an initiative that focuses on actions and includes public-private collaboration. To centralize efforts, in March 2006, members of several copyright-based industries announced the formation of a new coalition dedicated to fight piracy. The Institute for the Protection of Intellectual Property and Legitimate Commerce (IPIIC) lists its members as: APCM (the film and recording industries), BSA (the Business Software Alliance), MPA (Motion Picture Association), CNIV

(The National Chamber of the Garment Industry), and PRONAPHON (the National Producers of Phonograms). This association gave legal status to the group that was meeting with PGR and other government agencies. Under the aegis of the National Anti-Piracy plan, regular monthly meetings of the private sector and government officials are held to discuss priority actions, and the agenda now includes Internet piracy.

Mexican States also have a role to play in anti-piracy efforts. Anti-piracy actions taken by the States continued to be weak in 2008 which are also encumbered by the lack of *ex officio* authority (discussed further, below). Unfortunately, many of these local governments deflect their responsibility entirely, insisting that enforcement should be done only by the PGR. Only four of the 32 State governments appear to be interested in combating illegal trade and piracy: the State of Mexico, the Federal District, Jalisco and Puebla. Enforcement at the municipal government level is even worse. 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. Even with regulations in place and inspectors to enforce them, local anti-piracy actions have not been taken. There also remains an unfortunate lack of effective communication between the municipal, state, and federal governments on these kind of enforcement matters.

CRIMINAL ENFORCEMENT

Conducting raids and working with the police and prosecutors: A continuing major structural impediment to enforcement is that piracy is still a “private” offense and a complaint (*querrela*) must be prepared by the rights holders and filed with the PGR before the PGR will consider conducting a raid. This is because Mexican law does not provide for *ex officio* action which forces copyright owners to incur high legal costs in pursuing any piracy case. For over five years, the industries have advocated amendments to the criminal code which would permit *ex officio* actions and eliminate the costs and delays associated with filing formal complaints, but this bill still has not been passed.⁷

Several problems remain with Mexico’s approach to hard goods piracy: (1) the police and PGR have insufficient resources to conduct operations; (2) there are no organized anti-piracy campaigns by state and municipal governments; and (3) nothing long-lasting and effective has been done to eliminate the 50,000 points of sale offering illegal music. There are 27,000 points of sale for music and video in Mexico City alone. The copyright industry does appreciate the many coordinated actions and raids taken against the embedded street piracy problem, yet the goal should be deterrence and permanently shutting down these street operations.

The PGR interacts directly with 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. It is believed that results are poor because the state PGR cannot oversee municipal action (yet the industries would be interested in seeing any official data on this initiative).

Another PGR unit, PGR-SEIDF (the “Subprocuraduría” Specialized in Investigation of Federal Crimes), which includes the Specialized Piracy Unit, has worked with industries and achieved significant results in 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 organized crime networks, which are closely associated with the black markets. In 2004, the PGR empowered its Organized Crime Investigative Division, PGR-SIEDO, to investigate piracy and develop systematic

⁷ For example, the burdens of filing complaints are particularly onerous on recording companies since there are numerous sound recordings usually found on a burned disc. Criminal complaints are long and complicated documents accompanied by certified copies of powers of attorney. One power of attorney for every record company affected is required by prosecutors and judges. On top of this, the industry has to produce copies of registration certificates of many sound recordings as evidence of ownership. Finally, our attorneys must show detailed evidence of the location, means and people involved in every case to have better chance of obtaining the search warrant order from the criminal judge. In sum, every successful raid comes after hard work and a lot of paperwork. All of this could improve if the *ex officio* action is adopted in Mexican legislation.

coordination with the private sector. This division has excellent investigators and attorneys and has resources that the other divisions do not have, such as paid informants, wire-tapping authority and witness-protection programs. The specialized "subprocuraduria" for Federal Crimes continued its good level of cooperation with recording industry during 2008. Although no conclusive results were obtained in particular cases, the long term investigations followed positive paths. The fact that this group kept their attention on these cases given the challenging situation faced by the Calderon Administration' fight against the drug cartels offers some hope.

Two years ago the recording and film industries combined their anti-piracy operations into the Association for the Protection of Film and Music (APCM). In 2008, and there was a good level of cooperation with PGR with APCM cooperating with law enforcement on 3,170 raids, which included street actions, labs, warehouses and border operations. This was at a comparable level to 2007 results. The resulting seizures included 7.3 million music CD-Rs, 7.4 million film DVD-Rs, and 23.6 million blank media (CD-R/DVD-R) used in infringing operations, and law enforcement arrested 120 people. Several major actions have taken place. For example, last fall, the PGR received and pursued complaints regarding the unauthorized reproduction of sound recordings in disco clubs in Mexico City and conducted some raids resulting in the seizure of pirate CD-Rs. On July 4, 2008, 300 law enforcement officers (the PGR, the Federal Preventative Police (PFP) and the Investigation Agency (AFIS) plus local and state police) raided, for the third time that year, the infamous pirate market known as "La Cuchilla." Some 100 commercial establishments and 2 laboratories involved in music and film piracy were closed down, and large amounts of equipment and infringing products were seized.

In 2008, APCM collaborated with the PGR to arrest six individuals caught camcording in theaters. While MPA is pleased with these actions and appreciates PGR's cooperation, it is notable that in each of these cases, MPA had to prove commercial intent, which is exceptionally burdensome. Moreover, while the six arrests are an improvement over previous years, the number of illegal camcording incidents in Mexico has more than tripled since 2007. It is clear that if Mexico is to successfully combat illicit camcording, it must pass a law that criminalizes camcording in theaters, which would eliminate the need to prove commercial intent. Although piracy is not yet an *ex officio* crime, PGR has carried out several raids in 2007 on movie piracy without a formal complaint filed by MPA, which was later done with powers of attorneys from the local distributor Distrimax. Some very impressive raids were conducted in Tepito and La Cuchilla, the largest pirate markets. PGR seized more than 7,500 burners. Another interesting initiative carried out by the Municipality of Mexico City is the "expropriation" of downtown venues used by pirates; this effort aims to transform the old pirate markets into legal product distribution centers. The PGR has developed an anti-piracy advertising spot, which provides a toll free number for anonymous tips.

The ESA's anti-piracy enforcement program had several noteworthy actions in 2008 but also experienced (and continues to face) significant difficulties in obtaining raids against two key game piracy havens in Mexico City. ESA conducted two raids in Guadalajara (San Juan de Dios and La Fayuca), which has the largest piracy markets in Mexico, and one at Bazar Lomas Verdes, a significant retail piracy center in Mexico City. The raids yielded over 138,000 pirated games across multiple platforms and over 800,000 pieces of packaging material, as well as 117 burners and 9 PCs. Eleven burning labs were dismantled, including a total of 10 in Tepito in March 2008 and early January 2009. During the March 2008 Tepito raid, PGR seized approximately 290 DVD/CD burners, nearly 29,000 illegal copies of video games and more than 900,000 video game cover inserts. Two significant aspects of the Lomas Verdes raid were that five booths were judicially closed for the duration of the proceedings and the action took place during the daytime, for which PGR is to be commended. Despite these successes, ESA faced great difficulties in raiding two specific game piracy centers in Mexico City. One is a popular retail center that has housed pirate vendors for years and the other is both a significant retail and distribution center. Despite clear evidence of substantial game piracy activity in both areas and ESA's pending criminal complaints (one was filed several months ago and another was filed in early December 2008), PGR for months has refused to raid either area. The lack of raids against these piracy havens has permitted rampant game piracy to flourish, which was particularly damaging this last holiday season as game pirates openly distributed pirated games, profiting from their illegal activities without any fear that they would be shut down by criminal authorities. This situation is untenable and it is imperative that PGR raid these game piracy havens, thereby enforcing Mexico's criminal laws against all game pirates equally, without selectively picking which targets it will raid and which ones it will not.

BSA has achieved a closer collaboration with the State Authorities, especially in Jalisco. There are plans to expand these campaigns to Nuevo León and the State of Mexico. BSA, however, is not taking criminal actions at the municipal level. BSA did not obtain criminal convictions in 2008, but supported 45 street sweeps and 140 channel 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. 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. Unfortunately, the industries report that it has been extremely difficult to gain PROFECO's attention to IPR cases; they lack the necessary resources to do a good job.

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

JUDICIAL ISSUES

Unfortunately, the Mexican judiciary continues to view criminal copyright infringement as a minor offense, and issues very few deterrent sentences. Problems also remain with civil litigation. The litany of problems below remain familiar:

First, there remains the challenge for PGR prosecutors to effectively prepare the criminal cases, issue the indictments and fully prosecute the cases before the courts. The number of cases is still far below what is needed to have any significant effect on the marketplace. From the industries' perspective, the glaring problem remains the scarcity of full prosecutions.

APCM reports that there were 120 arrests made in 2008, and there were 7 convictions last year. There was, however, an unprecedented case that had terrific results. APCM reported that in May 2008, a 26-year old defendant who sold music, films and TV series throughout Mexico and abroad through his website was sentenced by a court in Cuernavaca to serve a prison term of 6 ½ years and pay a fine of 9,000 days minimum salary (about 424,400 pesos, or US\$29,500). BSA did not obtain any criminal convictions during 2008, and obtained only one (3 years in prison) in 2007.

Second, Mexico should consider adoption of mandatory sentencing regulations for criminal copyright cases, or the Supreme Court itself should set out recommended guidelines. Sentencing guidelines could greatly assist judges in deciding to impose higher sentences under current law.

Third, Mexico's three-tiered civil procedure system, involving actions in the first instance, the second instance and the Amparo hearing makes civil litigation more complicated, more time consuming, and more costly for the right owners. A related issue is the very long time it takes to resolve cases. For example, BSA notes that cases brought under the current law of industrial property progress excessively slowly, with some cases taking up to ten years. BSA believes there has been some improvement as some federal judges are exhibiting more interest in IPR cases; for example, Mexican law does award full validity to electronic documents and discovery, but some judges are still not familiarized with it.

Fourth, Mexican civil enforcement lacks *ex parte* measures on civil procedures to stop serious infringements and avoid the destruction of evidence. Mexico fails to comply with the TRIPS agreement on providing effective measures for IPR violation cases. There are no injunctions granted by civil courts to stop infringements, to seize allegedly infringing merchandise or to gather evidence/avoid the destruction thereof. In view of this problem, BSA stopped bringing civil suits regarding copyright infringement several years ago. The other major problem is that damages can only be collected after the infringement decision has become *res judicata*. This means that a rights holder must litigate in IMPI, the Tax Court and Circuit Courts, and after approximately eight to ten years of litigation, the rights holder is entitled to claim damages in a civil

court. This could take an additional two to four years. The *res judicata* prerequisite for damages related to copyright infringement was confirmed by the Supreme Court in 2008.

Fifth, there remains a need to create specialized IPR courts in Mexico to streamline efficiencies. Notably, in the last quarter of 2008 Internet-accessed courts were established to curb corruption in the search warrant request process. Through this new process, documentation and evidence for search warrants are submitted to the court via the Internet. The judges remain unknown to the parties, thus sheltering them from bribes and external influence. The Tax Court created a specialized Intellectual Property Court in 2008. Three Magistrates were appointed recently. Federal Circuit Magistrates are advancing the concept of a Federal IP Court, at the Circuit level.

ADMINISTRATIVE ENFORCEMENT

The two administrative agencies that work on copyright matters are IMPI and INDAUTOR. The copyright sectors have different experiences with these two agencies.

IMPI and administrative copyright enforcement: The business software, entertainment software and film industry work with IMPI for certain administrative enforcement efforts as well as coordinate with IMPI (and INDAUTOR) in public awareness campaigns.

Business software sector: BSA reports that 2008 reflected excellent cooperation with IMPI. The business software industry appreciate the coordination and assistance of IMPI that resulted in an unprecedented volume and quality of cases. BSA reports that in 2008, there were approximately 1,300 IMPI actions taken (about 1,100 *ex officio* and 200 *ex parte*, also known as "full raids"). IMPI is conducting more than 200 *ex officio* visits monthly on software matters. BSA notes that IMPI strengthened its administrative enforcement efforts last year by not allowing oppositions to the inspection visits, after the inspection has started. Over the past two years, IMPI has been improving its work against door closures (cases where the targeted suspect simply closes the door to the IMPI inspectors who can take no further action other than issuing a fine). In 2005, there was a favorable court case that enhanced 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 soon implemented that criterion in-practice. IMPI also has begun to impose fines on door closers, shortly after the raid, and the amount of the fines is also increasing considerably. The imposition of immediate, exemplary fines on door closers is a positive development.

BSA believe the following legislative solutions could further help administrative copyright enforcement: (1) end door closures, (2) establish a presumption of infringement in the event of door closures (this would codify the AOS Solutions case), (3) give more powers to IMPI officers so that they can amend the address and other identification information of the alleged infringer, at the time and site of the inspection, (4) eliminate the two witness requirement, (5) give public faith powers (this is similar to notary powers) to IMPI inspectors; and (6) prosecute tax crimes associated with these IP infringements.

Sound recording sector: For the second year in a row, IMPI continued its actions against cyber cafes offering access to P2P networks in Mexico City, Guadalajara and other important locations. In 2007, AMPROFON and IMPI signed an agreement to conduct 80 administrative procedures every month against the illegal downloading on cyber-cafes, mainly in the capital city area. This program worked out extremely well during 2008. IMPI continued its 80 administrative actions per month, mainly in capital city area. These actions helped to reduce the amount of illegal music file exchange in the Internet cafes in Mexico. IMPI deserves credit for its consistency in its actions. In fact, many of the raided Internet cafés have now posted information in its premises warning their customers about the legal consequences of the illegal downloading of sound recordings and movies; this is an educational element in this campaign that needs to be recognized.

Motion picture sector: During 2008, MPA worked with IMPI on educational efforts, including collaboration on an anti-camcording campaign, which would benefit both Mexican and U.S. filmmakers, as well as Mexican theater owners. In 2008, MPA and IMPI developed new signage for theaters warning that camcording is a crime. MPA has also been working with IMPI, the RTC (Radio, Television, and Cinematografía), and home video retailers on an agreement that would address Mexico's serious parallel import problem.

Entertainment software sector: ESA continues to have a positive level of cooperation with IMPI, though given the nature of the videogame industry's piracy problem in the country, much of the action in 2008 was focused on efforts through PGR. The ESA participated in IMPI's IP inspectors campaign and supported the "Digital Animation Campaign: It all Starts With An Idea, And It Could Be Yours," which also involved BSA.

Industries' views and experiences with INDAUTOR are mixed: It is important that INDAUTOR continue to train, and receive training for, its staff on key copyright matters. With respect to public awareness initiatives, it should continue to issue general information to the public about the importance of copyright in the local culture and economy.

INDAUTOR--conciliations in software end user cases: During 2008, BSA worked with INDAUTOR and held approximately 130 conciliation meetings (*Juntas de Avenencias*) with end users, a slight decline from the 192 actions in 2007. These actions are an alternative to litigation, and parties are given the opportunity to talk about a specific infringement situation and reach an amicable solution. With respect to improving its activities in this realm, INDAUTOR should consider two possibilities: (1) creating a new Center to handle arbitrations, mediations and negotiations, both physically and electronically, and (2) adding more conciliation rooms (*salas de avenencia*) and more mediators.

INDAUTOR—regrettable failure to issue public performance tariffs: INDAUTOR is responsible for supervising the collecting societies in Mexico. INDAUTOR has unfortunately not fully addressed the issues for which it has jurisdiction during 2008. For example, INDAUTOR has not yet issued rates for the broadcasting of sound recordings in TV and radio stations. The recording industry acknowledges that the initial attempt by INDAUTOR to set rates were questioned by competition authorities. However, the project was allowed to completely stall and has not moved from that point, leaving producers and performers uncompensated for the commercial use of their recordings, in violation of Mexican law. Subsequently, the industry held several meetings with INDAUTOR, requesting that the agency re-start the proceedings to publish the public performance rates (tariffs). Despite investing more than 3 years in discussions, INDAUTOR strongly suggested that the industry should continue negotiations with broadcasters and hotel chains but with no dateline. This agency's inaction has contributed to confusion in the marketplace. The needed action is simple: INDAUTOR should, consistent with the provisions in the Copyright Law, issue the tariff rates that follow international standards for the performance of sound recordings by TV and radio stations in Mexico

DISCUSSIONS / COOPERATION REGARDING THE INTERNET

Actions in the Internet space: With respect to Internet piracy, APCM has worked with IMPI on administrative enforcement measures with most cases followed with sanctions. APCM reports that it issued 162 cease and desist letters, and worked to take down 140 hosted web pages, 215 permalinks, 38 auctions sites, plus 833 P2Ps links and 50,238 cyberlocker links.

The film and music industries report that they have received a decent level of cooperation from major Mexican ISPs involving hosted content, such as the removal of illegal music files posted on WebPages and forums. However, in the case of P2P filesharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have to-date been reluctant to take any actions.

Legal concerns: There is no specific Mexican legislation establishing responsibility for ISPs in piracy cases. It is assumed that ISPs are subject to the general liability principles contained in the Civil and Criminal Codes. Obtaining IP (Internet protocol) addresses, usage patterns, and subscriber contact information is complicated and slow. Depending on the ISP, it is difficult to obtain full identity information of alleged infringers in a civil case. Furthermore, specific provisions in the Telecommunications Law prohibit ISPs to disclose personal information on customers except by competent authorities during the investigations of criminal activities. As a result, some groups (such as the recording industry and MPA, via APCM) turn to pursuing criminal actions with the police in order to get the required information and move forward against the Internet targets.

File sharing committed through P2P networks is not considered a serious legal violation on civil courts mainly because there are no precedents supporting rights holders' actions. On the criminal side, Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement and that is why, for right now, nobody can be effectively prosecuted in Mexico on P2P cases. Even if the case (say, in the hosted environment) goes forward on a criminal basis, the historical concern about the ability of police and prosecutors to investigate the case swiftly and prepare it fully come into play. Fortunately, APCM did obtain a significant criminal conviction in the hosted environment last year. The lack of specific Mexican laws results in a lack of certainty for ISPs on how to react to Internet piracy and notice and takedown notifications from the copyright industries.

Meetings between some copyright sectors and the ISPs: In order to address this uncertainty which is contributing to Internet piracy, a coalition of rights holders that includes the authors' society (SACM), the motion picture industry (MPA), the recording industry (AMPROFON), the music publishers (EMMAC) and book publishers (CEMPRO), in 2008 submitted a petition to the Communications Secretary to launch a negotiation roundtable with ISPs to find ways to reduce the availability of unauthorized content online and to govern ISP responsibility. A working group (the Commission for Internet Piracy Mitigation) has been formed between the coalition and the Ministry of Communications and Transportation, to find solutions to online piracy. Entertainment software publishers are also participating in the working group discussions.

As of mid-January 2009, three meetings have been held under the auspices of the Ministry of Communications and Transportation, with the parties exchanging proposals to be embodied in an agreement, the elements of which thus far include: (1) a notification procedure, (2) a stepped approach to subscriber termination, and (3) deterrent sanctions against serious or repeat offenders. IIPA urges the Government to remain involved in this exercise and to ensure that an outcome is reached that greatly enhances the cooperation between rights holders and ISPs in addressing infringement over information networks, and that provides much needed security and accountability in the online space.

BORDER ENFORCEMENT

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, undervalued product and/or NAFTA violations. APCM seized about 24 million units in 2008.

To address these concerns, PGR established a task force in 2007 consisting of Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. The task force works on individual projects as needed. Also, it is important 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 control blank media exports from Southeast Asia that pass through the U.S. to avoid tax burdens.

Customs Anti-Piracy Initiative: In 2008, Customs began an anti-piracy initiative through which it (1) conducts regular trainings of Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product; and 2) holds monthly meetings with industry members to review the results of the trainings and any improvements that could be made to border enforcement. The game industry has reported positive results from this initiative, including an increase in the number of Customs seizures of pirated games at various ports. In 2008, Customs seized 78,408 pirated games and numerous R4 circumvention devices.

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 a 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.

COPYRIGHT AND RELATED LAWS IN MEXICO

Mexico still has not implemented the obligations of the WIPO Treaties (which Mexico has ratified) into its domestic legislation. In addition, many bills that would strengthen enforcement were not acted on in 2008 and have been pending for years.

Current Legislation

Federal Law on Copyright (1996, as amended): Amendments to Mexico's 1996 copyright law entered into force on July 24, 2003. Regulations to implement the 2003 amendments were issued two years later, in September 2005. The copyright industries worked diligently to shape some of the more troubling parts of this legislation and regulations. Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) in 2002, but still has yet to publish the WCT and WPPT Agreed Statements.

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, 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. The major corrections needed in the current law would include, for example:

- Adding definitions and provisions on technological protection measures (TPMs);
- Adding definitions and provisions on rights management information (RMI);
- Clarifying the definition/scope/drafting of exclusive rights, especially regarding the rights of making available and communication to the public;
- Strengthen rights of performers and producers of phonograms to ensure they have exclusive communication to the public rights as well the ability to establish enforceable broadcasting and public performance tariffs;
- Narrowing several Berne- / TRIPS- / NAFTA- overbroad limitations and exceptions to protection;
- Proposing amendments to free-up strictures on contractual rights and transfers;
- Removing the onerous "for profit" (*lucro*) standard necessary in order to bring a criminal infringement action; and
- Addressing issues related to ISP liability and creating create notice and takedown procedures

Some of the above issues have been proposed, in a piecemeal way, by separate legislation or ongoing initiatives (as discussed throughout this report).

Given the extensive reform needed to properly and comprehensively upgrade the statutory provisions of the Mexican copyright law, IIPA recommends that Mexico request assistance from WIPO to conduct a full study and recommend reforms.

Organized crime law (amended in 2004): 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). IIPA members have no recent news to report on whether any copyright prosecutions have been initiated under this law.

Pending Legislation

Many of the bills listed below have been pending for several years. IIPA members note, with appreciation, that IMPI has been supportive of the bills aimed at strengthening the copyright law and the criminal code. IMPI has also been supportive of the ISP liability initiative as well (discussed above).

Criminal code: Bill to provide for *ex officio* copyright actions: A bill to amend the criminal code to increase criminal penalties for copyright infringement and to give *ex officio* authority to the police to pursue copyright infringement actions was presented to the Mexican House in 2004. This bill is extremely important for the copyright sector because rights holders will not have to file criminal complaints for every case of infringement. Such authority will also have the benefit of expanding anti-piracy enforcement nationwide, including at the state level. This original bill, as sent to the Senate, had constitutionality concerns. As a result, a new bill was introduced in the lower house and passed in 2008. It has been sent to the Senate where it awaits Justice Committee action. The copyright industries strongly encourage prompt action on this important piece of legislation.

Criminal code: Bill 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 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.) Unfortunately the 2008 session ended without Senate action on this bill.

Criminal code: Bill to provide protection against unauthorized camcording in theaters: An anti-camcording bill was introduced in the lower house several years ago but no action was taken by the appropriate committees. Thus, MPA decided to promote, with the support of the local theater association, a new bill. This bill would amend the Criminal Code to punish, with a prison term from 3 to 10 years and fines, the unauthorized camcording of films in theaters and would eliminate the need to prove commercial intent. The bill will be introduced in the Senate in the first session of 2009, and the Mexican government should give its full support to this bill.

Copyright law: Bill to protect technological protection measures: Already approved by the Chamber 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). As for its current legislative status, we understand that it needs to be reintroduced in order to start with more political support.

Copyright law: Bill to remove the private copy levy and the "*lucro*" (for profit) requirement: 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. Unfortunately, this bill was stuck in the Education Commission of the House of Deputies, lost its momentum, and needs to be reintroduced.

Copyright law: Bill adversely affecting music and sound recordings: 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 rights holders (both music publishers and producers). The bill was approved by the Chamber of Deputies in 2006, but has since been defeated in Congress by the publishers and fortunately was off the congressional agenda in 2008.

Bill to exempting IP matters from the Federal Law of Administrative Procedure: A bill that would exempt IP matters from the Federal Law of Administrative Proceeding has been approved by one Chamber. Removing intellectual property from the scope of this law and thereby allowing direct appeals to the federal district and/or circuit courts would reduce the time required to prosecute IP infringements. Reportedly IMPI also supports this bill. The bill is still in Congress, but is not moving forward at this point.

Bill to amend the Law of Industrial Property: The current Law of Industrial Property does not expressly allow complainants to be present during raids, requires two witnesses in order for the raid to be valid, and is complex when it comes to amending the address and other identification information of the alleged infringers. BSA is advocating legislation that would establish sentencing guidelines for IMPI fines, eliminate the two witness requirement, grant notarial ("public faith") powers to IMPI inspectors, and impose fines and apply a presumption of truth to allegations of infringement in cases ("door closures") where inspectors are denied entry or evidence is concealed during administrative inspections.

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, following the example of the Government of Jalisco. Self audits, which organizations can perform with Software Asset Management (SAM) tools, not only help governments operate more efficiently, but set an example for the public and private sectors. BSA plans to audit Nuevo León in 2009, as well as Federal Agencies and Jalisco again.

Customs: The customs law needs to be amended to grant customs officers *ex officio* powers, and customs reform would be welcomed by the copyright industries.

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 also conducted customs trainings in association with AmCham. BSA intensified its joint efforts with IMPI, in particular during the campaign "Piénsalo bien," which resulted in a massive wave of awareness building and legalization. Other campaigns are: "El Ejemplo Empieza en Casa" with Nuevo León; "Escuela Legal", a partnership with AmCham and the Association of Editors ("Cempro"); the Digital Animation Contest, which was co-launched by BSA and the Ministry of Economy, under the auspice of INDAUTOR and in close collaboration with IMPI, and IMPI's children campaign. The film and recording industries frequently organize training sessions for law enforcement officials, including IMPI, PGR and Customs. The entertainment software industry also conducted numerous training sessions for Customs and PGR on the various forms of game piracy and methods of detecting pirated games and circumvention devices.

PAKISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Pakistan remain on the Priority Watch List due to failure to adequately address piracy of books and journals, failure to resolve the cases involving pirate optical disc factories dating back to 2005, and the overall dearth of enforcement actions in Pakistan against all forms of piracy.

Executive Summary: For many industries, the piracy situation in Pakistan is out of control. Pakistan remains the world's most blatant pirate market for books, with the government taking little action to combat rampant piracy in the Urdu Bazaars. Politically connected pirates seem to overrun what otherwise seem to be well-intended efforts by the Federal Investigation Agency (FIA). The National Book Foundation continues to claim that it is taking advantage of a Berne-incompatible compulsory license. Much more must be done to curb book piracy. Piracy of other copyright materials remains rampant. The recent article, "*Pakistani Cinemas Shut Down to Protest Piracy*,"¹ speaks volumes about the piracy situation in Pakistan with respect to films, for example. The article documents the strike in 2007 by the local Pakistani cinema owner association to protest the government's failure to curb film piracy, and, e.g., noted that street piracy, cable and signal theft, and the ban on showing Bollywood films, all compounded the business problems for cinema owners; the article also notes that the number of cinemas in Pakistan has fallen from about 750 in the 1970s to about 300 by early 2007, with many having been converted into shopping malls. The music market for international repertoire has experienced similar disintegration. While cooperation and enforcement by the FIA and Pakistani Customs has been commendable in the past, especially with respect to stopping factory-pressed optical disc pirate production and exports, recent results have not been promising, and as a result, the piracy situation domestically remains dire.

Priority Actions Requested in 2009: IIPA requests that the government of Pakistan take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Undertake significant action against retail piracy throughout Pakistan, including pirate booksellers in the Urdu bazaars, and pirate resellers of CDs, DVDs, and CD-ROMs, followed by prosecutions of cases leading to deterrent penalties.
- Conclude cases against optical disc manufacturing pirates arrested years ago, with imposition of deterrent remedies.
- Take actions against business software end-user and hard-disk loading piracy, including inspections against businesses suspected to be engaged in the unauthorized use of software, prosecutions brought where warranted, and deterrent sentences at court.
- Take action against cable and satellite piracy, which in 2007 caused over \$110 million in losses to legitimate channels due to illegal distribution to an estimated 4.6 million unauthorized subscribers.

Legislation

- Repeal the TRIPS-incompatible royalty-free compulsory license under Article 36(3) of the copyright law, and ensure that the National Book Foundation ceases all reproduction thereunder.
- Amend the Pakistan Copyright Ordinance to enhance enforcement; create deterrence, including mandatory minimum sentences including fines and imprisonment for committing a crime of copyright infringement; provide exclusive rights for sound recordings including an exclusive communication to the public/making available right; and protect against circumvention of technological protection measures, circumvention services, and trafficking in circumvention devices.
- Pass and implement an optical disc regulation to license optical disc production, provide for 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), and requirements to use unique source identification codes (SID mastering/LBR codes and mold codes) to track the location of production.
- Fully implement and join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- Amend the Motion Picture Ordinance to more clearly cover home video products.

¹ Reuters News, *Pakistani Cinemas Shut Down to Protest Piracy*, March 15, 2007.



PAKISTAN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008²										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	77.0	85%	63.0	84%	78.0	86%	26.0	86%	14.0	82%
Records & Music	NA	NA	25.0	100%	25.0	100%	25.0	100%	70.0	100%
Books	NA	NA	55.0	NA	55.0	NA	55.0	NA	52.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	12.0	NA
TOTALS	77.0		143.0		158.0		106.0		148.0	

PIRACY CHALLENGES IN PAKISTAN

Book Piracy Situation in Bazaars Not Improving: Pakistan remains perhaps the worst book piracy haven in the world. Large-scale photocopying and print piracy make the Pakistani market virtually untenable for legitimate publishers. The Urdu Bazaars in Karachi (featuring 350 booksellers and wholesalers) and Lahore (featuring 700 sellers), are the main sources of pirated books in the country. Periodic raids run at the request of rights holders seem to yield no outcomes and no deterrence. Pirate booksellers are highly organized and well-connected, and often succeed in bullying authorities into dropping cases immediately after any enforcement action (or avoid enforcement action altogether). All types of books are pirated – practically anything that can sell more than a few hundred copies is a target for the pirate market. 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. Some pirate enterprises are now able to produce fairly high-quality copies that are more difficult to differentiate from the legitimate versions than previous low-quality versions were. Meanwhile, publishers report exports of pirated product flowing into nearby and regional markets as well as decimating the local market.

Educational Sector Likewise Experiencing Significant Piracy: The potential market for elementary and high school materials in English is immense, given the number of families in Pakistan who are sending their children to English-language schools. Nonetheless, the academic and professional markets are completely overrun by piracy. Elementary and high school courses taught in English routinely feature pirate versions of books. Piracy at the university levels is even worse, with rates soaring over 90%. Among the worst offending universities in this respect are the College of Business Management in Karachi, Punjab College of Business Education in Lahore and NED University in Karachi. Often, one student will purchase the required reading for a class and then organize the photocopying for the entire class, or lend the book to other students for them to copy any material they require. U.S. publishers receive routine and suspicious requests for free supplementary materials from professors who have apparently adopted the book when there are absolutely no legitimate sales. Unauthorized compilations in the form of course packs are on the rise as well. Some medical titles have been pirated, usually in one color, so they have misleading and inaccurate illustrations. 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 it 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."

National Book Foundation Must Cease Allowing Unauthorized Reproductions of Books: The Ministry of Education's National Book Foundation (NBF) has at times sent signals that it was prepared to cease the unauthorized reproduction of books under the guise of a royalty-free compulsory license (under Section 36(3) of the Copyright Act as amended in 2000, which clearly violates the Berne Convention and TRIPS). However, reports also indicate that NBF is still

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Pakistan. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

using the compulsory license. The periodic overtures of NBF were accompanied by fervent lobbying of foreign publishers and their governments to grant NBF license agreements. Such voluntary licensing is made impossible by the NBF's continued unauthorized activities. As a start to any discussion, IIPA expects: 1) immediate cessation of all unauthorized reproduction of U.S. publishers' titles; and 2) a written commitment from the NBF to use legitimate product and engage in transparent business practices, accompanied by a commitment from the government to repeal Section 36(3) of the Copyright Ordinance.

Business Software End-User Piracy Is Endemic: Despite significant public awareness and enforcement drives by the business software industry over the past two years, the piracy situation for this sector remained serious in 2008. At 85%, Pakistan holds the dubious distinction of having one of the highest PC software piracy levels in the world. The government has taken some steps over the years to legalize government use of software, and software procurement rules are in place to ensure that legitimate software prices are quoted with tender offers to supply hardware.

"Burned" Pirate Discs Greatly Outnumber Factory Produced Pirate Disks: With the near eradication of factory produced discs in Pakistan after 2005 enforcement activities, the chief optical disc piracy problem in Pakistan involves the burning of pirate content onto recordable CD-Rs and DVD-Rs with at least one industry describing the problem as rampant (although nowhere near the levels when factory production was fully operational). Small quantities of unauthorized factory DVDs remain available, although these are generally thought to have been imported into Pakistan.

Government Stands Idly By Watching Growth of Rampant Cable and Satellite Piracy: Piracy of cable and satellite broadcasting signals remains out of control in Pakistan, with cable companies estimated to transmit the vast majority of the programming they provide to end users without authorization. The illegal cable piracy operations are serviced by "lead *walas*" who obtain cable feeds from a cable operator with a hardware facility (head end). There were an estimated 4.6 million unauthorized subscribers causing over \$110 million in losses to legitimate channels in 2007. The pirates are organized, run their operations openly like a business, and essentially earn tax-free revenue with impunity. The pirates have always used the latest technologies, from "smart splitters" earlier this decade (allowing one legitimate or hacked "smart" card to be used to supply ten end-users with programming, and now "dream box" technology which uses an off-the-shelf technology that blocks fingerprinting and cannot be detected or descrambled. The pirate cable operators are even earning advertising revenues from their own in-house ads!

Mobile and Internet Piracy: Mobile piracy, whereby illegal vendors upload pirate content (ring tones, music, and published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and computer hard drives, has taken hold in Pakistan, and is set to grow more serious, since mobile penetration now stands at 51% in the country. There are slightly more than 88 million mobile users in Pakistan, according to the Wireless Federation.³ To date, nothing has been done to combat this growing piracy phenomenon, with increasing losses to U.S. industry (not reflected in the losses reported above). Internet penetration exploded in Pakistan in 2008, with roughly 17.5 million Internet users as of March 2008 (according to the International Telecommunications Union), representing roughly 10.4% penetration. Nonetheless, piracy on the Internet in Pakistan remains low, since only 128,700 broadband connections exist in the country, although this represents a 100% increase in broadband connectivity over 2007, so it is not unreasonable to begin working on enforcement capacity and regulatory solutions.

ENFORCEMENT CHALLENGES IN PAKISTAN

IIPA expresses its disappointment that the government of Pakistan has failed to date to deal with piracy phenomena, such as book piracy in the bazaars and in the educational sector, end-user piracy of business software, music, movie, and game piracy, and rampant cable and pay TV piracy. The Intellectual Property Office has not yet lived up to its intended mission as a forum for dialogue and coordination between private sector representatives and government officials, and has not come forward with a comprehensive plan for tackling Pakistan's outstanding piracy issues. The Federal Investigation Agency has provided an occasional bright spot in an otherwise bleak picture, spearheading the raids and closures of optical disc factories in 2005 and following up with some successful raids in 2006 and 2007 against

³ *Mobilink Leads as Mobile Penetration in Pakistan Surpasses 50% in Q2'08 (Pakistan)*, July 23, 2008, at <http://wirelessfederation.com/news/mobilink-leads-as-mobile-penetration-in-pakistan-surpasses-50-in-q208-pakistan/>.

"burning" lab operations, leading to a few criminal convictions.⁴ The FIA has continued to be in touch with relevant rights holders about targets for anti-piracy action. The following anecdotally and non-exhaustively, lists some of the key challenges to right holders in seeking effective enforcement of their rights in Pakistan:

- **Lack of *Ex Officio* Authority in IPO and FIA Raids:** One key issue in Pakistan remains the lack of *ex officio* authority being employed by FIA or IPO. At present, a formal complaint must be lodged by a copyright owner or an authorized representative before FIA will take any action. The industries have met with the Intellectual Property Office (IPO) Pakistan through seminars and trainings and are trying to convince law enforcement authorities to take more *ex officio* actions against blatant piracy.
- **Leaks Within the Enforcement Units:** In November 2007, after thorough investigation, the recording industry group lodged a complaint against five pirate audio cassette manufacturing factories and warehouses. FIA raided all five sites but pirated goods were found at only one site. It is believed that there have been instances such as this one described in which FIA has leaked the information before the raid. Security techniques must be adopted, such as removal of mobile devices from the enforcement officials prior to raids, and only having the head of the enforcement party know about the time and location of a raid, in order to avoid leaks and other irregularities.
- **Lack of Government Will:** In many instances, it is the lack of government will to stand up to piracy that ultimately dooms enforcement efforts. For example:
 - **Book Piracy:** While publishers have been in touch with FIA and have been pleased with FIA willingness to discuss potential book piracy targets, IIPA has received no information about FIA actions since those conversations. A police-assisted raid in 2006 in Karachi at a book market also illustrates the lack of will among some authorities in Pakistan. Pirate books were seized and some offenders were taken to the neighborhood police station. In reaction, a band of pirate booksellers surrounded the police station demanding that the police release the offenders and refrain from filing the "First Information Report" (FIR) against them. The police folded under the pressure and asked for a written undertaking from the offenders that they would not engage in piracy, whereupon they released the defendants without filing an FIR.
 - **Cable and Pay TV Piracy Enforcement in Pakistan:** The Pakistan Electronic Media Regulatory Authority (PEMRA), the regulatory body established in Pakistan in 2002 to facilitate and regulate the establishment and operation of all private broadcast media and distribution services in Pakistan, has utterly failed to exert political will to deal with cable and pay TV piracy (although the group has not been shy about banning or censoring foreign channels in the past). It has become painfully clear that the authorities in Pakistan do not care whether copyright authorization has been obtained for "head end" establishment by cable pirates, and are not interested in the taxes lost due to unaccounted-for revenues of the pirates (which would include business income taxes, personal income taxes, withholding tax and taxes on allied industries such as advertising and production).
 - **Business End-User Software Piracy:** Inspections are not being run against businesses suspected to be engaged in the unauthorized use of software, and prosecutions are not being brought where warranted. In addition, while many prosecutions were brought in previous years 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.
- **Lack of Deterrence at Court (Including Failure to Conclude Cases Against Pirate Optical Disc Manufacturers):** The minimal number of criminal prosecutions and the low level of fines when cases do proceed to conclusion results in non-deterrence in the Pakistani market. It is telling that cases against optical disc manufacturing pirates who were arrested years ago remain pending. The plant owners filed a Constitutional Petition (CP) in the Pakistani High Court challenging the legislation under which they were arrested back in 2006. Copyright cases are also marred by procedural hurdles such as excessive documentary requirements and delays. The maximum fine a pirate has received from a prosecution for publishing piracy was PKR15,000 (US\$189) in 2004, hardly a deterrent, and most cases involving publishers resulted in far lower fines.

⁴ The FIA Crime Circle in Rawalpindi obtained convictions in 2007 in cases commenced in 2006 against three major wholesalers of pirated optical discs on CD-R and DVD-R formats. In one raid, run in February 2007, the FIA Crime Circle, Rawalpindi raided a retailer and wholesaler of pirate burned optical discs in Rawalpindi and seized over 169,000 pirate discs. The FIA registered a criminal case against the owner of the shop. The case was pending in the Judicial Magistrate Court, Rawalpindi, which heard the first oral argument in February 2008.

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 tools to fight piracy.⁵ The Ordinance includes, as an example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan.⁶ Remaining problems in the ordinance include criminal fines that remain far too low to deter piracy, and in part to remedy this, the Ordinance should be amended to provide minimum jail sentences and fines for crimes involving copyright infringement. For example, the minimum fine might be increased to PKR500,000 (US\$6,300), which is reasonable by any estimation. There also exist some overly broad exceptions to protection and unclear full retroactive protection for works and sound recordings as required by TRIPS.

Royalty-Free Compulsory License for Books Is Out of Step with International Standards: One of the most significant deficiencies in the Ordinance as amended was the addition of 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 license 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, as noted, has engaged in the unauthorized reproduction of books under the guise of this license. This royalty-free compulsory license violates the Berne Convention and TRIPS and Pakistan must delete it from the Ordinance.

Pakistan Should Implement the WCT and WPPT: Pakistan should fully implement and join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, 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. In particular, the Ordinance should be amended to include broadcasting and public performance rights for phonogram producers and provide an exclusive making available right and protection of technological protection measures and rights management information. Finally, the Ordinance should provide proper incentives for service providers in the online space to cooperate with right holders, through adequate provision of liability for P2P file sharing, adequate liability for service providers engaging in direct infringement or facilitating infringement, and should in addition include a robust notice and takedown system. IIPA has shared with the IPO its thoughts on these issues in the past, including more detail than is contained in this report. IIPA hopes IPO will take the opportunity to amend its Ordinance to fully modernize the law.

Motion Picture Ordinance Should Cover Home Video Products: IIPA 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 to Pakistan, the government should enact effective 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 code including both mastering LBR code and mold code) to track location of production.⁷ Such regulations will give Pakistani authorities a needed tool to license any new plants wishing to produce and proving they have a right to produce content in Pakistan, to conduct spot inspections and raids on plants, to seize infringing copies

⁵ Three essential remedies exist in Pakistan for copyright infringement: i) civil remedies, including permanent injunctions, damages and wrongful profits, seizure of goods, etc.; ii) administrative remedies through IPO Pakistan, Customs, or the FIA; and iii) criminal prosecutions through the Police. Criminal penalties for knowingly infringing or aiding and abetting infringement of copyright include imprisonment of up to 3 years, and/or a fine of up to PKR100,000 (US\$1,260) (double for a recidivist). Section 74-A provides for restitution to the complainant (50% of the fine) in addition to any civil damages. In case an offense is committed by a company, every person who was in charge of and responsible to the company for the conduct of the business at the time the offence was committed is deemed guilty of the offence and punished accordingly.

⁶ 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 Ordinance.

⁷ 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.

of product and machinery, and to impose administrative and criminal penalties to deter the organized manufacturing and distribution of pirate product. IIPA understands that draft legislation remained pending as of February 2009; it is hoped that this draft will proceed to passage in early 2009.

Cybercrime Legislation Should Be Amended to Include Copyright Crimes: On December 31, 2007, the President of Pakistan (in the absence of a National Assembly, which was dissolved at the time) passed the Prevention of Electronic Crime Ordinance, 2007. The Ordinance criminalizes certain computer activities, including some forms of reverse engineering of software. The Ordinance does not provide a remedy for copyright infringement consistent with the Council on Europe Cybercrime Convention (2001) (to which the United States is a party). Article 10 of the Council on Europe Cybercrime Convention 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 willfully, on a commercial scale and by means of a computer system."

It would be helpful if the government of Pakistan revised the Ordinance to implement this provision of the COE Cybercrime Convention.

MARKET ACCESS CONCERNS

Import Duties: The recording industry reports very high import duties on U.S. sound recordings that severely restrict access to the Pakistani market. IIPA urges the government of Pakistan to substantially lower the import duties and related taxes.

GENERALIZED SYSTEM OF PREFERENCES

Pakistan 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 2004, the United States Trade Representative agreed to accept IIPA's petition to evaluate whether Pakistan remained eligible to retain its GSP trade benefits. On January 24, 2005, IIPA endorsed the termination of the Generalized System of Preferences (GSP) piracy investigation of Pakistan by USTR due largely to successful enforcement efforts against optical disc piracy. IIPA called upon the Pakistani government to remain vigilant against book piracy. Specifically, IIPA, in making its recommendation, noted,

"Vigilance will be needed, however, to ensure that the problem of massive optical disc piracy does not return to Pakistan. The plants must remain closed and the Government should implement mechanisms to ensure that optical disc piracy remains in check. In addition, other forms of piracy, especially book piracy, remain serious problems in Pakistan. The Pakistani Government must continue to address these outstanding issues, and the U.S. Government should continue to press to resolve these issues."

As a result of termination, Pakistan enjoys duty-free status for imports of certain products into the United States. During 2007, \$135.1 million worth of products came into the United States duty-free from Pakistan, or 3.8% of its total imports to the U.S. In 2008, the number spiked to \$183.9 million that entered the United States duty-free, or 5.1% of its total imports to the U.S. The government of Pakistan must meet the discretionary criteria in this U.S. law if it expects to continue receiving favorable treatment at this level.

PEOPLE'S REPUBLIC OF CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2009.

Executive Summary: China continues to have some of the highest pirates rates in the world. As the new global leader in Internet, broadband and mobile device penetration, China has become a safe haven for digital pirates. The Chinese government thus far has failed to take action against companies like Baidu and Kangjian Shixun from operating businesses predicated on providing access to infringing materials. Internet piracy is the number one priority for many copyright sectors and continues to grow exponentially every year. Deterrence remains absent from the enforcement system, both online and in the market for physical products, with the government maintaining a failed system of administrative enforcement, instead of turning to criminal remedies as exist in the rest of the world. China's many publicly announced enforcement campaigns have not had a demonstrable effect on the levels of piracy; criminal actions against copyright piracy continue to be rare, and manpower and financial resources continue to be woefully insufficient at NCAC and local copyright bureaus, which are primarily responsible for Internet enforcement and other areas such as end user piracy of software. More and better trained enforcement personnel are required at every level, along with effective and well-publicized actions, if piracy is to be slowed. Enforcement machinery, including especially in the online environment, remains cumbersome and agency jurisdiction and cooperation remain overlapping and muddled. Some progress was made in 2008 in legalizing government, SOE and enterprise use of software, as promised in the JCCT, but much remains to be done. Progress in attacking book piracy in university textbook centers continued as well, but efforts to deal with blatant online academic journals piracy, most egregiously in the Kangjian Shixun case, have been unavailing.

China is reported to have begun a process to amend its copyright law to complete addressing its WIPO Internet Treaties' obligations, but this will not be concluded for years. Desperately needed criminal law changes are apparently not even on the drawing board. Inadequate market access for most industries and barriers to establishing a meaningful commercial presence continues to fuel the market for pirated material, particularly in the Internet environment.

Priority actions requested to be taken in 2009: IIPA requests the following actions by the government of China, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Significantly increase criminal prosecution of copyright infringements, including on the Internet and over mobile services;
- Bring criminal prosecutions for corporate end-user piracy of software and software hard disk loading piracy;
- Bring criminal prosecutions against pirate OD plant owners;
- Significantly increase the number of administrative actions for online, corporate end-user, hard disk loading and hard goods piracy including textbook piracy;
- Take meaningful administrative actions against companies that provide deep-links to infringing files, such as Baidu, including through enforcement actions by SARFT and MIIT;
- Significantly increase the manpower and financial resources available to SARFT, MIIT, NCAC, the National Anti-Pornography and Piracy Office (NAPP), GAPP and the Ministry of Culture (MOC), and to local bureaus of the same;
- Enhance pre-release administrative enforcement for motion pictures, sound recordings and other works;



- Legitimize use of books and journals on university campuses and in government institutions and libraries, including ensuring that academic libraries do not stock illegal reproductions and do not share journals in electronic or hard copy with unauthorized users, and legalizing practices of textbook centers and on campus reproduction facilities;
- Allow increases in staff for, and anti-piracy investigations by, foreign rights holder associations;
- Assign specialized IPR judges to hear criminal cases, and move criminal IPR cases to the intermediate courts.

Legislation and Related Matters

- Clarify the 2006 Internet Regulations to ensure their effectiveness and implement them with more aggressive administrative and criminal enforcement;
- Amend or issue a new SPC Judicial Interpretation to establish, at a minimum, appropriate thresholds for criminal prosecution of Internet infringements and corporate end-user piracy of software;
- Ensure use of legal software by government, SOEs and other enterprises;
- Amend the Copyright Law to bring it into full compliance with the WTO panel decision and the WCT/ WPPT.

Market Access

- Provide effective market access for all copyright materials;
- Provide non-discriminatory treatment between local and foreign recordings. Foreign recordings should not be subject to cumbersome censorship procedures for online distribution, and the draft MOC circular that was informally circulated in early February should not be promulgated without significant changes that ensure that they will not unduly complicate legitimate commerce;

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.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 <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	NA	NA	NA	NA	NA	NA	244.0	93%	280.0	95%
Records & Music ³	564.0	90%	451.2	90%	206.0	85%	204.0	85%	202.9	85%
Business Software ⁴	2940.0	79%	2999.0	82%	2172.0	82%	1554.0	86%	1488.0	90%
Entertainment Software ⁵	NA	NA	NA	95%	NA	NA	589.9	92%	510.0	90%
Books	NA	NA	52.0	NA	52.0	NA	52.0	NA	50.0	NA
TOTALS	3504.0		3502.2		2430.0		2643.9		2530.9	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on the history of China under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² MPAA's trade loss estimates and piracy levels for 2006, 2007 and 2008 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

³ The estimated losses to the sound recording/music industry due to domestic piracy are \$564 million for 2008, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology. The Internet piracy rate is estimated to be 99%.

⁴ BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in China, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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.

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

COPYRIGHT PIRACY AND ENFORCEMENT IN CHINA

Internet and mobile piracy: Both Internet and mobile device piracy worsened significantly in 2008. China is one of the world's largest potential markets in terms of Internet and mobile delivery of copyright content, and its piracy problem now threatens to completely overwhelm the ability of legitimate rights holders to do business in China.

China's Internet population continued to mushroom in 2008. The China Internet Network Information Center (CNNIC), reports⁶ that the online population became the largest in the world in mid-2008 and at the end of 2008 is estimated at 298 million, almost as large as the population of the U.S. This is a spectacular 41.9% increase over the previous year (the figure was 137 million at the end of 2006). It was estimated that 270 million people used high-speed broadband interconnections (representing 90.6% of all users), allowing for download of larger files including feature movies, TV programs and videogames. China's Internet penetration rate is still only 22.6% (it was 16% at the end of 2007) so there is much room for continued growth, including in piracy losses to rights holders.

According to CNNIC, 83.7% of Internet users (247 million) accessed music on the Internet at the end of 2008, higher than any other use. The fifth and sixth largest uses were for online video and online gaming at 67.7% and 63.8% (202 million and 187 million users, respectively).⁷ The CNNIC has acknowledged in its July 2008 report that music is one of the most important "drives for promoting the increase in netizens," that the incredible growth in users accessing films and TV programs has "drawn close attention from the state and government" and that accessing games online was approaching double the rate in China from that in the U.S.⁸ Unfortunately, with online music and video piracy rates estimated at 99%, and piracy of online games not far behind, it is clear that it is piracy that is the main driver of Internet growth in China!

China also has by far the largest population in the world using mobile devices – 608 million (June 2008). Piracy on mobile devices, and the pre-loading of music files on mobile devices, has become a massive problem for the recording industry, and will become one soon for the motion picture and other copyright industries when the new mobile 3G networks are built out. 3G licenses were granted in mid-January 2009 to the three largest mobile services (China Mobile, China Telecom and China Unicom). 117.6 million people access the Internet from their mobile phones, providing instant access to pirate copyrighted material, at present primarily music, but also video, books and other materials. 43.5 % of these users are students, who are the heaviest users of illegal copyrighted material.⁹

The recording industry reports that China is now one of the biggest sources of illegal downloads in the world. Internet and mobile piracy have become the industry's highest priorities. The market for Chinese music, and for international repertoire, is reeling; China was responsible for only \$37 million in legitimate sales in 2008.¹⁰ The recording industry reports that ten or more "MP3 search engines" offer "deep links" to thousands of infringing song files and derive significant advertising revenue from doing so. These deep-linking services, like Baidu, Sohu/Sogou and Yahoo! China, provide an estimated 50% of pirate music files in China. Another 35% is provided by pirate websites, 14% via P2P filesharing (e.g., Xunlei and verycd.com) and 1% from cyberlockers. Baidu is by far the biggest violator of music copyrights and the greatest single obstacle to legitimate digital commerce in China.

Internet piracy in China is also infecting neighboring markets. For example, Baidu's unauthorized deep-linking service can be accessed by millions of Internet users all over the world, especially in Hong Kong, Taiwan and Chinese communities of various southeast Asian countries. Baidu MP3 search in Hong Kong provided redirection of search results to Baidu's unauthorized deep-linking service in China.

⁶ Statistical Survey Report on the Internet Development in China (January 2009) (in Chinese); <http://www.cnnic.net.cn/uploadfiles/pdf/2009/1/13/92458.pdf>

⁷ Accessing online news, instant messaging and search were the second, third and fourth largest uses.

⁸ <http://www.cnnic.net.cn/uploadfiles/pdf/2008/8/15/145744.pdf> (in English)

⁹ *Id.*

¹⁰ The one bright spot is that the mobile market is somewhat less problematic than the Internet market, since in this more closed environment, technical protection is easier. As a result, over 70% of these legitimate sales occur in the mobile market.

The Ministry of Culture's December 11, 2006 Opinion on the Development and Regulation of Internet Music, also discussed 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 businesses and the rights holders who license their product to them.

MOC did not implement this Opinion. However, in early February 2009, the MOC issued a draft Circular which proposes to implement a censorship approval system for foreign recordings released on online and mobile networks. This draft Circular also imposes severe restrictions on the license agreements which may be granted by foreign record companies. The recording industry has voiced strong opposition to the draft and hopes that they would not be finalized in the current form. If issued and implemented, this Circular would effectively halt what little legitimate digital music business there is in China. Pirate operators and deep-linking music services like Baidu do not need to comply with these draft rules.

For the motion picture industry as well, Internet piracy remains its top enforcement priority. The most damaging problem is the growth of user generated content (UGC) sites, where users post protected films and TV programs on the site for stable streamed viewing, followed by P2P and IPTV (webcasting). The impact of the UGC sites is multiplied by "leech sites" where the content on the UGC site is available by linking to it from the leech site. It is estimated that close to half of the content available on the top link sites around the world is sourced from UGC sites in China. They are popular because they do not require the download of software or of the film itself. P2P is also a problem. These are P2PTV streaming sites, like PPLive and PPStream, and sites that offer enabling filesharing software, like BT@China (China's biggest BitTorrent site), verycd.com (biggest eMule site in China), BTPig, Kugoo, Xunlei¹¹ and others. Most of these are advertising-driven sites, given the lack of development in China of credit card or similar payment mechanisms. Internet cafés also offer the ability to download movies in their facilities.

While online piracy grew worse overall in 2008, the industry reported a temporary stall in that growth for audiovisual material during the Olympic enforcement period but that improvement ended with the close of the Olympics, and has returned to its pre-Olympic level, particularly for hard goods piracy at the retail and street vendor level.

The entertainment software industry continues to report steadily growing Internet piracy of videogames. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing video game product, accessed from home PCs and from Internet cafés.

The book and journal publishing industry reports continuing growth in the number of Internet infringements over the past year, affecting academic books and commercial bestsellers or trade books scanned and traded or offered for download in PDF form.¹² Perhaps most disturbing is that electronic copies of journals are being shared with commercial entities in violation of site licenses, Chinese copyright law and international norms. The commercial enterprises then sell the journals in direct competition with legitimate companies. In the most notorious case, a company called Kangjian Shixun, provides electronic files of millions of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, without either permission or payment to the rights holders. Many of these articles are provided by a well-known, powerful State-run medical library. There is no excuse for such State-sanctioned piracy. Other companies are following in the footsteps of Kangjian Shixun, given the apparent and appalling reluctance of the Chinese authorities to act in this clear instance of copyright infringement.

The Business Software Alliance (BSA) reports that Internet piracy of business and consumer software is becoming far more serious a problem than in previous years. P2P filesharing makes up an estimated 90% of the piracy of software on the Internet but offers of pirate software on websites have also been a problem. In its first criminal action

¹¹ IIPA reported in its 2008 submission that on February 3, 2008 Xunlei lost a civil case to a Shanghai company and was ordered to pay damages of RMB150,000 (US\$21,927) for assisting in copyright infringement. Xunlei was then sued by MPA companies in February 2008 (see account below).

¹² The industry reports a high number of noncompliant ISPs, including ChinaNet, chinamobile.com and gddc.com.cn. Famous sites include ebookee.com.cn, ebookshare.net and vista-server.com.

for software piracy, BSA complained to the NCAC and the PSB about the tomatolei.com website which had been offering a pirate version of Windows XP since 2003, generating more than RMB100,000 (US\$14,618) per month in revenue. On August 15, 2008, the website owner was arrested. A contemporaneous story from China Daily quotes a computer dealer as estimating that this site was the source of over 10 million copies of “Tomato Garden” throughout China.

Internet Piracy Enforcement: Enforcement by the Chinese authorities against massive levels of Internet piracy is less effective than even China’s inadequate enforcement against physical products, as IIPA has detailed for many years. China is reportedly anxious to move quickly into the digital age, and since online piracy has been a main generator of this growth (online entertainment is even more popular than in the developed world), China clearly has not been willing to move forward with an effective online anti-piracy effort, in contrast to its massive effort to control and eliminate infringing streaming content of 2008 Beijing Olympic games, from the Internet. In the meantime, China’s own creative community remains in dire straits.

There are many examples of where China’s online enforcement mechanism falls far short of even what is minimally necessary to control online piracy. As discussed in more detail below, these include:

- The government has made little effort to address the acts of companies like Baidu and Kangjian Shixun that intentionally provide access to infringing content as a central part of their business strategy. This has affected all rights holders seeking to enforce their rights (with Baidu of course particularly affecting the recording industry).
- Administrative enforcement is woefully inadequate and non-deterrent. The number of trained personnel is miniscule given the size of the problem; the number of enforcement actions pale in comparison to the scale of hard goods piracy, and SARFT, MIIT, NCAC, NAPP, MOC and other administrative authorities rarely use their regulatory authority to take direct actions against the enablers/facilitators of piracy, and almost never refer cases that meet the criminal thresholds to the criminal authorities. There are major technical barriers to identifying infringers’ locations and identities; ISPs and website registration information is often incorrect and unenforced, and the notice and takedown system is overly technical and burdensome.
- Administrative enforcement is plagued by lack of cooperation among provincial authorities, and Internet piracy is generally not limited to provincial boundaries.¹³ Jurisdictional battles severely hamper overall enforcement and more central government direction is essential.
- While the underlying legal framework is generally adequate and ISPs who do not cooperate with rights holders can be deemed to be infringers, NCAC has yet to levy an administrative fine against an ISP.
- All the deficiencies in China’s use of criminal enforcement against online piracy, which would have real deterrent impact, are even more severe than they are with hard goods piracy. The application of the criminal thresholds to online piracy is unclear, and the “for-profit” condition to establishing a crime results in a huge loophole in the P2P environment. Criminal authorities lack training (and interest) and regularly demand that rights holders must go first to the administrative authorities which lack the investigative authority to police this kind of piracy adequately.
- Internet cafés, which are widespread in China and where piracy is rampant, are very closely monitored and punished for allowing politically subversive activities, but not at all for piracy.

In summary, while Chinese leaders continually speak of the importance of strong IPR protection to China’s own development, including online, these good intentions are not being translated into effective and deterrent enforcement action. In fact, its similar announcements with respect to the importance of spreading advanced broadband and mobile technology to all Chinese citizens can be seen as suggesting that concern about piracy is, at best, secondary given the fact that much of the current allure of broadband uptake is the ability to obtain content for free. With piracy fueling the growth of these technologies, that development has clearly taken precedence over online IPR protection and the development of legitimate commerce in the online environment.

¹³ Witness the Kangjian Shixun case, which has been passed among four administrative agencies in China, without resolution.

The recording industry has been the first, and most damaged, victim of global Internet piracy, especially in China. To combat the problem, the industry has sought, and continues to seek administrative enforcement through NCAC, MOC, NAPP and other agencies, but with little effect, perhaps in part because the major source of online piracy has been untouchably large and powerful ISPs and companies that generate tremendous profits by providing access to infringing materials. This has left the industry with no alternative but to seek remedies in civil court, which have their own onerous complications and shortcomings that we have seen in earlier cases against physical piracy.

The biggest provider of access to infringing materials in China is undoubtedly Baidu. An astonishing 50 to 75% of all illegal downloads of recorded music in China are estimated to be linked to Baidu. In 2005 international record companies brought a civil action against Baidu for these deep linking activities. The Beijing Intermediate Court ruled in favor of Baidu in 2006 and the companies appealed to the Beijing High Court, which rendered a decision on December 20, 2007 upholding the Intermediate Court's decision. Even though the new Internet Regulations had gone into force in mid-2006, this case was analyzed under the previous regulations that were in effect in 2005, and which were weaker than the regime established by the new regulations.

On the same day it rendered the Baidu decision, the Beijing High Court published its judgment in favor of rights holders in another case brought by both the local and international recording industry against Yahoo! CN, a smaller deep-linking site. The Yahoo! CN result reflects the current state of the law in China at this time, and the decision is a legal step forward for the Internet environment in China as well as for the Chinese judicial system.¹⁴ However, Yahoo! CN refused to comply with the court's order to remove its links to infringing music files and in January 2008, the industry filed applications in the High Court to enforce the judgment. Yahoo was seeking to avoid compliance by arguing that there were technical obstacles to removing the links. On June 19, 2008, it appealed to the Supreme People's Court. However, it withdrew its appeal in August 2008 and the judge handling the judgment execution proceeding then pressed Yahoo to comply by removing its links to the 229 tracks at issue in the case. Yahoo slowly began to remove the links but presently still has not fully complied – a few infringing links remain up. The industry is continuing to monitor the service and will press the judge to shut it down unless all links are removed. However, it is unclear that the judge has this authority and there may be no effective way to enforce the judgment. The experience of the "successful" litigants in the Yahoo! CN case is very instructive in understanding the need for greater involvement on the part of the relevant regulatory agencies. Even when successful in civil litigation, the complicated rules of evidence and limited forms of injunctive relief mean that even positive verdicts are merely pyrrhic victories that do little to provide a more secure environment for legitimate commerce. It is a matter of first importance that Chinese authorities employ the full extent of their regulatory authority to ensure that companies like Baidu and Yahoo! CN end their unfair practices, and not just stop linking to specific titles when enjoined by a Court to do so.

On February 4, 2008, the recording industry filed new civil suits against Baidu and another deep-linking site, Sohu/Sogou. Hearings were held in October 2008 in all cases and Baidu and Sohu/Sogou have raised many procedural and evidentiary challenges in a bid to delay the proceedings which have yet to be concluded. All the defendants argued that they had no constructive knowledge that the linked files were infringing even though notices had been and continued to be sent to them.

With the adoption of the Internet Regulations in July 2006 and the entry into force of the WIPO "Internet" Treaties on June 9, 2007 for China, the legal infrastructure for effective protection of content on the Internet in principle was significantly enhanced, and, while not perfect, provided the major elements of an effective regime for combating online piracy. China is to be commended for taking both these steps.

¹⁴ However, the Yahoo injunction only extended to a few songs and the resulting damages were extremely low. Baidu has failed to recognize the Yahoo judgment and Yahoo still has not fully complied with the court's order. This demonstrates the deficiencies that still are present in many areas of the Chinese legal system. IIPA had noted, in its February 2007 report, that, 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") that became effective on July 1, 2006 stated that under Article 23 of those regulations, ISPs were liable for these kind of linking activities. Since this was also the decision of the High Court, it should not have been necessary for the industry to sue Baidu again, nor go to such lengths to enforce the very clear judgment in the Yahoo case.

However, in June 2007, NCAC released a final version of a “recommended” “standard form” to be used when filing takedown notices for ISP action under the new Regulations. This form could be read as requiring rights holders to provide detailed and unworkable information and documents in warning notices to be sent by mail to the ISPs. After a meeting with industry, NCAC issued a letter clarifying that these were just recommendations and that rights holders may continue to send notices via email and in its own format. This position seems to be accepted by a majority of the ISPs and rights holders are monitoring the situation to ensure that it continues working.

There were a few positive enforcement developments in 2008:

- In mid July 2008, a complaint was filed with MOC officials in Sichuan who immediately commenced investigation into a group of infringing websites and conducted administrative action in August. Actions taken by MOC and the Communication Administration in Sichuan finally led to the removal of the infringing domain names from the ICP record registered in Sichuan. Due to the fact that the infringer was not subject to criminal investigation, the group of infringing websites continues to operate using resources from other provinces.
- In May 2008, as a result of raids and seizures of servers conducted in March 2008, the Copyright Bureau of Hebei province and Cangzhou city found Zhongsou, one of China's top unauthorised music search deep-linking service guilty of infringing record companies' copyrights. The authorities have ordered Zhongsou to stop infringing immediately and pay the maximum penalty of RMB 100,000 (US\$14,600). Three computer servers belonging to Zhongsou have also been forfeited. Publishers report good cooperation with Taobao.com (a site similar to eBay.com) in responding to communications about infringement on its network. Responses were timely and action was thorough.

NCAC is obligated to transfer cases involving criminal infringement to the PSB (police) and SPP (prosecutors' office), as set forth in the revised March 2006 Criminal Transfer Regulations.¹⁵ However, with few exceptions, these Regulations have been ineffective in securing more criminal cases against Internet piracy. First, it is unclear how the thresholds established in the 2004 and 2007 SPC SPP Judicial Interpretations (JIs) apply in the Internet environment and such clarifications should be widely circulated throughout all the agencies responsible for enforcement.¹⁶ Second, as discussed further below, the PSB demands from rights holders proof that in effect, the thresholds have been met, rather than a “reasonable suspicion” of such.

Another significant barrier to effective enforcement against the infringing activities of the more than 1,000 Chinese ISPs is the absence of stringent, and enforced, rules from MII and NCAC requiring ISPs to maintain accurate, up-to-date contact information. This information should be provided on the MII and NCAC websites, so that notices may be timely served to the right entity. This is still not the case today and such a list is urgently needed.

Another hindrance that NCAC and the Internet division of the PSB had reported to IIPA and its members in November 2006 is the difficulty of getting infringers' IP addresses and identifying rights holders. At that time, IIPA informed both offices that the associations stood ready to assist in this endeavor and that cooperation between enforcement authorities and rights holder organizations was severely hampered by outmoded rules, and that reforms would need to be made before Chinese enforcement could begin to resemble that in other countries, where such cooperation was a regular feature.

¹⁵ *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”).

¹⁶ In November 2007, the SPP issued “Guidelines” to prosecutors on how to apply the 2007 SPC SPP Judicial Interpretations which, among other things, lowered the copy threshold under Article 217 to 500 copies for the less serious piracy offense. In October 2007, IIPA met with an SPP official and noted that it was unclear whether the thresholds were intended to count each track posted (or downloaded), or each CD posted (or downloaded) (and whether the thresholds apply to 500 infringing “links” to infringing files in the search engine context) and asked the SPP to clarify these issues with an amended JI or other mechanism. Unfortunately, the SPP did not take up IIPA's request, nor has it, or the SPC, done so since then, despite repeated requests from industry. “Guidelines” are on file at IIPA.

Administrative Internet enforcement: The recent focus of the MPA Internet anti-piracy program has been the large UGC sites, like Tudou.com, Yukou.com and 56.com. In April 2008, MPA signed an MOU with the biggest such sites and sought their agreement to take down infringing material upon notice by the rights holder. This program has so far been quite successful and compliance has been over 90%. Efforts are ongoing under the MOU.

MPA has also filed 40 complaints against some of the largest pirate sites directly with NCAC in connection with its "Special Campaign Against Internet Piracy" from June to October 2008. So far NCAC has responded in some cases but is sharing the final outcome of the complaints. MPA has also filed 90 takedown notices with ISPs. The compliance rate has been about 75% in 2008, though a number of sites merely switched ISPs and it is not known whether they are continuing to infringe. MPA has also used the anti-piracy hotlines set up by MOFCOM and SIPO as well those set up by NCAC. Twenty two complaints were sent out in 2008 to the former, there has been some compliance but it remains unsatisfactory. Complaints sent to the NCAC hotline have received no response.

Under the January 2008 SARFT/MII Regulation on Internet Audiovisual Program Service,¹⁷ these UGC sites were required to apply for licenses. Many licenses have been granted but Tudou, Youku and 56.com were missing from the initial list, which may have represented that some attention was being given to copyright issues, but it is suspected this is more likely related to the political nature of their content. These sites have now received their licenses.

The recording industry filed complaints with NCAC, MOC and NAPP involving 1,047 sites in 2008, including 3 complaints against Baidu, however only 40% of the sites were actually taken down. In 2007, 77 sites were actually taken down. NCAC has a long way to go before its enforcement can be said to be effective.

Below are statistics provided by the recording industry on Internet notice and takedown actions by ISPs in China through 2008.

Record Industry Takedown Rate of Suspected Infringing Websites in China			
	Number of notices	Number of sites	Takedown rate
2003	1,320	2,509	29%
2004	2,632	7,170	61%
2005	1,778	4,711	61%
2006	1,495	1,205	58% ¹⁸
2007	6,787	4,618	71% ¹⁸
2008	10,019	6,298	62%

The publishing industry has filed complaints with NCAC, GAPP and local authorities involving pirate websites. The Kangjian Shixun case complaint mentioned above has been pending for over two years. AAP has met on numerous occasions with authorities and provided whatever information was requested. This is such a blatant case of piracy with such substantial damages to publishers that it should be acted on immediately. The case is serious enough to warrant criminal prosecution¹⁹ but there is no excuse for the authorities' failure to even take administrative action to close the site and punish its owners.²⁰

¹⁷ The Regulation required that Internet video services be licensed but the applicants could be only state-owned companies and had to have legal program services. It is not clear that copyright licenses are part of this "legal" requirement. The "state-owned" requirement was waived for existing services, like the UGC sites.

¹⁸ Although a number of sites were taken down by ISPs/ICPs after receiving a takedown notice, some of the sites very quickly reappeared on the same ISP/ICP offering different repertoire.

¹⁹ Discussed below is a less serious book posting and download case decided in 2008 involving just over 1300 titles on an ad-supported website in which the defendant was convicted and sentenced to 1 ½ years imprisonment.

²⁰ AAP reported in last year's submission that its complaint against 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.

In 2008, BSA sent over 34,000 takedown notices to ISPs throughout China involving infringing software. This was the highest number of takedown requests for any country in Asia and reflects the massive size of the problem in China.

Criminal Internet and hard goods enforcement: China must significantly increase criminal prosecutions for copyright piracy to create deterrence in its enforcement system, including against Internet piracy. Despite statements by Chinese leaders that criminal enforcement is a necessary component of its enforcement system, attempts by industry to obtain it have been nearly always futile. The reality remains that copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative means or private civil actions rather than criminal means.²¹ China has not met its promises in the JCCT to increase significantly the number of criminal prosecutions for copyright piracy. IIPA has continued its effort, begun in 2006, through news reports released in China and through its own investigations, to identify criminal cases brought for copyright piracy under Articles 217 and 218 of the Criminal Law. China does not separately break out criminal cases involving copyright, but some indication can be gleaned from news reports and from the text of the few decisions that are available publicly. As of the end of 2007, IIPA and its members had stated that they were aware of only six criminal cases involving U.S. works brought by China since it joined the WTO in 2001 (all six in 2005-2006) and a few more cases involving the works of other WTO members.²²

However, again by searching press and other reports throughout China, IIPA was able to uncover 27 new criminal convictions in 2008 of which 5 were known to involve U.S. product, almost equal to the total number of convictions known to involve U.S. product discovered from 2001-2007.²³ One of these cases is the famous joint FBI-DOJ-PSB *Operation Summer Solstice* case, involving the largest software counterfeiting ring ever prosecuted (in which 11 Chinese citizens were convicted and imprisoned for producing counterfeit Microsoft software in 19 different versions, in 11 languages for sale in 36 countries). The press reports of these 27 cases characterized them as all cases where the defendant was convicted for “the crime of copyright infringement” and not “illegal business operations” which have been the vast majority of cases involving copyright products in past years. It is particularly noteworthy that 6 of the 27 cases appear to have involved only the retail sale of pirate product.²⁴ If the press reports we have collected correctly summarize these cases, then it is apparent that the criminal courts have now accepted the new 2007 SPC/SPP JIs which re-interpreted Article 217 of the Criminal Code to include retail sales only (without the requirement that the defendant had to have reproduced the pirate copies as well). This has been an objective long sought by IIPA and its members. It is particularly noteworthy that two of the six retail cases involved street vendors.²⁵

²¹ 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 copyright piracy as an important crime. The 2007 IPR Action Plan also specifically referred to the need to bring criminal cases, but the number of copyright criminal cases actually commenced in 2007 appeared to be minimal. In 2008, China released its long-awaited *National Intellectual Property Strategy*. This 9 page document (in English) is dense with recommendations for IP reform. Criminal enforcement is only mentioned in two places --“(27) take stronger measures and punishment against piracy”....and “Transfer more administrative cases to judicial organs. Accept more criminal cases.”

²² Through the end of 2007, IIPA had been able to identify 82 cases since 2001 which it believed were brought under the piracy provisions of the Criminal Law, namely Articles 217 and 218. The vast majority of these involved only Chinese works, or IIPA has been 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 at that time 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).

²³ Report on file at IIPA.

²⁴ All six cases involved the sale of DVDs in amounts that exceeded the criminal thresholds.

²⁵ The courts in both cases employed the copy thresholds; one case involved 1106 copies, the other 553.

Six of these criminal cases involved offenses associated with the Internet. However, four of these cases involved the crime of setting up pirate servers to play videogames online and the duplication of Korean and Chinese online games.²⁶ No U.S. or Japanese games were involved in these cases, at least according to the press accounts. One case decided in October 2008 involved the downloading of 1,345 electronic book titles and then reposting them for reading by consumers. The site was ad supported. In this case the copy thresholds were exceeded and the defendant received a sentence of one and a half years in prison and a RMB 100,000 (US\$14,600) fine. There is no question that this is a welcome sign of some progress.

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 rights 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 Internet and hard goods piracy levels. Other countries/territories that have significantly reduced piracy levels have done so only through the aggressive use of deterrent criminal prosecutions.²⁷ China must do the same. IIPA hopes that this apparent increase in criminal convictions for Internet piracy as well as for hard goods piracy, including for piracy of U.S. works, may be a signal that more resources will be devote to criminal enforcement in 2009.

Criminal convictions for piracy of U.S. films have been obtained in four cases that IIPA is aware of to date, beginning with the *Guthrie* case in 2005, the *Tong* case, also in 2005, the *Zhou Cheng* case, in April 2008, involving retail piracy in Beijing (a first), and the December 2008 *Jin Hu Dong* case, involving the granting of false licenses for use of MPA product for video-on-demand or online use.²⁸ However, as noted below, a major effort to get the criminal authorities to prosecute OD factory owners was unavailing.

Civil Internet Cases: As discussed above, the civil cases against Baidu and Yahoo! CN illustrate some of the procedural and other problems faced by copyright owners in China's civil court system. In the Yahoo case, the damages were *de minimis*, limited to a few tracks, and provided little deterrence to the defendant. US\$25,000 in damages was awarded for 229 tracks infringed, an average of about US\$50 per song. Unfortunately, the average awards in civil cases in China do not come close to compensating rights holders 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 cases²⁹ through 2007 were about RMB3,500 (US\$512) per title, which does not cover legal fees and expenses, much less compensate the rights holder for its loss. These paltry sums fell further to an average of about RMB 400 (US\$58.48) per title in 2008. 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 courts' 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, such as (a) providing clear guidance for application of statutory damages provisions and reasonable compensation for legal fees and

²⁶ In its 2008 submission, IIPA discussed the first of these "server" cases, the Shanda case, involving the Korean Legend of Mir game, noting that the PSB had said that it had many other "server" and Internet cases pending, but no further information could be found. In 2008, it appears that at least 10 of these cases were concluded with convictions. Another welcome sign.

²⁷ South Korea, Singapore, Taiwan and Hong Kong are examples of countries where criminal enforcement has been able to significantly reduce piracy levels.

²⁸ The Jin Hu Dong case involved the defendant's licensing of film rights for over 1000 films, including over 600 titles owned by the major U.S. studios, for Internet and VOD use. Reportedly, illegal profits of RMB10 million (US\$1.46 million) easily meeting the criminal threshold, were found. MPA initially filed a complaint in this case in December 2005 with NCAC but a raid by the Beijing PSB was not run until October 2007. The owner, Yang Jianwei received a sentence of imprisonment for 4 years and a RMB1.5 million (US\$219,276) fine.

²⁹ In 2006, the record industry began to shift the focus of its civil cases to Internet piracy, filing at least 105 civil cases against Internet infringers since 2003. As of January 2006, 96 cases have been concluded, 79 successfully, while another 10 cases remain pending, 7 of which were filed in February 2008. In 2007, the motion picture industry filed more than twenty complaints against retail outlets, all of which received favourable judgments. The Internet cases which settled in 2008 are discussed in the text below.

expenses; (b) introducing a presumption of subsistence and ownership of copyright; (c) allowing organizations that are authorized by rights holders to conduct anti-piracy cases on their behalf to sue in their own name; and (d) allowing repertoire or title-wide injunctions. These are serious deficiencies in the civil system that will affect Internet cases and have affected hard goods cases already.

In 2007, MPA filed complaints in the Shanghai Intermediate Court against a number of defendants for unauthorized offering of 20 MPA titles, including *Pirates of the Caribbean 2: Dead Man's Chest*, as part of a subscription and downloading service made available in Internet cafés. These cases were settled in 2008; the terms of the settlement included the defendant's promise not to infringe any MPAA member company titles (beyond the 20 that were the subject of litigation), a remedy that likely could not have been obtained had the cases come to judgment. In February 2008, following Xunlei.com's conviction in a Shanghai court, litigation was initiated by MPA and its members. The case has since been settled to the satisfaction of the plaintiffs.³⁰

Piracy of "hard goods": Piracy of physical product, or "hard goods," consists of the manufacture of optical discs (ODs) in factories (or burned in CD-R drives or towers), their distribution through the wholesale chain and their export or sale at the retail level, unauthorized use of business software in government or private enterprise settings, the "hard disk loading" of software, without a license, on computers for sale, and the commercial reprinting and photocopying of books and journals.

While the piracy rate for PC software (primarily unauthorized use of software by consumers and in government, SOE's and enterprises) is now 79% of the market, down 1% from 2007, the piracy levels for video, audio and entertainment software in OD formats continues to range between 90% and 95% of the market. IIPA reported in its 2007 and 2008 submissions that the 2006 "100 Day Campaign," directed primarily at retail piracy, did not achieve the results touted by the Chinese authorities. While seizure statistics were very high,³¹ reports and outside surveys commissioned by industry at that time noted that pirate product remained available throughout the campaign in virtually the same quantities as before 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.

Despite the repeat of these campaigns in 2007 and 2008, including during the Olympics, industry still cannot report any meaningful improvement in the retail marketplace after these campaigns concluded. Reports are that retail and street vendor piracy overall is as bad as it ever was. If the recent criminal cases against retailers continue to occur at a higher rate, however, this situation should improve.

OD piracy at the manufacturing/factory level (discussed further below) continues as a major problem. Furthermore, raids and seizures at the wholesale/warehouse/distribution level continue to turn up massive quantities of pirate product. The Chinese authorities reported that, from January-November 2008, they seized 76.85 million "illegal publications" which included 69.71 million "pirated audiovisual products," 12 million pirated books and 2.58 million copies

³⁰ Chinese film and TV producers have also been using civil remedies against UGC sites in China. Huayi Brothers, producers of a Chinese film still in theaters, has sued Youku.com and Tudou.com and others for copyright infringement. Huayi had earlier won another case against Youku.com and obtained a damage award of RMB70,000 (US\$10,233). <http://transsialawyers.com/newsletter/prc-telecoms-media-technology-law-newsletter/14-january-2009>.

³¹ 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 of GAPP 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. Industry still has not been given any further information on these cases, what penalties were imposed, whether U.S. works were involved etc.

of pirated software and “electronic publications.” Eight OD production lines were closed. The authorities also reported that 117 criminal cases were decided, with 373 offenders convicted.³² The well-documented lack of criminal prosecutions and deterrence in administrative enforcement in China has prevented improvements in the market and ensures that piracy rates of physical copyrighted products will continue to be among the highest in the world.

Optical disc factory piracy: In IIPA’s 2007 submission, we reported that there were approximately 92 optical disc plants in China, with 1,482 total lines, which brought 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, CD-R or DVD-R production. With minor expense, pirate high definition DVDs can also be produced.³³ A considerable amount of very high quality pirate Chinese OD production continues to be exported. Infringing product from China was found in nearly every major market in the world, as it was in 2006.

A considerable effort was made during 2006 and in early 2007 by the recording and motion picture industries, and the U.S. government in bilateral meetings, to persuade the Chinese government to cooperate effectively with industry to forensically identify infringing CDs and DVDs produced by Chinese OD factories. They specifically proposed that Chinese authorities collect and maintain “exemplars,” (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 would facilitate greater regional and global cooperation in the fight against piracy. Despite China’s call in the 2007 IPR Action Plan and the 2008 National Intellectual Property Strategy for greater international cooperation to fight piracy, the Chinese government has been unwilling to cooperate with rights holders or governments in such an endeavor.

IIPA and the U.S. government have repeatedly urged the Chinese government to bring criminal actions against OD factories engaging in piratical activities. IIPA, in its 2007 submission, reported on administrative actions finally taken against 14 OD factories in 2006, most of which were identified by industry. Chinese authorities had reported that six of these plants were allegedly closed (although it still is unclear whether such closures were permanent); that the licenses of eight of the plants were “temporarily” suspended (reportedly most of these licenses were restored); and that one or two of the 14 plants were under “criminal investigation.”

When it became apparent that criminal actions would not be commenced in these cases, industry brought evidence of piracy exceeding the then-existing thresholds against 17 OD plants directly to the PSB and formally requested, in writing, 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. IIPA members are unaware of any criminal prosecutions having been commenced against any of these plants for which formal complaints were made to the proper authorities. The PSB gave various reasons for not bringing such actions. They said that the cases had to be brought initially to administrative authorities, or that the evidence presented, which industry believed clearly raised a strong, virtually irrefutable, inference that piracy meeting the thresholds was occurring, did not “prove” that the thresholds were met. With respect to the first reason Chinese law expressly permits citizens and rights holders to bring criminal cases *directly* to the PSB,³⁴ and with respect to the second reason, China stands alone in the world in apparently requiring more than “reasonable suspicion” in a crime before commencing an investigation. IIPA understands the “reasonable suspicion” criterion is under study but no formal change has yet

³² <http://www.gapp.gov.cn/cms/html/21/367/200812/462133.html>.

³³ MPA reports that HD disks are being fraudulently sold in China as Blue-ray disks.

³⁴ 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).

occurred. Until China criminally prosecutes factory owners engaged in pirate production, there is little hope that levels of piracy can be significantly reduced.

Government Legalization of Business Software and Enterprise End-User Piracy: Unauthorized use of software within government offices and enterprises in China causes the majority of piracy losses faced by the business software industry.³⁵ With respect to government legalization, China made a commitment in the 2004 and 2005 Joint Committee on Commerce and Trade (JCCT) meeting to complete legalization within all government agencies, including provincial and local level government offices, by the end of 2005, and announced completion of its effort at the end of 2006. While progress appears to have been made, more needs to be done and multi-year implementation plans should be put into place. This must include budgeting for the purchase of legal software.

In the 2005 JCCT and again in 2006, China committed to the legalization program for state-owned enterprises and private business and agreed to discuss software asset management. An implementation plan was issued in April 2006, but 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 no permanent plan is in place. Toward the end of 2007, NCAC announced a list of model enterprises for software legalization. However, it does not appear that the selected enterprises had complete software asset management programs in place or had undergone a review of their software license histories. The business software industry also has not seen any material change in enforcement activity against corporate end user piracy that would serve as an impetus for enterprises to legalize. Plans for a “blacklist” of enterprises have been announced but not yet implemented. In addition, steps have not been taken to ensure that all companies bidding on government contracts certify the software they use is legally licensed, subject to audit. In short, while overall there has been gradual progress on enterprise legalization, much remains to be done on this issue.

Among the most notable and far reaching commitments emanating from the 2006 JCCT was the commitment to prohibit sale of computers both manufactured in China and imported without legal operating systems. This commitment is particularly important as China is now the second largest computer market in the world measured in new PC shipments annually, and will be the world’s largest in several years. Implementation of this commitment resulted in a significant increase in software sales in the initial year, but progress since has been small and the percentage of PCs sold without licensed operating systems may be well over 50 percent. The problem is two-fold: smaller computer makers comprising up to a quarter of all of China’s new PC shipments are not captured by the Chinese government’s mandatory annual reporting requirements. These smaller computer makers comprise somewhere between 20 to 25 percent of the market and there are thousands of them. The second problem is that reporting by the top 30 or so computer makers that are required to report PC sales and OS shipments is not verified by the government. It is easy to claim that all new PCs shipped without proprietary software are shipped with Linux, and it is very difficult to capture installation of unlicensed proprietary software onsite at businesses by small PC makers (“system builders”) or in PC malls. These remain prevalent practices. In this rapidly-growing market for PCs, IIPA and BSA urge the Chinese authorities to require a certificate on each new PC sold that it contains legally licensed operating system software, and step up auditing and enforcement. The government itself committed to procure computers with legally licensed operating system software pre-installed, and to provide adequate budget resources for compliance. We are not aware of any effective reporting or compliance mechanism for this decree, and getting adequate budget resources to agencies appears to be a problem. The government needs to institute an effective compliance mechanism that focuses primarily on pre-installation sales to government agencies and enterprises.

While the PC software piracy rate has decreased over the last few years, and there has been some progress among larger computer makers, more work remains, particularly among smaller PC makers and enterprise end-users. Chinese authorities have not been successful in their efforts to address the pervasive use of unlicensed software by enterprise end-users. Enterprise end-user piracy does not appear to be a crime in China so there is no criminal

³⁵ The business software industry also loses revenue due to retail hard-disk loading and the production in China (generally for export) of high-quality counterfeit software packages. The recent conviction of 11 defendants in the Operation Summer Solstice case (discussed above), involving the largest organized criminal counterfeit ring ever prosecuted, is a clear illustration of the dimension of the counterfeit problem.

enforcement against end-users (as distinguished from commercial counterfeiters). Systemic change in addressing enterprise end-user piracy will require criminalization. And administrative and civil enforcement remains very weak and ineffective against the massive scale of the problem. NCAC is woefully understaffed. It conducts some end-user raids, but cannot, even with the best of intentions, undertake meaningful enforcement with deterrent impact without significantly more manpower. In 2008 BSA requested 31 end-user actions with local enforcement authorities. A total of 29 raids were conducted, resulting in 8 settlements and 5 fines. This level of deterrence remains woefully insufficient against the scale of the problem. In addition to adding significant staff and resources at NCAC, more deterrent administrative fines of greater severity must be issued. Failure to confiscate equipment in many cases is also a problem. BSA did bring several civil cases against corporate end user piracy in 2008, but it is difficult to build these cases in any scale due to difficulty in obtaining pre-trial evidence.

In a widely publicized action, it was recently reported³⁶ that in the city of Nanchang in southern China, the Culture Bureau ordered all Internet cafés to legalize their software use either by installing Windows or Red Flag brand Linux or face heavy fines. However, it was also alleged in the same report that in reality only Red Flag Linux could be installed, primarily because it would allow the Chinese government to better monitor Internet usage for accessing or sending politically sensitive information. This kind of discrimination in the legalization and enforcement context is a constant threat to the software industry and must be continually monitored.

Internet café and public performance piracy: Piracy in Internet cafés is a major concern. Virtually all of these cyber cafes make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices.³⁷ The unauthorized public performance of U.S. motion pictures and music videos continues mostly unchecked in hotels, clubs, mini-theaters, and karaoke establishments. Television piracy, particularly at the city level, and cable piracy (over 1,500 registered systems which routinely pirate U.S. product) continue to harm the U.S. and Chinese industries. In 2008, MPA was involved in 1,845 raids where, 7,704,205 illegal discs were seized.

Book and journal piracy: U.S. book and journal publishers continue to suffer from piracy in three key forms: illegal printing of academic books and commercial bestsellers, unauthorized commercial-scale photocopying and, as discussed above, Internet piracy encompassing online academic and professional journals and sites offering scanned books for download. Well-known 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 2008, the publishing industry continued to work with GAPP, NCAC and several local copyright bureaus to deal with illegal reproduction of textbooks in “textbook centers” on university campuses.³⁸ In its 2007 and 2008 submissions, IIPA applauded the unprecedented administrative actions taken by GAPP, NCAC and local authorities on this issue, many of which resulted in administrative fines.

This progress continued in 2008, yet piracy remains at high levels. At industry request, administrative actions continued in March 2008 when authorities in Zhejiang Province raided the university textbook center at Zhejiang University in Hangzhou, ultimately issuing an administrative decision ordering that the university cease all infringement, ordering seizure of all infringing stock and imposing and RMB50,000 fine (US\$7309). Significantly, this decision emphasized the nature of textbook piracy as “against the public interest,” indicating a higher priority crime than previous

³⁶ See <http://www.iht.com/articles/ap/2008/12/03/asia/AS-China-Internet-Cafes.php>. “Large numbers of Web sites are blocked and dozens of Chinese citizens have been arrested for accessing or sending politically sensitive information over the Web. They include a former Shanghai university librarian imprisoned for three and a half years last month for downloading and distributing information about the banned Falun Gong spiritual group. Despite such prosecutions, China has the world’s largest population of Internet users with 253 million, and authorities are eager to encourage Internet usage as a driver for commerce. Internet cafes are patronized mainly by migrant workers, the rural poor and online gaming enthusiasts.”

³⁷ Even as far back as 2005 it was reported that 76% of Internet café users visit to watch movies. See http://www.media.ccidnet.com/art/2619/20050814/310051_1.html

³⁸ IIPA notes that this problem plagues Chinese publishers as well, with locally-produced Chinese books found in every raid conducted to date.

decisions had indicated. This is a positive development. This was followed by a September 2008 raid against Shanghai Jiaotong University's textbook center, resulting in a similar administrative order imposing an RMB10,000 (US\$1462) fine plus confiscation of the proceeds of the illegal sales.

IIPA and AAP applaud this continued engagement by the local authorities and the coordination by GAPP and NCAC. The timing issues that plagued the authorities' inspections early on have been remedied to a large extent, and authorities are generally responsive to complaints in a fairly timely manner. Given the narrow window of opportunity available for action in each case, this is an extremely positive development.³⁹ IIPA and AAP hope this good cooperation continues into the high seasons (February/March and September/October) of 2009.

One area of possible improvement concerns transparency in the process of inspections, raids and formulation of administrative decisions. In some recent raids, rights holder groups have had difficulty getting information about titles seized and plans for issuance of decisions. Also, the fact remains that in many cases, seizures and penalties are limited to the titles specified on the complaint. This procedural difficulty in the law results in less deterrent penalties than are otherwise deserved, as well as infringing stock left behind at the end of a raid. Given the increasingly restricted access to textbook centers (following news of raids around the country), it is extraordinarily difficult for rights holders to obtain information about precisely which titles may be inside a textbook center at a given time. This procedural hurdle to thorough enforcement should be re-examined.

Inspections in 2008 also yielded new discoveries about the practices of some academic libraries in selected areas of the country. IIPA has learned that libraries are now stocking copies of illegally reproduced textbooks and reference books for use by patrons. These books are similar in quality to those reproduced by the textbook centers. Universities should take immediate steps to ensure that their collections feature only legitimate books.

IIPA and AAP remain convinced that the partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities is essential to tackling the ongoing on-campus infringement issues, especially given the large number and wide geographic spread of universities engaged in these practices. Unfortunately, after some promising activity in 2006, MOE has been notoriously reluctant to engage, and indeed has consistently refused meetings with rights holders during 2007 and 2008. The past year saw no apparent progress in implementing the notices issued by the Ministry in late 2006.⁴⁰ These notices instructed universities that, among other things, they were to ensure that textbook centers were free of infringing activity by December 31, 2006. Unfortunately, over two years later, rights holders have been told of no plan for implementing these notices. IIPA and AAP consider it imperative that an action plan be developed to ensure that the notices don't remain just ink on paper.

In addition to the unauthorized reproduction of books on campuses, copy shops outside universities continue with illegal photocopying. 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 outside the university context as well. High level foreign technical or medical books marketed to professionals and bestsellers tend to be vulnerable to this type of piracy, as are commercial bestsellers, undermining the legitimate market for foreign and Chinese publishers alike. These books are sold widely by street vendors throughout China. Especially disconcerting is the increasing prevalence of pirated copies of books that have been denied entry to China for censorship reasons. The content control mechanisms have blocked the legitimate market, leaving the marketplace wide open for pirated versions.

³⁹ 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 rights holder complaints in previous years were conducted outside of these time periods. For example, the first 2006 investigations took place in June and July, when universities were out of session. Low seizures and low fines are bound to result. However, this problem seems to have subsided, with timely raids over the past two years.

⁴⁰ MOE joined GAPP and NCAC at the end of 2006 in issuing notices to regional education bureaus and regional copyright bureaus that copying of books at universities was not to be tolerated.

Piracy of Entertainment Software Products: Piracy levels for hard goods videogame products (both optical disc and cartridge-based formats) remain extremely high. Chinese enforcement authorities continue to fail to impose deterrent administrative penalties or initiate criminal prosecutions against infringers. During 2008, Nintendo of America, through Chinese administrative officials, conducted a number of raids against factories and vendors in Southern China. In one factory raid, over 10,000 counterfeit and infringing products were seized and removed for destruction. The factory was the largest manufacturer of counterfeit *Wii Remotes* and *Nunchuks* in Southern China, and in the past, had also been involved in the production of *Wii* mod chips and game copiers for the *Nintendo DS*. Administrative officials also seized approximately 7,300 counterfeit *Wii* discs from vendors in Guangzhou. The vendor's modus operandi was to keep small quantities of the counterfeit games at the market, with the remaining inventory stored off-site at a warehouse. Following the raid on the retail stores, the officials also raided the warehouse, seizing the stockpile of counterfeit video games and removing them for destruction. In early 2008, Customs officials, in two separated actions, seized a total of 84 packages containing counterfeit *Nintendo DS* cartridges, bound for the United Kingdom. Actions were initiated against the exporters, though investigations continue into both the exporters and importers to determine whether they are involved in other export activity involving counterfeit and pirated products. This action by Customs was most encouraging as seizures of outbound products is rather rare in China. Chinese exports continue to be found in Latin America, including in Brazil, Mexico, Paraguay and Uruguay.

Failure to pay U.S. rights holders for the public performance of musical compositions: U.S. owners of musical compositions (songwriters and music publishers) are receiving virtually nothing out of China for the public performance of their music by government broadcasters, bars, and other public establishments. This is a fundamental TRIPS/Berne right which leaves China vulnerable to another WTO case. In 2001 when China joined the WTO, it amended its copyright law to provide a right of remuneration for the public performance of music,⁴¹ but it wasn't until 2007 that a draft tariff schedule of payment was considered (which was pathetically low by modern standards), and while there was considerable support for it within China, it was blocked by SARFT in the State Council. The Chinese government estimates that advertising revenue in 2006 alone was US\$1.75 billion (believed to be understated). Since music performing rights payments in most countries are calculated as a percentage of such revenue, and it is estimated that 15% of music heard on Chinese broadcasting is U.S. music, the cumulative loss to U.S. composers and music publishers is in the tens of millions of dollars, even at the low rates initially proposed. The damage to Chinese composers and publishers is incalculable. A new tariff should be proposed, made retroactive and adopted as soon as possible. Royalties should then actually be paid to U.S. rights holders as a clear mandate under China's WTO obligations.

COPYRIGHT LAW AND RELATED ISSUES

As briefly mentioned above, on January 26, 2009, the WTO DSU panel considering the three U.S. claims that China was in violation of its WTO TRIPS obligation released its final decision. The U.S. government prevailed on two of its three claims -- one which successfully challenged Article 4 of the Copyright Law on the grounds that it denied copyright protection to works whose "publication and distribution was prohibited by law," and the second which held for the U.S. in its challenge that releasing counterfeit goods into the marketplace and only removing the infringing mark was a violation of TRIPS. The third claim challenged China's high thresholds for criminal liability for piracy on the grounds that China failed to criminalize a great deal of copyright piracy and trademark counterfeiting "on a commercial scale" -- a mandatory obligation under TRIPS. While the panel concluded that the U.S. did not prove its claim, the panel did carefully analyze the TRIPS Article 61 term "on a commercial scale" and agreed with the vast majority of the U.S. arguments. It also did NOT conclude that China's criminal thresholds were acceptable under its "commercial scale" standard.

Previous IIPA Special 301 reports have gone through the legislative landscape in China in detail. The following is intended to provide a summary of the key legislative and regulatory deficiencies and an update on new developments.

⁴¹ The 1990 copyright law did not even have a right of remuneration and China was in violation of the Berne Convention from 1992-2001 when it amended the law.

Adoption of the “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 at 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 right of communication to the public. 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. IIPA indicated that further regulations would be highly desirable to remove any ambiguity in coverage. He did not close the door to this possibility, but this has not yet occurred.
- **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, as they affect the right of communication to the public. The test of what constitutes a circumvention device still remains unsatisfactory. Exceptions were significantly narrowed, though remain overbroad in some areas.
- **Service provider liability, notice and take down, and exceptions:** The final regulation is a substantial improvement over earlier drafts and generally tracks the DMCA and EU E-Commerce 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). 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. Director General Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works and said that ISPs are liable for linking activities under Article 23, which we believe is the correct reading as affirmed in the Yahoo! China decision of the Beijing High Court. Furthermore, the Beijing High People’s Court in the Yahoo case clarified that the Article 14 notice is not a pre-requisite to invoke joint liability under Article 23 of the Internet Regulations. Other necessary clarifications are: that email notices are permitted and that takedowns following notice must be within 24 hours,⁴² and that ISPs that fail to immediately take down sites following compliant notices from rights holders are infringers and, as such, should be subject to the same administrative fines as any other infringer.⁴³ The NCAC should clarify and reform the evidentiary requirements necessary to provide a compliant notice. Unfortunately, Article 14 of the Internet Regulations arguably appears to require detailed evidence and, if so, that Article should be amended. In addition, the current law does not provide a specific remedy against repeat infringers.
- **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

⁴² While an official of the SCLAO has told IIPA that in his view email notices are acceptable, this interpretation has not been effectively communicated to the ISP community. In a November 2006 meeting with IIPA in Beijing, NCAC officials stated that takedowns should occur in no more than 48 hours. Unfortunately, this also appears *not* to have been communicated officially to all ISPs in China; prompt takedowns remain spotty in China.

⁴³ 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 of identifying infringers and bringing administrative actions against them. NCAC has apparently to date not acknowledged that fines can be imposed.

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 “non-profit” entities, and (d) failure to clarify that Article 8 does not apply to foreign works.⁴⁴

Administrative-Criminal Transfer Regulations: It was hoped that the amended Criminal Transfer Regulation would lead to far more and easier referrals from administrative agencies to the PSB. However, as IIPA has noted in its 2007 and 2008 submissions, 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 as to what would facilitate such “reasonable suspicion” transfers is necessary. One PSB requirement for case transfer from administrative authorities is that the administrative authority provide proof of illegal proceeds/gains obtained by the infringers. However, administrative authorities have no investigative power to collect sufficient evidence to fulfill this requirement. Therefore, administrative authorities conclude the matter by just seizing infringing products. Reports in the Chinese press routinely note referrals occurring (though IIPA is aware of only a very limited number of cases involving copyright) 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.

The Copyright Law should be amended to bring it into compliance with the WIPO Internet Treaties and the WTO panel decision. It is worth noting that a Chinese official also acknowledges that further amendments to the copyright law are needed⁴⁵ to bring China fully into compliance with its international obligations, particularly under the WIPO Internet Treaties. IIPA has already set out some of the issues that need to be dealt with in the amendment process and all rights holders eagerly await this process. Some of the amendments that should be made are:

- protection for temporary copies (can also be done in regulations or a JI)
- narrow some exceptions to protection and add reference to the three-step test
- ensure that the anti-circumvention provisions clearly cover copy controls and preparatory acts e.g., devices and services, and that there is a clear definition of circumvention
- ensure that live sporting events are protected either as works or under neighboring rights
- remove reference to “public interest” as a criteria for administrative enforcement
- Add public performance and broadcast rights for all works and for sound recordings
- increase and clarify statutory damages for infringements, and maximum administrative fines for infringements
- clarify secondary liability for infringement and ensure that central government authorities and courts have jurisdiction over Internet infringements, regardless of where the infringement occurs or the server resides
- establish clear presumptions of subsistence and ownership
- impose a clear obligation on ISPs to take action against repeat infringers.

In addition of course, in order to come into compliance with the WTO panel’s recent decision, Article 4 needs to be amended to remove all language that limits the scope of subject matter that receives full copyright protection.

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

⁴⁴ 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 widely available.

⁴⁵ Interview with NCAC Vice Minister Yan Xiaohong, June 13, 2007, BBC republishing and translation of original Xinhua text from June 9, 2007

fairly large amount” or “when the amount of the illicit income is huge”) for criminal liability calculated based on pirate profits or income.⁴⁶ 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), which, as discussed above, China has joined. 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 the 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 rights holders, and (5) increase the level of penalties overall. China must also make good on its promise to criminalize fully 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).⁴⁷ We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not included in the 2004 JIs; we seek confirmation that the recidivist provision in the 1998 JIs remains intact, since it is not inconsistent with the 2004 JIs.⁴⁸

Criminal thresholds should be further lowered or abolished entirely: 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, copyright owners have not found that the copy have proven very helpful in generating new criminal prosecutions. China should further lower its thresholds or abolish them.

A new challenge is how to meet the threshold in the case of Internet infringement. The new SPP “guidelines” do not deal with this issue.⁴⁹ 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 or “illegal business volume” is not proved.

Without clear evidence of infringement satisfying the threshold requirement, law enforcement agencies are often reluctant to take actions against alleged Internet infringers. This is further exacerbated by the lack of power on the part of rights holders to investigate the content or to seize the servers of alleged infringers to preserve the evidence. There is an urgent need for a new and separate Judicial Interpretation to deal with guidelines for criminal cases involving the Internet.

China should adopt full communication to the public and broadcasting rights for record producers and for all works: 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 U.S. 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 no collections have been made.

⁴⁶ As noted below, the new JIs set forth what “other serious circumstances” and “other particularly serious circumstances” are, but nevertheless, since 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.

⁴⁷ 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.”

⁴⁸ 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.”

⁴⁹ See footnote 16.

Moreover, where appropriate and particularly for music, China should adopt an exclusive right of public performance and broadcasting, permitting the Chinese performing rights society to negotiate freely a fair payment for this right.

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). In some cases prints shipped to theaters were misappropriated and copied directly into prints (i.e. telecine transfer), which can then be used for mass production of high quality DVDs. These copies and masters are then distributed to bootleg "dealers" throughout the world and over the Internet. China should take whatever legislative steps necessary to criminalize camcording and telecine transfer of motion pictures.

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 seven 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. rights holders who would like to more effectively and efficiently provide their products to Chinese consumers.⁵⁰

There are a range of general restrictions, affecting more than a single copyright industry, which stifle the ability of U.S. rights holders to do business effectively in China. Some of these have been challenged in the WTO case. Taken together, these are summarized below.

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), and entertainment software publishers, at best, to enter the Chinese market as a partner in a minority-share (up to 49%) joint venture with a Chinese company.⁵¹ These limitations should be eliminated. In many instances, China does not permit any foreign ownership at all.

⁵⁰As a result of many of these deficiencies, on April 10, 2007, the U.S. government, supported by the China Copyright Alliance, filed a WTO dispute settlement case asserting that China has failed to afford trading rights and certain distribution rights for some copyright industries. See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm. The U.S. requested the establishment of a WTO dispute settlement panel on October 11, 2007. The market access measures that the U.S. government alleged to be WTO-incompatible include: (1) claims involving the failure to afford trading rights (the right to freely import without going through a government monopoly) to imported films for theatrical release, audiovisual home entertainment product, sound recordings and book and journal publications; (2) measures that restrict market access for, or discriminate against, foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment product and that discriminate against foreign suppliers of distribution services for publications; (3) measures that provide less favorable distribution opportunities for foreign films for theatrical release than for domestic films; and (4) measures that provide less favorable opportunities for foreign suppliers of sound recording distribution services and for the distribution of foreign sound recordings than are provided to like service suppliers or like products. It is expected that the interim panel decision will be issued soon in this case.

⁵¹ 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% elsewhere. However, these regulations 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.

China's burdensome 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 December 11, 2006 *Opinion on the Development and Regulation of Internet Music*, also discussed below, would impose 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 businesses and the rights holders who license their product to them. A new draft Circular has recently been circulated by the Ministry of Culture that would pose significant problems for the distribution of legitimate foreign content, and which would have no real impact other than to provide yet additional advantages for those enterprises that provide access to infringing (and non-censored) content. It is a matter of the first importance that this draft Circular not be issued in its present form.

Entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the market window for legitimate distribution of an entertainment software product (this window is often 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.⁵² As has been committed for other industries, and consistent with the JCCT outcome, the Chinese government should rid the market of pirated game titles that are still under GAPP review, effecting an immediate seizure of the unauthorized titles. Pirates should not be given free reign of the market while legitimate publishers comply in good faith with China's content review process. Another serious concern involves another approval process with the Ministry of Culture for online versions of games.⁵³ 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 become subject to two separate content review processes before two different agencies. The need to comply with two review procedures before two different agencies exacerbates the delay in getting new releases to market, and is overly burdensome to publishers. Finally, transparency in the review process and in the criteria employed in these reviews are likewise sorely needed.

IIPA notes that the responsibility for censorship of home video product and sound recordings released in a physical format has been transferred from the Ministry of Culture to the GAPP. This appears to be an effort to tighten Chinese government control over content and MPA members and international record companies have already experienced a slow down in the censorship process, which impacts directly the piracy situation in China. Some of this may be due to the changeover but the process should eventually be expedited, not slowed down. The average censorship process for home video product in other Asian countries is seven working days, although in some cases it may take up to 21 days. Even considering GAPP's transition period, the censorship process has taken several months where only a small handful of titles were approved at the end of December. Pirates effectively enjoyed a "protected window" where only illegitimate copies are available and consumers were given no legitimate alternative. If the GAPP

⁵² An ESA member company reports that one of its titles was under review for a period of 18 months (the longest such review period known thus far), and subjected to several layers of reviews before several different bodies. Despite the length of the review, the process remained opaque with the criteria for review still unknown to the publisher.

⁵³ 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 and has recently issued new regulations covering 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.

censorship process is not improved to match international practice quickly, piracy levels will worsen and government efforts on enforcement will be ineffective due to the lack of legitimate home video product to meet consumer demand.

Internet Audio-Visual Program Service Management Regulation: This new regulation issued by MII and SARFT took effect on January 31, 2008 and is stated to apply to all audio visual programs provided to the public via the Internet in China. The regulation requires that all Internet audiovisual program service providers obtain a permit for the “Transmission of audio-visual programme via the Information Network” or for file recordation. Such permits would only be granted to state-owned or state-controlled companies. However, it was reported in the press on February 5, 2008 that SARFT and MII have issued a statement clarifying that the new rules on ownership of video sites apply only to new set-ups and that existing privately-owned sites can continue to operate. The permit holders are responsible for the legality of the content of the programming and the relevant government authority may transfer cases that involve criminal acts to the Ministry of Public Security for criminal investigations. It remains to be seen if this regulation can be used to fight piracy of audio visual products (e.g., music videos) and films on the Internet. So far, some applicants, which are also engaged in piracy have had their license requests denied or delayed, though it remains unclear whether this is for the absence of copyright licenses, or for their political content or other reason.

Restrictions on trade association staff and on anti-piracy investigations: Also affecting the ability of some copyright industries to do business in China are the severe restrictions maintained on the ability of copyright industries’ trade associations in China from engaging in investigations in the 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 in certain sectors 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 hamper the fight against piracy in China.

There are also many industry-specific market access restrictions:

Recording industry: Record companies are prevented from establishing a meaningful commercial presence that would permit them to develop 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.⁵⁴ 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)).

Similarly, the *Opinion on Development and Regulation of Internet Music*, along with earlier regulations, significantly stifles the development of legitimate online music commerce in China, including both Internet-based music services and

⁵⁴ 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.

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.

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 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 without any limitations.
- **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 the 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. 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. 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. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.
- **Restricted market access for foreign satellite signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the

national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.

- **Broadcast quotas, content restrictions, and restrictive license practices for satellite channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).⁵⁵ The China TV Program Agency under CCTV must approve all importation of foreign programming under the guidance of SARFT. China has 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).⁵⁶
- **Black-out periods:** The Chinese government has on various occasions, including a complete ban imposed in December 2007, 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 rights 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 rights holders' abilities 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.

Entertainment software industry: The entertainment software industry notes its concern over the ban on video game consoles. The current ban on the manufacture, sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 *Opinion on the Special Administration of Electronic Gaming Operating Venues*, is also impeding the growth of the entertainment software sector in China. The ban also includes within its ambit development kits used in creating and developing video games. It is a rather unfortunate situation as it also prevents foreign publishers from outsourcing the development of segments of games to domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation. The Chinese government should be encouraged to eliminate this ban, on both video game consoles for home use and on development kits. Maintaining the ban not only impedes access to the market for foreign publishers but also hinders the fledgling Chinese game industry's access to game development technology — a policy seemingly at odds with the government's interest in spurring the growth of this dynamic sector.

Business software industry: As noted above,⁵⁷ government efforts to legalize software use in enterprises have, on occasion, gone hand in hand with preferences favoring the acquisition of Chinese software over non-Chinese software. Examples of state-owned enterprises being instructed to prefer domestic software include a January 2008

⁵⁵ Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time (17:00-20:00) 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 30% of daily animation programming delivered by animation and youth and children channels, and during prime time, foreign animation and programming is banned. 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.

⁵⁶ 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.

⁵⁷ See text accompanying footnote 36.

“Announcement on Preparation for the Inspection of the Use of Genuine Software in State-Owned Enterprises by the Province” issued by the Guangdong provincial government and a December 2007 speech by a Deputy Party Secretary and Vice Chairman of SASAC at a “Working and Training Conference on the Software Legalization in Central Enterprises”. As recently as this January a Vice Minister of MIIT encouraged and commended those enterprises that have adopted indigenous software products in their legalization in a speech at the plenary session of the Joint-Ministerial Meeting for Enterprise Legalization. These actions appear to be inconsistent with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold” China reiterated this commitment in the 2008 meeting of the JCCT. The Chinese government should, consistent with its WTO and JCCT obligations, refrain from instructing or encouraging state-owned enterprises to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant government agencies at the central, provincial and local levels.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA undertook many training and awareness programs throughout China in 2008. The trainings have involved police, prosecutors, judges, customs officials, and administrative agency enforcement personnel. Training and awareness have always been a high priority for the copyright industries in China.

In 2008, MPA sponsored and co-organized 18 trainings/seminars for over 1,500 enforcement officials, IPR judges, representatives from ISPs and ICPs, local copyright industries, with topics covering new trends in piracy worldwide, MPA’s anti-piracy strategy, impact of piracy on the film industry, strategic civil litigation against piracy, IPR cases in U.S. courts, investigative techniques against Internet piracy, identification of pirate optical disks, etc.

MPA assisted in organizing the following law enforcement trainings with the NCAC:

- March -- Kunming (103 officials from Sichuan, Shan’xi, Guizhou, and Yunnan participated)
- May – Taiyuan (74 officials from Hebei, Henan, Tianjin, Inner Mongolia, and Shanxi participated)
- June – Wuhu (105 officials from Shanghai, Jiangsu, Zhejiang, and Anhui participated)
- July – Harbin (106 officials from Liaoning, Heilongjiang, and Jilin participated)

MPA assisted in organizing the following trainings with local Cultural Task Forces

- January – Shanghai (over 80 participants)
- January – Beijing (over 90 participants)
- June – Nanchang (102 enforcement officials in Jiangxi Province)
- December – Hangzhou (over 120 participants)
- December – Shanghai (over 100 participants)
- December – Beijing (over 80 participants)

It assisted in organizing the following trainings for Customs officials

- January – Fuzhou Customs (34 customs officials)
- January – Guangzhou Customs (36 customs officials)

...and trainings/lectures for students

- April – East China University of Political Science & Law in Shanghai (60 students)
- June – Beijing Hepingli 2nd Primary School (600 students)
- June – China Media University (over 100 students)

...and conducted seminars

- April – Seminar on movie/TV online copyright protection and signing ceremony of MOU between MPA and 7 UGC sites (over 100 participants)

- May – High level seminar on application of IPR laws (10 participants)
- November – China workshop on Internet IPR criminal enforcement

The record industry focused primarily on training for online enforcement and conducted over ten training events for enforcement officers at central and provincial level from various government agencies including Copyright bureaus, Cultural Enforcement Taskforces, Press and Publication Bureaus, NAPP, and Customs, as well as for IP Court judges and representatives from ISPs and other internet companies.

BSA also provided training on how to identify pirate software and on enforcement generally. In December 2008, it conducted *an* enforcement training for officials from the Beijing Cultural Law Enforcement Contingent.

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: The Philippines should be elevated to the Priority Watch List. IIPA also may recommend a review to determine whether the Philippines qualifies for benefits under the Generalized System of Preferences trade program, under which more than \$913 million of Philippine goods, or more than 10.5% of the Philippines' total imports to the U.S. in 2008, enjoyed duty-free access to the U.S. market.

Executive Summary: In general, the piracy situation in the Philippines worsened in 2008. In addition to physical piracy (CDs, DVDs, CD-ROMs, photocopies and book reprints), the legitimate market for foreign and local Philippine copyright material was decimated by Internet piracy (mainly peer-to-peer), mobile device piracy, camcording piracy, retail piracy, optical disc production, and pay TV theft. The Philippine Anti-Piracy Team (PAPT) provided support for anti-piracy activities upon industry request, but too few investigations led to arrests and prosecutions. The promise of establishment of new intellectual property courts has not yet been fulfilled, but hopefully can be accomplished in 2009 to ensure copyright cases do not languish or conclude badly. Judicial corruption has become an increasingly serious concern. Only a handful of criminal convictions in copyright cases have ever been handed down in the Philippines, with even fewer achieving deterrent sentences, or sentences that were carried out in practice.

Priority Actions Requested in 2009: IIPA requests the following actions, which, if taken, would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Ensure search warrants are obtainable on a reasonable and timely basis consistent with international law.
- Develop IP expertise in judges and prosecutors by re-establishing intellectual property courts and increasing speeds of dockets, enabling a significant number of pending cases to move forward in the system.
- Launch anti-corruption initiative to eradicate compromises in IP enforcement and take action to punish offenders.
- Remedy bottlenecks on inquests and preliminary investigations by the Department of Justice by streamlining signing procedures (now apparently limited to one or two officials with authority to sign).
- Increase the number of investigations (including *ex officio*), raids and criminal proceedings against: mall owners and retail merchants engaged in piracy, including mobile device piracy; those engaged in illegal camcording of motion pictures; photocopy shops; large-scale pirate distributors; businesses engaged in corporate end-user piracy of software and other materials; and optical disc plant owners (in both unlicensed replicating plants and licensed plants).
- Increase the capacity to investigate and eradicate P2P and other Internet-based piracy; implement current laws (like the E-Commerce law) and pass pending legislation to foster removal of infringing material or services from the Internet through imposing ISP liability and an effective notice and takedown system.
- Address book piracy through closer monitoring of key areas selling pirated books, both on and off university campuses, and employ resources to locate and arrest fugitives in piracy cases.
- Cease licensing new optical disc plants forthwith since the Philippines suffers from production overcapacity and closely monitor the activities of licensed plants which are known not to be used by the legitimate sector, or have previously been caught manufacturing infringing products, through regular inspections by properly-trained personnel.
- Allow right holders to participate in investigations and accompany inspectors.
- Augment anti-camcording enforcement efforts.
- Curb Pay TV (cable and satellite) piracy by shutting down some of the estimated 800 pirate cable systems, and/or through license or permit revocations/suspensions.
- Expedite the collection of public performance royalties on the broadcast or communication to the public of sound recordings by removing obstacles to collection and assisting in information dissemination to dispel public confusion.



Legislation

- Pass as a matter of first priority the copyright law amendment Bill (SB 880 and HB 03741) aimed at implementing the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty and making other positive changes.
- Enact national legislation (HB 04117) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT.

PHILIPPINES										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	105.0	70%	88.0	69%	71.0	71%	46.0	71%	38.0	71%
Records & Music	117.0	83%	88.3	80%	50.3	62%	21.0	40%	20.0	40%
Books	NA	NA	49.0	NA	49.0	NA	48.0	NA	48.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	11.3	85%	NA	90%
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	78%	33.0	85%
TOTALS	222.0		225.3		170.3		126.3		139.0	

PIRACY CHALLENGES IN THE PHILIPPINES

Camcording Piracy: In 2008, the Philippines held the dubious distinction of being among the world's worst in terms of number of forensic matches and interdictions in illegal camcording of motion pictures. The number of instances of illegal camcording forensically matched to the Philippines in 2008 was 44, a 389% increase over 2007. Philippine movie pirates choose films that release earlier than, or day-and-date with, the United States, and notably, a day-and-date release in the Philippines is still more than half a day earlier than a U.S. release. For example, *Rambo* and *Indiana Jones and the Kingdom of the Crystal Skull* were illegally camcordered in the Philippines and uploaded to the Internet the same day as their U.S. theatrical release. The movie *Jumper* was illegally camcordered in the Philippines and available on the Internet four days before its U.S. theatrical release. Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are distributed globally (13 different countries across 3 continents). The Motion Picture Association notes that approximately 57 percent of illegal camcords forensically traced to theaters in the Philippines have been found outside of the Philippines, either in hard goods or on the Internet. This piracy has a devastating impact on the life cycle of U.S. motion pictures, eroding their viability not just in the Philippines and other Asia Pacific markets, but also in the United States. Camcorder piracy in the Philippines has also had a profound negative effect on the local movie theater business in the Philippines. As a result of illegal camcording, countless thousands of theatrical receipts are being lost, as movie theater tickets range from P120 (US\$2.55) to P150 (US\$3.20) for a high end theater, while a pirate DVD generally runs around P80 (US\$1.70). Pirate versions sourced from illegal camcording are often available just two or three days after the theatrical release in the Philippines.

Internet Piracy: Internet usage in the Philippines exploded in 2008. A recent study by Universal McCann notes 37 million regular Internet users² and Internet World Stats notes almost 1 million broadband connections in the country as of March 2008,³ representing significant growth compared with 2007. The Philippines ranked seventh in the world in percentage growth of broadband connections in the year ending October 1, 2008.⁴ It is therefore not surprising that Internet piracy grew in 2008, predominantly through peer-to-peer (P2P) services and involving all kinds of copyright content (for example, in 2008, illegal downloading of e-books increased, as did the sale online of scanned versions of

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in the Philippines. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on the Philippines' Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Lawrence Casiraya, *RP Has Highest Percentage of Social Network Users – study*, May 8, 2008, available at <http://newsinfo.inquirer.net/breakingnews/infotech/view/20080508-135336/RP-has-highest-percentage-of-social-network-users---study>.

³ See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm> (citing International Telecommunications Union).

⁴ See Fiona Vanier, *World Broadband Statistics Q3 2008*, PointTopic, December 2008, at 17.

textbooks, reference books and trade books placed onto CD-Rs). In addition, the Internet has become the source of choice for other forms of piracy, including mobile device piracy and even DVD and VCD content.

Mobile Device Piracy: Mobile device piracy similarly exploded in the Philippines in 2008. Vendors in the Philippines have dedicated booths and stalls within shopping malls (like notorious shopping areas such as Metrowalk, Makati Cinema Square, and Quiapo) and pre-load, load after the sale, or “download for a fee” pirate content (music, published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. An investigation in late 2007/early 2008 revealed a chain of computer dealerships actively involved in unauthorized direct loading to iPod music player devices at the point of sale. Test purchases made from every branch of the chain resulted in the staff loading many hundreds of songs on purchased devices. The practice is so open and blatant that many retailers advertise the sale of pirate downloads on banners outside their premises. Moreover, staff in major retail outlets in even high-end shopping malls will take customers from their salesrooms to nearby piracy retail outlets to load the devices after sale. Books and journals, especially medical and nursing titles and trade books are also being offered for download onto PDAs, either by these same for-profit entities or by vendors on medical campuses. Infringers especially target medical students and practicing physicians who want easy access to reference titles.

Business Software End-User Piracy: The rampant use of unlicensed software in the workplace by businesses continued to cause the greatest revenue losses to the software industry in 2008, thereby stunting the growth of the information technology sector. The piracy rate (estimated to be 70% in 2008) remained high compared to the regional median for Asia of 66% in 2008. The continuing high piracy level can be attributed in part to an increase in PC shipments to the Philippines, without a commensurate rise in legitimate software sales.

Book and Journal Piracy: In 2008, illegal commercial-scale photocopying of entire books (and some print piracy) continued to harm foreign and domestic publishers in the Philippines, in commercial establishments surrounding universities, or in street stalls in metropolitan areas. Activity even continued near the Philippine Regulations Commission, the government institution that regulates legitimate business in the country. Photocopy shops operate on college, medical and nursing school campuses. The high number of college and graduate students in the Philippines results in high demand for university textbooks, technical books, and professional medical and nursing books. The “university belt” in Metro Manila is especially well known, and publishers have discovered that most cities contain areas rife with photocopy shops. Photocopy shops also operate in and around hospitals; some even sell pirate versions door-to-door to doctors’ offices and medical establishments, and at trade fairs. These shops avoid holding stockpiles of infringing goods and copy on a “print to order” basis, complicating investigations and enforcement actions. Pirates can also burn CD-Rs with up to 100-200 titles on each disc, or can scan files, making them available for download onto PDAs in hospitals, educational institutions, and even shopping malls. U.S. publishers have encouraged the Commission on Higher Education (CHED) to provide proper incentives to campuses that do not tolerate illegal activity by vendors or students, and consequences (e.g., regarding accreditation and funding) for universities that fail to deter this activity. To date they have not acted on that request.

PD 1203 Reprints: Apart from the photocopying issue, publishers remain concerned about possible illegal reprints of textbooks and medical books. In the past, some 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 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.” Prior to the issuance of this statement, the IPO had asked the distributors of books purporting to be reproduced or left over under Presidential Decree 1203 to remove illegal stocks from their stores, resulting in some improvement, although the suspicion remains that stocks simply moved to a less open location.

OD Replication for Export: The Philippines once again apparently emerged in 2008 as an exporter of pirate CDs, DVDs, and CD-ROMs. Local production reportedly makes up an estimated 40 to 50 percent of hard goods found in the domestic market and pirates once again have found it profitable to export. We believe the Optical Media Board (OMB) holds a list of licensed plants that has not been made available to IIPA and apparently has not been shared with the U.S. government. However, it is clear that the total number of plants in the Philippines have a production capacity which exceeds legitimate demand.

Retail and Mall Piracy: With increased production has come increased detriment to copyright sectors in the Philippines. As an example, hard goods piracy has all but wiped out home video sales with pirates controlling upwards of 90 percent of the P6 billion (US\$127 million) industry. Availability of pirate CDs, DVDs and CD-ROMs (and burned CD-Rs and DVD-Rs) remains stable, although pirate product has been relocated from hot spots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City to neighboring streets outside the mall vicinity. "Runners" inside and out of these malls offer product and lead buyers to the neighboring street. Piracy remains open at other notorious shopping areas such as Metrowalk, Makati Cinema Square, Quiapo, and the Paranaque Night Ruins. As noted, pirates sell both locally-produced discs and imports primarily from China. Market intelligence also suggests an increase of locally burned pirated discs (including a recent proliferation of pirate DVD-Rs) from Quiapo Bartertrade complex, which is also known as a key local market for illegal drug manufacture and distribution. One reason pirate product remains ubiquitous in the Philippines is the increasing availability of inexpensive hardware that plays the various media, as there is anecdotal evidence that pirate CD and DVD sales rose concomitant with the arrival in the Philippines of cheap CD/DVD players.

Mechanical License Piracy (Karaoke): Karaoke is quite popular in the Philippines, and in a recently reported phenomenon, various machine brands are sold in Raon, Quiapo with accompanying discs containing as many as 5,000 karaoke tracks. These tracks consist of both local and international repertoire. Some brands come preloaded with karaoke recordings of legitimate record companies. Roughly four brands have sought licenses from music publishers, but those that don't are violating copyright for failure to pay proper royalties. Exacerbating the problem are a few of the manufacturing companies which have slapped USB ports onto their karaoke machines which allow them or the owners of the machines to add tracks, including from the manufacturer's websites.

Pay TV (Cable and Satellite) Piracy: There remain an estimated 800 pirate (unlicensed) cable systems broadcasting copyright content without consent from the channels or the content owners in the programming of those channels. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimated revenue losses of US\$85 million in 2007 to the channels and content owners, and continuing losses in 2008.

ENFORCEMENT CHALLENGES IN THE PHILIPPINES

Major issues still plague right holders seeking redress for copyright infringements in the Philippines, most notably (as discussed below), the complete systematic failure of the courts to mete out proper deterrent justice in open-and-shut piracy cases. Overall, the system in the Philippines lacks well-coordinated and sustained enforcement efforts by the various vested authorities and enforcement coordination. Executive Order 736, issued by the President on June 21, 2008, attempted to address this lack of coordination. The EO institutionalizes permanent intellectual property units in the Philippine government's law enforcement agencies, creating the National Committee on Intellectual Property Rights (NCIPR) as the coordinating body of various units. The Department of Trade and Industry chairs the NCIPR and the Intellectual Property Office serves as vice chair, and members include the Department of Justice, the Department of the Interior and Local Government, the Bureau of Customs, the National Telecommunications Commission, the National Bureau of Investigation (NBI), the Philippine National Police (PNP), the Optical Media Board (OMB), the National Book Development Board, the Bureau of Food and Drugs and other agencies. IIPA understands that the NCIPR has met and is encouraged by its creation but has yet to see any progress toward more effectively addressing IPR infringements in the country on a national level. Meanwhile, the Pilipinas Anti-Piracy Team (PAPT), made up of the PNP, NBI and OMB, continued in its initiative begun in 2005 to eliminate software piracy and promote faster growth of the country's IT industry, and the Business Software Alliance remained pleased with its working relationships with PAPT, conducting eighteen end-user raids and two retail raids in 2008. Finally, there were again some impressive seizures of pirate product in 2008, as the motion picture industry's enforcement program specifically reports 1,685 inspection orders, resulting in seizures of 4.1 million pirate discs. Yet, out of all that raiding activity, and raids on behalf of other industries, not one criminal case was concluded.

Criminal Court System Remains Dysfunctional and Non-Deterrent: Starting with the criminal inquest procedure at the Department of Justice, and ending with criminal trial, criminal cases in the Philippines on copyright matters almost never conclude successfully. The inquest procedure can take many months, delayed by bureaucratic hurdles (the need for multiple signatures from too few designated officials), with little assistance by prosecutors (e.g.,

putting together evidence, obtaining witness testimony, and obtaining business records). Cases listed for trial proceed on non-consecutive days with multiple adjournments of several months at a time. For example, a ten-day trial with three month adjournments would typically take at least two and a half years. During the elongated trial period, many problems often arise, including the transfer of prosecutors and judges (meaning institutional memory of the case is lost); delay tactics by defendants' counsel by challenging search warrants or seeking further delays due to technicalities; and even the disappearance of key witnesses, the defendants themselves (the Philippine National Police have shown no sustained inclination or interest in searching for defendants), or key evidence needed to properly adjudicate the case. Challenges by defendants' counsel (even those without merit) usually result in automatic consideration, leading to further months of delay before such technicalities are adjudicated. As a result, the criminal system offers no deterrence to copyright piracy. No criminal copyright convictions were secured prior to 2002, and since 2002, there have only been five convictions under the Copyright Act.⁵ The largest criminal fine in any of the cases thus far was a modest P200,000 (approximately US\$5,000), and while two defendants were sentenced to one year in prison or more, in one case involving blatant and massive photocopy piracy, the defendant remains at large.

Establishment of IP Court Would Succeed If Copyright Cases Proceed to Conclusion with Deterrence: IIPA hopes the Philippine government will follow through on indications that it would reestablish a specialized IP court in the Philippines, in line with President Gloria Macapagal Arroyo's call for such a court. IIPA would hope that, as a result of the establishment of these new courts, greater numbers of criminal prosecutions against key mall operators, pirate book producers, large-scale pirate distributors, optical disc plant owners, those engaged in illegal camcording and other key pirates would ensue.

Lack of Effective Search Warrant Procedure in Copyright Cases: One of the most problematic and frustrating aspects of the Philippine court system has been the *de facto* unavailability of search warrants in copyright cases due to constitutional challenges by defendants' counsel. The Telmarc Cable case,⁶ coming on the heels of the search warrant quashed in the Solid Laguna decision,⁷ was affirmed by the Supreme Court in 2007. In the Telmarc case, the Supreme Court indicated that for an affidavit to properly support a search warrant, the "oath required must refer to the truth of the facts within *the personal knowledge* of the applicant for search warrant and/or his witnesses, not of the facts merely reported by a person whom one considers to be reliable" [emphasis added]. Notwithstanding the fact that the claimants took the police officer to the site of the infringement to personally witness the acts being committed, the warrants were quashed. The most recent example of egregious results occurred in a case against the Powermac Centre Company, concerning the unauthorized pre-loading of mp3 music files on to iPods by Powermac's retail stores. In this case, the judge quashed his own search warrant issued in January 2008, making the seized product no longer admissible in court. These decisions belie the government's indications that the Supreme Court's own decision in the Columbia case⁸ (a case which held that affidavit evidence is sufficient to uphold the requirement of "probable cause" to obtain a search warrant) was the controlling precedent. Without the availability of a search warrant remedy - a TRIPS requirement - progress cannot be made in piracy cases in the Philippines. Finally, and sadly, it appears that some corruption pervades the system in the Philippines.

No Ex Officio Authority for Police: 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

5

THE PHILIPPINES: CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2007	
TITLE	DATE OF DECISION/LAW
PP v. Abdul Alonto et al.	09 January 2007 (RA 9239: Optical Media Act of 2003)
PP v. Manny Marasigan	05 June 2006 (Copyright infringement)
PP v. Nestor C. Yao; PP v. Nestor C. Yao alias "Jao Jee Hung"	13 July 2006 (Copyright infringement)
PP v. Macacuna Gandarosa Y Basheran & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
PP v. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro	20 December 2006 (RA 9239: Optical Media Act of 2003)
PP v. Eugene Li	10 February 2005 (Copyright and Trademark infringement and Unfair competition)
PP v. Catherine Marquez	22 June 2004 (Copyright infringement)
PP v. Harold Chua	03 October 2002 (Copyright Infringement)

⁶ *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*, CA-G.R. SP. No. 96767 May 31, 2007. See IIPA's 2008 Special 301 report on the Philippines for further discussion, at <http://www.iipa.com/rbc/2008/2008SPEC301PHILIPPINES.pdf>.

⁷ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005.

⁸ See *Columbia Pictures Entertainment, Inc. v. Honorable Court of Appeals, 14th Division and Jose B. Jingco of Showtime Enterprises., Inc.*, G.R. No. 111267, September 20, 1996 (J. Romero, Second Division).

complaint. This should be remedied, and the authority should extend to initiating actions and seizing infringing items *ex officio*.

Lack of Effective Enforcement Against Illegal Camcording: As noted, the Philippines has become among the world's worst countries in allowing illegal camcording of motion pictures right off the screen. IIPA members have discussed this problem with the IP Office on numerous occasions in 2008, and hope for the Director General's strong support of national legislation and a strict enforcement campaign to defeat this virulent form of piracy in 2009. In the meantime, swift and immediate enforcement action/investigation should commence against illegal camcording. IIPA notes with optimism the introduction of HB 04117, the Anti-Camcording Act of 2008, on May 19, 2008.⁹ The Bill sits with the Committee on Public Information but apparently will be voted upon in early 2009. The Bill should be enacted with the greatest priority. Local ordinances in Metro Manila and Quezon City are welcome, but this problem is of a national scope and requires a national solution (and the Copyright Act, while helpful, is insufficient on its own to eradicate the illegal camcording problem). HB 04117 would define the acts constituting unauthorized possession, use and/or control of audiovisual recording devices, and the presumptions as to the subsistence of copyright and ownership of copyright. There have reportedly been attempts by the OMB to expand its jurisdiction into camcording piracy, although there appears to be opposition to this jurisdictional assignment, including by theatre owners (National Cinema Association of the Philippines or NCAP). The National Bureau of Investigations (NBI) also recently introduced new procedures for anti-camcording complaints which were supposed to make it easier for rights holders to complain about illegal camcording, but reportedly the procedures are quite onerous (and simply lead back to the IP Code, i.e., they do not impose new liability or ease evidentiary burdens). While IIPA is appreciative of efforts by NBI to create this structure, IIPA favors tailored legislation as that in the House Bill and the local ordinances to address the illegal camcording phenomenon in the Philippines.

Lack of Effective Enforcement on the Internet: As Internet piracy flourishes in the Philippines, the enforcement infrastructure needs to catch up with the technology. In 2008, there were no known investigations into or actions taken against Internet piracy in the Philippines. The E-Commerce Law establishes important legal principles for liability (i.e., contributory and vicarious liability are codified in the law), but there is no statutory notice and takedown to date in the law. Such a mechanism should be added, but in the meantime, the Philippine government should remind the public that use of P2P networks by copying or distributing illegal files is copyright infringement, and it should launch a campaign aimed at stopping Internet infringements. Blatant commercial Internet pirates advertising hard goods or downloading for loading onto devices (including mobile devices) should be acted against like physical piracy. Service providers should take steps to stop or take down infringing activities or materials utilizing their services.

Mobile Device Piracy Enforcement Commences: During the last few months of 2007 and into 2008, the international recording industry group, the International Federation of the Phonographic Industry, working with the local music recording industry association (PARI), conducted market surveys of the mobile device piracy phenomenon and provoked enforcement actions against a chain of computer dealerships. IIPA calls upon the Philippine government to significantly step up its activities against this form of piracy in 2009.

Mall Piracy Starting to Move Underground; More Action and Accountability Needed: In 2008, industry saw the beginnings of movement of mall piracy out of public view at some of the piracy hotspots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City. However, piracy remains at those sites; it is just hidden from view and operated by runners. The Philippine government must adopt a zero tolerance policy, and warn mall owners (and where relevant, retail mall merchants) that they will be held accountable for failing to stop piracy in the malls. They should follow President Gloria Macapagal Arroyo's letter memorandum of November 16, 2006, which called upon the government to "enforce criminal, civil or administrative liability of owners of buildings, such as malls and the like, that lease space to establishments selling pirated and counterfeited goods, or ensure implementation of contracts of lease that prohibit tenants from selling pirated goods in the premises of the lessor," and to "[c]onsider, and as appropriate, implement measures that include suspension, revocation or denial of pertinent national and local government permits or licenses of individuals, firms or establishments that engage in, allow or tolerate the production, importation or sale of pirated and counterfeited goods." Passage of the Bills already introduced into the House and Senate would further enhance the

⁹ An Act To Prohibit And Penalize The Unauthorized Use, Possession, And/Or Control Of Audiovisual Recording Devices For The Unauthorized Recording Of Cinematographic Films And Other Audiovisual Works And/Or Their Soundtracks In An Exhibition Facility, Providing Penalties Therefor, And For Other Purposes.

government's ability to address mall piracy by confirming secondary liability for mall owners that contribute to, or control and financially benefit from, piratical activities occurring in leased premises on their properties.

No More Optical Disc Licenses Should be Issued by OMB, and Policing of Licensed and Unlicensed Plants Must Ensnare: Since the Philippines now suffers from over-capacity to produce CDs, DVDs, CD-ROMs and burned CD-Rs and DVD-Rs, the government should immediately cease granting licenses for new plant production. On top of this, the government should follow President Arroyo's missive in her November 2006 memorandum to "[i]ntensify regular and effective ... raids and 'spot' inspections on factories that produce illegal optical discs, trademarked and copyrighted goods, ... seizure and destruction of pirated and counterfeited goods and equipment used to produce them, and ... arrests and prosecutions leading to deterrent level sentences served." OMB's record in 2008 was not as good as 2007, as they were reluctant to undertake many enforcement actions against illegal replicating plants or to allow the industry representatives to inspect the authorized replicating plants (although over five million pieces were seized, arising from more than 1,800 inspection orders). The OMB also failed to carry out arrests, as it does not have the budget or infrastructure to detain offenders. As a result, enforcement against pirate hard goods CD/DVD businesses diminished in 2008. Most OMB operations are inspection orders (as opposed to search warrants, which, as noted, are very difficult to obtain). Largely due to budget restraints, the OMB rarely operates outside Metro Manila, although they did hit some retail raids regularly in notorious shopping areas such as Metrowalk and Makati Cinema Square and Quiapo.

OMB Should be Properly Funded to Enhance Its Operational Capacity: The Philippine government should finally deal with the serious under-funding of OMB (with Edu Manzano as Chairman in a holdover capacity since his three-year term expired in 2007). The OMB's total budget for 2008 was P27 million (US\$570,000), including funds for salaries, capital outlays and Maintenance and Other Operating Expenses (MOOE), with the MOOE budget set aside for investigations and raids making up P11 million or US\$232,000. This is insufficient to effectively conduct anti-piracy operations throughout the entire country, and since the MOOE budget is also supposed to cover overhead including rental (which requires P5 million or US\$105,500), electricity, travel, communications, and office supplies, it is clear OMB (which now has only around 20 approved positions) faces an impossible task. In the past, OMB was granted Malacanang Intelligence Funds of P5 million, but for the past two years, OMB has not received any funding from this source. The OMB also received P500,000 (US\$10,500) from the Metro Manila Film Festival in 2008.

Linking Piracy With Organized Crime: IIPA has long called upon the Philippine government to get serious about piracy and its connection with organized criminal behavior. The Philippines should enact a statute such as that in Hong Kong (the Organized and Serious Crimes Ordinance), or other models, including a mechanism by which to trace and seize assets tied to various crimes, including crimes involving copyright or other IP.

Curb Pay TV (Cable and Satellite) Piracy: In 2008, very little progress was made against rampant pay TV piracy in the Philippines, and court processes in the cases going forward have revealed serious flaws in the judicial system. Past complaints of cable piracy laid with the National Telecommunications Commission (NTC) ran into difficulties, raising doubts as to whether the NTC could properly handle such copyright complaints. In 2007, a memorandum of agreement between the Intellectual Property Office and the NTC sought to clarify the situation with the NTC agreeing to first determine issues of copyright infringement. Seeking to capitalize on this new procedure in late 2007, the Motion Picture Association of America, on behalf of two of its member companies, first filed complaints of copyright infringement against Cable Link. It is disappointing that the complaints still remain with the IPO, and that the substantive issues of copyright infringement have not yet been addressed; rather, the right holders have had to spend most of their time to date complying with onerous procedural requirements. It was hoped that the MOA would have led to NTC invoking its authority to revoke licenses of operators that utilize pirate programming, however, to our knowledge, NTC has done little to stop rogue operators.

In another case, *Juliano-Tamano et al v. Discovery Communications, Europe et al*, an initial decision by the Secretary of the Department of Justice that there was no broadcast right in the Copyright Law of the Philippines,¹⁰ was reversed in October 2007.¹¹ Unfortunately, the Court in Cotabato City has refused to set a hearing for the case, and in the meantime, the defendant has appealed to the Supreme Court to reinstate the initial decision of the DOJ Secretary. Other cases are being explored using the IP Philippines' Bureau of Legal Affairs, which has the power to undertake administrative action on IP complaints, but to date, there have been no positive resolutions in any pay TV piracy cases.

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2008 and already have additional trainings planned in 2009 for prosecutors and law enforcement agents. Past trainings have included sessions on illegal camcording, bringing successful prosecutions in the Philippine courts, and adequate software asset management. The following is a non-exhaustive list of industry trainings:

- On April 17, 2008, the Business Software Alliance conducted trainings in Quezon City for 16 new officials of the Philippine National Police's Anti-Fraud and Commercial Crimes Division, on IP Laws and Licensing Guidelines.
- In July 2008, the BSA partnered with IPO and the U.S. government to support the establishment of specialized IP courts in the Philippines.
- On July 2, 2008, BSA representatives conducted trainings in Quezon City for 25 agents of the OMB, as part of a PAPT Seminar on IP Laws and Licensing Guidelines.
- On January 5, 2009, BSA representatives conducted training for thirty-five participants as part of a PAPT Technical Training on conducting corporate end-user routine inspections and briefing of targets at the OMB Office in Quezon City.
- The MPAA conducted training throughout the year for enforcement authorities and theater personnel on anti-camcording measures.

IIPA is also aware and was supportive of two specific U.S. government training programs. In one, the U.S. Agency for International Development project ROLE (Rule of Law Effectiveness) assisted the OMB in formulating Administrative Rules and conducted a training session for OMB operatives in early 2008. USAID also assisted the OMB in producing a Licensing Manual, although the Administrative Rules and Licensing Manual do not appear to be in use by OMB. In November 2008, the U.S. Commerce Department's Commercial Law Development Program (CLDP) worked with Intellectual Property Office (IPO) on a Judges Colloquium since the Philippines is getting its specialized IP court up and running. BSA partnered with the IPO to bring Judge Jayin Sunthongsingkarn (Judge, Thailand IP&IT Court) to share his experiences and the benefits of having a specialized IP court. The Judges Colloquium was well attended and the Chief Justice of the Supreme Court, in a keynote address, offered support for specialized IP courts in the Philippines. An opening plenary day (November 26) was followed by a two-day workshop, including mock trials on IP (patent, trademark, copyright) with judges from the Philippines, Thailand (the IP&IT Court), Malaysia (IP court), and Taiwan (IP Court) invited.

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. 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 2008. Under Presidential Decree 1986,

¹⁰ In *Juliano-Tamano et al v. Discovery Communications, Europe et al*, I.S. No. 2006-002, Secy. of Dept. of Justice Chambers, July 5, 2007 (Cotabato City Court), the Attorney General ruled that broadcasters do not have standing to sue since they are not the requisite holders of the programming, and ruling that

¹¹ *Juliano-Tamano et al v. Discovery Communications, Europe et al*, Resolution, October 10, 2007.

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 ISSUES

Enact WIPO Treaties Implementation and Other Needed Amendments: Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998). The Philippine government has, even before but especially since it joined the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, placed on the Congressional agenda passage of amendments that would fully implement those treaties as well as make other necessary changes to accommodate changing substantive and enforcement concerns (such as the addition of statutory damages and a codification into Philippine law of secondary liability).¹² The latest attempt is contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara), and House Bill 3741, which are virtually identical to bills proposed in previous Philippine Congresses. IIPA strongly supports passage of SB 880 and House Bill 3741, with a few modifications.¹³ 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 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 Senate 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 "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, would result in one of the most modern copyright laws in the world. President Arroyo's 2006 letter memorandum to enforcement agencies implored the legislature to pass modernizing legislation: "[c]ontinue to provide the Executive and the Legislative with policy and legislative proposals in order to update the country's intellectual property laws, ensuring that these are in compliance with the country's existing international obligations embodied in treaties and other agreements."

¹² In respect of the addition to the copyright bill which would impose mall liability, we understand that Senator Manny Villar has been opposed to this provision. IIPA notes that President Arroyo issued a directive for 2008 instructing the IPO to consider Mall owner liability and included that in their action plan for the year. IIPA representatives would be pleased to sit down with Senator Villar to address any concerns he may have with the mall owner liability provision, which simply confirms liability for indirect infringement when the mall owner knows about and materially contributes to infringing activity.

¹³ The proposed modifications to SB 880 are:

- First, IIPA proposes a systematic approach to exceptions and limitations in the IP Code, 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). Such modifications would offer a fuller guarantee for compliance with international norms.
- Second, one provision in need of clarification concerns the exclusivity of the "making available" right for 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..."

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 a speech in 2006 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 market in the Philippines saw enormous growth in the market share for local music. It is no coincidence that such changes occurred when the Philippines adopted better copyright laws and saw increases in enforcement activity.¹⁴ A study of the Business Software Alliance and IDC estimates that for the Philippines, a 10-point reduction in the current piracy rate would yield additional US\$32 million (Php1.3 billion) in tax revenues and US\$623 million (P25.3 billion) to the economy, create 2,200 new IT jobs and increase local vendor revenues by US\$431 million (P17.5 billion).¹⁵ Other creators in the Philippines, e.g., film makers like Gerardo De Leon,¹⁶ Ishmael Bernal,¹⁷ Eddie Romero,¹⁸ 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*;¹⁹ writers like Nick Joaquin,²⁰ Edith Tiempo,²¹ and Virgilio Almario;²² musicians like Antonio Molina,²³ Jose Maceda,²⁴ and Ernani Cuenco,²⁵ as well as those involved in entertainment software development,²⁶ all stand to reap the benefits of better copyright protection in the Philippines.

Enact Anti-Camcording Legislation: IIPA also calls upon the government to enact House Bill 4117, the Anti-Camcording Act of 2008, which is discussed above. This legislation will prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. While the illegal copying is already a violation of the copyright law, the added protection against unauthorized use of the equipment in the theater will obviate the need to prove infringement in order to combat this highly damaging activity.

¹⁴ 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).

¹⁵ 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>.

¹⁶ 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 is *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.

¹⁷ 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.

¹⁸ See 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").

¹⁹ The Philippines has a rich tradition of motion picture production, including the films of the late Lino Brocka.

²⁰ 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 Manilaños*, *Cave and Shadows*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/joaquin.php.

²¹ 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.

²² 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.

²³ 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*, *Pandangguhan*; and (vocal music) *Amihan*, *Awit ni Maria Clara*, *Larawan Nitong Pilipinas*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/molina.php.

²⁴ 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.

²⁵ 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.

²⁶ 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).

Make Adjustments to E-Commerce Law, E.g., Add Statutory Notice and Takedown: At present, the E-Commerce Law establishes that service providers can be liable for direct infringement, for inducing or causing another person or party to commit any infringement or other unlawful act, or vicarious infringement, i.e., knowingly receiving a financial benefit directly attributable to the unlawful or infringing activity. It also provides in turn a limitation on liability for service providers who “merely provide access” to an “electronic data message or electronic document” that infringes copyright, provided that the service provider does not have actual knowledge of infringement, or is not aware of the facts or circumstances from which infringement is apparent. These provisions are helpful in setting forth important copyright liability principles. However, the law does not provide for a statutory notice and takedown system. Instead, service providers must only abide by “injunctive relief issued by a court ... requiring that the service provider take or refrain from actions necessary to remove, block or deny access to any material, or to preserve evidence of a violation of law.” A systematic and effective approach to address the problem of Internet piracy should be adopted in the Philippines as to intermediaries such as ISPs as well as websites or people providing or facilitating distribution or access to pirate materials. Such a legal system should include a notice and takedown system similar to that in effect in many countries, whereby service providers take down or block access to infringing material or activities or block access to users engaging in infringement: if they know of infringement; are aware of circumstances from which infringement is apparent; or are notified of alleged infringing activity.

Government Legalization: Regarding government acquisition of legitimate software, Executive Order No. 262, 2000 entitled “Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government” was promulgated. The EO prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding, but the EO has yet to be fully implemented. The State budgets allocated for government procurement of IT products simply does not enable the bundling of legitimate software.

Ensure Rights Holders are Properly Consulted Regarding Any Moves Toward Collective Licensing or Implementation of Fair Use Guidelines as Regards Published Materials: The Philippine government recently announced the formation of FILCOLS to act as a collecting society for publishers and authors. Any move toward establishing such a collective licensing model in the Philippines must at a minimum include an open and transparent consultation process with all (foreign and domestic) affected right holders regarding the parameters for any such organization. Such a society's practices must conform to certain criteria for any such organization, including that collective licensing must be voluntary, must not interfere with market forces and must permit adequate, appropriate and fair remuneration to publishers and authors, must not set arbitrary percentages for licensed uses (e.g., 10% of a chapter or book), and should not result in condoning the practices of copyshops. The Philippine government must also engage in a transparent consultation process regarding any developments toward the adoption of fair use guidelines.

Avoid Burdensome Restrictions on Collective Management of Music Rights: Draft Guidelines for the Accreditation of Collective Management Organizations issued by the IP Office are currently being considered. These Draft Guidelines could create significant barriers to the effective collective administration of rights in music. Some of the ideas being considered or proposed during public meetings, including obligatory pre-approval of tariffs and mandatory accreditation of collective management bodies, would be detrimental to existing licensing mechanisms for music. The Philippine government must avoid restrictive rules that would result in a dysfunctional licensing market.

Other Draft Legislation: There are several other copyright-related bills being considered by the current Congress. IIPA states in general its support for Senate Bill 1572, An Act Strengthening the Enforcement of the Copyright Protection of Intellectual Property Right Owners of Computer Programs Creating For This Purpose the Business Software Copyright Piracy Enforcement Unit, Defining Its Powers and Functions, Appropriating Funds Therefor, and For Other Purposes. IIPA also states its support for Senate Bill 684, An Act Requiring the Teaching of Intellectual Property Ownership Particularly Copyright Law as Part of the Curriculum of All Primary, Secondary and Tertiary Schools In the Country, and For Other Purposes. The IT Panel of Congress' Technical Working Group also recently recommended the adoption of the APEC model on data privacy, which has been introduced as a Data Privacy Bill (HB 03828). BSA plans to submit its formal Position Paper on the draft bill in due course.

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 2007, almost \$1.2 billion of goods, or 12.4% of all goods imported in the United States from the Philippines, enjoyed duty-free treatment under the GSP code. In 2008, more than \$913 million of goods, or almost 10.5% of all goods imported in the United States from the Philippines, enjoyed duty-free treatment under the GSP code. IIPA is considering recommending a review to determine whether the Philippines meets 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.

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Russian Federation be retained on the Priority Watch List.¹

Executive Summary: In 2008, Russian law enforcement officials conducted a substantial number of criminal enforcement actions, including raids against warehouses, retail establishments, and some optical disc production facilities. Although the total number of actions undertaken were fewer than the previous year, these activities and those of the past several years, have resulted in a significant decline in business software piracy, and a modest decline in physical (hard copy) piracy for some of the other copyright industries. In early 2008, the Russian Ministry of Education fulfilled its commitment to legalize software in the schools. This initiative was part of government-funded program that entailed the purchase and distribution of licensed copies of both Russian and non-Russian software products throughout the country. This initiative also contributed to a significant decline in the personal computer software piracy rate in Russia – 14 points in the past four years – as well as strong revenue growth.

At the same time as these positive steps were taking place, the majority of copyright industries – motion picture, recorded sound, entertainment software, music and book publishing – experienced a year of disappointment in Russia, because of the smaller number of enforcement actions undertaken than in years past, a lack of focus by Russian authorities on the growing threat of Internet piracy, and ongoing high piracy rates – for hard and digital copies – keeping legitimate markets from achieving their full potential. Of particular concern is the continued operation of various pay-per-download services that have taken the place of the infamous allopMP3.com. These websites, operating under “licenses” granted by collecting societies that have no authority to issue such licenses, continue to plague the Russian market a year after Russian Civil Code amendments went into force which, among other things, clarified that these types of activities by both websites and rogue collecting societies are illegal. All the copyright industries concur that Russia needs to significantly improve its criminal enforcement activity well beyond current levels, including the imposition of deterrent penalties, as well as improving the quality of investigations and prosecutions.

The IIPA encourages the Obama Administration to work with the Russian Government to make further progress on intellectual property rights (IPR) issues as the new Administration engages Russia. IIPA supports a reconsideration of U.S.-Russia relations and the various mechanisms available to further cooperation. Given Russia's own interests and technical expertise in many areas, Russian authorities have expressed an understanding that a fully functioning economy requires attention to IPR. IIPA and its members look forward to actions that effectuate this understanding, and are ready to continue to work with the USG and Russian authorities to ensure full implementation of the November 19, 2006, IPR Agreement between the Governments of Russia and the United States.² The IPR Agreement was entered into in the context of Russia's efforts to accede to the World Trade Organization (WTO) and it reflects Russia's acknowledgment of the numerous legal reforms and enforcement steps it needs to undertake to modernize and improve its copyright system for the benefit of Russian and foreign authors, performers, and producers. As the U.S. Government has consistently noted, Russia must meet the IPR Agreement obligations on protection and enforcement as part of its entry into the WTO. Russia's full compliance with the IPR Agreement should be considered in the Special 301 context, as well as during its

¹ For more details on Russia's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALSUMMARY.pdf>. See also the previous year country reports at <http://www.iipa.com/countryreports.html>.

² The IPR Agreement (the details of which are contained in an “IPR Side Letter”) was signed by Russian Minister Gref and Ambassador Schwab. It is known formally as the U.S.-Russia Bilateral Market Access Agreement on Intellectual Property Rights and is at http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html.



review under the General System of Preferences (GSP) program. Compliance with the IPR Agreement will help to significantly reduce piracy, which harms all creators, U.S. and Russian alike, and should be appropriately reflected in Russia's Special 301 status. U.S. industry has been disappointed that the recent discussions with Russia have been hindered by a lack of an interlocutor on the Russian side who is empowered to make decisions and move the process forward. The Obama Administration should encourage an enhanced dialog on IPR matters with the Russian authorities as a matter of priority. As such, the copyright industries are ready to work with the new Administration in this endeavor, to reinvigorate technical support as appropriate, and to pursue an activist work plan.

Top priorities for the music industry in Russia are: first, to enhance the growth of digital music markets by eliminating the operation of illegal pay per download Internet sites and illegal peer-to-peer services. A second priority is to swiftly certify a legitimate collecting rights society as required in Part IV of the Civil Code (which entered into force on January 1, 2008) by the relevant Russian Government authority (Roshrankultura). Stopping the illegal Internet sites and peer-to-peer services can be achieved, in large measure, by enforcement actions against the rogue societies illegally offering "licenses" that they have no authority to grant, as well as against the websites operating in concert with these rogue societies. The state accreditation of a collective management of rights society must be truly representative, and supported by and be transparent to the owners of neighboring rights – both local and international – who are entitled to equitable remuneration under Russian law. Another priority is the need for the Russian Government to undertake coordinated criminal actions against organized criminal syndicates that dominate some of the copyright industry markets, especially the video game, music, motion picture, and book industries.

COPYRIGHT ENFORCEMENT IN RUSSIA

Criminal Enforcement in General: Criminal enforcement in Russia remains a priority for IIPA and its members. In 2008, the Russian Government conducted some significant raids and seizures and the Russian police continued to take actions against copyright infringers, particularly with respect to street vendor piracy and companies involved in the installation and use of pirated software. However, the overall number of raids, seizures, and criminal cases commenced, was reportedly down from previous years.

In 2008, 6,885 criminal IPR (copyright and trademark) cases – including those under Article 180 of the Criminal Code which treats trademark infringements – were initiated (that is, investigations were commenced), and of these, 4,858 cases went to court, with 3,482 cases leading to some penalty under the Criminal Code (Article 146 – copyright). By comparison, the Russian Ministry of the Interior (MOI) statistics reported a total of 4,088 criminal convictions in 2007, 7,423 in 2006, and 2,924 in 2005 (and a total of 7,578 and 6,960 cases in 2007 and 2006, respectively, were commenced in each of those years). The reduction in the number of initiated criminal cases is a concern to U.S. industry which is worried that this may indicate a reduction of police activity in the area of IPR enforcement.

As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. There were also a considerable number of administrative and criminal penalties imposed against illegal hard-copy vendors. For example, there were eight criminal actions taken against sellers at the Gorbushka market according to the software industry. As a result, it now appears that pirated products are not sold as openly as they once were at this market (in fact, the software, music and motion picture industries report that the Gorbushka market operators are now cooperating with rightsholders by terminating lease agreements with detected pirate traders).

Thus, there is evidence that enforcement activities against physical piracy and street vendors (as opposed to online piracy) can and are improving the conditions for some businesses in Russia. Unfortunately, any successes will be short-lived if the 2008 trend of diminished enforcement activity continues. For example, the business software industry reported fewer end-user raids, fewer criminal cases commenced, and thus fewer convictions in 2008, than in 2007.

The motion picture industry reports that enforcement activity in the past few years (although it declined in 2008), especially in Moscow and St. Petersburg, in combination with market changes, has led to an increase of legitimate DVDs sold in Russia over the last several years. DVD sales for Russian and Motion Picture Association of America (MPAA) members' titles have increased from 24 million in 2005, to 42 million in 2006, to 67.4 million in 2007, to 78 million in the

first eleven months of 2008. The motion picture industry reports that theatrical box office revenue in Russia, and the other C.I.S. countries, exceeded \$800 million in 2008.

Law enforcement officials initiated several cases against those engaged in video game piracy in 2008. The number of products seized during the raids ranged from 800 to 50,000 discs. Most of these actions involved cases against warehouses where pirated products were found; criminal investigations have commenced against the warehouse owners.

The music industry continues to emphasize the critical need for criminal, rather than civil, enforcement directed against Internet pirates – websites and illegal collecting societies. Criminal enforcement needs to be directed as well against optical disc piracy – namely against the criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials. Addressing commercial-scale piracy through criminal measures is an obligation of WTO members; that is because only governments can effectively deal with these problems. In contrast, civil measures are intended for “civil” actions, that is, disagreements between parties. Massive and organized criminal activities are not civil disputes, nor are civil measures capable of delivering the requisite level of deterrence.

The problems of civil actions are further exacerbated by the very limited scope of available relief. Civil enforcement inadequacies include: remedies generally limited to the seizure of specific repertoire that is the object of a lawsuit in any specific instance; the failure to award preliminary injunctions, or to freeze assets and evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of contributory liability under the Russian civil law system dealing with copyright infringements. Physical piracy enforcement is also hampered by the requirement that exemplars be collected only by state officials (or jointly with rightholders), and by a statutory reliance on government expert reports, which both cause trial delays. Thus, effective action against massive and organized illegal activities often is only possible by way of criminal enforcement.

In general the copyright industries report that deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators, and, rarely if ever against owners of commercial Internet operations. In fact, in the last years when optical disc plants profited and proliferated in Russia, we are not aware of a single plant owner who has been convicted, and only a handful of plant operators (i.e., plant managers or employees) have served jail time or been given suspended sentences. Far fewer criminal cases were initiated against optical disc plants in 2008 than in 2007, a downward trend in fact, of the past several years; in addition, many older cases have languished for a long time. One practical problem that has surfaced recently, is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing and even fewer ending in court rooms.

The lengthy investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IP violations, it should take measures to increase the number of so-called experts as well as consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. For example, in a case involving the seizure of a large quantity of pirated video game material in Novosibirsk, it has taken more than a year for the experts to finalize their seizure report, and the examination is reportedly expected to take 5 to 6 months more.

Improvements should also be made with respect to court procedure, particularly with how a court dispenses with the seized pirated products. Though courts should include an order for destruction of the goods in its verdict, such orders are typically never included in the judgment. As such, the right holder who requests the destruction of the seized goods (or moves for recovery of damages) in the criminal procedure must institute an entirely new proceeding before the Arbitration Court. This unnecessarily lengthens the process and makes enforcement even more difficult.

Although there were fewer criminal cases in 2008 than in prior years, there were some significant cases. Unfortunately, as in recent years, most cases continue the trend of not applying deterrent penalties as a final disposition. Here is an example of a notable exception: in November 2007, the Moscow Vostok-D plant was raided; it had two DVD

lines and over 100,000 illegal discs which were seized at the time of the raid. On December 11, 2008, the Kuzminsky district court of Moscow sentenced seven people in connection with the raid, all of whom were Vostok-D plant employees. The plant's chief manager was given a four year sentence and the other defendants received three and a half year sentences. All had been arrested and tried in a copyright infringement case that resulted from the raid. The equipment and the 2 DVD lines at the plant were confiscated as well.

As was highlighted in the previous year, piracy rates continue to be very high. Thus, improved criminal enforcement is a necessary and important step to establishing legitimate markets for the benefit of Russian and foreign rightholders. In sum, IIPA recommends that the Government of Russia improve its IPR criminal enforcement (including actions aimed at Internet piracy); one way to accomplish this would be through the central coordination of law enforcement. This should include a high-level announcement by the government that IPR enforcement – including Internet piracy – is a priority. IIPA recommends that prosecutors: (a) coordinate their efforts with the police (as should the investigative departments of the Ministry of the Interior (MOI), the Federal Security Service of the Russian Federation (FSB), and Customs now that they all can initiate criminal cases); (b) bring more IPR cases; and (c) conduct expeditious investigations. The development of instructions by the MOI and the General Prosecutor's Office with an updated and detailed methodology for investigations of copyright infringements would help to increase the quality and effectiveness of IPR enforcement activities. Another recommended measure is the appointment of IPR special prosecution investigators and police officers at both the federal and regional levels throughout Russia. In September 2007, the General Prosecutor's Office was reformed and reorganized: prosecutorial bodies are now divided into prosecution offices and investigative committees. The appointment of specialized IPR prosecutorial investigators could, if utilized correctly, significantly increase the efficiency of IPR criminal investigations. The copyright industries are willing to continue their assistance in this regard with training programs for judges and other law enforcement officials.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet and optical disc operations. There needs to be a focus on criminal enforcement targeted against organized crime syndicates. Criminal procedure changes which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations of copyright infringement activities of plant owners and executives (rather than mere plant operators). Regarding Internet piracy, although the notorious allofpm3.com is not currently in operation, other similar (in fact, nearly identical) sites are operating, and must be closed, along with the commencement of criminal investigations against the site operators and the rogue collecting society operators who are illegally conducting business under the 2008 Civil Code. The ability of wrongdoers to simply modify their Internet sites and continue to operate in violation of the law manifests a clear need for reform. To date, there has not been a single criminal conviction against an Internet website operator. One roadblock to effective enforcement has surfaced recently: namely, the police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing. This needs to be addressed and corrected.

More and improved criminal proceedings in general, along with speedier investigations and trials are needed – against hard copy and digital copy pirates. Last, we recommend that the General Prosecutor's Office needs to appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful a conclusion.

In January 2008, while campaigning, then-presidential contender Dmitry Medvedev told a Moscow City forum of non-governmental organizations that “disregard for the law” must be stopped, and that a national program to combat IPR piracy was needed. IIPA encourages President Medvedev to fulfill his promise to combat IPR piracy with criminal enforcement – a problem he properly identified.

Raids Against Optical Disc Plants: Raids have been undertaken at some optical disc plants in 2008, such as the plant in Kazan and the Victoria plant – raided twice in 2007, and again in 2008. However, the Victoria plant is a good example of the problems the industry confront in Russia. Even though the Victoria plant has been repeatedly raided, and a criminal case instigated against two employees there (but not the owner), the plant was given a new 5-year license to operate in April 2008 (even as the criminal cases remain open).

The optical disc enforcement regime continues to lack effectiveness evidenced by the continued operation of many of the raided plants. For example, in February 2007, the Poliplast plant was raided, but its license was not suspended. This plant continues to operate. In another matter, two criminal cases were initiated against the Victoria plant, which has been raided several times over the past few years, yet the plant continues to replicate. In April 2008, its license was extended five years despite the open criminal cases pending in relation to its operations. The Moscow Vostok-D plant, already noted, which was raided in 2007 was only in operation because it had lines belonging to a formerly-licensed plant named Atya located near Moscow, which was raided in 2005. The Atya plant director received a 2-year suspended sentence and the plant owners changed their name with the licensing authority. They then voluntarily asked for the cancellation of Atya's plant license, and began operations as Vostok-D. The Gamma plant, raided three times in 2007, is an example of a plant that, once raided, did finally cease its operations.

The cases generally highlight the weaknesses that must be addressed if Russia is to meet the IPR Agreement's obligations for effective optical media regulation. With an estimated 42 plants in operation, raids at a handful of plants, and surprise inspections at very few, IIPA believes there is ample evidence that additional effective enforcement is needed to deter illegal activities, and that such enforcement needs to be called for from the highest levels within the Russian Government.

Raids Against Businesses Using Pirate Products: The Business Software Alliance (BSA) reports the overall quantity of end-user raids against businesses remained high, but that the number and quality of the raids was uneven nationwide, and declined from 2007 levels overall. In 2008, there were 499 raids, down from 589 raids in 2007 (and 550 in 2006). As in recent years, enforcement of IPR is inconsistent, with some cities and regions, such as St. Petersburg and the Siberian region (Kemerovo, Irkutsk and Omsk), being largely ignored by the police. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Ministry of Interior (MOI) and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. In 2008, the police ran more raids against chain retail stores (740, up from 621 in 2007), and increased warehouse inspections. Also, in 2008, the police initiated 154 criminal cases against end-user pirates (down from 200 cases in 2007); beginning in 2007 and continuing in 2008, some of these included raids against some larger companies. There were a total of 71 end-user court verdicts in 2008, down from 83 in 2007 (but up from 50 in 2006). There were 427 criminal cases initiated against channel pirates, up from 378 in 2007 (and 288 in 2006); there were 234 court verdicts in channel cases compared with 216 in 2007 (and just 131 in 2006). Further, the business software industry reported that one of the reasons for the 14% drop in piracy rates the past three years, is the effectiveness of end-user enforcement activities overall, which has resulted in a broadening of public education (for businesses especially) about legal versus illegal activities, and the resulting legal licensing of software at many companies and government entities. In addition, the business software industry (BSA) continued to report good cooperation with the police and Ministry of the Interior and Department K officials (including joint participation at training conferences in 2008, as in recent years). Even with the significant activity taken against business software piracy, the Business Software Alliance reported, as preliminary figures, that it lost \$2.773 billion in Russia in 2008, and the piracy rate was 70% (albeit, a 14% decline in the past four years).

However, in general, the police continue to be reluctant to conduct raids against many medium and large-scale targets; when raids are conducted, the police tend to seize fewer than 10 personal computers ("PCs") on average. This problem is related to the experts' inability to examine large quantities of PCs, a problem connected to the fact that the MOI has not issued an internal order instructing the MOI Expert-Criminal Centers on how to properly conduct software examinations (although some of these centers do prepare expert examinations, this is not their official function).

A new Federal Law on Police Activities – effective January 10, 2009 – was adopted. The copyright industries are monitoring the implementation of this law in the hopes that it will not limit the ability of police to undertake raids and to secure evidence, especially against commercial enterprises. As a result of 2006 amendments to the Criminal Procedure Code, and until this law went into force, the police had broad authority to commence investigations *ex officio*, even though in practice, cases were nevertheless delayed by prosecutorial investigators. The new law, is in the process of being implemented with guidelines from the Ministry of the Interior. IIPA recommends that the Ministry promulgate regulations that will not delay police actions in IPR investigations until after a criminal or administrative case has been initiated; to do so would create a further hindrance to effective enforcement. In sum, the on-going prosecutorial delays and certain of the

noted police activities, highlight the lack of effective enforcement coordination between prosecutors (including the General Prosecutor's Office and the regional investigative offices), police, and rightholders.

Raids at Storage Facilities and Piracy at Retail Outlets: Several copyright industries continue to report that raids, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for legal entities (or alternatively, the failure of the Article 146 Criminal Code provisions to be applied to company directors); (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to initiate criminal cases.

There were a considerable number of important raids against pirate warehouses in 2008 and there were a number of large seizures of copyrighted materials at these warehouses. In total, the copyright industries reported 31 warehouse raids resulting in the seizure of over 7 million CDs and DVDs.

The motion picture industry (MPAA) reported on several of these raids undertaken by Russian enforcement authorities, many with the cooperation of the Russian-Anti Piracy Organization (RAPO). One continuing concern has been the diminishing role of the Federal Service (FSB) police; IIPA members hope that there will be increased FSB engagement in 2009. RAPO continues to operate its own forensic lab, housed at the Ministry of Culture's Federal Press and Mass Media Agency (Rospechat). Some examples of important raids in 2008 included: a raid in March 2008 when the Economic Crime Police raided a pirate DVD plant and a nearby warehouse in Periaslavl Zalesky. A further investigation in this matter led to the discovery of another warehouse belonging to the same owners, located near Moscow; the two warehouses were storing approximately 1.5 million DVDs which were seized. The plant was closed and a criminal case was initiated; the case is still ongoing. In another large raid in February 2008, a warehouse in Solnechnogorsk (outside of Moscow), resulted in the seizure of 700,000 pirated DVDs.

In 2008, RAPO took part in a total of 326 raids, and it conducted 534 examinations of seized pirated product. As a result of this activity, 174 criminal and 138 administrative cases were initiated on behalf of RAPO and MPAA member companies. There were also over 2,000 retail outlets inspected in 2008. In total, these inspections revealed that over half of the product in retail outlets in Moscow is pirated material. The results of similar inspections in St. Petersburg revealed that more than 60% of material in their retail outlets was pirated, and in other major cities the percentages were as high as 75% to 80% pirated product.

While these raids are positive, the Russian courts have not imposed deterrent sentences against the owners or operators of warehouses, falling short of its IPR Agreement obligation to criminally prosecute in cases of piracy on a commercial scale. RAPO reports that the telecine problem (film prints being transferred illegally on telecine machines to DVDs or tapes) has disappeared as a result of dramatic improvements in the handling and delivery of theatrical film prints. However, unauthorized camcording still remains a serious issue. There were 35 Russian camcordered films identified in 2008; this was a 59% increase from 2007. In most cases, good quality videos sourced from Ukraine were married with good quality audios sourced from Russia to make the final pirated product.

According to the Entertainment Software Association (ESA), video game piracy remains significant in Russia, with pirated products still widely available on the street, in underground venues and at markets. Domestic factory replication remains widespread (although there continue to be some imports from Ukraine), and the pirated video game products that are manufactured are highly sophisticated. Pirate distributors are well versed in circumventing government regulation and enforcement. For instance, government regulation requires that information on game packaging identify the source of the product such as the place of manufacture and all authorized distributors. ESA member company investigations reveal that such information is typically falsified and the companies/distributors named are non-existent. Although the piracy situation in Moscow has improved somewhat in that large retail chains no longer carry pirated products, the same cannot be said for other Russian cities, such as St. Petersburg, where pirated products continue to be openly sold in the largest retail chains. Piracy at Internet game clubs or cafés (where the establishment is either using pirated or unlicensed video game software on the café computers), continues to be problematic, although action against such cafés appears to be routinely undertaken by law enforcement. Rightholders are typically asked to support such cases and to provide information with respect to the pirated video game titles and the damages incurred.

The book and journal publishing industry continues to report concerns about hard-copy piracy and online infringement – now of primary concern (as noted in the section on Internet piracy, below). Popular target works include reference works, textbooks and commercial bestsellers. Illegal commercial photocopying of academic materials is also a problem, necessitating vigilance by universities and schools in monitoring use of legitimate materials on campuses.

The City of Moscow's ban on the sale of CDs and DVDs in underground pedestrian walkways is another positive step undertaken in recent years. The Anti-Counterfeiting Unit of the Moscow Police has the authority to terminate leases with vendors and kiosk owners who violate this ban. The Russian Government reported in 2008, that the Moscow City Police initiated 2,037 cases against vendors and seized more than 4 million counterfeit items, in addition to closing 32 retailers.

Internet Piracy Enforcement: The IPR Agreement obligates Russia 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). Internet and wireless access by Russian citizens is growing rapidly – by some accounts, Russia will soon have the second largest Internet population in Europe, behind only Germany, and it is currently the fourth largest market worldwide for mobile telephones. In 2008, the Russian Government reports that it (via Department K – the office with responsibility for combating technological crimes) identified 101 offending sites, but it provided no information on the number of sites that were closed in 2008 (there were 72 such sites closed in 2007).

In June 2007, the most notorious website, allofmp3.com, was taken down, and has not resurfaced at that Internet address. However, a nearly identical site, apparently owned and operated by the same company has sprouted up in its place, and the illegal distribution of copyrighted material continues there, as well as on many other sites. Russia is also host to a number of major BitTorrent indexing sites such as <http://www.torrentz.ru/> (which includes materials from many copyright industries), and which are popular channels for illegal peer-to-peer downloading. One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian but currently hosted in Estonia. Neither the hosting ISP nor the website owner have complied with takedown requests. Additionally, since Russia is the fourth largest mobile phone market, the number of Russia-hosted “WAP” websites offering pirated video game products for mobile phones is of great concern. The response to takedown notices sent by video game publishers to these site operators and to the ISPs hosting these sites, have had mixed and largely inconsistent results.

Publishers report continuing problems with Internet piracy affecting academic and professional textbooks and reference books. In particular, a family of sites – including <http://ebook-mega-store.com>, <http://download-ebook.org> and <http://www.ebooknetstore.com> – continues to decimate the market for academic and professional materials. Other sites include: <http://www.pdfchm.com/> as well as free-file host providers like Paid4share.net, Icefile.info and others. Takedown notices have gone unheeded (notable non-compliant ISPs include: relcom.ru, agava.ru and delfan.net). IIPA urges immediate action against the operators of illegal sites, in particular, these mentioned sites. Commercial bestsellers are also widely available for download on multiple websites.

Few, if any, criminal cases have been pursued against illegal website operators, or against those who, in furtherance of a criminal conspiracy, purportedly license such sites having no authorization to do so. Russian authorities must step up efforts to investigate Internet piracy of business and entertainment software, books, music, and film material, by a variety of technical means, and there needs to be an increase in the number and disposition of effective criminal investigators. The business software industry (BSA) reported 25 raids against Internet users or services in 2008, which resulted in the commencement of 15 criminal cases, resulting in seven convictions (all of which were against individuals in the cities of Izhevsk and Samara, for those involved in the distribution of illegal copies of software offered via peer-to-peer networks). Other industries report that some Internet Service Providers (ISPs) will cooperate and will move to take down pirate sites once identified, but many ISPs will not cooperate – even with clear evidence of piracy – absent a court order. This is the reason why ISP cooperation, and clear third party liability, is essential.

Given the growing threat of Internet piracy, Russian authorities are allocating far too few resources to fight it. IIPA members report that IP crime is a very low priority for the Ministry of the Interior's Department K (the department with responsibility for combating technological crimes). Although Department K has equipment and expertise, there is not a

single person in the department assigned to the sole task of combating IP crime, and according to their own statistics, only 9% of the cases they pursued in 2008 were related to copyright infringement on the Internet. For many years, rightholders have recommended the establishment of a sub-unit within Department K to deal exclusively with IP Internet cases, and to ensure it is properly staffed, equipped, and trained with detailed methodologies to combat these copyright crimes, especially for the maintenance of evidence. At present, jurisdiction for Internet piracy is not consolidated. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal peer-to-peer services, does not fall within the current jurisdiction of the Computer Crimes Department (Department K) within the Ministry of the Interior.

The copyright industries report that they have participated in as many as 40 to 50 training seminars a year with enforcement agencies and judges on how best to fight against Internet piracy, as well as hard-copy piracy, and remain ready to continue this cooperation.

Administrative Enforcement: The business software industry (BSA) reported 37 administrative court decisions against infringing end-users and three against channel pirates in 2008. This is comparable to the 40 administrative court decisions that were resolved in 2007 – 35 against end-users, five against channel pirates (compared with 38 and zero, respectively, in 2006). There were also a total of 48 end-user settlements and 22 channel piracy settlements. Over the past few years, the average administrative fine imposed has been about 3,680 to 4,906 rubles (US\$150 to \$200) per case.

Software Legalization: BSA reports that the Russian Government has responded seriously to the strong market demand for legal software in the Russian education system. In October 2007, a resolution was adopted that will result in the Ministry of Education purchasing legal software programs – from Russian and foreign vendors – for all Russian schools (kindergarten to 12th grade); this major step has ensured that the schools are using legitimate software, thus eradicating piracy in a large segment of the public service sector. The program is probably the largest software distribution project in software history. Every public school in Russia – some 65,000 schools in total – received a package with 56 disks containing software from 30 vendors (both Russian and non-Russian). The Russian Government is also taking steps to work with BSA member companies to make technology more relevant, accessible, and affordable for Russian schools and pupils. BSA anticipates that these programs will yield noticeable reductions in software piracy in 2009, and the software industry is ready to carry this remarkable progress into other sectors of the Russian economy.

Enforcement Training: In 2008, many of the copyright industries participated in Russian government enforcement training programs. For example, the government hosted one cross-industry training seminar, jointly organized by the European Commission, the General Prosecution Office, and the Investigation Committee of Russia in December 2008. That program was a follow-up to the training commitments outlined in the EU-sponsored IPR roundtable that took place in Russia in October 2007. Topics addressed included hard copy piracy and Internet piracy, as well as the sharing of investigative best practices from enforcement officers from several EU countries. A number of copyright industry representatives participated in the training for the 160 prosecutors that attended the program. Participants indicated interest in participating in future training programs, noting the need for more programs of this sort.

Optical Disc Plant Licensing and Inspections

The continued lack of clear authority for optical disc licensing and inspections in 2008 remains a significant setback in the enforcement of optical disc production and distribution in Russia. In 2007, as part of a government reorganization, there was a transition period while the licensing authority was transferred from one agency (Roshrankultura) to a newly established “Federal Service for the supervision of mass communication and the protection of cultural legacy” (Rossviazokhrankultura). In May 2008, the Russian Government, was again reorganized. The former Ministry of Economic Development and Trade (MEDT) was divided in two: into a Ministry of Economic Development (MED) and a Ministry of Industry and Trade (MIT). Copyright policymaking was not affected – it remains within the Ministry of Culture (and Rospatent retained its primary responsibility for trademark and patent policy). However, the former Rossviazokhrankultura was reorganized into two entities: Roshrankultura and Rossvyazcomnadzor (which as of January 2009, is now named Roskomnadzor – the name change did not indicate any change in authority). Roshrankultura, a part of the Ministry of Culture, retains its role as the chief enforcement agency for copyright matters. However, optical disc plant licensing is now under the authority of Roskomnadzor (now part of the Ministry of Communications and Mass Media);

unfortunately, it has to date been awaiting authorization and resources to commence its work. As a result of these reorganizations, Rossvyazcomnadzor (now, Roskomnadzor) did not undertake regular inspection of plants or the suspension of raided licensed plants in 2008 as required under the IPR Agreement.

The lack of regular surprise inspections of all the production facilities exacerbates Russia's optical disc piracy problem, and is not consistent with Russia's IPR Agreement obligations. Instead, according to IIPA's information, in 2008, Russian authorities undertook only 10 raids and closed 4 licensed plants (in 2007, three out of 42 licensed plants and three unlicensed plants were inspected). Only two plants operating without a license were closed in 2008. The Russian Government reported that the two unlicensed plants were uncovered by the Ministry of the Interior (MOI) in the Spring of 2008; this was the first major activity against any plants since the 2007 St. Petersburg raids.

Now that both the optical disc plant licensing authority (Rosokhrankultura, now Rossviazokhrankultura) and the Economic Crime Department of the Ministry of the Interior have completed their reorganizations, we hope that they will address their present lack of adequate staffing and be able to engage in the kind of monitoring contemplated by the IPR Agreement. More training and more resources need to be available to conduct the promised effective enforcement. In addition, the problem of optical disc piracy in Russia has moved from major production facilities to smaller "burning" operations which require more flexible enforcement mechanisms and resources. The Russian Government is also not prosecuting the "persons and enterprises" involved in the manufacturing, storage and/or distribution of optical discs as required by the IPR Agreement. Nor is the Russian Government initiating investigations to determine and prosecute the owners, distributors and manufacturers of these optical disc products as required by the IPR Agreement.

On a positive note, the Russian Government has taken steps to address the problem of the Russian State owned Restricted Access Regime Enterprises ("RARE") that house or run optical disc plants. The Russian Government reported at the June 2008 Working Group meetings with U.S. Government officials the following: in 2007, there were ten reported RARE plants – that is, OD plants on government controlled military-industrial sites. In mid-2008, only five such plants – on four RARE sites – remained in operation. At present, there are four such plants on four RARE sites still in operation. The Russian Government reported in 2008 that it was in the process of closing the remaining plants by cancelling their leases. This is a positive step. IIPA continues to recommend that, in addition to lease cancellations, any plant engaged in the production of illegal optical disc material should also be the subject of a criminal investigation, closure, and the prosecution of those involved. In 2008, it was reported that a warehouse containing illegal video games was found located on a RARE site; it is not known whether action has been taken against this warehouse.

There are key legislative reforms still needed to improve optical disc enforcement. Russia has not yet enacted a sound optical disc licensing, revocation, and recordkeeping regime as described in the IPR Agreement. This essential IPR Agreement obligation had a June 1, 2007, deadline and is key to addressing many of the current OD piracy problems – both the manufacturing and distribution of pirate material. Rosokhrankultura, to its credit, tried to apply such measures in a *de facto* manner (during the reorganization in 2007), but the absence of clear statutory authority limited its success. IIPA is concerned that there is no known timetable in the Russian Government to meet this obligation. The current combination of the federal law on (optical disc) licensing, the Administrative Code, and government regulations on the licensing of the reproduction of discs (including audiovisual works), does not allow the regulatory body to suspend (or revoke) a license at all. Russia should include the monitoring of high-grade polycarbonate material used to manufacture optical discs in its OD enforcement regime, especially its border enforcement. Although this problem has declined in recent years, the recording industry reported that in 2008, Russian manufactured pirated optical discs were forensically matched to thirteen replication plants and found in Germany, Hungary, Ireland, Estonia, Latvia, Bulgaria, Moldova and Ukraine, as well as for sale on numerous Internet sites.

Implementation of the IPR Agreement

The IIPA continues to recommend several key measures to improve enforcement in Russia and in order to fully implement the IPR Agreement. These include:

1. 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.

2. Amending the relevant code(s) so that legal entities can be subject to criminal liability (a bill to do so was considered, but never adopted by the Duma in 2007).

3. Using the existing authority to take down websites offering infringing copyright materials of films, music, business and entertainment software and books, and to criminally prosecute those responsible, including unauthorized collecting societies (such as ROMS, FAIR, ROUPI and FOSP) that purport to grant licenses for rights that they do not possess, as well as introducing clear provisions to establish liability in civil and criminal cases for ISPs that fail to operate in a responsible manner, and for services that effectively promote, contribute or otherwise induce infringement. The Russian Government in 2008 did, as promised, post public information on government websites informing the public that the Civil Code prevented collecting societies from granting rights beyond their specific mandate from rightholders. The generic statement made on the Ministry of Culture website (which did not refer to online music) clarified that collecting societies purporting to grant licenses to users (whether they are legitimate societies or rogue societies) can do so only in respect of music, which they are mandated by rightholders to manage on a collective basis, i.e. by way of a direct agreement between the society and the rightholders in question, until state accreditation is granted to a specific society to represent all rightholders. When and if state accreditation takes place, the accredited society will be able to grant licenses in respect of all rightholders, including those who do not have an agreement (giving a mandate to administer rights) with the society. The government needs to be clear that Internet licenses are not the same as, nor are they covered by, state accreditation, but remain based on licenses individually agreed upon between rightholders and websites. Additionally, the Russian Government needs to bolster the public campaign with the take-down of notorious sites, as well as the criminal prosecution of the operators of these sites.

4. 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.

5. Using the improved border enforcement authority to stop the import of optical grade polycarbonate used to produce illegal product, in addition to the export of shipments of 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.

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 MPAA 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). The recording industry (Recording Industry Association of America, RIAA, and International Federation of the Phonographic Industry, IFPI) reports that the biggest illegitimate market for selling international repertoire (and most Russian music) is in Moscow. Elsewhere in the country – for example, in St. Petersburg, Novgorod, Yekaterinberg, Rostov-on-Don, and the Krasnodar region – the market is flooded with pirated music. In St. Petersburg, musical disc distribution is controlled by unauthorized organizations that require retailers to pay "membership fees" in order to sell optical discs in that city.

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

10. Adopt guidelines (in the Ministry of the Interior) that continue the broad *ex officio* authority by police to commence IPR investigations and to seize evidence as provided in the 2006 amendments to the Criminal Procedure Code. A new Federal Law on Police Activities – effective January 10, 2009 – could, if it is not properly implemented, limit this ability by police, until after a criminal or administrative case has been initiated which would hamper the collection of evidence and the effective prosecution of (or administrative actions undertaken against) IPR infringers.

The IPR Agreement Obligations: Status Report: As noted, since the signing of the IPR Agreement in November 2006, some steps have been undertaken, but much remains to be done. One notable “positive” step that simultaneously illustrates the weakness of the Russian legal/enforcement system is the closure of the notorious website *allofmp3.com* and the surprising acquittal of the former CEO Denis Kvasov. Although IIPA and its member are obviously pleased that *allofmp3.com* was itself taken down, we note that a nearly identical site is now in operation that is apparently owned and operated by the same or related parties – illustrating the need for corporate criminal liability and the criminal sentencing of principals of pirate operations, as well as the need for better information about and the investigation of these juridical entities. As noted, Russian enforcement authorities have undertaken plant and warehouse raids, and seized large quantities of illegal material. Although there was a pause in 2008 during the Russian Government reorganization, Russia has been meeting quarterly with the U.S. through the U.S.-Russia Working Group, which IIPA members view as a positive step toward ensuring that dialog and work to implement the IPR Agreement continue.

IIPA is disappointed that the IPR Agreement deadlines were not met, with Russia still needing to: (1) address the problem of illegal optical disc manufacturing; (2) effectively enforce criminal laws with deterrent penalties for IPR violations (especially focusing on larger enterprises – and whether committed for purposes of commercial advantage, private financial gain, or resulting in substantial economic harm); (3) combat Internet piracy; (4) implement international IPR agreements, up to the WTO-TRIPs levels; (5) enact legislation (Article 393 of the Customs Code) to provide Customs officials with the authority to take actions *ex officio*; and (6) fully implement the WIPO “digital” treaties (the WCT and the WPPT).

One particular concern, pertaining to ensuring that collecting societies can only operate within the scope of the mandate that they receive from rightholders, was presumably corrected in Part IV of the Civil Code with the requirement of state accreditation; the requirement entered into force on January 1, 2008. It has now been a year since this provision went into force, but unfortunately, it has not yet been effectively implemented against the many rogue collecting societies and websites that fictitiously claim to represent rightholders. Rightholders are eagerly awaiting the state accreditation process, and look forward to a swift and effective implementation of this critical provision in 2009, in line with the requirements of Part IV of the Civil Code. Proper implementation of this process is necessary to meet the requirements set out in the IPR Agreement. After considerable delay, the state accreditation process began in September 2008; for neighboring rights, the process was set to begin in December 2008, but *Rossviazokhrankultura* has now postponed that process into 2009. While rightholders welcomed the introduction of the state accreditation process, these prolonged delays have created an environment of uncertainty, leading to the collapse of the previously existing system of collection of equitable remuneration for producers and performers. In the vacuum, new rogue societies have surfaced, taking advantage of the legal uncertainty, claiming to have authority to represent rightholders, and undermining longstanding contractual relations (for example, with RFA, the one society that is mandated by both the local and the international music industry and which complies with international standards in terms of accountability and transparency). Users have begun to cease payments to RFA justifying their action as the result of the absence of an accredited society. The Ministry of the Interior, although aware of the need for swift enforcement against rogue societies and fraudulent licenses, has not been able or willing to act until the accreditation process proceeds.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms: Effective enforcement is itself predicated upon the existence of a comprehensive and modern IPR legal regime, elements of which continue to be absent in Russia. Russia has made progress on legal reforms. Here are some of the recent highlights:

- Russia acceded to the two WIPO digital treaties – the WCT and WPPT – effective February 5, 2009. This very positive step was the result of a July 24, 2008 resolution signed by the Prime Minister to accede to the

two treaties. The treaties still need to be fully implemented with legislation – including additional amendments to Part IV of the Civil Code – as detailed below.

- The Criminal Procedure Code was amended in 2006 to allow Russian police, in addition to prosecutors, to initiate criminal investigations. (As noted, IIPA is monitoring the progress of the 2009 law and regulations from the Ministry of the Interior to ensure that this effective enforcement tool remains viable).
- The Criminal Code was amended in January 2007 (in force April 9, 2007) to increase IPR penalties from 5 to 6 years imprisonment and to reclassify “grave crimes.” This latter change allows prosecutors and enforcement authorities to use investigative measures far exceeding those under the prior “medium gravity” threshold. (To date, rightsholders’ expectations that these provisions would be used against the large-scale operators of illegal activity have not been met, but we are hopeful they will be used properly in 2009).
- The Supreme Court, on April 26, 2007, adopted a resolution detailing IPR (Articles 146 and 180) enforcement practices. This directive was aimed at the lower courts to provide guidance to them for IPR enforcement (along with a similar June 2006 resolution directed at civil IPR cases). It is expected that in 2009, another resolution – by the Supreme Court and Senior Arbitration Court – will set guidelines for the full implementation of the 2008 Civil Code (IIPA encourages the swift adoption of this joint resolution).
- Amendments to the Administrative Code of Misdemeanors were adopted on April 9, 2007, with a new Article 14.33 on unfair competition. This change means that the introduction of illegal goods into markets can result in fines on either individuals or legal entities (as an administrative liability). Article 14.33 provides for additional sanctions only after the facts of copyright infringement have been established. This is why this provision does not pertain to or require the seizure or forfeit of pirate product. The Administrative Code was positively amended in 2006 by revising the timetable for administrative investigations which now permits 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, with further revisions in July 2007 (changing the sanctions from multiples of the minimum monthly wage to ruble equivalents) which now provide sanctions of 30,000 to 40,000 rubles (US\$869 to \$1,159).
- Amendments to the Code of Administrative Misdemeanors were adopted in 2005 and entered into force in January 2006. These amendments add administrative liability for copyright infringements and the confiscation of such products.
- Amendments to the Civil Code (in force, January 1, 2008) provide as a remedy for infringement, the “liquidation of a legal enterprise” – if used effectively against illegal companies (including optical disc producers) this should improve enforcement.
- Administrative amendments (Resolution #185, March 27, 2007) extended the existing street sale ban – applicable to street vendors and kiosks – from music and audiovisual material, to software and database materials as well.
- Amendments to the Federal Law on Licensing – making software production an activity subject to licensing in Russia – went into force on August 6, 2008.
- A Software Licensing Agreement (in accordance with Resolution #1447-R of October 18, 2007) went into force; it is applicable from 2008 through 2010, and applies to all 65,000 Russian schools (from kindergarten to the 12th grade). This is a major accomplishment of the Government of Russia, requiring the purchase and installation, from Russian or foreign vendors, of legal software in all schools.

As noted in the 2008 Report, these legal reforms are a step in the right direction toward meeting the IPR Agreement obligations, and other essential steps are pending government review or Duma adoption. But, there are many other essential legal reforms, some required by the IPR Agreement, that have yet to be adopted.

The priority legal reforms include: (1) the Criminal Code which needs to be amended to make legal entities liable for IPR crimes; (2) the Customs Code which must be amended to add *ex officio* authority (amendments were introduced in the Duma but never enacted in 2007); (3) the complete and proper implementation (in the Civil Code) of both digital treaties – the WCT and the WPPT – now that Russia has acceded to the treaties (effective February 5, 2009), as well as the other Civil Code amendments (some of which were considered, but never adopted, in 2008); and the adoption of long-promised optical disc regulations.

Effective optical disc regulations would: properly regulate the licensing of plants and their equipment and raw material used in production; provide for the surprise inspection of plants; and, provide for closure of illegal plants and the imposition of sanctions – including criminal penalties – for violations. Russia plans to address this problem with one legislative amendment: to deny licenses to plants and individuals whose business license was previously revoked, as well as with regulatory amendments to the Prime Minister's Decree of April 2006.

Amendments to the 2002 Reproduction Regulatory Regulations were adopted on October 2, 2007 (further amending the April 2006 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, Rossvyazcomnadzor (now, Roskomnadzor) can issue and check licenses, and it can suspend a license, but it cannot close a plant. The regulations foresee only one regular (planned) visit every five years to each plant, absent information about piracy at a plant. The current regulations seem only to have resulted in further confusion about the ability of Roskomnadzor to suspend a plant license without a court order. In addition, there are no provisions for properly seizing evidentiary material under the administrative procedures (which time-out after two months). And further, the Federal Service was not granted such authority under the Administrative Code after the reorganization, thus denying administrative remedies. Overall, this is not what the IPR Agreement calls for to effectively enforce optical media production and distribution, and criminal (and other remedial) relief for infractions. Thus, although IIPA members welcome the fact that the new Federal Service is in operation, we are concerned that it is still operating under the existing, inadequate, plant licensing and inspection regime, without the needed and promised comprehensive and more effective regime – with clear regulations (or if needed, legislation) to license production and suspend (without a court order) the licenses of violators and to permanently close illegal plants.

One other legislative recommendation (first proposed in 2007) would mark a step backward if adopted. The proposal, if enacted, would require copyright product labels (or stickers) as individual identifiers on all legitimate product sold in Russia. This proposal, made in the past by the Moscow City government and others in the federal government, however well intentioned, will have the practical effect of hampering the dissemination of legal product, while illegal product, with counterfeit labels, is freely distributed.

Since its adoption, IIPA and its members have commented on two major overarching concerns with the new Civil Code. First, there are many provisions (including legal terms and definitions) whose context and relation to other provisions in the Civil Code lacks clarity. One example is Article 1326 which does not explicitly clarify that the making available right (Article 1324(2)(4)), or any other interactive use, is covered by the statutory license in Article 1326(a). Ambiguities may cause challenges to enforcement efforts. Second, there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

In 2008, IIPA made several recommendations to address some of problems and to improve enforcement generally. The Civil Code, Part IV amendments passed a second reading in the Duma on January 30, 2009. With the exception of one non-copyright amendment (a compulsory license for semi-conductors), the amendments are largely the same as those introduced at the first reading. Thus our recommendations remain the same as those proffered in 2008, as set forth below. The recommendations include a suggestion for the introduction into the Civil Code of a clear definition of an "Internet Service Provider" (ISP) 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 addition, to stem the rise in Internet piracy that is harming many of the copyright industries, Russia should undertake steps to address and implement notice and takedown procedures for websites hosting illegal material.

IIPA continues to recommend the following set of Civil Code Part IV amendments, in order to comply with TRIPs and the WIPO digital treaties:

- Article 1229, the Civil Code's "three-part" (fair use) test is far too broad and must be narrowed. It does not currently comply with Article 9(2) of the Berne Convention, Article 13 of WTO/TRIPs and Articles 10 and 16 of the WCT and the WPPT, respectively. The three-part test must be re-stated in its entirety in Article 1229. Further, in Article 1274(3), any taking of a work for the purposes of parody, should be limited to that portion of the work necessary for this purpose (one suggestion is to delete paragraph 3, if it is not so limited in scope, and allowing the three-part test to govern this use).
- Articles 1273 and 1306 in the Civil Code contain an overly broad exception for copying for "personal needs" (or alternatively, translated as "personal purposes"). IIPA recommends that the best way to "fix" this exception would be to clearly apply the three-part test to narrow the scope of the exception as well as to apply it only to specific instances (and to clearly, as it does now, exclude some activities from these personal use exceptions, such as camcording and telecine copying).
- Article 1280(4) of the Civil Code violates the three-part test for permissible exceptions, and needs to be significantly narrowed.
- Articles 1299 and 1309, respectively for works and objects of neighboring rights in the Civil Code fail to provide WCT (Article 11) and WPPT (Article 18) compliant levels of protection – because they are too narrow, and do not provide adequate remedies for technological protection measures (TPMs).
- Articles 1270(2)(1), 1317(2)(4) and (6), 1324(2)(5) and (6), and 1330(2)(2) contain definitions of "reproduction" that fail to adequately cover the creation of temporary copies because they explicitly state that temporary copies that constitute "integral and essential" parts of processes conducted with the sole purpose of lawfully using or bringing works or objects of neighboring rights to the public do not qualify as reproductions.
- Articles 1232-38, 1240, 1286, and 1307-08 over-regulate contractual relations in connection with copyright and neighboring rights (including the application of general rules on assignments and licensing of exclusive rights).
- Articles 1281, 1282, 1318, and 1324 fail to clarify that the Civil Code provisions apply equally to pre-existing works. (By one reading – a cross-reference to Articles 5 and 6 with Articles 1281 and 1282 – the Civil Code does apply to pre-existing works – but this should be clarified).
- Article 1231 fails to clarify whether non-Russian works and objects of neighboring rights receive national treatment (i.e., that foreign works are protected the same as Russian works).
- Article 1231 mixes copyright, patents, trademarks and other IP together, where it should be differentiated; separately, the right of remuneration needs clarification.
- 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.
- The Civil Code fails to clearly provide for third party liability for civil and criminal facilitation of Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases.
- Article 1244 needs to be corrected so that the Civil Code further limits the current abusive practices of collecting societies in Russia. This includes amending Articles 1244(4) and 1326, so that rightholders can freely exclude their works and phonograms from the accredited societies' repertoires and can in lieu authorize their own collective societies (by direct contract).
- Article 1326(1) should be clarified so that the making available right applicable for objects of neighboring rights is not limited by the statutory license in that provision.

- Article 1334(2) should be clarified so that any use of a protected work or object of neighboring rights incorporated into a database is clearly subject to the rightholder's exclusive rights (as otherwise limited by the general narrow exceptions of the Code).
- Article 1239 of the Civil Code provides procedures for granting compulsory licenses without specifying conditions. This type of licensing is applicable only to patents and should be so stated.

There are several positive features of the Civil Code that deserve mention, as well. These features include:

- Article 1242 which clarifies that collective administration organizations can only operate within the mandates they receive from rightholders.
- Article 1253 which adds civil (but, because it is the civil code, not criminal) liability for legal entities.
- Articles 1252 and 1302 which adds remedies for the seizure and destruction of materials and equipment used in infringements. However, this could be further improved by deleting the exception for the sale of materials by the state for "income," and by parallel changes in the respective procedural codes.
- Article 1261 which adds clear protection for computer programs as "literary works."
- Article 1240 and 1263 which provides proper rights of ownership and exploitation of audiovisual works.
- Article 1270(11) which provides a clear making available right consistent with the digital treaties; and, Article 1245 which provides a private (personal purpose) levy.
- Article 1301 which provides statutory damages (ranging from 10,000 to 5 million rubles).

GENERALIZED SYSTEM OF PREFERENCES PROGRAM

In the first eleven months of 2008, Russia benefited from over \$541 million in unilateral duty free Generalized System of Preferences ("GSP") benefits in the U.S. market. In 2007, Russia benefited from \$403.7 million in duty free GSP imports into the United States. The IIPA recommends that U.S. Government should continue to monitor whether the Government of Russia is complying with the eligibility requirements for GSP benefits, and if it is not, should consider terminating some or all of Russia's eligibility to participate until such time as it has achieved "adequate and effective protection" of intellectual property rights as contemplated under the GSP statute.

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Losses due to piracy in Thailand remained quite high in 2008, and piracy levels were generally above average for the Asia region, for example, 76% for software (10 points higher than the 66% regional median). Pirate product remains widespread in Thailand. As a result of piracy over the years, recent political turmoil in Thailand, and the global economic recession, the local creative economy has been devastated. The number of Thai films produced decreased from 55 titles in 2007 to 35 titles in 2008. Physical sales of legitimate music products decreased 40%, causing record companies to lay off employees, cut costs, freeze salaries, or close down their businesses.

Enforcement efforts to combat piracy have been mixed in Thailand over the years, and remained so in 2008. Police *ex officio* raiding and Department of Special Investigations (DSI) assistance in high-level piracy investigations involving music and recording piracy improved in 2008. IIPA hopes that DSI's involvement signals a shift to "upstream" investigations into organized piracy targets, including effectively addressing the production and export of pirate books. The Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) continued providing good support in fighting the particular issue of end-user software piracy. Unfortunately, these efforts have not yet made a significant impact on continuing high piracy rates for these industries. All the industries are hopeful that the new government under Mr. Abhisit Vejjajiva will adopt a serious attitude to the piracy problem that prejudices Thailand's economic, social and cultural interests. IIPA welcomes the fact that some industry sectors have already had the chance in January 2009 to sit down with the new Deputy Minister of Commerce, Mr. Alongkorn Ponlaboot. Finally, these new leaders' challenges will be exacerbated if the courts in Thailand continue creating further problems by arbitrary refusals of search warrants and by refusing to consider copyright piracy as a serious crime.

On January 14, 2009, His Majesty the King received the WIPO Global Leaders Award from WIPO Director General Dr. Francis Gurry. IIPA congratulates His Majesty and hopes that this award will spur the Royal Thai government to take much more effective action to significantly reduce piracy in Thailand and improve its law to better protect the rights of Thai and foreign authors and right holders. Greater bilateral engagement through a U.S.-Thailand Free Trade Agreement once seemed within reach, but lost momentum with suspension of talks in late 2006. Dialogue on IPR issues continued in October 2008, but commitments by the Royal Thai government remain elusive.

Priority Actions Requested In 2009: IIPA requests that the Royal Thai government take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Close notorious piracy markets ("Red Zones" and "Yellow Zones") and hold accountable mall owners, those who control the malls, and those who otherwise facilitate infringement.
- Investigate key book pirates, including exporters, by: acknowledging the need to investigate, and then commencing such investigation against, the book production-for-export business in Thailand; and addressing rampant illegal photocopying of academic materials.
- Fix the search warrant problem, by ceasing arbitrary refusals of warrants, and facilitating a right holder's ability to obtain a search warrant from the IP&IT Court when there is suspected infringement.
- Prosecute key piracy cases against high-level organized piracy targets, including plant owners, burner labs, warehouses, retailers, mobile device stores or services, and pirate book producers, with deterrent results actually imposed and publicized.
- Address corrupt practices which hamper the rule of law in Thailand and detrimentally affect the copyright industries.
- Encourage active cooperation of Internet service providers with right holders to prevent the use of networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers. As an immediate first step to achieve this objective, meetings between agencies and affected sectors should be convened to discuss ways to work cooperatively to halt Internet transmissions of pirate materials.

Legislative

- Modernize the copyright law and join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Seek passage of draft amendments to the Customs Act to empower customs officers with the authority to inspect and confiscate goods entering the country for transit and transshipment.
- Support legislation that will ban unauthorized camcording of movies in theaters.
- Create a sound legislative structure to address Internet piracy and promote service provider responsibility, holding ISPs accountable for any direct infringement on their services, and employing mechanisms, including statutory notice and takedown, to address hosted piracy, P2P file sharing, advertising sites, and Internet-based mobile device piracy.
- Fix the Motion Pictures and Video Act B.E. 2550 to address potential quantitative and screen time quotas on foreign films that could undermine market access for legitimate content.
- Address organized crime, by adopting measures to make copyright piracy a predicate offense to trigger remedies to deal with organized crime, including freezing of all assets related to piracy.
- Fix the Optical Disc Manufacturing Act to remove the onerous and unprecedented obligation that right holders acquire a "copyright owner's code" before any replication of legitimate CDs.
- Clarify that copy exceptions in the copyright law comply with TRIPS Article 13 by confirming that, contrary to some interpretations by the Royal Thai courts, the exceptions do not allow whole copying of books without payment.

THAILAND Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	17.8	65%	21.7	50%	20.7	50%	21.9	45%	24.9	45%
Business Software	295.0	76%	257.0	78%	253.0	80%	155.0	80%	100.0	78%
Entertainment Software	NA	NA	91.4	77%	NA	82%	NA	75%	NA	76%
Books	NA	NA	37.0	NA	35.0	NA	30.0	NA	30.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	149.0	62%	30.0	60%
TOTALS	312.8		407.1		308.7 ²		355.9		184.9	

PIRACY CHALLENGES IN THAILAND

Physical Piracy in Retail Hotspots in 2008: Street piracy still pervades the markets in Thailand due to irregular enforcement and non-deterrent sentences. Piracy decreased somewhat during key points of the year, for example, during President Bush's visit in August 2008 and during a Bangkok Metropolitan Police Bureau crackdown, but part of the reason for any decrease in piracy can be attributed to economic malaise. The "Red Zones" and "Yellow Zones" designated by the Royal Thai government denote specific areas or even whole provinces targeted for enforcement activity, and indicate the continued scope and severity of the piracy problem.³ Some targeted enforcement in such "Zones" notwithstanding, piracy otherwise dominated the markets in Bangkok, Phuket, Samui, Pattaya, Chiangmai, and Krabi. The global economic crisis hardly made a difference to pirates, although anecdotally, pirate prices decreased (pressed music pirate discs decreased from 99 Baht-US\$2.90, to 70 Baht-US\$2.05, while burned discs decreased from 50 Baht-US\$1.47 to 35 Baht-US\$1.03, or 3 for 100 Baht-US\$2.93), and the quality of product decreased, e.g., pirates moved from factory discs to burned discs, and off-set printing for labels to sticker labels. Pirates operating in the physical market also made changes to accommodate

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Thailand. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² 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.

³ Red Zones include: in Bangkok – Klong Thom, Sapan Lek and Baan Mor shopping areas, Patpong and Silom shopping areas, Mah Boon Krong (MBK) Center, Sukhumvit area (Soi 3 – 19), Panthip Plaza; Chiangmai Province; Phuket Province; Koh Samui District in Suratani Province; Pattaya in Chonburi Province; Haad Yai District in Songkla Province; Ao Nang area in Krabi Province; Hua-Hin in Prajauabkirkan Province. Yellow Zones include: in Bangkok – Nom Chit shopping area, Lad Prao, Pata Pin Klao shopping area, Fortune shopping area, Taladmai Don Muang shopping area, Tawanna shopping area, Pratunam shopping area, Jae Leng shopping area, Kao San Road shopping area, Sapan Bhud shopping area; Patumtani Province; Nonthaburi Province; Nakhonratchasima Province; Konkan Province; and Ratchaburi Province.

technology and better compete with Internet piracy, e.g., by offering thousands of songs in MP3 format on one disc. The availability of pirated discs containing music has declined as consumers of pirated music product increasingly are accessing their content in digital formats.

Internet Piracy Grew Worse in 2008 with Greater Connectivity: Internet connectivity has exploded in Thailand, which boasted more than 13.4 million users, or 20.5% penetration, and 600,000 broadband connections, or roughly 1% penetration, as of March 2008 (according to the International Telecommunications Union). Internet piracy in Thailand takes four forms: websites advertising pirate product,⁴ illegal downloads directly from websites or through deep linking, websites supporting commercial and non-commercial P2P and download services (for example, over 90% of software piracy cases on the Internet in Thailand in 2008 involved P2P downloads), and cyber lockers. Many consumers have replaced the purchase of hard goods with ripping content from the Internet to use on their computers or store on mobile devices. Of the illegal P2P services, those employing the swarming technology of Bit Torrent grew more prevalent in the past year. Free cyber lockers have grown in popularity. IIPA is encouraged by a recent raid involving a man advertising pirate movies and TV series' over the Internet through a website based in Thailand.⁵

Camcorder Piracy: Illegal camcording⁶ grew in frequency and severity in Thailand in 2008 – over 35 cases of illegal camcording of U.S. major motion pictures were detected. This is an 800% increase in illegal camcords over 2007. Many films, such as *Speed Racer*, *10,000 B.C.*, and *Wanted*, were stolen one day after their local theatrical release. Many films shown in Thailand are in the original English (with Thai subtitles). This combined with an almost 50% early or day-and-date release schedule, makes Thailand an extremely high-risk country for the motion picture industry, since illegally camcordered movies could easily serve as the source for global piracy. Of the top 25 grossing films worldwide between January 1, 2008 and December 31, 2008, approximately 36% were illegally copied on camcorders in the theaters at least once in Thailand, and of those, 100% were early or day-and-date release titles. Camcording piracy hit local Thai films as hard or harder than it hit foreign films, as we are informed that nearly every major Thai movie release in 2008 was illegally recorded by a camcorder during the first week of its theatrical release.

Mobile Device Piracy: Illegally “ripping” copyright content and storing such content on mobile devices, on thumb drives, or on MP3 players, became a dominant piracy phenomenon in Thailand in 2008. Fewer consumers purchased physical product, instead choosing to rip their content from the Internet. In addition, former retailers of pirate optical discs have set up brick-and-mortar shops offering digital download services to consumers onto these devices, some maintaining an in-store hard drive containing literally thousands of files to purchase and load onto mobile devices. In a recent investigative survey conducted in Thailand, investigators were able to purchase players with infringing pre-loaded tracks, or received offers from shop staff to load extra tracks upon purchase of the devices. Book and journal publishers report occurrences of downloading reference books and dictionaries in a similar manner. Unfortunately, the problem is only set to grow worse, as recent estimates had mobile penetration in Thailand at 53 million users by early 2008.⁷ Thai law enforcement officials are well behind the curve on mobile piracy, incorrectly questioning whether the mobile download (or upload) services provided by the stores can be considered copyright infringement, arguing, again incorrectly, that it is customers, not the stores themselves, that are ordering the content. The file transfers, done as a service by sellers, clearly constitute copyright infringement, and must be dealt with severely or this problem of mobile device piracy will spiral out of control. Industry's surveys reveal that mobile shops in the Red and Yellow Zone areas, i.e. Pantip Plaza, Klongtom and

⁴ For example, in April 2008, following an in depth investigation, the Business Software Alliance supplied details to the police who raided and arrested the operator of idsoft.org, a website offering counterfeit software to be sent by mail, which was directed at the local Thai market.

⁵ The Motion Picture Association reports that on February 6, MPA Thailand representatives teamed up with ECOTEC officers to conduct the first ever raid in the country specifically targeting Internet piracy. It was the second significant operation since the start of the year following the January raid on a burner lab where 500 burners were seized. The suspect arrested confessed to running a web-based pirate operation from his home using pirated DVD copies as masters, and admitted to selling pirated movies as well as local and international TV series' for less than US\$1 each through courier delivery. Among the products seized were over 150 MPA member company titles such as *“Wanted,” “The Kingdom”* and *“Enchanted”*. Also seized were 14 packages of pirated DVDs from the nearby post office which the suspect had sent for shipment to buyers outside Bangkok. Initial investigations revealed that the suspect's bank account showed an inflow of approximately US\$11,550 (THB400,000) over a two-month period.

⁶ Illegal camcording occurs when professional camcorder pirates who use video cameras to illicitly copy a movie during its theatrical exhibition in a movie theater, usually very early in its run. The pirates sell the master recordings to illicit source labs where they are illegally duplicated, packaged and prepared for sale on the pirate market.

⁷ *Thailand's Mobile Market Reached 53 Million Subscribers by End-2007*, Reuters, May 23, 2008, at <http://www.reuters.com/article/pressRelease/idUS99589+23-May-2008+BW20080523>.

Saphan Lek, Koa Sarn Road, Fortune Center and Sear Department Store, all offer “pre-downloaded” music files to customers on such devices as a service.

Book Piracy, Including Production for Export and Unauthorized Photocopying: Publishers continue to alert Thai authorities to concerns about pirated books in Thai and English, some of which have been destined for export. Reports indicate that there are multiple printing factories in Thailand located in various provinces. Yet, the Royal Thai government, specifically, the Department of Intellectual Property, Department of Special Investigation, and Royal Thai Customs, often make statements indicating that they do not accept that printing factories in Thailand can actually print and distribute or export pirate books, claiming such companies in Thailand do not have the technical capability to carry out such an operation. Further proof of the pirate production-for-export model emerged in March 2008, when the Royal Thai Police’s Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) seized approximately 30,000 copies of Thai language primary school textbooks in the provinces of Mahasarakarm, Roi-ed and Udonthani, in a raid carried out on behalf of the local Thai Kurusapha Organization. The textbooks, produced in Thailand, were initially seized on the grounds that they had dangerous ink, not on the basis that they infringed copyright. Adding to the irony, after they were seized, it was determined that “those [pirate editions] with acceptable quality” would be donated to libraries and schools.⁸ Evidence has also emerged from U.S. and South Korean Customs authorities regarding recent exports from Thailand of pirate books in varying quantities, including English language technical and professional books, and English language textbooks. These production operations are highly sophisticated, networked, and difficult to detect.

Another form of piracy harming Thai and foreign publishers is unauthorized photocopying of educational materials, especially near schools and universities. Shops continue to copy books for students, often on a “made to order” basis to avoid keeping infringing stock. Lecturers are culpable too, compiling “course packs” of works without permission from publishers and even translating works and marketing them as their own publications. Other pirated materials include foreign language newspapers, an eclectic range of novels, travel guides, and history books. Various private institutes in Thailand provide illegally reprinted Test of English as a Foreign Language (TOEFL) materials to their students. Another problem involves unauthorized translations into Thai, still common among teachers and professors.

Optical Disc Pirate Production, Factory and Burned, Including “Mobile” Burning Labs: Optical disc pirate production (CDs, VCDs, DVDs, CD-ROMs, CD-Rs, DVD-Rs) remains widespread in Thailand, with a sharp increase in 2008 of burning onto recordable discs, and even the advent of mobile CD-R burning operations, including a small truck loaded with a computer and a CD-R burner ready to write tailor-made compilations onto blank CD-Rs. Regarding factory production, there remain dozens of factories. The plant visit and “exemplar” programs (by which sample discs are collected from each of the plants in order to assist in forensic matching) are ongoing, and have been accompanied by the establishment of a forensics lab (donated by the U.S.), however, industry is not permitted to participate in these plant visits. IIPA’s understanding is that the DIP and the Forensics Division of the Royal Thai Police undertook random plant visits during three periods during 2008 (January to February, June to July, and November to December) and obtained exemplars from 20 plants. Anecdotal evidence indicates disc exports continue from Thailand to Malaysia,⁹ and to Australia (through an operation run by a Thai student community in Australia, operating a website in Thailand that shipped discs to Australia). Evidence also exists of imports into Thailand of discs from Malaysia, China, Cambodia, and Laos, so pirate trade appears to be two-way.

End-User Piracy of Business Software/Government Legalization: The greatest source of losses to the business software industry is the use of unlicensed or pirate software in the workplace. The rate of unauthorized uses of business software in business settings remains unacceptably high, at 76% in 2008 (based on preliminary numbers), still well above the Asia regional median of 66%. Nonetheless, it is important to note that the PC software piracy rate declined by two points from 2007 levels. Hard disk loading of illegal software onto computer hard drives also remains a problem in Thailand.

⁸ *It Pays to Tell*, Daily Express, March 28, 2008.

⁹ On September 24, 2008, Royal Thai Police with assistance of the Motion Picture Association, cracked a piracy ring operating from an abandoned warehouse in Yanawa district, Rama 3 Road, Bangkok. The front of the warehouse was disguised as a junk garage, while the air-conditioned back area housed one DVD replicating line, one printing machine, and 2,400 kilograms of polycarbonate, used in the production of optical discs, 16,000 pirate discs and 93 stampers (the key glass part containing the content and used to produce discs). Titles included *The Mummy: Tomb of the Dragon Emperor* and *Batman: The Dark Knight*. The officers also found 14,000 pirated optical discs in the trunk of a car, and arrested one Thai man and two Malaysian suspects, the only people found. It is believed the plant was run by the Malaysian mafia and had been producing pirate product for six months for export back into Malaysia. The investigation is ongoing.

Entertainment Software Piracy: Piracy of entertainment software remains prevalent in Thailand, whether through sales of optical discs (now more than ever believed to be locally “burned” rather than industrially replicated) or cartridge-based games, and use of pirated games in unlicensed Internet game rooms (IGR) or cafés. Malls serve as the primary retail channel for pirated entertainment software products, both pirate video game discs and counterfeit video game cartridges. Vendors typically only have binders of game covers or empty boxes in their stands (unlike their prior practice of hiding a stash of pirated products in a closet or an adjacent store). When a customer, after browsing the shop “catalogues,” requests a specific title, a runner is sent to meet a backpacker (whose function is to roam the mall carrying a number of pirated discs in a bag) to retrieve the requested product.

Signal Piracy (Cable and Satellite): Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission of U.S. programming over systems from original cable or satellite transmissions, remains rampant. Cable piracy and signal theft in Thailand involves not only major channels, but also the feed by many unlicensed cable operators, particularly in provincial areas outside of Bangkok, of continuous, unauthorized motion pictures on dedicated movie channels operating on their systems. Progress on three successful 2006 investigations in Phuket has been slow. However, the Governor of Phuket recently approved the prosecution of these cases and the cases have now been referred back to prosecutors for further investigation. Revenue losses to right holders in the programming and the channels runs in the hundreds of millions of dollars. Illegal decoder boxes and smart cards are widely available in Thailand. The cable industry reports nearly two million unauthorized hookups in Thailand, with only a fraction of that number of legitimate subscribers to the major pay television operators in Thailand. A new problem emerged in Thailand in 2007 and continued in 2008, involving individuals who apply for a legitimate pay television subscription service, and then use the Internet to share the smart card with others, collecting a monthly fee from users of the pirate service. Such Internet card-sharing could have serious repercussions for the legitimate industry as well as direct-to-home pay television services. The Department of Intellectual Property reported in 2007 that ECOTEC arrested one violator and filed a case against him.

Another development is the inclusion in the new Broadcasting Act (Section 70) of a provision that punishes manufacturers, importers, sellers and those who service pirate decoders aimed at decrypting Thai-licensed services. IIPA hopes that this change will stimulate the police to launch additional cases but expresses disappointment that the international industry’s recommendation to the Council of State that the legislation be broadened to encompass pirate decoders of international program providers’ signals was not accepted.

ENFORCEMENT CHALLENGES IN THAILAND

General Notes on Enforcement Taken in 2008: The industries take note of Prime Minister Abhisit Vejjajiva’s reported Government Policy Statement on December 30, 2008 that intellectual property rights is an important part of his policy going forward.¹⁰ IIPA notes that several Royal Thai government agencies continue to work with right holders to improve intellectual property protection in the country. First and foremost is the Royal Thai Police, and its Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC), which is principally responsible for piracy suppression nationwide.¹¹ The Department of Special Investigations (DSI) runs large-scale commercial piracy anti-piracy enforcement actions, and assists the Police with its investigations,¹² while the Customs Department is responsible for border measures, both import and export. The Department of Intellectual Property (DIP) of the Ministry of Commerce acts as a coordinator among enforcement agencies as well as the main policy-making branch.¹³ Industry enjoys generally good and cooperative relationships with these agencies and the agencies all continued, with varying degrees of success,

¹⁰ Indication of the new Prime Minister’s Government Policy Statement appears in the Royal Thai Embassy’s *Thailand’s Recent Developments on Protection and Enforcement of IPRs*, which IIPA just received on February 13, 2009. IIPA appreciates the information as well that Prime Minister Vejjajiva has established a new National Committee on Prevention and Suppression of IPR Violation as of January 2009, comprised of various agencies mentioned herein, and that this committee reportedly met on February 2, 2009.

¹¹ The Metropolitan Police Bureau is in charge of piracy suppression in Bangkok.

¹² For example, the record industry reports that the government’s performance in piracy suppression for that industry was slightly better than in 2007 and that the number of street stalls and pirated shops declined. The record industry noted that Police became more diligent in 2008 in conducting *ex officio* actions than in the past, that the Department of Special Investigations (DSI) helped the Police in anti-piracy actions, and that DSI’s own investigations led to a number of major cases. Even the new Deputy Minister of Commerce, Mr. Alongkorn Ponlaboot, has been involved in a recent raid.

¹³ Other agencies have responsibility over specific aspects of copyright, e.g., the Ministry of Culture is responsible for implementation of the Film Act.

to run raids against piracy operations, including *ex officio* raids,¹⁴ with a majority of raids focused on retail optical disc piracy in the Red Zones and Yellow Zones.

Overview of Some Key Challenges in Enforcement System: Unfortunately, several significant problems continued to curtail the agencies' effectiveness to attack piracy in Thailand. These included a drop off in the number of enforcement actions,¹⁵ the failure to target major players in the piracy network in Thailand,¹⁶ the failure to employ adequate resources to create deterrence (for example, the government did not effectively use forensic equipment donated to them to trace back the origin of optical disc manufacture), the failure to deal with piracy problems other than optical disc, including (but not limited to) Internet piracy, book piracy, illegal camcording piracy, end-user piracy of business software, and cable and satellite signal theft,¹⁷ and the failure to achieve successful and deterrent outcomes in piracy cases heard at the IP&IT Court. In addition, some basic procedural aspects of a good enforcement system, such as obtaining search warrants on the basis of suspected infringing activity, have been made complicated and burdensome by the IP&IT Court in recent years. Evidentiary standards have also hindered enforcement, for example, Police will not arrest pirate vendors based solely on the pirate DVD sleeve (cover), notwithstanding that the sleeve contains copyright and trademark material including art work and the movie title.¹⁸ Of course, pirates, knowing this, keep the discs in a separate location so they can avoid arrest.

The recent establishment of four Mobile Task Forces within the DIP and the Royal Thai Police, heralded with such promise a year ago, has not resulted in a significant increase in copyright enforcement. For example, in one recent month, the Mobile Task Force conducted only two copyright-related matters, compared to twenty-nine trademark cases, and in part this is reportedly due to budgetary and human resources constraints. Further, no steps have been taken by the Royal Thai government to hold mall owners (e.g., in the Red and Yellow Zones) accountable for piracy occurring on their watch. One very useful and easy tool would be for the government to mandate that mall owners include a clause in their lease agreements that their tenants' leases can be abrogated if the tenants use the rented premises for infringing activities.¹⁹ Finally, it has been suggested that the Ministry of Commerce develop an enforcement arm to parallel that of ECOTEC.

¹⁴ For example, the music industry's enforcement group reports that for the year 2008 there were 436 successful raids involving pirate international music with 359 arrests and 207,737 discs seized. All cases were reportedly sent to court without settlement. Some of the raid results included:

- A May 7, 2008 DSI *ex officio* raid on house No. 65, 67 Roong-roj Village, Moo 9, Salathammassop Sub-district, Taweewattana District, Bangkok, and house No.133, Soi Boromratchonnane 119, Boromratchonnane Rd., Salathammassop Sub-district, Taweewattana, Bangkok and Home No.34/109 Nantawan Village, Bangkhunkong, Bangkruiy, Nonthabur, resulting in the seizure of 564,212 pirate film and music discs and a pick-up car parked inside one of the houses; upon questioning, the housekeeper was charged with copyright infringement, confessing that he was hired by an organized criminal gang to watch the houses.
- A June 15, 2008 Special Operation Unit (Provincial Region 1) *ex officio* raid at Zeer Rangsit, Paholyothin Road, Lam Lookka, Patumthani Province, resulting in 11 arrests and seizure of 130,000 pirate discs.
- The raid took place on August 9, 2008 by the Department of Special Investigation (DSI) at the target house located inside *Army Camp Raid* the Battalion Infantry 11th Regiment King's Guard, situated on Anusaowaree, Bangkaen, Bangkok with 5 people arrested and charged with Copyright Infringement for producing and selling of copyright infringing products. There were a 77,000 illegal discs and 57 CD-R Burners (568 Layers in total) found inside the house.

¹⁵ The Royal Thai government claims to have conducted 2,973 copyright raids in 2008 according to Royal Thai Embassy, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, February 13, 2009, see *supra* note 10, resulting in seizure of 2.3 million pieces of pirate material. We note that this number of raids is significantly down from previous years (from 4,614 in 2007 and 6,459 in 2006). Customs seizures were also down in 2008, with 411 cases of suspect infringing goods stopped at the border, comprising almost 1.2 million pieces (not broken down by counterfeiting or pirated materials). The government claims that in that same time period, 4,979 IP cases were lodged with the IP&IT Court, although only some of those were copyright-related, and it is unknown of the 15 reported prison terms how many were copyright-related (several are mentioned in this report, however).

¹⁶ Most raids focused on smaller targets, but the Royal Thai Embassy claims that at least some actions were taken against "large-scale manufacturers, wholesalers and warehouses including retailers within the red zone, or in areas with historically high levels of violation, such as Pantip Plaza, Silom, Maboonkrong, Klong Thom." See Royal Thai Embassy, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, February 13, 2009, *supra* note 10. Most of the raids reported as "large scale," however, involved between 1,200 and 1,745 discs.

¹⁷ In IIPA's 2008 report, we acknowledged some action regarding unauthorized broadcasting by Thailand's then 77 licensed broadcasters, resulting in some fines imposed at the IP&IT Court, but indicated that no fines or other administrative penalties had been paid, and worse, that no actions had been taken against the some 400 unlicensed broadcasters. We also criticized the Department of Intellectual Property's proposed long-term approach, since it would require a "final adjudication" in order to suspend a license upon a finding by the National Broadcasting and Telecommunication Commission that the broadcaster was engaged in unauthorized theft of signals or programming.

¹⁸ In 2007, the Department of Intellectual Property indicated in an official report that they would like to commence criminal prosecutions against piracy through proof of the mere display of the cover pictures or artwork. Industry agrees, but also asserts that such underground practices should lead authorities to investigate up the chain of distribution to locate the pirate warehouses, distribution hubs, and production sites.

¹⁹ During the third quarter of 2006, the Memorandum of Understanding on "Prevention and Suppression of the Distribution of IPR Infringing Products" was signed between government representatives, industry, and shopping mall owners. However, reportedly, this has led to no positive development to combat mall piracy.

IP&IT Courts Key to Increasing Level of Deterrence: A disturbing trend over recent years is the increasing unwillingness for the IP&IT Court to mete out deterrent sentences in copyright piracy cases. We are unsure of the reasons for this attitudinal shift which has resulted in decreasingly meaningful, deterrent sentences, but do note that public statements made by certain Judges on the Court indicate they do not view copyright piracy as a crime affecting society at large (and, for example, they therefore do not see links between piracy and organized crime). As a result, criminal verdicts result in very lenient sentencing, most often comprising fines of less than US\$400 with no imprisonment imposed in typical retail piracy cases. The Court also applies “discounting factors” to “first time offenders” or who plead guilty, resulting in purely nominal sentences that have rendered the Thai court system dysfunctional in the fight against piracy. One exception to the rule involves some verdicts for sale of products advertised on the Internet, since the offenders in those cases were found to have violated the reproduction right as well as engaging in unlawful distribution. In a recent Internet piracy case, a fine of US\$3,000 and a suspended six month sentence was imposed. Even this sentence, however, reveals the overall lack of deterrence, when compared with similar cases being adjudicated elsewhere in the region.²⁰

Inability to Obtain Search Warrants from the Court an Increasing Problem for Some Right Holders: Another abiding problem is the increasing reluctance of the IP&IT Court to issue criminal search warrants, at least for some industries. Some judges have even rejected search warrant applications from copyright owners without any reason, or worse yet, giving as the reason for rejection that the right holder did not take a civil action against the infringer rather than request the warrant. The success rate for business software piracy-related search warrant applications dropped from 76% in 2006, 60% in 2007, to a woeful 3% in 2008 (despite providing increasing detail in search warrant applications).²¹ The affected industries have tried to address the problem of arbitrarily refusing to issue warrants by engaging in dialogue with the judges through formal meetings and seminars, and seeking out a clear and transparent explanation of the requirements for issuing a search warrant in corporate end-user software piracy cases.

Internet Infringements Enforced Through Non-Statutory Sporadic Cooperation, But Obtaining Records Difficult: Regarding the growing Internet-based piracy phenomena in Thailand in 2008, service providers (ISPs) cooperated with some, not all, right holders, and for those, the takedown rates of infringing materials or activities was quite high. For example, the local music industry association was able to achieve 155 takedowns out of 163 notices to service providers in 2008, a 95% takedown rate.²² This rate demonstrates that service providers, cooperating with right holders, can curtail online infringements at hosted sites even without statutory mandates or incentives. Between January 1 and October 31, 2008, the Business Software Alliance also sent 889 takedown notices to ISPs pointing out the existence of infringing software on their network. Thus far, it appears ISPs have acknowledged the problem of Internet-based and P2P infringement. However, their cooperation to date has been purely voluntary and very sporadic. Neither the Computer Act nor the Copyright Act of Thailand provide for statutory notice and takedown, nor for service providers to divulge the identities of specific users to right holders. Service providers claim an obligation of confidentiality to their customers that precludes them from being able to divulge the IP address or the name of the webmaster, for instance. While Police can obtain such information, some ISPs have even become nervous for the same reasons about sharing such identification information with Police, albeit this was regularly being done on an informal basis.

²⁰ In one encouraging development in 2008, the IP&IT Court ruled in favor of the copyright holder in an end-user software civil case and awarded damages of Baht 3.5 million (approximately US\$101,000). This amount included the retail value of the infringing software (Baht 2.5 million or approximately US\$72,000) found on the computers, plus legal fees, interest, and damage to the software copyright holder's reputation.

²¹ We believe there is a general misunderstanding of the aims of the BSA in its enforcement effort which may be an irritant leading to fewer warrants. The BSA program aims principally and primarily to legalize businesses which now engage in the unauthorized use of business software, and to do so in the most efficient manner. There are many avenues to achieve this end, including settlements, which can be very effective in legalizing businesses and save the courts valuable resources and time. BSA representatives have sat down with the new Chief Justice of the IP&IT Court to explain the aims of the campaign in Thailand, and would be pleased to do so again. In addition to the recent civil court judgment mentioned *supra* note 20, in January 2009, the Police also were able to obtain two search warrants for an end-user software piracy case.

²² On a positive note, it appears that industry was able to get a takedown of the notorious site BitThailand.com, since the site itself is no longer available. However, we note that it redirects to a site called 2bbit.com, which has a suspicious disclaimer that provides,

None of the files shown here are actually hosted on this server. The links are provided solely by this site's users. These BitTorrent files are meant for the distribution of backup files. By downloading the BitTorrent file, you are claiming that you own the original file. The administrator of this site (<http://www.2bbit.com>) holds NO RESPONSIBILITY if these files are misused in any way and cannot be held responsible for what its users post, or any other actions of its users. For controversial reasons, if you are affiliated with any government, ANTI-Piracy group or any other related group, or were formally a worker of one you CANNOT download any of these BitTorrent files. You may not use this site to distribute or download any material when you do not have the legal rights to do so. It is your own responsibility to adhere to these terms.

The Royal Thai government should optimally ensure that ISPs are aware of their responsibility to deal with infringements, preferably by enacting a statutory notice and takedown and otherwise fostering cooperation to defeat online infringements, including P2P file sharing. If there continues to be no assistance to right holders by a statutory notice and takedown mechanism and a way to obtain identifying information about suspected piracy activity from ISPs, then the sole responsibility would fall on the government and ISPs to ensure copyright interests are protected in the online space.

Drop in Business Software Enforcement in 2008 Until “Countdown to Crackdown”: The business software industry reported that they received good support from the Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) for end-user software piracy actions and also the support of DIP and ECOTEC in building awareness and promoting the use of legal software in the workplace. Nevertheless, the software industry, like other industries reported difficulties in obtaining criminal search warrants from the courts, with arbitrary refusals occurring more frequently. This inability to obtain search warrants from the IP&IT Court in turn resulted in a decrease in the overall number of enforcement actions against end-user software piracy during the first three quarters of 2008. In addition, raid coordination for software cases became more difficult, since the number of police units authorized to conduct IP raids decreased, meaning right holders had to compete over limited resources. Those who were available from ECOTEC were competent and dedicated but lacked sufficient manpower to respond in a timely manner to complaints filed. As a result of these problems, the total number of end-user software piracy raids for the Business Software Alliance and members in 2008 decreased to 45, a 40% drop compared with 2007 (80 raids). Unfortunately, the authorities refuse to name the targets, for fear of defamation claims, but the failure to fully publicize raids makes them much less effective as a deterrent.²³ The situation changed somewhat in September, when ECOTEC agreed to endorse the BSA “Countdown to Crackdown” campaign, offering businesses 30 days to legalize. Enforcement began on October 15, 2008 with extensive press, including a press conference co-held by BSA and ECOTEC, to publicize the statistics on raids conducted. Following the start of the crackdown, 19 raids were conducted by ECOTEC. In addition, around 30,000 businesses were sent ECOTEC-branded direct mailers and these were followed by another batch of around 20,000 letters. Regarding government legalization of software usage, IIPA is pleased that, according to the Royal Thai government’s latest report, it has requested the cooperation of all government sectors to abide by the decision of the Cabinet in 1999, which stipulates that all government sectors are to strictly use legitimate software.

Book Enforcement Not Forthcoming: Royal Thai authorities have done little in 2008 to further initiatives begun in 2007 (like the “Stop Book Piracy” initiative) and otherwise to reduce illegal photocopying, printing, translations or adaptations. Authorities do not take *ex officio* raids against book piracy. Most disturbingly, while publishers and their representatives have met with Department of Intellectual Property (DIP), Department of Special Investigations (DSI), ECOTEC, and Royal Thai Customs, none of these authorities seems to believe printing companies based in Thailand could print and export pirate books, despite the evidence being amassed.²⁴ The Thai authorities have not conducted any in-depth investigations against suspected counterfeiters, although they have supplied specific information such as immigration records of some suspected offenders. IIPA would like to see the following in the next year with respect to the production-for-export problem in Thailand:

- **Use Investigative Powers to Help Locate Pirate Book Printers in Thailand.** While DSI and Royal Thai Customs have cooperated to a significant extent in these investigations, they now need to use their investigative powers, which far exceed any powers that the publishers have as private parties, to help track down the illicit enterprises.
- **Increase Cooperation with Foreign Bureaus, Including United States Customs:** There is a sense that DSI and Royal Thai Customs do not trust the evidence of infringement being provided by other countries, including the United States on the source of piracy operations.

²³ One feature of Thailand’s criminal law allows a party charged with a criminal offense to bring a defamation action against anyone who publicizes the charge before a final judgment has been issued. In the past, right holders have on occasion gotten cooperation from the police to release the names of infringers to the press, but they have become reluctant to do so.

²⁴ The publishing industry has several investigations pending against suspected print pirates in Thailand. We have information that suggests that the printing is taking place inside Thailand and that there are multiple sources for the pirated books that are making their way into mainstream channels of commerce outside Thailand, including in the U.S.

- **Name a Single Coordinator for Book Piracy Enforcement:** IIPA continues to call upon the Royal Thai government to designate a permanent point of contact, for example, within the Interior Ministry, to instruct other law enforcement agencies regarding enforcement against book piracy.

Other issues hindering enforcement of the rights of publishers in Thailand is attrition among key enforcement officers, creating major obstacles in putting into place a lasting cooperation between publishers and enforcement agencies in Thailand. The Royal Thai government has not done much to address the core misunderstandings about “fair use” in the educational context, and universities still need to take a role in ensuring legitimate uses of textbooks and other published materials in schools and universities.²⁵

Camcorder Piracy Enforcement: We urge the Royal Thai government to ensure that the problem of illegal camcording is properly addressed. Illegal camcording harms local Thai films as well as foreign films. The Royal Thai government has represented to industry that its law already adequately protects against illegal camcording, and that its authorities could take actions against illegal camcording without enactment of a standalone provision outlawing the use of or intent to use audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. There is currently one case under investigation following a police interdiction and arrest of a suspect caught recording *Body of Lies* at the Siam Paragon theater on October 9, 2008. Industry indicated its willingness to review the record of cases brought against illegal camcording in 2008. To our knowledge, other than this case arising in October,²⁶ the Royal Thai government has not come through with such case results.

Entertainment Software Piracy Enforcement: ESA member companies continue to conduct “mall sweeps” in cooperation with local law enforcement. We encourage the authorities to commence *ex officio* raids against such targets. As noted above, criminal cases rarely result in even meager fines (ESA members report that fines are typically only imposed in cases where 100 or more discs are seized, leading pirates to keep very few discs on hand), and no imprisonment, but only community service, if that.

Updates on Optical Disc Piracy Cases: IIPA previously reported three major optical disc actions, against Cyber Planet (which was raided on April 10, 2007, and charged with violating the Optical Disc Manufacturing Act for failing to inform DIP regarding production), the “307 Plant” (raided on June 20, 2007, and leading to prosecutions under the copyright law and the Optical Disc Manufacturing Act, with testimony heard by the IP&IT Court on November 20-23, 2008; a verdict is possible as soon as February 2009, but none had been announced as of the date of this filing), and one unregistered plant (raided October 19, 2007, and leading to the arrest of the home owner for not registering the property as an optical disc plant under the Optical Disc Manufacturing Act and for infringing copyright, and the arrest of his two employees, nationals of China and Myanmar, for copyright infringement; the court has temporarily suspended consideration of the case since the defendants absconded after being let out on bail, but arrest warrants have been issued).

Corruption: There have long been instances of corruption in the IP enforcement system in Thailand. In the 2008 Special 301 report, IIPA highlighted a stoppage by a local police station, and the courageous acts of the then head of ECOTEC to re-establish the rule of law. In other instances, corruption is more subtle, for example, substitution of low-level defendants for the major target well after the raid has been run, delays in post-raid inquiries, and leniency of police officers on the pirate targets during raids. Some simple but concrete steps, like rotating police officers every year or two in order to prevent them from making connections with pirates, and securing raid parties (for example, by removing mobile devices from those on a raid party to avoid leaks, which has been highly effective in the territories employing this technique), can ensure that honest government officials are able to do their honest work without worry that corrupt forces around them will nullify their good intentions.

²⁵ IIPA read with interest in the Royal Thai Embassy’s February 13, 2009 report, *Thailand’s Recent Developments on Protection and Enforcement of IPRs*, *supra* note 10, about certain DIP activities during 2008, including sending officers to lecture on book copyrights to teachers and librarians, and to explain its manual on fair use at universities. The U.S. publishers again request to be permitted input in the formulation of “Fair Use Guidelines for Education,” particularly in light of court decisions which may be easily misinterpreted by the universities regarding the scope of allowable copying. At least, it must be made clear in such activities by DIP that wholesale copying of academic materials without permission and payment is impermissible.

²⁶ *Id.* The Royal Thai Embassy’s February 13, 2009 report mentions this case, but it is unfortunate that, thus far, the government response does not indicate support with industry’s strong view that a standalone approach is needed.

Link Between Piracy and Organized Crime: It has long been the case that powerful interests have been attracted to the low-risk, high profit world of piracy in Thailand. In 2006, an industry representative was shot and killed in Nakorn Pratom Province, and a staff person was attacked during a raid in Open Market in Nonthaburi Province. In 2007, at the Tanwanna shopping mall, a scene between two rival gangs involved in pirate optical disc businesses erupted in violence, resulting in one death and another serious injury. There have been some instances in which politicians or ex-politicians have been suspected of close involvement with piracy operations. There are connections between organized criminal piracy and corrupt practices, like substituting pitiful, undesirable defendants in a criminal trial for the real big fish target, which has happened on many occasions in Thailand at the Police and prosecutor's level. To address the involvement of organized crime, the government of Thailand should ensure that copyright infringement is a predicate offense for remedies like freezing assets of organized criminals, and that copyright infringement is a predicate offense in the Money Laundering Act. The government prosecutors should also consider filing charges against pirates on the basis of tax evasion in parallel with copyright offenses whenever this presents itself.

TRAINING AND PUBLIC AWARENESS

Numerous Industry Trainings in 2008: Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2008. These included the following:

- On April 10, 2008, the Thai Entertainment Content Trade Association (TECA) and the Prevention and Suppression of Intellectual Property Infringement Committee (which has since been dissolved according to industry reports) presented a seminar, "How to Use Copyrighted Works Properly," for 200 participants in Pattaya City mainly involved in the karaoke business.
- On April 29, 2008, for World Intellectual Property Day, TECA presented a concert at Central World Plaza, to send the message to protect copyright and to demonstrate copyright's role in local economic and cultural development. The event was co-organized with the U.S. Embassy and the Department of Intellectual Property.
- On April 29, 2008, IIPA delivered a "Roundtable Discussion on the Development of International Copyright Protection" for roughly 50 participants from the Department of Intellectual Property and the IP&IT Court, discussing the latest developments in implementation of and ratification/accession to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- In April 2008, the Department of Intellectual Property, ECOTEC, with support from the Association of Thai Software Industry (ATSI), Association of Thai Computer Industry (ATCI) and the Business Software Alliance launched a major educational initiative known as the "National Software IP" (NSIP) Campaign. The campaign utilized mass media to educate corporate end-users of the legal risks in using pirated software in the workplace. Under this campaign, DIP sent out educational letters to 30,000 businesses nationwide. These businesses were also invited to attend software asset management (SAM) seminars to learn how to better manage software.
- On May 8, 2008, TECA and the Prevention and Suppression of Intellectual Property Infringement Committee (which was dissolved according to industry reports) presented a half-day seminar, "How to Use Copyrighted Works Properly," at Rajabhat Hua-Hin University, Prachuabkirkhan. The seminar aimed to educate 300 entrepreneurs in Hua-Hin, particularly pub, bar, and Karaoke operators to properly use (and license) copyright works and recordings.
- On May 20, 2008, TECA and the Prevention and Suppression of Intellectual Property Infringement Committee presented a half-day seminar, "How to Use Copyrighted Works Properly," at the Thavarn Hotel, Phuket Island for 200 Phuket business people.
- Also on May 20, 2008, TECA and the Prevention and Suppression of Intellectual Property Infringement Committee gave a half-day presentation to 200 Police on how to distinguish pirate product from legitimate product.
- From September 24 to 28, 2008, the Export Promotion Department (DEP), Ministry of Commerce, organized the Thailand Entertainment Expo 2008, held at Siam Paragon, Bangkok, to promote potential of Thai entertainment industries and to upgrade Thailand as a marketplace for entertainment. Around 200 film, music, animation, and television companies participated, and an estimated 100,000 people participated in the Expo. TECA and other industry groups participated. The DEP has indicated its intention to conduct another Expo in 2009.
- In September 2008, ECOTEC launched a "Countdown to Crackdown" campaign that offered businesses a 30-day warning before a wide-scale enforcement program would be launched to combat business software piracy in the

workplace. Consequently, enforcement began on October 15 with extensive PR being used to publicize the raids conducted.

- On October 7, 2008, TECA and the government organized a press conference entitled, "Stop! Hurting Artists. Stop! Piracy," to send the right message to consumers that buying pirated product means hurting artists and encouraging corrupt criminals. Through the press conference, TECA also sought cooperation not only from consumers but also governmental agencies and the private sector to help fight piracy. TECA also discussed the "Childnet" Internet charity program which was launched in conjunction with the International Federation of Phonographic Industries to make parents aware of the facts surrounding the use of P2P file sharing software such as inadvertent file sharing.
- In 2008, MPAA participated in 26 separate training exercises in various locations throughout the country for judges, prosecutors, law enforcement and customs officials. In total, there were 3,235 trainees.
- Throughout 2008, the Business Software Alliance provided Software Asset Management (SAM) seminars in 5 cities, Bangkok, Chiangmai, Korat, Ayudhaya, and Choburi. Over 2,000 people attended these trainings throughout the year.

Government Public Awareness Event: On January 14, 2009, the Department of Intellectual Property and the Airports Authority of Thailand at Suvarnabhumi International Airport in Bangkok launched an anti-piracy and anti-counterfeiting effort, in a ceremony attended by WIPO Director General Francis Gurry, and at which posters and leaflets displaying messages in both Thai and English warning consumers, "Warning, carrying fake goods to some European countries is a crime, France: up to 3 years in Jail/300.000 Euros Fine, Italy: up to 10,000 Euros fine," were placed at different areas of the airport and handed out to travelers. The event was well publicized by several Thai newspapers and TV channels, and the stated objective of the collaboration between DIP and the Airports Authority is to educate and warn Thai residents and tourists not to import into or export out of Thailand pirated or counterfeit goods.

COPYRIGHT LAW AND RELATED ISSUES

In Thailand, copyright protection is governed chiefly under the Copyright Act, B.E. 2537 (A.D. 1994), which was last revised in 1995. The law created an adequate basis for protection, particularly if properly enforced with the imposition of the statutory maximum sentences, for example.

Need for Modernization to the Copyright Act – Fits and Starts Since 2005 to Present: Technological developments now make it critical for the Royal Thai government to make changes to modernize the statute and make it more effective and user-friendly. The comprehensive amendments dating back to 2005 would have made some important improvements to copyright protection in Thailand.²⁷ Included in those amendments were provisions to strengthen civil remedies by allowing courts to award compensatory and punitive damages and lost profits, make it an offense for a photocopy shop to provide infringing copies of works, clarify that temporary copies are covered as reproductions under the Thai Act, distinguish between "disposal" (sale or other transfer), rental, and "communication to the public," attempt to deal with the WIPO treaties' requirements to prohibit the circumvention of technological protection measures (TPMs), and prohibit the unlawful tampering with rights management information (RMI), strengthen criminal penalties in certain respects, and establish voluntary collective management of copyright.

In 2007, the Royal Thai government, rather than considering the comprehensive approach in the 2005 draft, decided to divide the drafting process into two baskets, dealing with collective management and criminal penalties as standalone issues. The 2007 amendments would have imposed an unclear mandatory collective management regime in Thailand in a way which could have undermined the ability of right holders to engage in free contractual and licensing/payment relationships, and also would have removed all minimum criminal fines and minimum imprisonments (in cases where infringement was done "by way of trade"), replacing the current penalty structure with only maximum fines – exactly the wrong direction.²⁸ The good news is that the amendments, while passing a first reading, were never enacted prior to the establishment of a new Parliament. The latest report IIPA has received indicates that the collective management issue is back with the Department of Intellectual Property awaiting a new legislative plan, and that the WIPO

²⁷ A fuller description of the improvements and problems with previous drafts has appeared in previous IIPA Special 301 country reports on Thailand, at <http://www.iipa.com/countryreports.html>.

²⁸ A full set of comments on the 2007 draft appears in the 2008 IIPA Special 301 reports on Thailand, at <http://www.iipa.com/countryreports.html>.

treaties issues are under consideration of the Council of State.²⁹ IIPA sincerely hopes that the WIPO treaties elements of the 2005 draft will be incorporated into a new copyright revision draft and that the Royal Thai government will decide to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. IIPA also looks forward to having an opportunity to review the latest draft.

ISP Liability Issues: One very important legal question which should be resolved in the copyright law involves the extent to which Internet service providers can be held liable for infringing activities hosted on their servers, or engaged in by third parties using their services, such as P2P file sharing services. A law dealing with ISPs in Thailand, the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000), went into force in early 2000, but the National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of that law, still has not been established more than eight years after enactment of the Act. 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. Nonetheless, it would be important for both a cooperative mechanism including notice and takedown, and the informational requirement regarding infringers' identities, to be made clear and in writing in the copyright law being revised.³⁰

Of some concern has been reaction to passage of the Computer Crime Act B.E. 2550 (2007), which went into effect on July 18, 2007. The law, while essentially an anti-cybercrime statute, was thought to enable right holders to protect copyright in the online environment in limited circumstances. For example, Section 14 of the Act makes it a crime to use a computer system to disseminate illegal, fraudulent or obscene data. The law also covers limited cases of circumvention, i.e., it makes it illegal to circumvent an access control measure to avail oneself of a specific computer system, or to "uncover" or disclose a circumvention method. The law places potential liability on ISPs for contributing to such computer crimes as well. However, right holders have indicated this law is also apparently being used by ISPs as a shield to protect data from being disclosed to copyright owners – data which right holders need and is indispensable for them to obtain a search warrant from court.³¹

Ban Illegal Camcording: It is time for the Royal Thai government to enact, perhaps as part of the current copyright law revision process, a standalone provision to ban the illegal use or intent to use of an audiovisual recording device in a movie theater to record a film off the screen. At various times of the year, IIPA and the Motion Picture Association have discussed the need for such standalone provisions in order to enforce against rampant and growing instances of illegal camcording in Thailand. A standalone mechanism independent of copyright is needed so that the courts can be alleviated of various procedural hurdles to enforcement (such as subsistence and ownership issues) in order to effectively fight this virulent and fast-spreading form of piracy in Thailand.

Clarify Exceptions as to Copying of Academic Materials: IIPA continues to call for clarification of Article 32 of the copyright law, which provides for certain exceptions to copyright protection. In light of interpretations of this Article, especially paragraphs (6) and (7) that have been interpreted to allow wholesale copying of academic materials, Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms.

²⁹ See the Royal Thai Embassy's February 13, 2009 report, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, *supra* note 10.

³⁰ At least one industry group has reported that the latest draft copyright amendments have an exception clause for ISPs which is arguably too "vague and too board," potentially providing ISPs with an excuse not to cooperate. IIPA has not reviewed such provisions but would look forward to doing so and being given an opportunity to comment.

³¹ Further to the issue of identifying information of suspected infringers, we understand that the Royal Thai Cabinet has approved a draft data protection bill and is under second review by Council of State. IIPA has not reviewed this legislation, so cannot say whether it would have any adverse effect on Internet enforcement of copyright.

Organized Crime Prevention Legislation: IP violations still have not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E. 2542 (MLPSA).³² Unfortunately, while the government had intended to include copyright piracy as a predicate offense in a draft bill to amend the MLPSA in 2004, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.³³ 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. The Royal Thai government should address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations, by adopting anti-organized crime legislation, and legislation on asset freezing, which would include intellectual property rights violations as predicate offenses.³⁴

Remaining Problems with the Optical Disc Manufacture Act: IIPA has previously discussed and analyzed the Optical Disc Manufacture Act which went into effect on August 29, 2005.³⁵ IIPA learned in 2007 that the Royal Thai government was considering amendments to the Act to make it even more effective, however, little progress appears to have been made in this direction in 2008. In IIPA's view, the law needs the following fixes (discussed in more detail in previous filings):

- **"Copyright Owner's Code" Creates Burden on Right Holders:** The Act should be amended to remove the onerous and unprecedented obligation that right holders acquire a "copyright owner's code" before any replication of legitimate CDs. By requiring an application for and affixation of a code to all legitimate discs, Thailand may have inadvertently created a formality that violates Thailand's international obligations.³⁶
- **No Licensing Regime:** The Act should be amended to require a license for a plant to begin producing optical discs and a license term and renewal process should be established.
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Act should be amended so that there is a before-the-fact automatic permit for export of discs and import/export of machines, stampers/masters and polycarbonate.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Act should be amended (or regulations issued) to provide for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found in violation of the statute infringing copyright or trademark.
- **No Mandatory Minimum Criminal Penalties:** The Act should be amended to provide for mandatory minimum fines and imprisonment.

UNCTAD/Chulalongkorn University "Working Draft" on "The Interface of Intellectual Property and Competition Law in Thailand: On December 15, 2008, the United Nations Conference on Trade and Development (UNCTAD), without conferring with any sister IP organizations of note (most notably the World Intellectual Property Organization), issued through the Royal Thai government's Department of Intellectual Property website, a working draft entitled "The Interface of Intellectual Property and Competition Law in Thailand: International and Comparative Perspectives." Rather than sticking strictly to competition law, the working draft made some questionable recommendations in the realm of copyright (such as recommending that Thailand adopt a commercial purpose "reverse engineering" exception to the prohibition on circumvention of technological protection measures) and made controversial (and, IIPA believes, misleading or incorrect) statements about copyright exceptions, and hints that compulsory licensing or price fixing may be appropriate responses to textbook needs in the educational context.³⁷ While it is unclear how the report

³² 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\$5,800).

³³ 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>.

³⁴ IIPA has learned from the Royal Thai government that DIP was entrusted in April 2008 to revise the Prime Minister's Office Decree on the Enforcement of IPR Related Laws such as the Revenue Code, Factory Law, Drug Law and Import-Export Law so that more agencies will cooperate in IP investigations. It is unclear how the change in government has affected the DIP mandate to revise the Decree, but such revisions could be helpful in establishing links between piracy and other punishable offenses.

³⁵ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

³⁶ 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.

³⁷ The UNCTAD author[s] bring to light Thailand's new obligations (extended to all WTO members) under the Thai-Japan Free Trade Agreement, which was signed in April 2008, and went into force on October 30, 2008. The Thai-Japan FTA requires Thailand to provide, immediately, an exclusive "making available" right, as well as protections for technological protection measures (TPMs) from unlawful circumvention (and trafficking in circumvention devices) and protections

will be used in Thailand, because it was published on the DIP website, and because of previous indications that the government would be considering legislative approaches to IP and competition law, IIPA believes future activity arising from this report should be closely monitored.

Fair Use Guidelines: The DIP issued three guidelines on fair use in recent years, namely, the “Fair Use Guidelines for New Report,” the “Fair Use Guidelines for Education,” and the “Fair Use Guidelines for Software.” The DIP has indicated that these guidelines are intended to serve as manuals for users of copyright works, e.g., the education guidelines are intended “to reduce risk of copyright infringement in books and other copyright works.” IIPA appreciates the good intent of DIP, and only requests that the affected stakeholders, such as the publishers and software industry, be permitted to weigh in the formation of such guidelines, given their experiences in creating similar rules for the road in other countries.

Legislation to Address Cable Piracy: A law dealing with cable piracy would be a welcome addition to the anti-piracy laws. The DIP Report indicates that a Television and Broadcasting Draft law was proposed so as to provide framework for radio and television broadcasting business operations with or without the use of frequencies, as well as the qualifications of licensed operators and the duties and functions of the National Broadcasting and Telecommunication Commission. The DIP Report indicates that this draft law is intended to enable the authorities to effectively control illegal broadcasting of copyrighted works and prevent copyright violations on cable television. As discussed in the report above, government proposals should empower the commission with the authority to temporarily or permanently suspend or revoke the licenses of the operators involved in unauthorized broadcasting, without requiring a final judicial decision. The law must also not impose undue restrictions on the ability of legitimate broadcasters and content owners to freely contract, i.e., it must not force them to negotiate with the cable pirates or grant those previously engaged in cable piracy with non-exclusive licenses.

Customs Act Revision Should be Enacted: According to the latest reporting from the Royal Thai government,³⁸ an amendment to the Customs Act that would empower customs officers with the authority to inspect and confiscate goods entering the country for transit and transshipment has been submitted to the Ministry of Finance, and will then proceed to the Cabinet and Council of State for consideration. IIPA fully supports these changes to the Customs Act and hopes they will increase the effectiveness of customs officials in tracking and preventing copyright infringements.

MARKET ACCESS ISSUES IN THAILAND

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 2009 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

Problematic Film Act Enters Into Force on July 1, 2008, Imposes Screen Quota and Uncertain Censorship and Ratings System: The most concerning development by far in 2008 was the passage on December 20, 2007, and entry into force on July 1, 2008, the new Motion Pictures and Video Act B.E. 2550 (2008). Reportedly, Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, film/screen time quotas, at a time when there are 704 screens in Thailand, more than enough to have free flowing films of all kinds, and at a time when most other countries are removing quotas, not putting them into place. Clearly, the new quotas will harm foreign right holders.

The Act also imposes new and onerous rating requirements on films, music videos and live performances, and censorship requirements³⁹ on films, audiovisual products, music used for karaoke, and videogames.⁴⁰ The concerns over

for rights management information (RMI) from unlawful removal or alteration. This FTA is helpful to the United States and its right holders since essentially the obligations therein will now be made applicable to U.S. by virtue of TRIPS MFN obligations. The competition portion of the working draft refers mainly to recent EU case law on “abuse of dominance” but hints at the possibility of compulsory licensing.

³⁸ See the Royal Thai Embassy’s February 13, 2009 report, *Thailand’s Recent Developments on Protection and Enforcement of IPRs*, *supra* note 10.

³⁹ In previous reports, IIPA has noted that “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.”

⁴⁰ The changes in the Film Act come at a time when Thai filmmakers, directors and producers are seeking greater deregulation, i.e., the switch from the strict censorship regime to a more audience- and filmmaker-friendly ratings system, and are seeking to cut import taxes on film stock, cameras and other equipment, which must be imported, and for which the duties are extremely high.

this new ratings and censorship regime include: 1) the time frame for obtaining ratings or censorship approval, which is too long (15 days), allowing pirates (who of course do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, again, giving pirates an additional cost advantage in the market; and 3) the severe consequences for failure to comply with the ratings and censorship system, of criminal liability including both jail time and a fine; 4) fixation requirement, i.e., that the relevant rating or censorship code be "fixed" onto the container of films or audiovisual products as well as on the packages, and "embed" the rating or censorship code into the content of films and audiovisual products so that the rating or censorship code appears on the screen or any media when broadcasted or displayed.

One further part of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, as well as Karaoke operators, to acquire a "license to operate the business" in advance, with violators subject to criminal liability of up to one million Baht (US\$28,880) or up to two years in jail. Industry has noted that optimistically that the new law could be able to curb piracy in street stalls, shopping malls and complexes and even in Internet café in parallel with Copyright Law.

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.

Television Advertising Restrictions: Advertising is currently prohibited on pay television systems under the 1992 amendments to the Radio Communications Act of 1955. The draft "Act on Broadcasting and Television Business Operations" contemplates the establishment of criteria within which business operators may seek advertising income, but would require that 5% of received advertising income be deposited in a proposed National Broadcasting Business and Television Business Commission. 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.

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." Thailand receives among the largest benefits through the GSP program of any nation. During 2007, more than \$3.8 billion worth of products came into the United States duty-free from Thailand, or more than 16.8% of its total imports to the U.S. In 2008, more than \$3.5 billion in goods entered the United States from Thailand duty-free, or just over 15% of its total imports to the U.S. enjoyed duty-free status under the GSP code. Thailand must meet the discretionary criteria in this U.S. law if it expects to enjoy favorable treatment for these imported goods.

WATCH LIST

BELARUS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Belarus remain on the Watch List in 2009.

Executive Summary: 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. After 16 years, Belarus has not yet adequately implemented the IPR obligations in that agreement.

In 2008, the U.S. Trade Representative – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ delayed implementation of its intellectual property commitments under the [1993] U.S.-Belarus Trade Agreement.” Further, USTR “encourage[d] Belarus to strengthen its IPR laws, reduce piracy and counterfeiting levels, and increase its IPR enforcement efforts.” The USTR detailed in its Special 301 announcement, the numerous legal reforms necessary for Belarus to undertake in order to meet its Trade Agreement obligations as well as encouraging Belarus to “properly implement the WIPO Internet Treaties.” There were no reports of any relevant or significant legal reforms or enforcement successes in Belarus in 2008.

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) in Belarus. The Vigmplast 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.

Legal Reform Deficiencies: In 1996 (in force, June 18, 1996), Belarus enacted a new law on copyright and neighboring rights; amendments were adopted in 1998. The 1998 amendments were intended to, among other things, partially implement the WIPO “digital” treaties (WCT and WPPT). To our knowledge, no further amendments have been adopted. 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 adopted in 2000. The provisions (Article 201) include sanctions of 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\$4,527).
- 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 have insisted that this protection already 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 because they are not "effective legal remedies" (e.g., in accordance with Art. 11 of the WCT). 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 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. Several years ago, Belarusian officials reported that the Council of Ministers (an Inter-Ministerial Committee) had adopted a program for IPR protection focusing on legislative reforms (including copyright, patent and trademark laws), but there

have been no further reports of any activity by this Committee and the plan was never implemented. IIPA continues to recommend a focus on legal reforms, as well as, 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 needs to 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 recommend government 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.

There are no comprehensive enforcement statistics for 2008. In recent years, the industries have reported a trend of an increase in the total number of raids, but unfortunately, the vast majority of these raids are aimed only at small-scale retailers of illegal material. While these are helpful, they have little deterrent effect on the overall piracy problem. Furthermore, the administrative fines that are imposed, even against these retailers, are generally insignificant.

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2009.

Executive Summary: Brazil is one of the largest commercial markets for legitimate copyrighted materials in the Western Hemisphere, and the Government has manifested in most cases a clear appreciation of the importance of protecting intellectual property that is greatly appreciated by IIPA members. With the exception of the disturbing attitude toward photocopying practices in the academic sector, the Brazilian Government has actively worked with the private sector to develop and implement strategies aimed at education, enforcement and expansion of commercial opportunities. This overall commitment has produced some concrete results, but much remains to be done in the fight against piracy. There are several forms of piracy that continue to prejudice the position of the creative community in Brazil, broadly grouped as: (1) hard goods piracy, including retail and street piracy, end-user software piracy, camcord piracy and illegal photocopying, (2) online piracy, and (3) imports of infringing products and contraband. The rapid growth of Internet users in Brazil continues to pose both opportunities for new business models and more avenues for piracy for all industry sectors. During 2008, the copyright industries continued to work well with the National Council to Combat Piracy and Intellectual Property (CNCP), as this entity became more active in both operational initiatives and legislative coordination efforts than in 2007. Despite good cooperation between the law enforcement authorities and rights holders on seizing pirated product, there remain numerous challenges in obtaining deterrent and expeditious criminal prosecutions and civil judgments against copyright infringement. Universities, likewise, need to take more steps to legalize use of academic materials on their campuses. This coming year will also present a legislative agenda on many copyright law and enforcement issues that will require close monitoring. Finally, a thorough overhaul of the Brazilian judicial system is needed to have cases reach sentencing more quickly and with fewer procedural obstacles.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Brazil in order to improve the adequate and effective protection of copyrighted materials:

Enforcement

- Achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process (BCM), including: (1) increase anti-piracy raids in well-known marketplaces, (2) encourage the establishment and formation of joint state and municipal anti-piracy intellectual property rights (IPR) task forces which focus on priority locations, (3) take enforcement actions on the Brazil-Paraguay border, both on-land and on-water, (4) enhance deterrence through criminal prosecutions and the application of deterrent penalties, (5) continue work to implement the action items in the CNCP national plan, (6) pursue federal government-sponsored educational and media anti-piracy campaigns, working with the private sector to raise public awareness of the anti-piracy fight, and (7) continue working with the industry through the CNCP.
- Create more Specialized IPR units at both the state and local levels.
- Improve actions against Internet piracy. This includes conducting *ex officio* actions on facilities that knowingly offer public access to unauthorized peer-to-peer programs, particularly those locations that facilitate or enable unauthorized transactions by providing the materials required for copying downloads (e.g. blank CD-Rs).
- Have the CNCP continue to support discussions between the copyright industries and the Internet Service Provider (ISP) community to combat Internet piracy.
- Conduct effective enforcement against copyshops, located both inside and outside university campuses that make illegal copies of books and related teachers' notes beyond the legal limits. Engage university administrations in efforts to encourage the use of legitimate materials on campuses.
- Establish a reference price for imported blank media.
- Establish a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures.

Legislation

- Work with the House of Deputies' Anti-piracy Special Committee to pass pending legislation aimed at providing and enhancing the tools and measures necessary to conduct effective copyright enforcement (such as making criminal



copyright cases move faster, permitting sampling of forensic evidence, making camcording a crime, adopting the cybercrime bill).

- Ensure that the copyright sector can participate with the Ministry of Culture on any process in 2009 to amend the Copyright Law.
- Have the State of São Paulo University (USP) reverse its harmful administrative rule which allows widespread reprographic copying of portions of books by commercial, for-profit copy centers, and institute guidance for other universities that have followed in USP's footsteps.
- Create specialized IPR courts with copyright jurisdiction.
- Remove market access barriers, including high tariffs and taxes placed on entertainment software and consoles. Impose no new barriers (such as a theatrical window) on films.
- Amend the Penal Code to impose criminal penalties on the unauthorized camcording of films in theaters.
- Reject legislation that would have the effect of promoting unauthorized, overbroad reproduction of works in university settings (such as House Bill 5046/2005 and Senate Bill 131/2006).
- Ensure that the bill (House Bill 1120/2007) which deals with public availability of products or works based on publicly financed research, comports with international norms by leaving value-added copyrighted products incorporating publicly funded data out of its mandate;
- Amend the Digital TV bill to include a provision prohibiting the retransmission of digital audiovisual content on the Internet.
- Reject a bill which would exempt from taxes the importation of blank digital media.
- Reject a bill (Projeto dos Sacoleiros) which would grant a 50% exemption on the importation tax of products imported through terrestrial border. (If this bill passes, then the implementing regulation must assure that blank digital media will not be included in the list of products to benefit from the tax reduction).
- Reject a bill that would authorize the suspension of intellectual property protection in Brazil for nationals (individuals and/or companies) of WTO infringing countries, deny registration of intellectual property rights, block remittance of royalties and technical assistance payments, and provide for compulsory licensing.

BRAZIL Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Music Compositions	117.1	48%	151.6	48%	176.5	40%	334.5	52%	343.5	52%
Business Software ²	1,068.0	60%	889.0	59%	574.0	60%	383.0	64%	359.0	64%
Motion Pictures ³	NA	NA	NA	NA	NA	NA	101.0	22%	120.0	30%
Entertainment Software ⁴	NA	NA	NA	91%	159.3	88%	120.8	77%	120.4	74%
Books	NA	NA	18.0	NA	18.0	NA	18.0	NA	18.0	NA
TOTALS	1,185.1		1058.6		927.8		957.3		960.9	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009SPEC301methodology.pdf. For more information regarding the history of Brazil under USTR's Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more on IIPA's global issues, see IIPA's 2009 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² BSA's 2008 statistics are preliminary and represent the U.S. software publishers' share of software piracy losses in Brazil. 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. The methodology is based on that found in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org.

³ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

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

Brazil is a beneficiary country of the U.S. Generalized System of Preferences program (GSP). The GSP program requires that a beneficiary country provide "adequate and effective" protection to U.S. copyrighted materials. During 2008, \$2.75 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code.

COPYRIGHT PIRACY IN BRAZIL

Internet piracy is a major challenge for all copyright-based industries doing business in Brazil. At the same time, piracy involving hard goods continues to be a key concern for several copyright-based industries.

Internet piracy: Brazil is the sixth most populous country in the world, and the seventh largest in terms of Internet usage. There are an estimated 67.5 million Internet users in Brazil, which represents about 35% of the country's population (according to the ITU, reported by www.Internetworldstats.com).

The recording industry reports that Internet piracy in Brazil is today the most prevalent form of music piracy. Most of the problem is file sharing committed through peer-to-peer (P2P) networks. The most popular P2P network in Brazil is ARES, but Gnutella, BitTorrent and E-donkey are also very popular. According to a third party survey conducted by IPSOS, every year there are more than 1.7 billion illegal music downloads in Brazil, and there are almost 3 million downloaders.

However, during 2008 a significant increase in music piracy took place in "blogs", forums and social networks, where millions of links to illegal music files are posted by registered users. One of these social networks (ORKUT) comprises more than 35 million users and about one million active cyber-locker-links available at any moment in time. These specific cases remain largely ignored by the enforcement authorities, in particular because of their lack of training and attention to Internet-based piracy. The recording industry initiated in 2008 a notification campaign requesting ORKUT to remove links and "communities" dedicated to piracy. So far ORKUT responded with slow and sporadic actions not strong enough to solve the problem.

The Motion Picture Association (MPA) reports that its principal Internet problem involves cyberlockers such as rapidshare and megaupload. Hard good sales via the Internet continues to be a problem. On a positive note, auction websites offering illegal film content have decreased thanks to cooperative efforts between industry and the popular Brazilian website Mercado Livre.

The Entertainment Software Association (ESA) reports that there has been an alarming and dramatic increase in infringing activity for video game products occurring through P2P networks in Brazil. Over the past year, based on recently-completed studies, Brazil has risen to become one of the top ten countries for overall P2P game download volume. For example, in industry estimates of game downloads for 13 top game titles over a 4-week period (December 2008), Brazil accounted for 4.9% of completed downloads globally, and 5.4% of completed downloads for the two most heavily copied games. The industry estimated there to have been more than 318,000 infringing downloads of these titles completed during this period. The studies also revealed a disproportionately high percentage of console game downloads (52%) to PC game downloads (39%), which tends to confirm the widespread availability of console circumvention devices in this market.

Hard goods piracy: Three factors contribute greatly to the widespread availability of pirated hard goods in Brazil. First, there are large-scale distribution networks in Brazil that involve thousands of street vendors and established facilities (such as gas stations), which blanket the major highways in Brazil, as well as non-established facilities in *camelodromos* (street markets). Second, there is a large supply of blank media. An estimated 600 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country. Paraguay, as well as Hong Kong and Taiwan, account for 50% of the blank media entering Brazil. Third, organized crime is deeply involved in piracy in Brazil. Not only are Chinese and Middle East groups operating in the border with Paraguay, but they also control the distribution of pirate DVDs in the black markets at the end of a complex chain of command chain.

MPA reports that the most harmful form of audiovisual piracy in Brazil is indeed hard good piracy. DVDs in streets/markets increased despite public perception that DVD piracy had leveled off, primarily because the pirate distribution channels formerly dedicated to the distribution and sale of CDs have shifted to DVDs.⁵ Most of the pirate audiovisual products

⁵ IBOPE (a market research institute in Brazil) conducted a survey on behalf of U.S. Chamber of Commerce and Angardi in 2008, and this report showed a slight decrease of pirate consumers but a big increase on piracy consumption of DVD units. The IBOPE study showed that in 2007, 30%

are burned CD-Rs or DVD-Rs. The vast majority of pirated DVD-Rs are locally reproduced in hundreds of facilities of varying sizes throughout the country. The large pirate black markets are a problem, as are strategic point of sales for certain street vendors, all of which create serious economic harm for legitimate business, especially local movie theaters and video rental stores. Pirated film products enter from Paraguay, and smugglers are moving to Guaira, Ponta Porã and Corumbá. Street sales of pre-release pirate DVDs (before the release of legal DVD and during theatrical release window) are especially damaging. Simply put, physical piracy damages the home entertainment market very rapidly. Sales of legitimate DVDs for the rental market decreased more than 30% in 2008.

MPA also reports that unauthorized in-theater camcording spiked in Brazil in 2008. In 2008 MPA identified 21 camcording cases in Brazil, compared to only one in 2007. Movies such as *Hancock*, *Speed Racer*, *Twilight*, *Madagascar: Escape 2 Africa* and *Kung Fu Panda* were camcordered in Brazil and posted to the Internet by organized release groups within days of their theatrical release in Brazil, undermining the lifecycle of the film not just in Brazil, but in other international markets, as well. To date, the National Anti-Piracy Council has proven unable to provide political support for such an initiative even though illicit camcording has a devastating impact on local video rental stores and theater owners.

The recording industry reports that the Brazilian music market saw some recovery during 2008. Physical piracy of recorded music in Brazil appears contained, mainly due to the consolidation of a national anti-piracy campaign and the striking increase of Internet piracy, especially of P2P file-sharing and cyber-lockers links posted on forums and social networking sites. Interestingly, the sales of hard copies of recorded music increased by 6.4% and sales through digital channels such as mobile phones increased by 89%. In total, the music market in Brazil saw an increase of 14%. The level of optical disc piracy of music products remains at 48% of the total Brazilian market. Street piracy in São Paulo and Rio de Janeiro is widespread, appearing in key traffic areas like Paulista Avenue in São Paulo. The larger problems are found in the popular street markets (*camelodromos*). However, because of the more systematic controls implemented by Civil and Federal police in recent years, the streets in major cities looks cleaner and seem to have lower amounts of pirated recorded music available.

The Business Software Alliance (BSA) reports no significant improvement in the business software piracy situation in Brazil during 2008; instead, the success was keeping the high piracy levels relatively stable. Software piracy continues to include the following: illegal reproduction and 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. The increasing use of the Internet as a means of advertising illegal software, along with the unauthorized electronic distribution of illegal software, continues. BSA reports that preliminary estimated trade losses due to software piracy rose to \$1.068 billion in 2008, with an estimated piracy rate remaining steady at approximately 60%. If the levels of software piracy were lowered by 10 points, there would be positive benefits to the Brazilian economy.⁶

The Entertainment Software Association (ESA) and its members report that there are a multitude of sources for pirated game product in Brazil. Small local disc-burning operations source their "masters" (from which they burn copies) either from counterfeit imports or, of late, more frequently from downloads of versions of pirated games on 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. Pirated CDs have been increasing in quantity in São Paulo, especially in the open flea markets. "Feiras livres" (which ordinarily are where fruit and vegetable vendors congregate) are also increasingly becoming the leading hotspots for the sale of pirated video products in the country. Despite the focus on border enforcement, there is still Asian-manufactured product flowing into Brazil from abroad, particularly Nintendo cartridges, and high-end counterfeit game discs. Better enforcement against purveyors of circumvention devices and services is also necessary.

The publishing industry reports that very little about the book piracy situation in Brazil changed in 2008. Unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials continues to be the major form of book

of the consumers interviewed had purchased piracy DVDs (against 22% in 2006), and in 2008 this number decreased to 28% (the error margin was 4%). Nevertheless, what is surprising is that the report also showed that the level of consumption of pirate DVDs increased from 11.6 units to 17.3 units per person.

⁶ According to a January 2008 report issued by BSA-IDC, the information technology sector's contribution to the Brazilian economy could be even bigger if Brazil's PC software piracy rate were to be lowered 10% over the next four years. This would create an additional 11,500 jobs, \$2.9 billion in local industry revenues, and \$389 million in additional tax revenues for federal, regional, and local governments. See The Economic Benefits of Reducing PC Software Piracy, available online at <http://www.bsa.org/idcstudy>,

piracy, resulting in substantial losses to international and Brazilian publishers alike. 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 Portuguese. The Associação Brasileira de Direitos Reprográficos (ABDR) has been working with authorities to conduct enforcement actions and plan for future endeavors. 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 most immediate concern of academic publishers in Brazil is the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP) almost four years ago. This rule allows (1) reprographic copying of portions of books by commercial, for-profit copy centers and (2) copying of foreign works that are "not available in the Brazilian market" without a license. It appears that "not available" means in practice, that if a book is not written in Portuguese and is not for sale in the nearest bookstore, it qualifies under this resolution. The latter provision applies even to the 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 obligations. 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 the WTO TRIPS Agreement. ABDR presented a formal request for revocation of this rule to USP, receiving a refusal on the basis that the rule is "constitutional" and grants access to education and knowledge. Thus the ruling still stands, so forming a terrible precedent for others to follow. At least two private universities - Fundação Getúlio Vargas of São Paulo (FGV/SP) and Pontifícia Universidade Católica de São Paulo (PUC-SP) -- have implemented similar rules. This phenomenon contributes to an overall climate of disrespect for copyright in the academic context among universities in particular, and among government authorities more generally. Finally, as publishers are seeing an increase in electronic dissemination of textbooks, chapters and supplementary materials, authorities should be vigilant about addressing Internet piracy in the academic context as well.

COPYRIGHT ENFORCEMENT IN BRAZIL

The Brazilian government through the federal, state and military police has conducted numerous enforcement operations. Police raids, especially on hard goods piracy, have been relatively successful seizing infringing product. Federal authorities conduct border operations and more complex investigations. However, as IIPA and its members have noted for many years, conducting raids merely to confiscate products, without further effective prosecution and deterrent sentencing, is not enough to reduce the significant piracy levels in both the hard goods and online environments in Brazil. A long litany of systemic problems and bottlenecks exist in bringing effective and expeditious criminal and civil copyright infringement cases in Brazil. An illustrative list of requested actions would be to:

- Encourage police to finalize their work and present cases to prosecutors, in a timely manner, as raids and seizures are rarely followed by criminal prosecutions.
- Encourage law enforcement to undertake more in-depth Internet piracy investigations, including surveillance on known pirate sites and generating leads that could lead to the identification of the sources of infringing product.
- Increase high-level investigations against organized crime syndicates.
- Augment coordination between federal and state IPR task forces.
- Establish a dedicated IPR section in the Federal Police and in Customs.
- Increase the number of border enforcement personnel, especially at the tri-border area.
- Legalize use of copyrighted materials on university and school campuses.
- Foster deterrent sentencing, encouraging training and outreach to the judiciary to increase understanding and appreciate of copyright piracy as a serious economic crime.
- Address, in a comprehensive manner, judicial delays in both criminal and civil copyright cases.
- Promote an environment of cooperation between ISPs and copyright holders to prevent online piracy.

CNCP work and industry cooperation: The CNCP (the National Council to Combat Piracy and Intellectual Property) is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign. All of the copyright industries' local colleagues participate directly on the CNCP. Copyright industry cooperation with the CNCP was excellent in 2008. In late 2007, new CNCP leadership was installed, and the new leadership seems to have emphasized educational and public awareness program planning. While such programs are indeed an important element of any national strategy, continued operational coordination, concrete actions, and leadership in legal reform, are imperative, and

indeed CNCP's focus in 2008 turned more toward these tangible action items. For example, the CNCP has supported an extensive training program that ABES and APCM have participated within more than 30 cities and exceeding the presence of over 2,000 law enforcement officials. The CNCP is overdue, however, in its obligation to understand and combat the Internet piracy problem in Brazil. Until now, no actions are being taken in the educational, enforcement or awareness area on the Internet front. The CNCP is not yet preparing itself for the present and future of the fight against digital piracy and that may compromise its effectiveness in the long term.

During 2008, the CNCP hired an outside Strategic Planning Consulting firm to develop a five-year anti-piracy plan to improve the quality and effectiveness of the CNCP and its programs. This process is in its final planning phase, as the discussion has turned to metrics and ways of measuring plan progress. Presently there are 23 proposed anti-piracy projects that range from strengthening partnerships with the ISP community, developing educational campaigns in schools, creating an anti-piracy intelligence database, working on an Internet anti-piracy portal, supporting cities with a "zero piracy" program and working to legalize the black markets, among others. In 2008, CNCP Executive Secretary Dr. Andre Barcelos and his staff personally participated in more than 20 training programs sponsored by ABES and APCM throughout the country. For example, proposed campaigns might include: (1) a "Legal Fair" campaign where the CNCP will work closely with vendors at fairs where pirate product is often offered, in order to have only legitimate product available; (2) a "Piracy Free Cities" campaign where the CNCP will support municipalities that will promote legalization of all products, following the example of Blumenau in the State of Santa Catarina; and (3) a "Business Against Piracy" Campaign where the CNCP will support shopping centers and outlets in promoting the public awareness of the problems of piracy. This strategic plan is in the final phase of construction. Members of the IIPA are very supportive of this new direction taken by the CNCP.

More resources at the national level: The local representatives of the copyright industry sectors all have good relationships with Brazilian law enforcement. Brazil's law enforcement agencies, various municipal authorities, and prosecutors all have authority to enforce copyright infringement. More resources should be provided to law enforcement.

More cooperation needed with state and local officials: State and local officials do conduct *ex officio* actions on a regular basis especially in São Paulo and Rio, but more actions are needed elsewhere. The relationships with State civil and military police vary, as does the level of local attention to anti-piracy efforts. The copyright industry strongly supports efforts by the CNCP and other government agencies to create task forces to focus on anti-piracy efforts. Seven police precincts specializing in IPR matters already exist (Rio de Janeiro, São Paulo, Bahia, Pernambuco, Minas Gerais, Federal District and Rio Grande do Sul). It is critical that such a specialized unit be also installed in the State of Paraná. Below is a listing of several state efforts to set up task forces to combat IPR piracy:

- The State of Rio de Janeiro created a special anti-piracy task force in mid-2002, and its Special Anti-Piracy precinct has been quite active. Nevertheless, this task force is a small operation with personnel and financial resources far below what is required by the private sector.
- The Governor of the State of São Paulo signed a decree in January 2006 creating an inter-secretarial committee to fight piracy.
- The state government of São Paulo created a specialized police unit for piracy cases, the DEAPIR – Delegacia Antipirataria, under the DEIC (Organized Crime Office). DEAPIR took part in several raids in 2008. Unfortunately, its participation in anti-piracy actions has been far below the level expected by the industries, mainly because it has no capacity to conduct its own investigations and relies exclusively on the information provided by the private sector. While it has been more cooperative recently, compared to prior years, it still lacks human and financial resources to be efficient and proactive.
- The municipality of Blumenau, in the state of Santa Catarina, declared itself "piracy free," and the mayor subsequently announced the creation of a municipal anti-piracy council to lead enforcement and educational initiatives to fight piracy.
- The municipality of Porto Alegre in Rio Grande do Sul has established a municipal anti-piracy entity.
- 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 Fortaleza and Curitiba.

Criminal actions/raids involving primarily hard goods: As mentioned above, the industry groups have excellent relationships with Federal Police. All assist these authorities in providing information and support to conduct anti-piracy operations. While the level of police attention to piracy varies throughout the country, many raids were conducted in Brazil.

The sound recording and motion picture industries combined their anti-piracy operations in 2007 in a new organization named APCM (*Associação Anti-pirateria de Cinema e Musica*), and this joint effort worked well last year. During 2008, APCM conducted, with support of different law enforcement agencies, 3,942 raids (almost a 40% growth compared to all of 2007), seizing more than 32.3 million blank and recorded discs plus over 8.8 million copies of filmed products (about 20% more than in 2007). Of these 41 million units, 42% were blank DVD-Rs and 21% pirated movies, and the rest was music CDs, music DVDs or blank CD-Rs. In all, 72% of raids were against street vendors and black markets. The South Region (the State of Parana that borders Paraguay) led with the most seizures of blank discs (74% of all blank media seizures), and raids concentrate in the São Paulo metropolitan area (24.97%), the interior of São Paulo (15.66%), Rio de Janeiro (14.20%) and Minas Gerais (14.18%). APCM reports that the Federal Police recently conducted raids on facilities dedicated to the manufacture of digital jukeboxes containing illegal copies of sound recordings. There were 149 arrests in 2008, with over 110 of them from São Paulo and 80% against street vendors. APCM reports that there were 195 convictions obtained in 2008, a slight increase over the prior year. A majority of the sentences (80%) imposed a minimum sentence of 2 years, but due to the Brazilian procedure penal code, those convicted rarely received an unsuspended jail sentence.

ABES, the local software association that represents the interests of both the business and entertainment software sectors, also has developed good relationships with the CNCP and local enforcement authorities. With respect to entertainment software piracy, ESA and ABES undertook a number of efforts to support anti-piracy actions and public awareness of entertainment game piracy in Brazil. These actions include: (a) supporting police search and seizure operations against retail centers, open-air markets and street sellers, (b) monitoring the Internet and requesting removal of announcements containing pirated products or websites that offer free illegal downloads, (c) conducting investigations targeting burning labs, importers, warehouses, or factory/replication facilities, (d) monitoring newspaper advertisements involving pirated products, (e) following-up and supporting issues and requests made by police, (f) preparing reports with all results related to the above actions, (g) participating in anti-piracy training programs directed to numerous enforcement officials, and (h) supporting the development of public awareness, training activities, and campaigns.

ABES undertook anti-piracy actions for BSA and ESA last year, and conducted 2,849 criminal and administrative raids that resulted in over 1.6 million illegal software seized, 1 laboratory closed, 5 people arrested, over 19,000 advertisements removed and 375 websites shut down. In addition, 3,328 cease and desist letters were sent to end users, and 128 civil actions were filed. For example, in November 2008, 200 Federal Police agents started an operation against the illegal commerce of IP equipment that reached 62 establishments, distributors and importers of portable PCs in Brasília, Belém, Manaus, Fortaleza, Recife, Salvador, Belo Horizonte, Rio de Janeiro, São Paulo, Curitiba, Florianópolis, Joinville and Porto Alegre. In addition, the customs office in Foz do Iguaçu almost doubled the amount of taxes assessed on merchandise coming from Paraguay in 2008 compared to 2006. In São Paulo, enforcement actions resulted in the closure of three long standing outlets for pirated goods, including Stand Center and Promocenter. Enforcement at Foz do Iguaçu appears much improved. For example, in October 2008, the Port of Santos Customs Office destroyed 1.2 tons of merchandise having an approximate value of R\$ 6 million (US\$2.6 million). Such objects were the products of fraudulent import, false statements of merchandise, piracy and abandoned merchandise. Pirated and counterfeit merchandise seized at the border by the customs office in Foz do Iguaçu in 2008 is valued at over US\$82 million, a 7% increase in value over seizures in 2007. The seized merchandise included blank and burned optical media discs valued at more than US\$5.6 million and electronic products (including consoles and cartridges) valued at more than US\$22 million.

Actions in the Internet space: The copyright industries confirm that there are no “safe harbor” provisions in Brazilian legislation. ISPs are considered subject to general liability principles on Civil Code; there are no specific liability provisions involving copyright infringement for the ISP community. Any notice and take down procedures are conducted strictly on a voluntary basis between ISPs and right holders and results vary based on the different forms of piracy in the Internet space.

APCM reports that Brazilian Internet Service Providers are cooperating in removing illegal music and film content identified by the APCM anti-piracy Internet investigation team, with respect to hosted content. The recording industry reports that the Brazilian ISPs have not taken any action to curb P2P music piracy despite their requests for industry assistance. However, the ISPs do take down sites hosted on their servers that offer illegal files. The recording industry's campaign to take action against major individual uploaders met a negative ruling in 2007. The judge, considering the recording industry's request

to ISPs to identify the uploaders, decided that such an action would violate the individuals' privacy rights; this case is under appeal.

BSA notes that there is no specific legislation that would establish a specific time period for ISPs to keep logs and records of Internet transactions. Currently ISPs are keeping the data for a short period, making it difficult to track and investigate P2P piracy (ideally such data should be kept at least for 6 months to 1 year). In a recent litigation case initiated by the recording industry's national group (ABPD) against a group of heavy uploaders in the São Paulo area, the appellate court confirmed the right of the plaintiff to obtain the disclosure of defendant's personal information. However, the ISP was unable to provide the data in view of the long period passed for the resolution of the appeal. The ISP's simply "lost" the information waiting for the appeal resolution. This specific deficiency certainly may frustrate the efforts developed by the recording industry in Brazil to challenge the massive exchange of illegal music files occurred over the P2P networks. The CNCP should dedicate resources to research the relevant legislation in Brazil in order to provide clear recommendations for a regulatory solution.

With respect to videogames, the domestic enforcement program of the Entertainment Software Association (ESA) reports success in their actions against local websites and auction listings. During 2008, over 19,000 online advertisements for pirated software products were removed from the Internet. ESA, working with the local software association ABES, reports that the level of cooperation between websites' ISPs and the game software industry is around 80%, while cooperation with auction sites' ISPs is 100%. Also, 375 websites that offered pirated software products or pirated software files for download, were taken down.

There appears to be no legal impediments to criminal enforcement of Internet piracy other than training law enforcement and providing them with the necessary resources.⁷ APCM realizes that Internet piracy will not be the top priority for the police but it is grateful for the support from law enforcement special cybercrime units both in the federal and state police. Several criminal cases have been pursued in collaboration with Federal Police and Civil police against Internet pirates selling pirated DVDs and those offering the sale of pirated movies via social networks such as ORKUT. Currently the recording industry is not prosecuting any P2P case through criminal means, given that such actions may have a negative impact with the general public and with the government. BSA reports that it did not take any criminal Internet actions in 2008.

In mid-October 2008, Minister of Culture launched a roundtable negotiation between ISPs, the recording industry and the audiovisual industry with the aim to reach an agreement regarding P2P piracy with parties exchanging proposals. Two meetings have taken place and it is hoped that something more concrete will be finalized by early Spring 2009. A very positive point is that the CNCP is participating in these roundtable negotiations.

Few criminal prosecutions and fewer deterrent penalties: Copyright prosecution actions tend to concentrate in Rio de Janeiro and São Paulo, where there are specialized IP units. In 2008, the specialized IP precincts have contributed heavily for the success of many operations, but the number of agents dedicated to investigate the cases is still quite small. Prosecutorial attention to copyright offenses remains inconsistent, especially in the provinces. Enforcement efforts sometimes fail due to the lack of sufficiently skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence.

APCM reports that convictions improved in 2008, with 195 convictions for audiovisual and music piracy. Most of these convictions were issued in the states of São Paulo and Rio. To place this number in its proper context, it is important to realize that more than 80% of the convictions result in the minimum 2-year sentence, and that these sentences are usually suspended, and pirates rarely if ever serve time in prison. Brazilian legislation allows suspended sentences for first-time offenders, and the definition of first-time offender is so broad that only defendants whose cases have reached final judgment are termed repeat offenders.

Delays in criminal cases begs for institutional reform of the judiciary: It still takes three to four years for a criminal case in Brazil to reach the sentencing phase, and no improvement to resolve this situation was made over the past year. Many factors that contribute to such onerous delays.

⁷ The Brazilian Penal Code provides that the reproduction and distribution without the authorization of the copyright owner with direct or indirect profit intention is a crime, punishable with 2-4 years' imprisonment and a fine. The reproduction and distribution without a profit motive is not a crime but is a copyright offense subject to the possibility of heavy fines.

The police do not have deadlines to complete their investigations and deliver the results to the prosecutor and so investigations may take up to five years, with the interested rights holders pushing the process every step of the way. Moreover, the police often keep case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case. Two possible solutions may alleviate the situation: (a) The appointment of specialized IPR experts at the "Instituto de Criminalística" (CSI Institute of Brazil) that can dedicate full time to the piracy cases; and (b) an amendment to the penal procedures code to establish a specific term for the police investigations.

Furthermore, criminal case experts must be appointed only by the judge and there are few experts in the country. It would be very helpful if the law was amended to permit the private sector to appoint experts in order to expedite the preliminary investigations conducted by the police. The process of identifying and verifying low-quality pirated products is not difficult and should not require highly trained experts. It is easy to see how it takes years for the police and prosecution to present the criminal copyright case to the court. Brazilian courts already have very heavy case loads, and there is a tremendous backlog of cases. A solution to expedite matters that has often been proposed is to create a specialized court for copyright matters.

Another embedded problem in the Brazilian judiciary is the length of the process due to innumerable appeals existent in the procedure code. This is a problem that creates impunity for all sorts of serious crimes, such as homicide, drug trafficking and corruption. Reports suggest that the Brazilian government intends to reform its judiciary because of these widespread systemic problems. This much needed effort will likely encounter some difficulties as it moves forward, given that it will depend on political will and much coordination between the various political parties and the government.

Civil actions, delays and high bonds: BSA, via ABES, concentrates most of its efforts on bringing civil judicial actions (search and seizure) against end-users (usually businesses that do not use legitimate or licensed software). In 2008, BSA started 131 civil actions against end users (in contrast, ABES does pursue some criminal actions against distributors, but not end-users). BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Paraná, São Paulo, Rio de Janeiro, Minas Gerais, Espírito Santo, Bahia, Pernambuco, Ceará, Goiás, Mato Grosso do Sul, and the Distrito Federal (Brasília). However, Brazilian courts 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. In these cases, the courts appoint experts who search premises and seize eventual illegal material. Further delays occur as the court-appointed forensic experts have to analyze the results; to ameliorate the backlog caused by this, BSA supports legislative reform to permit foreign sampling and private sector assistance in the forensic work.

BSA continues to report that in 2008 the main problem in civil actions was the big backlog of cases in the judicial system. Given the several possibilities of appeal during any legal action, actions can take up to 12 years to reach a final decision. Cases usually take from 18 months to 4 years just to come to trial in the first instance. BSA took part in a seminar promoted by the School of Judges of the Rio de Janeiro State in October 2008, which brought a lot of attention to IPR issues. Subsequent discussions with the Copyright Office (INPI) showed that there is a possibility of bringing the discussion of IPR to judges and prosecutors in the form of courses and seminars.

Border enforcement: Brazil's extensive border makes it very vulnerable to smuggling of all sorts of goods, from drugs to DVDs. With increasing efforts in the Foz do Iguaçu-Ciudad del Este area, copyright pirates have gone either south (smuggling from Uruguay) or north in the dry zones of Ponta Porã-Pedro Juan Caballero (Brazil-Paraguay) or Corumbá-Puerto Suarez (Brazil-Bolivia), all known drug trafficking routes. Still, the tri-border area with Paraguay and Argentina remains an important focus of piracy (mostly due to the lack of commitment and results from Paraguayan authorities). Border enforcement would be enhanced if Brazilian authorities better coordinated with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. Seizures of blank media increased by 23% (26 million units in 2008 versus 21 million in 2007). Customs authorities have been very active not only at the border of Paraguay where the seizures of blank optical discs increased significantly, but also in ports like Santos and Paranaguá. At a recent event at the Ministry of Justice, it was reported that 8% of the seizures of Federal Highway Patrol in the border area with Paraguay, contains guns, drugs and ammunition.

As in years past, the business 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 into Brazil, Argentina, and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice. ESA reports that their companies notice no effective decline in the flow of pirated entertainment software products, particularly

of counterfeit Nintendo cartridge-based products, into Brazil. Customs enforcement would also be much enhanced if cases of interdiction were referred to the appropriate authorities for criminal prosecution.

COPYRIGHT LAW IN BRAZIL

The Brazilian government held a conference on December 5, 2007, to launch its National Forum on Copyright. There, government officials outlined several key actions anticipated for 2008 and the Minister of Culture highlighted two initiatives: (1) the creation of a National Copyright Agency, and (2) a revision of the 1998 Copyright Law, specifically a proposal to present an entirely new bill to Congress in late 2008 or in 2009. Neither of these two initiatives occurred in 2008.

Over the past year, the Ministry of Culture held various public meetings in several cities to discuss issues related to intellectual property law reform in Brazil. The copyright industries believe that its input and expertise is critical to the formulation of any copyright law amendment package that may be developed in Brazil, and we look forward to working with the Government in 2009 to identify and implement amendments that would enhance the protection afforded to creators in Brazil.

Proposed legislation related to enforcement

For the past two years, the industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement.⁸ Currently there are several proposals that the industries have worked to present both to the Congress and through the CNCP. In May 2008 a Special Commission to Combat Piracy (CEPIRATA) was created at the Chamber of Representatives in order to unify the various legislative proposals affecting copyright and piracy. While CEPIRATA did hold several public meetings, there has been no activity since July 2008.

Below is a summary of various bills pending in Brazil that are of particular interest to the copyright industries.

Bill on forensics and destruction of illegal products: This proposal would establish a system to facilitate forensic experts' work. It would allow criminal judges to appoint private sector experts and would secure increases in government resources allocated to fighting software piracy. The initiative contains provisions allowing private sector to appoint experts, anticipates destruction of seized merchandise and sampling of pirate seized goods for experts' reports purposes. It would also allow law enforcement to destroy seized material before the final judgment.

Anti-camcording amendment: This amendment is necessary to facilitate the enforcement and prosecution of unauthorized camcording. MPA is seeking to have an anti-camcording provision included in various bills. For example, PL 2927/03 seeks to modify the Penal Code and the Penal Procedure Code, and is pending before the House of Deputies. MPA is seeking to include an anti-camcording provision in a similar bill that has not yet been formally presented in the Senate. The proposed sanction for camcording would carry a two-four year jail term.

Cybercrime Bill (Bill 89/2003): BSA reports that Bill 89/2003 advanced last year and was approved by the Senate, but is still under consideration by the Chamber, and this bill is expected to pass in 2009. This bill amends the Penal Code to create criminal sanctions for Internet crimes, such as child pornography, invasion of privacy, identify theft, and the like. There also is a provision which establishes that ISPs shall only provide information regarding users to authorities with a judicial request; MPA is lobbying to have this particular proposal modified in order to allow ISPs to provide users' information through a court order and not only to police authorities and prosecutors.

⁸ In prior legislative initiatives with the CNCP in 2007, the copyright industry sectors identified several much needed enforcement-related measures, such as: (1) increasing minimum sentences so as to prevent alternative sentencing; (2) permitting the preparation of technical reports to accompany pirate samples; (3) permitting *ex officio* measures to extend to all copyright infringements; (4) penalizing the provision of raw materials in furtherance of infringing activities; (5) empowering judges to order the destruction of infringing products before a final decision; and (6) establishing minimum statutory damages equivalent to the value in the market of 3,000 legitimate copies in copyright piracy cases. Also at that time, the industries proposed additional amendments to this 2007 CNCP package, and as a result, some of industries' suggestion now appear in the pending legislation mentioned above. Additional suggestions at that time included: (a) adding an anti-camcording provision; (b) eliminating the requirement that a profit be realized in order for the act to constitute a crime, (c) adding sanctions for the circumvention of technological protection measures and rights management information; (d) adding criminal penalties for television signals; (e) increasing the minimum sentencing for software infringements in the Software Law; (f) easing forensic review of all suspected infringing products seized so as to permit sampling; (g) permitting rights holders the ability to serve as depository to warehouse/store seized materials, pending litigation/prosecution, and (h) simplifying the documents that record seizures (current documents are unnecessarily complex and detailed).

Objectionable copyright bills regarding student copying: There have been two objectionable bills proposed that would allow university students to make extensive copies of copyrighted content. Bill No. 131/06, presented in the Senate, would establish that a student could copy 25% of any work without remuneration to the rights holder. Based on our last reports, the bill is under review of the Senate Education Commission; its reporter has been appointed but has not yet issued the report on this bill. A separate bill (Bill No. 5046/2005), even more egregious, would modify Article 46 of the Copyright Law in a manner such that it would permit university students to make copies of entire works as long as those copies are not directly for commercial use; at last report, that bill was under review in 2007 by the Constitutional Commission of the House of Representatives. Academic publishers (local and international) already must combat unauthorized photocopying of books and journals in educational institutions, and legislation that in effect would codify such use should be opposed. Brazil must comport with the TRIPS three-step test for exceptions to protection, and this legislation fails to do so.

Bill regarding electronic public availability of information produced with public funds by higher education institutions: Bill No. 1120-2007 purportedly creates an electronic government portal through which technical and scientific information generated at higher education institutions using public funds would be available. IIPA supports the making available of data from publicly funded research, but the law should be carefully crafted to ensure that value-added publications resulting from such research and produced by third parties not using government funding are not included in this effort.

Specialized IPR courts with copyright jurisdiction: 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 support the creation of these courts, which would significantly improve intellectual property rights enforcement. During 2007, the CNCP held meetings with judges to discuss the possibility of creating specialized IP courts, but there was no progress on this in 2008.

Sacoleiros bill: A bill has been proposed (*Projeto dos Sacoleiros*) that would grant a 50% exemption on the importation tax of products imported through terrestrial border. This would likely have the effect of making it easier to legally import blank media through Foz do Iguaçu, the main terrestrial port for smuggling of blank media used in piracy, and this bill should be opposed for that reason. However, if it does pass, it is imperative that any related regulation ensures that blank or recorded digital media will not be included in the list of products to benefit from the tax reduction.

Tax exemption on certain imported media: Bill PL 210/07 would exempt from taxes imported recordable blank media. It has been presented in the Senate and is before the Education Commission. A public hearing will take place likely in the first half of 2009. MPA is lobbying for the rejection of this bill.

Remaining Deficiencies in Current Legislation

1998 Copyright Law and 1998 Software Law: The Brazilian government unfortunately continues to refuse to ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), despite the fact that its copyright law is quite comprehensive and the Brazilian creative community relies on copyright protection to reach the global market. Although the law is generally quite good, gaps do remain. 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. Brazilian law fails to provide criminal sanctions for circumvention of technological protection measures and removal or alteration of electronic rights management information. Although the law provides remedies against the removal or alteration of technical devices incorporated into works to protect against copying, there is currently no prohibition against circumvention devices or trafficking in such devices or circumvention services. Furthermore, additional measures are needed to clarify the responsibilities of ISPs in the online environment. As mentioned above, the Ministry of Culture is coordinating a working group among the content and the ISP communities and meetings are ongoing.

Tax Evasion in the Software Law: A “fiscal crime” provision was inserted into the 1998 Software Law, with the approval of the software industry. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independent 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. However, the Receita Federal and the respective state tax authorities have not pursued such tax evasion cases or dedicated any resources to pursuing them in 2007 or 2008.

The Criminal Code (2003): The business and entertainment software industries remain very concerned because the 2003 criminal code amendments fail to increase sanctions for the infringement of computer programs. 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. This increase is 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 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 a detention of three months to one year or a fine. 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. However, the effectiveness of these amendments in practice has been diluted because defendants always gets alternative sanctions such as community service and minor fines instead of jail-time convictions. In addition, a critical unresolved problem is that the criminal code amendment did not change the Software Law. The one-year sanction for computer software infringement still appears in the separate 1998 Software Law, unchanged by the amendments to the criminal code. 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. And importantly, 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 the need to amend the legislative to raise penalties.

IPR TRAINING AND PUBLIC AWARENESS

It is essential that Brazilian government (CNCP) assume its duty of training the enforcement agencies and judicial officials.

The copyright industries on their own 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. In addition, each of these groups provide training and seminars for police and customs officers in many states. During 2008, APCM participated in two important training programs. The first was with FIESP (Federation of Industries of the State of São Paulo) and training approximately 200 officials in the key ports of Santos, Vitoria, Recife and in Foz do Iguaçu. The second training, in conjunction with the software industry, was for law enforcement (civil and military police, federal police and municipal authorities), and involved more than 40 training sessions in 30 cities, training more than 3,000 agents. Through a partnership with ABES and the American Chamber of Commerce, BSA offered training to enforcement officials in 14 Brazilian States in 2008. The program has been extended to reach young executives, as well as key management officials within companies and to create awareness of software asset management and of companies' possible exposure to damages arising from a judicial prosecution.

ADDITIONAL ISSUES

Government software asset 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 to not only ensure all of its software is licensed, but 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.

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 was a suggestion submitted to the CNCP some time ago but was not formally included in the Action Plan for 2008.

High tariffs and barriers on entertainment software: 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. For the entertainment software industry, the major tax problem relates to internal taxation within Brazil.⁹ First, the state of São Paulo (which represents about 50% of the Brazilian market for this product) treats entertainment software as merchandise, which has a higher tax rate and raises the price of the legitimate product drastically. Second, entertainment consoles have a very high tax rate (about 50% of the value of the product), which poses quite a market access barrier. 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.

Foreign ownership restriction bills on audiovisual sector (PL 210/07, PL 29/07 and three others): Five bills were presented in the House that seek limitations on foreign capital participation, in varying proportions, in Brazilian companies that produce national audiovisual content, pay-TV programmers and operators, and Internet service providers and telecoms which distribute local content. MPA is actively involved in efforts, with its industry partners, to defeat these initiatives. These bills would not only harm foreign entities, but also impair the continued growth of the Brazilian audiovisual industry as a whole. The bills are expected to be approved in the House of Deputies by the end of 2009.

Digital TV: Administration officials send ambiguous messages on the government's commitment to addressing piracy. In 2006, Brazil chose the ISDB-T standard for the Brazilian digital terrestrial TV system and no system to protect digital TV content was adopted. MPA is lobbying on two bills in Congress (PL 6525/06 and PL 6915/06) to include a provision against the retransmission of digital audiovisual content on the Internet.

Cross-retaliation bill against IP: As a consequence of the Brazil-U.S. cotton dispute at the WTO, a bill (PL 1893/07) was presented in the House of Deputies that would allow the Brazilian government to undertake cross-retaliation measures affecting intellectual property rights granted under TRIPS. The bill would authorize the suspension of intellectual property protection in Brazil for nationals (individuals and/or companies) of WTO infringing countries; deny registration of intellectual property rights; block remittance of royalties and technical assistance payments; and permit compulsory licensing. The bill has already been approved in the Agriculture Commission and in the Economic Affairs Commission, and still needs to be analyzed by the Foreign Relations and Constitutionality Commissions. At this point, it seems nearly impossible to block passage of the bill in the House of Deputies since the government has majority in that chamber.

⁹ ESA indicates that its members report 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.

BULGARIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Bulgaria be placed on the Special 301 Watch List in 2009.

Executive Summary: Internet piracy (both online and for the delivery of pirated hard goods) has become the most serious copyright problem in Bulgaria. While it is true that street piracy of pirated copyright materials (now mostly burned CD-Rs and DVD-Rs) remains a problem, that has been dwarfed by Internet piracy. The business software community continues to experience problems with end user piracy and hard disk loading. Over the past year, the film, recording, and software industries continue to report good cooperation with most Bulgarian enforcement authorities, including some major actions to take down some Torrent sites. However, there has been little progress imposing deterrent criminal sentences and civil remedies and damages, mostly due to an ineffective judiciary. Many prosecutors are well intentioned but unable to press cases forward. Administrative enforcement actions have yielded virtually no positive results, except in the fight against signal theft piracy where the raids against cable operators have tripled in comparison to the year prior. Raids and actions against both physical and Internet piracy need to be transformed into regular and sustainable enforcement programs bringing together all relevant enforcement bodies. Unfortunately, rights holders' work with the interagency Council on IPR Protection was thwarted in 2008 when the Council's agenda and working principles were reorganized and rights holders could no longer participate directly. It is imperative that the Council reestablish such transparency and direct coordination. Disturbingly, Bulgaria has taken a major step backward in its legislative efforts to halt Internet piracy when a court in December 2008 ruled as unconstitutional a decree that implemented Bulgaria's EU obligations on data retention. This means that there is no way for enforcement authorities to obtain necessary data from Internet service providers regarding the identification of possible infringers using the ISPs' services. It is imperative that the government facilitate and support nascent discussions between the copyright sector and the ISP community on developing cooperative means to halt Internet piracy.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Bulgaria in order to improve the adequate and effective protection of copyrighted materials there:

Legislation

- Solve the problem caused by the court's recent ruling undermining Ordinance Number 40 of the Ministry of Interior and the State Agency for Information Technologies and Communication, and provide for the proper and full implementation of the EU Data Retention Directive such that data from ISPs is saved and made available to the authorities investigating Internet crimes.
- Introduce and pass amendments to the tax-related legislation to introduce the "Tax Initiative," giving tax authorities the power to inspect business software license compliance within their routine tax inspections and impose administrative sanctions.
- Draft and adopt appropriate amendments to the Copyright Act, the Tourism Act and the Radio and TV Act to ensure that payments for the public broadcasting of sound recordings are collected.
- Develop the proper legal instrument giving Customs the authority to promptly seize and destroy pirated and counterfeit products.

Enforcement

- Improve institutional cooperation in IPR enforcement through the Council for IPR Protection by setting up a Task Force to facilitate and speed up the prosecution of Internet related crimes. This cooperation also should include building and implementing a long-term consistent strategy for the Council to work with the private sector, in a transparent and cooperative manner, to combat all forms of piracy.
- Support efforts of copyright sectors and ISPs, as facilitated by the State Agency for Information Technologies and Communication, to negotiate a voluntary Memorandum of Understanding on Internet piracy actions. Take steps to encourage the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers. As an



immediate first step to achieving this objective, the government should convene meetings of affected sectors to discuss ways to work cooperatively toward halting the transmissions of illegal copyrighted materials on telecommunications networks.

- Support the good Internet piracy work of the CyberCrime Unit, provide more resources, and encourage more actions.
- Engage the Economic Police to take more actions against software piracy (end user, hard disk loading) by resuming the upgraded Police Direct Contact program.
- Reduce delays in criminal prosecutions and trials, and impose deterrent sanctions in piracy cases.
- Improve judicial issuance of expeditious and adequate civil remedies in business software cases, including the issuance of *ex parte* civil searches, damages, and injunctive relief.
- Increase the administrative actions against all types of signal piracy against cable operators that transmit TV programs without the consent of the rights holders and urge the Ministry of Culture to increase the rates of the imposed administrative fines.
- Take administrative actions against all types of software piracy and against users of recorded music that fail to pay public performance royalties.
- Strengthen the judiciary and establish unified practices (such as mandatory instructions of the Prosecutor General) in the investigation and prosecution of IPR crimes; continue training prosecutors, investigative magistrates and judges on IPR, and instruct them to give priority to IPR infringement cases.
- Support country-wide pro-copyright education and anti-piracy awareness and public education campaigns.

<p style="text-align: center;">BULGARIA Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008¹</p>										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	NA	NA	NA	NA	7.0	75%	7.0	80%	6.5	75%
Business Software ²	53.0	70%	38.0	68%	25.0	69%	21.0	71%	18.0	71%
Entertainment Software ³	NA	NA	NA	NA	NA	NA	21.0	81%	NA	50%
Motion Pictures	NA	NA	NA	NA	NA	NA	8.0	NA	4.0	35%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	53.0		38.0		32.0		57.0		28.5	

On January 1, 2007, Bulgaria joined the European Union. When the European Commission confirmed Bulgaria's accession, it noted progress on key issues and identified the need for Bulgaria to continue efforts to fight corruption, improve judicial reform and prosecute organized crime.⁴ In April 2007, USTR removed Bulgaria from the Special 301 Watch List because of passage of legislation (the 2007 Optical Discs Act) and improved enforcement, especially against hard goods/optical disc piracy.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on Bulgaria under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For a global overview of IIPA's global issues, see the IIPA cover letter to USTR in this 2009 Special 301 filing at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² BSA's 2008 statistics are preliminary, represent the U.S. publishers' share of software piracy losses in Bulgaria, and follow the methodology compiled in the Fifth Annual BSA/IDC Global Software Piracy Study (May 2008), available at www.bsa.org. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁴ 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>.

COPYRIGHT PIRACY IN BULGARIA

Internet piracy: There are now 4 million Internet users in Bulgaria, representing about 55% of the population (according to www.internetworldstats.com). Over the past two years, Internet piracy has become much more problematic than hard goods piracy. Copyrighted material is being downloaded from certain accounts hosted on servers managed or controlled by some local ISPs. On the other hand, “warez” sites have significantly diminished and those few sites that have been encountered prove to be hosted on servers located abroad. Offering access to illegal content in the free-hosting area has shifted towards widespread peer-to-peer (P2P) file sharing. Large BitTorrent sites such as arenabg.com, zamunda.net, torrentvalley.com are operating entirely in the “grey” sector of the Bulgarian economy. These sites allegedly pay no taxes yet generate revenue from an immense network of connected advertising companies that use the sites for commercial advertising. All LANs raided in the past year were also infringing the Bulgarian tax regulations. Some of the owners of the LANs and the FTP servers with huge quantities of protected content – music, film, software – have a criminal history and were engaged in various illegal activities.

The film industry in Bulgaria, led by BULLACT, reports that the film market is diminishing. There are only 80 rental shops left countrywide of which around 50 are operating. Sales of physical copies have dropped dramatically and local distributors sell around 300-400 copies of box-office movie titles. Internet piracy, especially P2P, is estimated at nearly 100% and is suffocating the film industry. Pre-release Internet piracy no longer spares local creators and producers as Bulgarian movies are also made available in the Internet.

The recording industry in Bulgaria, led by BAMP, reports that the music market is in dire condition. Sales of physical copies of recorded music are dropping significantly. Legitimate sales of local releases barely ever reach 5,000 copies. Internet piracy of recorded music is nearly 100%, and is suffocating any new business endeavors. Pre-release Internet piracy also seriously damages local creators and producers.

The Business Software Alliance (BSA) indicates that Internet piracy, especially P2P, affecting the software sector also worsened last year, and is fast becoming a major threat. Another widespread form of Internet piracy is the making available of copyrighted material through the so-called Local Area Networks (LANs), using hidden FTP servers with huge illegal content is the favorite business model of LANs.

The Cyber Crime Unit of the GDCOC in early 2007 tried to address the P2P threat and issued protocols of warning and instructions to several portals to take down their pirate torrent tracking sections. Two such sites, www.zamunda.bg and www.arenabg.com, did not comply with police instructions and were raided in March 2007. Criminal proceedings were initiated against the owners of these sites but progress has been very slow. These two cases triggered a media debate which revealed that some political officials openly challenged both the government's and the creative industries' effort to fight widespread Internet piracy. For example, in May 2007, a Member of Parliament promoted free access on the Internet and the use of notorious BitTorrents sites as platforms for political messages. During 2008, the Cyber Crime Unit, with the assistance of prosecutors and information provided by the film, music, and software sectors, organized regular raids against LANs and torrents trackers. In November 2008, the Cyber Crime Unit ran raids against 2 LANs (OptiNet and ComNet) in the city of Yambol, finding and seizing 8 Terabytes of illegal content on these servers. According to media reports, the owners of those LANs were municipal officials; the chair of the municipality council himself and the Mayor were involved in these illegitimate businesses.

In 2008, the Cyber Crime Unit, following signals of the film industry, called six administrators of torrent sites to a meeting and warned them in writing to shut down their sites. Taking the order into consideration the sites shut down for a day or two but then reappeared under slightly modified addresses. Only one shut down permanently. On the request of BULLACT, the Dutch anti-piracy organization, BREIN, also succeeded in closing down the torrent sites that were hosted by the Dutch server, LEASEWEB. However, these torrent sites relocated their servers .

Hard goods piracy: Physical piracy is no longer the primary piracy threat in Bulgaria, although it can still be readily found. The decline in optical disc piracy is due to the expansion of Internet-based piracy. There is no evidence that the 8 functioning optical discs plants in Bulgaria are engaged in illegal production; for many years, factory-pressed products had been the big problem in Bulgaria, but that has diminished since the 2006 passage of key amendments to the Optical Discs Act and its implementation in 2007. Burned optical discs (meaning CD-Rs and DVD-Rs containing infringing materials) are the

predominant form of hard goods piracy, and much of the source material for these CD-Rs and DVD-Rs comes from the Internet. Thanks to sustained pressure against street piracy in Sofia, BAMP reports that pirated sound recordings have virtually disappeared from the notorious Slaveykov square, while pirated films can still be found in the streets. However, unlike the situation in Sofia, street piracy is still a major problem at the Black Sea resorts and the skiing resorts in Bulgaria, such as Borovetz, Bansko and Pamporovo. Burgas being one of the most visited summer resorts, continues to keep high levels of hard goods piracy, while the biggest Black Sea resort of Slanchev Briag is still the heart of illegal commerce with counterfeit and pirated goods. Even though raids do take place there, enforcement efforts remain largely symbolic and without a lasting effect.

For the software industry, the use of unlicensed software by end user piracy (especially by the small and medium enterprises) and the distribution of pre-installed unlicensed copies by system builders (hard disk loading) piracy are unique and the most harmful forms of piracy in Bulgaria. In 2008, the practice of offering for sale assembled PCs with pre-installed unlicensed business software continued to be a predominant code of conduct among local system builders that was confirmed by a number of successful test purchases and follow-up police raids. As mentioned above, Internet piracy is growing. BSA believes that the recent insignificant reduction of the business software piracy levels is not necessarily an indication of improvement – just the opposite, it sends out the message that either there is no political will to fight piracy or there are not sufficient resources to achieve tangible results. This, apart from the ineffectiveness of IPR enforcement, directly relates to two other factors influencing piracy: the lack of public awareness and support for anti-piracy measures and widespread political and public tolerance towards all forms of piracy.

COPYRIGHT ENFORCEMENT IN BULGARIA

The Council on Intellectual Property Protection needs to achieve results: The Council on IP Protection at the Ministry of Culture was created in January 2006, and is the most important interagency coordination body and facilitator for dialogue with the private sector. However, in 2008 the direct dialogue of the IPR Council with the industries was seriously interrupted. A new body – the Consultative Committee on IP matters (“The Committee”) – was created within the office of the Deputy Minister of Culture which had the unhelpful effect of cutting off the private sector’s direct participation in the sessions of the IPR Council. In addition to the lack of transparent rules on the membership of this Committee, several attempts by the copyright industries to bring some of its proposed initiatives to the attention of the IPR Council (such as the “Tax Initiative”) failed because the agenda of the Council entirely depends on the sole discretion of the Deputy Minister of Culture. The poor consequences of the new organization were pointed out to the Deputy Minister, the IPR Council members, and the Minister of Culture himself, but the ban imposed on the industries’ direct participation within the Council has not been lifted.

With the involvement of the copyright sector the Council should build a solid long-term strategy for legislative reform and IPR enforcement and regularly report to its members on its action plans and results. Copyright groups are receiving mixed signals from the Ministry of Culture. On the one hand, following requests from rights holders groups, the Council did include Internet piracy on its agenda and both the Minister of Culture and the Deputy Minister have been positive about the concept of ISPs cooperation in combating online piracy. On the other hand, neither the Committee nor the Council seriously addressed the issues of Internet piracy and ISP cooperation. As a result, there is a complete lack of tangible results in these areas.

Given the growth in Internet piracy in Bulgaria, the active copyright industries in Bulgaria have focused much of their local work on issues related to criminal and civil enforcement of Internet piracy cases.

Low cooperation from the ISP community: The Bulgarian IPR legislation and legislation related to ISP liability are compliant with EU *acquis communautaire*. However, it is of the utmost importance that the Bulgarian government acknowledges the vast availability of illegal content online that is occurring via local ISPs and encourages specific forms of cooperation with the ISPs to address the Internet problem.

There has been some progress in working with Bulgarian ISPs with respect to Internet piracy in the free hosting environment. For a number of years, BSA has been issuing notice and takedown requests to ISPs, with relatively good results. Unfortunately, similar cooperation with the ISPs in the P2P file-sharing environment cannot be reported. ISPs are reluctant to work with the copyright sector on this issue and to provide assistance, and instead rely on the principle of “neutrality of the infrastructure” as a basic concept of the EU Telecom package and the relevant Law on Electronic Communication in Bulgaria, as well as the ISPs’ limitations on liability in the EC Directive on Electronic Commerce and respectively the Bulgarian Law on

Electronic Commerce. There is no specific legislation that affirmatively encourages ISPs' cooperation with copyright rights holders.

BULLACT also has experience with take down notices, however the results are not encouraging. Some torrent site administrators do not delete the link mentioned in the request, resulting in the request being only temporary as the title is again uploaded within 24 hours. Other administrators directly refuse to comply with the notice using the argument that the site is registered abroad and therefore does not fall under national jurisdiction, or that the actual infringers are those who upload or download the illegal content.

The copyright industries, led by the local music and software sectors, have sought to initiate communication with the telecommunication and ISP community and to suggest the introduction of legal business models for access to copyright content on mobile platforms or on the Internet. The government should take concrete steps to encourage communication with and cooperation from the IT sector / ISPs in the fight against Internet piracy. A December 2008 event, "Round Table on Content and Internet – the Cooperation between Right-holders and ISPs", initiated by a Bulgarian Member of the European Parliament and financed by the Group "Alliance of Liberals and Democrats for Europe" (ALDE), provoked much interest from a large number of organizations and institutions both from the public and private sector. At this event, it was agreed that in early 2009 representatives of the content providers' organizations, the Bulgarian Association for Electronic Communications (the association of the major ISPs) and other non-governmental organizations, under the auspices of the State Agency for Information Technologies and Communication, will commence negotiations for drafting a Memorandum of Understanding to establish institutionalized cooperation for countering Internet piracy. The State Agency for Information Technologies and Communication and its director made a commitment at the December Round Table to facilitate and actively participate in the negotiations between the content and the service providers. Similarly, the Cyber Crime Unit with the Ministry of the Interior and its Chief Inspector also have been urging the ISPs to work with the copyright industries in assisting the enforcement agencies in the investigation and prosecution of cyber crimes and Internet piracy.

No active support in 2008 from the government in terms of ISP liability / cooperation: Prior to the reactions coming out of the December 2008 Roundtable (above), there has been no significant support on behalf of the government to facilitate negotiations and cooperation between the IPR holders and ISPs. Despite the fact that the Internet piracy problem has been consistently raised by the private sector, only one session of the Council for IPR Protection was dedicated to Internet piracy, and there were no tangible results.

The copyright sectors have been working over the years with various Bulgarian agencies on Internet anti-piracy cooperation. For example, to provide formal assistance to the Ministry of Interior's enforcement agencies at the end of 2004, BSA together with the other copyright sectors like BAMP and BULLACT, signed a Memorandum of Understanding and Cooperation with the Ministry which resulted in a joint strategy to fight Internet piracy. In 2007, two addendums to this Memorandum, one with the National Police Directorate (Economic Police) on the Police Direct Contact (PDC) program, and the other with the GDCOC, provided, for example, the donation of technical equipment and assistance in the investigation of software and cyber crimes; unfortunately the PDC program was abandoned by police headquarters. Finally, as mentioned above, the copyright sectors have joined a working group to draft a Memorandum of Understanding and Cooperation with the major ISPs association for combating Internet piracy, and this work will commence in early 2009. No meetings have been held yet but they will be organized shortly.

Data retention problems will undermine criminal Internet enforcement: A troubling development in late 2008 appears to have created a legal vacuum by shutting down any and all enforcement against online piracy by preventing law enforcement or right holder access to data retained by ISPs. Unless this is somehow reversed, this development appears to eliminate criminal remedies by the State, which would be effectively unable to obtain such information from ISPs. This clearly must be corrected.

On December 11, 2008, the Supreme Administrative Court (5 judges) revoked Article 5 of Governmental Ordinance Number 40⁵ of the Ministry of the Interior and the State Agency for Information Technologies and Communication. This ordinance implemented Article 251, paragraph 2, of the Bulgarian Act on Electronic Communication ('AEC'), which was

⁵ Ordinance Number 40 of 7 January 2008 on the Categories of Data and the Procedure of their Preservation and Making Available by the Enterprises, Offering Public Electronic Communication Networks and/or Services, for Purposes Related to National Security and Criminal Enforcement.

Bulgaria's implementation of the EU Data Retention Directive. This article placed an obligation on ISPs to provide to law enforcement agencies' data on electronic traffic and messaging. The data was supposed to be retained by telephone companies and ISPs as necessary for the purposes of criminal prosecution or national security. The revocation was based on the Court's view that this provision violates constitutional rights. This is a very dangerous court precedent in favor of the ISPs' claims that enforcement by the private sector in the Internet space will threaten personal rights and constitutional freedoms. This decision, unless reversed, will become a major impediment to the successful collection of information on instances of infringement and identification of the suspected infringers and will curtail the investigation of all Internet-related crimes; now not even the police will have access to this data. New draft amendments to the AEC are currently under consideration at the Bulgarian Parliament. There is a debate around the question of whether the police would have access to the data retained by the ISPs, which could result in the adoption of a complicated procedure. Bearing in mind the specific nature of copyright infringements via the Internet, this would seriously impede the police investigation process.

Criminal and administrative actions in the Internet space: The Bulgarian Penal Code, and particularly Article 172a (as amended in August 2006), contains the necessary legal provisions for the criminal prosecution of Internet piracy. Some legal and practical difficulties do arise when investigating P2P cases where the criminal liability of the network administrators and relevant ISPs may be involved (pursuant to Article 21 of the Penal Code) on the grounds of their acting as accomplices in the criminal activities of uploaders that make protected content available for online access and downloading. BSA reports that the investigation of the first such cases that were initiated back in 2006 and 2007 have still not yet been decided by the criminal court even though these cases are of immense importance to combating Internet piracy. Criminal investigation and prosecution of administrators and owners of FTP servers with illegal content within LANs are more common and seem to be less complicated and yet there is no significant court practice on such cases that would give reason to claim that there are no legal obstacles in fighting that form of Internet piracy.

Good work with Cyber Crime Unit: The film, recording, and business software industries continued to enjoy constructive and productive relationships with the Cyber Crime Unit in 2008. The Ministry of the Interior and the head of the Cyber Crime Unit in particular, are fully dedicated to their tasks and excellent partners in the fight against copyright crime, including Internet piracy. Recent structural changes within the Ministry were discussed for the purpose of enhancing the ability and capacity of the Cyber Crime Unit and turn it into the most efficient IP enforcement body in Bulgaria. Pursuant to the latest structural changes within the Ministry of the Interior, and despite some plans to have it relocated to other less effective offices within the Ministry, the Cyber Crime Unit managed to keep its structural position and competence for the time being. It is now a body within the Directorate "Counteraction to Organized and Serious Crime" (previously known as the General Directorate to Combat Organized Crime), at the General Directorate "Criminal Police." The need to improve communication with prosecutors and to establish uniform best practices regarding the fight against IP crimes was incorporated in this shift. However, industry suggestions to broaden the scope of competence of the Cyber Crime Unit and to enhance its administrative capacity with additional personnel remained without a concrete response.

The Cyber Crime Unit has to be credited not only for the enforcement actions against notorious torrent trackers and large LANs across the country, but also for their day-to-day work with the private sector and the ISPs aimed at diminishing the availability of illegal copyrighted material over the Internet. This Unit also is in charge of counteracting against all types of Internet related crimes and offences such as phishing, financial fraud, child abuse and pornography, but manages to maintain good balance in its work countrywide. In addition, the industries note the good work of the Sofia Investigation Services in investigating the Internet piracy cases that are within its competence (the P2P piracy cases); its work is good but unfortunately its investigations were impeded by supervising prosecutors thus undermining the overall efficiency of the work of the investigators.

BSA enjoys excellent cooperation with the Cyber Crime Unit which has resulted in steady and intensive police enforcement against Internet piracy and larger end user targets. In 2008, the BSA assisted Bulgarian authorities in conducting 17 enforcement actions among which: 7 Internet ones conducted by the Cyber Crime Unit against LANs and torrent trackers; 4 end user raids, 2 of which conducted by the Cyber Crime Unit and the other 2 by economic police officers of the regional PDs; 4 hard-disk loaders raids, 3 of which conducted by the regional economic police officers and 1 with the tax authorities followed by civil litigation against the offender; and reseller raids conducted by the economic police officers. In addition, 355 referrals to the police for warning letters and protocols within the context of the PDC program were made, but the police refused to provide

feedback on the number of protocols⁶ that have actually been issued. BSA local counsel also sent out 145 notice and takedown letters to ISPs and 514 warning letters to end users.

The recording industry reports that during 2008, it worked with the Cyber Crime Unit on actions that resulted in 15 raids that interrupted the sharing and distribution of more than 75 terabytes (TBs) of illegal content – music, films and software. More than 200 FTP servers, computer configurations, laptops, screening servers and hard disk drives with illegal content were seized. Some of the most successful attacks were against:

- LAN in Dobrich – 12 FTP servers with 25 TBs of protected content – music, films and software were seized, and a criminal investigation has been initiated;
- LAN in Varna – 21 computer configurations confiscated with 15 TBs of illegal content; in addition to the penal code investigation, the tax authorities have started their own investigation;
- ISP in Haskovo – 4 FTP servers with 6,5 TBs protected music, film and software were seized;
- LAN in Chirpan – 1 FTP server with more than 3 TB illegal content (music, movies, software and pornography) were found and seized
- LAN in Pleven – 1 FTP server with 3 TBs of protected content and 72 computer configurations with illegal software were seized;
- 2 LANs in Yambol – 8 units of FTP servers with more than 7 TB (terabytes) of music, movies and software, distributed without the permission of right holders were found and seized.
- On November 11, 2008, officers from the Cyber Crime Unit of the Directorate “Counteraction to Organized and Serious Crimes”, acting on evidence from BAMP, shut down the site www.torrentvalley.com. As a result, the Bulgarian authorities stopped the free distribution of more than 1,000,000 illegal torrent files with films, music, software, books, animation movies, games and pornography. End-user access to 5,000 torrent trackers from around the world was thus prevented.
- Thanks to sustained pressure from the Bulgarian authorities in 2008, the illegal site www.GepiMp3.hit.bg was closed and the ISP www.bol.bg terminated the illegal distribution of protected content of its free server.

Also, BAMP addressed the three major telcos – Vivatel, Mtel Globul, with letters urging them to interrupt phone accounts related to SMS payments of illegal traffic or access to protected music content without the consent of the right-holders.

BULLACT has sent 44 take down notices to torrent tracker sites. Sixteen warnings against torrent tracker sites were sent to the Cyber Crime Unit. The prosecutors denied to initiate eight magistrate cases on different grounds. The remaining eight are still under investigation.

Fewer actions with the economic police: BSA has enjoyed relatively good cooperation with the regional economic police sections of the Ministry of Interior which has resulted in handling physical piracy, hard disk loading and smaller end-user cases. Unfortunately in 2008, software anti-piracy enforcement undertaken by the economic police worsened. This could be for any of several possible reasons. First, the reduction of physical piracy cases in the major cities and the ineffectiveness of economic police officers to effectively attack pirate OD resellers at the winter and summer resorts may have been due to corrupt practices and political pressures. Second, the role of the police diminished in hard disk loading cases because many of these cases usually involved a small number of unlicensed copies of business software, and these cases are often dropped by prosecutors as minor ones. BSA is working on establishing cooperation with the tax authorities for joint administrative/civil litigation of that type of unauthorized use. Third, there is no IPR sector at the Economic Police Headquarters to supervise and provide methodological assistance to the regional economic police sections. Presently there is only one person at the headquarters who is designated to handle the large volume of work related to enforcement of both copyright and industrial property rights. Fourth, there is insufficient administrative capacity and lack of qualified and trained personnel and adequate technical equipment and support, both centrally and regionally, as well as a shortage of funds for outsourcing specialized technical assistance and forensic expertise for the investigation of IPR crimes.

Given the problems noted in software cases with the economic police, in 2007 BSA suggested an upgrade of the highly efficient “Police Direct Contact” program called PDC II. A Memorandum regarding this upgrade was signed in February

⁶ The protocols are very similar to warning letters but instead of being sent out by the rights holder, they are issued to the alleged offenders by the police on the grounds of Articles 55 and 56 of the Law on the Ministry of Interior, and as a result, convey a strong message to the targets.

2007, setting up high expectations for improved results from business software legalization efforts. To recap, the PDC is an enforcement program that involves issuance of protocols of warning and instructions to alleged offenders pursuant to leads provided by the BSA. As explained above, the protocols are very similar to warning letters but are in fact issued by a state authority, i.e. the police, within their powers to prevent crime. The protocols do not entail police raids, seizure or prosecution but inform the managers of companies that are allegedly using unlicensed business software on the criminal liabilities that such activities could bring about and instruct them to cease such incriminated activities and legalize their software use. Ever since 2002 when this program was initiated it has produced immense legalization of business software used by small and medium enterprises and together with this saving administrative resource both of the police and the judiciary that would have been involved in lengthy criminal proceedings. Unfortunately, another year passed and, without any explanation and even after the necessary technical equipment was provided, the Headquarters of the Economic Police refused to execute the Memorandum and thereby abandoned the entire PDC program.

BAMP also reports that it submitted seven claims to the Economic Police and its regional departments in the country. The Economic Police units organized 12 raids against hard goods piracy, resulting in 13,632 burned CD-Rs and DVD-Rs were seized in these operations.

Administrative enforcement brings mixed results: The Law on Copyright and Neighboring Rights provides that administrative remedies to counter piracy are available (Article 97). Results were mixed in 2008, varying by industry.

BSA reports that no administrative cases have been conducted by the Ministry of Culture Inspectorate and a few *ex officio* police actions on other crimes but also involving business software offenses have been conducted and reported to the BSA. In 2008, the Inspectorate of the Directorate conducted not a single operation against business software violations. The random occasions of inspections at cyber cafes and Internet clubs that happened in 2007 disappeared altogether in 2008.

On a more successful note, BULLACT reports that 62 raids against cable operators were conducted jointly by BULLACT and inspectors of the Copyright Department with the Ministry of Culture, as well as 5 raids against hotels for illegal transmission of TV programs. A total of 62 administrative protocols ascertaining the infringements were drawn up and 40 resulted in administrative fines. In this fight against signal theft piracy, the number of administrative raids against cable operators have tripled in comparison with 2007 (18 raids in 2007 and 62 in 2008). Fifty-five Internet cafes and clubs were raided by the same administrative authorities, and 46 administrative fines were imposed for illegal use of entertainment software.

Where it concerns administrative enforcement in the field of public performance, the recording industry reports enhanced action. Finally, the Culture Ministry used its competence in this field and organize a series of inspections of pubs, restaurants, bars and other public places where recorded music is being played. The inspections received wide media coverage. The findings of these inspections make a strong case for the introduction of music licensing requirements in the Bulgarian Tourism Act (see below).

Problems with prosecutions — too few case, too slow: Both the business software and music industries believed that during 2008 the Supreme Cassation Prosecutor's office and particularly the Deputy Prosecutor General, Mr. Kamen Sitniski and his team, remained dedicated to IPR protection and are motivated to address copyright piracy. His work is appreciated. However, in terms of overall enforcement results, the work of the entire judiciary remains a major problem.

Bulgarian prosecutors fail to conduct expeditious and effective investigation and prosecution of IPR crimes. Prosecutors create considerable delays in criminal enforcement immediately after police conduct raids. BSA reports that prosecutors and judges undermine software infringement prosecutions through perverse evidentiary decisions, such as returning critical evidence (like seized computers and hard-drives) to defendants, or refusing to admit such items into evidence even though they are properly seized. In a number of cases, prosecutions have been abandoned altogether without cause. Prosecution and court proceedings are extremely slow, formalized and heavy. There remains a concern that corrupt practices are still affecting some case outcomes, and that these officials may be liable to influence in software infringement cases. In some instances, political protection has impeded the successful prosecution of software cases.

Despite some positive developments within the Supreme Cassation Prosecutor's Office in 2006 and 2007, the new management's approach has not yet reached the regional level where the IPR crimes are actually investigated and prosecuted. Prevalent are District Attorneys' 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. For example, BSA experienced negative practices of prosecutors from the Plovdiv District Attorney's Office related to the implementation of Article 172a of the Penal Code; last summer there was an investigation and a resulting raid which appears to have subjected to a leak prior to the raid.⁷

To address these problems regarding prosecutions, BSA, BAMP, the head of the Cyber Crime Unit, and the Deputy Director of Sofia Investigation Services met with the Prosecutor General in October 2008. Several key points were discussed. First, the main topic was how to stimulate the effective development of the three emblematic cases against the torrent-trackers such as www.arenabg.com and www.zamunda.net. These cases were the result of the Cyber Crime Unit/BAMP/BSA joint raids in May 2006 and March 2007. The Cyber Crime Unit and the Sofia investigation office have both terminated their activity and collected the necessary evidence. Nevertheless, the cases are still pending in the preliminary investigation phase without being processed to the court due to the prosecutor's ambiguous attitude. It was decided that BAMP members – licensees of the major music companies - were to be once again interviewed by the chief investigator in order to give further impetus to the case. Second, a joint proposal for the creation of a special Task Force Unit was drafted and ready to be proposed at the next meeting of the Council on IP Protection. The Task Force Unit is going to bring together representatives of the Supreme Prosecution Office of Cassation, the Cyber Crime Unit, the Investigation Service and the Tax Authorities within the ministry of Finance. The Task Force Unit initiative has now been presented for approval to the Council on IP Protection. Third, the Chief Prosecutor accepted to send an official instruction to the competent regional offices in order to get them to use the Guidelines for Uniform Practices on IPR cases. Information and examples of discrepancies and problems within the current prosecutors' practice regarding IP protection were provided by the copyright sectors. Additional expertise on the incriminated torrent trackers was prepared and processed to the attention of the Deputy Chief Prosecutor. More concrete follow-up on all these matters is needed.

Very few deterrent sentences: Because most IPR cases are terminated or dropped at the preliminary investigation stage, there is not sufficient amount of results to validate any trend. It does appear fair to say that of those trials that have been completed, the verdicts leave the impression that judges impose low and non-deterrent sanctions. The random distribution of cases as an anti-corruption tool has a negative effect on the sustainable capacity of the judges to deal with this very specific type of legislation.

BSA reports that in 2008, only 6 of its criminal cases (which involved 2 LANs (Internet), 2 end user and 2 hard disk loading cases) reached a verdict of the first instance criminal court (5 sentences and 1 plea bargain). Four of them are final and the other two have been appealed and are currently pending before the upper instance court. Unfortunately none of the sentences impose deterrent sanctions; the usual sanctions were as low as 3-5 months suspended imprisonment and a fine in the average amount of 500 BGN (US\$330). BSA also notes that many software cases in 2008 were dropped at their preliminary investigation stage; prosecutors very often do not deem it necessary to notify BSA about their motions of terminating software

⁷ BSA local counsel filed a criminal complaint (№ 12197/2008) at the registrar of the General Directorate to Combat Organized Crime at the Ministry of Interior regarding information on the use of unlicensed copies of software published by BSA member companies on behalf of a big end user company in the town in Plovdiv. This company is one of the largest in Bulgaria offering technological solutions in the field of ventilation, air-conditioning and refrigeration systems, and working with a large number of highly qualified personnel. The type of business of the company requiring the use of high technologies for design and manufacture of its products also necessitates the implementation of various exceptionally expensive computer programs, including such owned by BSA members. On July 1, 2008 the materials from the police raid conducted upon BSA's criminal filing were reported to the Plovdiv DA's Office with an assessment for initiation of criminal proceedings for a crime under Article 172a of the PC against the owner and manager of the company. The Plovdiv District Attorney, however, refused to initiate preliminary proceedings on the grounds that there was not enough data available and ordered an additional inspection by Plovdiv police department. On July 2, 2008, pursuant to the DA's instructions officers of the GDCOC assisted by officers of the regional unit of the GDCOC conducted a raid on the premises of the company offices. During the operation, only 15 computer systems were found there (BSA preliminary data indicated there were over 30 PCs) with only copies of Windows XP installed on them. The police requested documents certifying the legitimate acquisition and use of this product and were provided with invoices for the purchase of 15 licenses for Windows XP dated July 1, 2008. Moreover, the additional inspection of an IT expert indicated that those computer programs had been installed on the PCs in the time frame between 16.00 and 24.00 hours on July 1, 2008. When asked why there were no files on the operating PCs, the company staff gave the absurd explanation that upon completion of each document, it was printed out and deleted from the PC's memory. In the remaining office premises, including the ones in the design and construction department of the company, the PCs were missing notwithstanding this fact, some electricity cables for PC configurations could be seen. Upon completion of the raid, the materials were reported to the District Attorney who instructed a further inspection, namely the verification of all company clients whose projects have been completed and manufactured, with a view to establishing the use of unlicensed software. No data is yet available whether this case has been further investigated which raises grounded suspicions as regards the impartiality of the prosecutor as well as the efficiency of practices of this Office.

criminal cases. Furthermore, despite the relatively good number of enforcement actions against various forms of Internet piracy in the period 2005 – 2008, only few cases have reached the court and only one has been completed with two final verdicts against the two defendants (probation for one and 5 months suspended imprisonment and a fine of 500 BGN for the other). This paucity of cases sends a bad message indicating lack of political will and capability on behalf of the Government to deal with this new problem.

The recording industry reports that many cases are dropped at the preliminary investigation stage. Furthermore, very often right holders are not duly notified by the prosecutors about their motions of terminating the proceedings. Only one criminal case has reached a verdict in 2008 – criminal proceedings opened following a raid against OD reseller in the town of Plovdiv have been completed with a plea bargain at the Regional Court of Plovdiv (9 months probation for the defendant imposed).

“Tax initiative” proposed by the business software industry: BSA reports that almost all software cases initiated in 2008 (as well as in previous years) are linked with serious tax violations. BSA suggests that Bulgaria implement measures, both legal and practical, that would utilize the tax authorities’ administrative capacity to reduce the acquisition and use of unlicensed software and thus by countering software piracy increase the tax revenues. Besides tax violations, IPR crimes frequently go along with child pornography, terrorist propaganda, and other grave violations of basic human rights. It is very often the case that the easy profits gained at low risk from piracy by organized criminal groups are used to finance multiple other illegal activities.

Given the limited administrative capacity of the government enforcement authorities primarily responsible for IPR enforcement, alternative approaches for increasing the efficiency of IPR enforcement should be sought. BSA points out that best practices in some neighboring countries such as Greece and Serbia have proven that involving the tax authorities in checking the software license compliance within the routine tax inspections produces tangible results in terms of business software legalization and reduction of software piracy rates. The implementation in Bulgaria of these best practices, referred to as “Tax Initiative,” would assign secondary enforcement responsibility to the tax inspectors (there are approximately 300 tax inspectors across this country). This would help offset the insufficient administrative capacity of both the police and the Ministry of Culture with fast administrative procedures and would relieve the judiciary from investigating and prosecuting some (not all) criminal software cases.

Collect public performance income: Enforcement related to public performance presents another problematic area for the collecting societies in Bulgaria. In late 2007, the Ministry of Culture started a strategic program of enhanced attention to this problem, especially focused on the tourist sector. In line with the new policy guided by the Deputy Minister, in 2008 the Inspectors of the Ministry organized 265 administrative checks within their competence and prepared 265 relevant protocols testifying infringements, as well as 295 inspections. Further to these inspections, 227 acts establishing administrative violations and 144 criminal decrees were issued and administrative sanctions were imposed.⁸

Despite this enforcement effort, the majority of hotels, discotheques, night clubs and bars all over the country still remain out of the scope of application of the Copyright Law and as a result, continue to generate massive losses for the music sector. Sustained enforcement actions are required in order to create better awareness among users about their obligation to pay for public performance of recorded music. The situation shows the urgent need to adopt relevant legal amendments in the Tourist Act that would enable the practical enforcement of the Copyright provisions related to public performance.

The music industry notes that, in general, more than 90% of the broadcasters - radios and TVs have already contracts with the collecting societies, thus showing respect for the law. However, a large group of users -- the cable industry -- still continue to disregard the copyright law. Law enforcement agencies should take action.

Prosecutors Manual on IP Procedures: The local copyright industry groups worked together to press 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 booklet was published in October 2007 and was to

⁸ The protocols testifying infringements followed by acts of establishment of administrative violations committed are the administrative instruments issued by the competent administrative authorities and are aimed at ascertaining the act of infringement committed by the offenders. Following the issuance of the acts of establishment of administrative violations committed, the Ministry of Culture issues the respective penal decrees whereby the relevant administrative sanctions are imposed to the offenders.

be circulated among the DA's Offices as guidelines for prosecutors on how to work on IPR cases. However, despite the expectation of the private sector and the agreements reached that it should be circulated by the Prosecutor General as a set of mandatory instructions, this did not actually happen. As a result, this manual remains in a very ambiguous legal position, with no guarantees that it would achieve its final goal to unify the practices in the investigation and prosecution of IPR crimes. A new commitment to that effect was made by the Prosecutor General in October 2008 and its execution is still expected.

COPYRIGHT LAW ISSUES IN BULGARIA

Problems with implementation of the EU Data Retention Directive: Bulgaria adopted the Act on Electronic Communications ('AEC'). Chapter 15 of this law contains provisions on security of electronic communications and on the relevant protection of user's data. The act transposes the EU Data Retention Directive and stipulates that, because of national security concerns and the detection of crimes, some categories of data have to be retained by the providers of public electronic communications networks and/or services. Further to Article 251(2) of the AEC, a joint Ordinance by the Ministry of Interior and the State Agency for Information Technology and Communications had to be adopted. In 2008 this article of the Data Retention Directive was implemented in Ordinance No. 40, issued by the Ministry of the Interior and the State Agency for Information Technologies and Communication. Discussed earlier in this report is the stunning news that on December 11, 2008 the Supreme Administrative Court abolished Article 5 of Ordinance No. 40 which required ISPs to provide law enforcement agencies with data on electronic traffic and messaging, all part of the EU Data Retention Directive. This court decision will be a major impediment to the successful collection of information on instances of infringement and identification of the suspected infringers which as a whole will impede the investigation of all Internet related crimes.

Legislative reform regarding public performance rights and collecting societies: A major legislative concern for the recording industry for the past two years involves efforts by broadcasters to amend, and undermine, Article 40 of the Bulgarian Copyright Act, which deals with collective rights management. Fortunately, this initiative to change this article was withdrawn in 2008. On a positive note, the licensing requirements for broadcasters now include signed contracts with the collecting societies.

Adoption of the respective legislative amendments in the Tourism Act that would enable effective enforcement of the Copyright Act provisions related to public performance (see section below) is needed. Legislative amendments in the Copyright Act that need to eliminate the present loophole whereby the public performance of sound recordings remains out of the scope of the administrative sanction provisions of the law still remain unresolved and need further consideration. Since then, the music industry has sent alternative proposals to the Ministry of Culture on how to change the Copyright Act. It is also necessary to harmonize other laws, such as the Radio and TV Act and the Tourism Act, to address this public performance issue.

Tourism Act: The need to amend the Tourism Act, adopted in 2002 and lastly amended in July 2008, is of major importance for the whole collective management system and the sustainable development of the music sector. Since the beginning of 2007, the music industry (led by BAMP) and the collecting societies have pressed for amendments to the Tourism Act that would guarantee better enforcement related to the public performance, in particular in hotels, bars, restaurants and discotheques. BAMP and the collecting societies succeeded in introducing adequate provisions regarding the public performance in the body of a draft bill submitted by Bulgarian MPs – the need for hotels, restaurants and other tourist places to present contracts with the collecting societies as a prerequisite and condition for obtaining the relevant tourist license. This amendment is of the utmost importance to the music industry in Bulgaria. It would guarantee fair treatment of all users (it is important to note that similar licensing requirements already exist in the Radio and TV Act), effective public performance copyright enforcement and it would promote a more transparent and competitive business environment. However, the resistance of the entire tourist sector is ferocious. The Minister of Culture is fully supportive of the music industry proposal and on several occasions defended them within the Council of Ministers. The Bill, which was submitted by several MPs, has passed its first reading but legislative consideration is suspended while waiting for a similar bill to get adopted and processed by the Council of Ministers.

The Radio and TV Act: The 2005 amendments to the Radio and TV Act (in late 2005) properly provided for obligatory contracts with the collecting societies as part of the license/registration package of any broadcaster to be presented to the Council of Electronic Media (CEM); these provisions were implemented in 2007. As a result, CEM has to inform the

Ministry of Culture on the results of its inspection. Unfortunately, CEM lacks the competence to monitor the implementation of the relevant copyright obligations by the broadcasters, let alone the right to impose sanctions in cases of infringement. As a result, more amendments to supplement the Radio and TV Act have been under preparation in order to establish legislative harmony with the Act on Electronic Communications. The latest 2007 amendment of the Radio and TV Act focused solely on harmonization with the Act on Electronic Communication. The music sector had proposed additional amendments that would involve CEM in copyright enforcement and monitoring and would provide for better IPR protection in the broadcasting environment. However, these were rejected by the Working Group within the Ministry of Culture tasked with drafting the amendments. Amendments to the Law in this respect would be greatly appreciated, but they are not expected to materialize in 2009, bearing in mind upcoming elections.

Tax Initiative: BSA believes that the introduction of legislative amendments making possible the implementation of the “Tax Initiative” are of utmost importance for the software industry, as discussed above. BSA’s earlier amendments to the Law on VAT and the Law on Corporate Taxation were rejected by the Parliament when voting the so-called “budget package” but a new attempt will be made at the end of this year (2009) when this package is routinely put under consideration by the legislators. In the meantime, proposals for amending the Tax Procedure Insurance Code to the same effect (implementation of the “Tax Initiative”) are to be attempted in 2009. Above all however, the mandatory prerequisite for having this goal achieved is to form a political will that prioritizes IPR protection and utilizes all possible legal instruments for reducing the software piracy rate and creating a favorable environment for the legitimate software business and innovations.

Civil Procedure Code (2008): In March 2008 the new Civil Procedure Code came into effect which is expected to influence the civil litigation against copyright infringements. The new procedures, combined with the provisions of the Copyright Act that were introduced in early 2007 transposing the provisions of the Enforcement Directive, give legal grounds for civil litigation against all IPR infringements, including the ones conducted via Internet. It will likely take some time before the judiciary is ready to efficiently handle such cases; for example, this may be compounded by the recent court judgment affecting data protection. In 2007, BSA started a test civil case against a hard disk loader with respect there procedural elements. Unfortunately, due to the lengthy civil proceedings this case has not yet been considered on the merits and it is still early to evaluate the level of implementation and enforcement of these provisions in practice.

Customs: In general, communication between the music industry and Bulgarian customs officials is good, and the Bulgarian customs authorities make substantial efforts to control the EU external border (keeping in mind that Bulgaria is ranked third in Europe as to the number of illegal goods seized at the external border). Many rights holders in Bulgaria believe that the operational enforcement of Article 11 of the EU Regulation 1383/2003/EEC would enable the quick seizure and destruction of counterfeited and pirate goods by customs authorities. Article 11 of the Regulation requires a summary procedure for destruction of confiscated illegal goods within 10 days after the seizure. In order to enforce the Regulation, each member country is supposed to adopt a local piece of legislation – an act, ordinance or other legal instrument that would implement the Article 11 procedures. Bulgarian customs authorities unfortunately lack such a local instrument. On several occasions, BAMP has insisted before the Council on IP Protection on the needed adoption of relevant local legislation to implement this EU Regulation, but in 2008 there was no adequate response regarding this request.

Criminal Code (2006): One of the main legislative achievements in 2006 was the amendment to the Criminal Code criminalizing the storage (holding in possession) of “tangible carriers containing copyrighted material.” The creative industries’ hope and expectation that this amendment would bring a chain of enforcement actions against wholesalers of pirate ODs ending in court unfortunately were not realized. Sadly, another year has passed and the local industries report that, to the best of their knowledge, not a single verdict has been issued against OD resellers or for the storage of infringing copyright materials based on the new text of Art. 172a.

The Optical Discs Act (2007): The law regarding the manufacture and trade in optical discs, which the industries worked hard to pass and implement, still contains deficiencies. Efforts to strengthen the law were completed in 2006, and the law entered into effect on October 19, 2007. Unfortunately, the new amendments failed in their main purpose to ban street sales of optical disc media with copyrighted material. Another deficiency is that the amendments do not provide for increased powers of the state control bodies in conducting surprise inspections and seizing documents, samples, raw materials, manufacturing equipment, or matrices. Such powers are essential for the purpose of establishing evidence related to alleged infringements. The law also does not allow right holders and their organizations and representatives to participate in the inspections. However, in recent years the nature of piracy (Internet piracy, burning) has shifted such that infringing copies of

pressed optical discs are no longer a major problem, and even several DVD lines are closing due to low demand on the market for OD. The need for amendments to this law is no longer urgent.

TRAINING AND PUBLIC AWARENESS

More training needed: Although the relevant legal framework to investigate and prosecute Internet piracy is in place, the judiciary in principle seem reluctant to enforce it properly. The lack of knowledge or understanding of Internet and the specific digital environment is amongst the reasons for the inefficient, clumsy and lengthy investigations. Prosecutors do not have enough logistical support nor the motivation to move faster on crucial cases. Further training of prosecutors on IPRs and the new digital challenges is needed, especially on uniform investigatory practices. The courts are another problematic area that calls for attention. Although very few cases have reached the court, the ones that have, face again the lack of specific knowledge and the indifference of judges.

The recording industry (represented locally through BAMP) and the business software industry (BSA) regularly conduct training for the law enforcement agencies and the judiciary, and also participate in conferences and seminars organized by local or international governmental and non-governmental organizations. During 2008, BSA local counsel participated in numerous trainings and seminars for police officers, customs officers, public prosecutors and judges as well as other regional international symposium where Bulgarian officials were in attendance. Similarly, BAMP officials participated in seminars on intellectual property enforcement, including those directed at Internet issues. For budgetary reasons BULLACT (representing locally the film, broadcasting, and entertainment software industries) cannot finance training on a large-scale for enforcement authorities but have remained consistent in taking part in conferences and seminars organized by other copyright industries.

Public awareness: Local public opinion, in general and especially the younger generation, appears to be tolerant toward copyright piracy and the free access to protected copyrighted content on the Internet. Raising public awareness against piracy is a challenge that needs special attention and a lot of additional efforts, both from the private and the public sector. In particular, it is important for the Bulgarian government to support country-wide pro-copyright education and anti-piracy awareness campaigns.

COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Costa Rica remain on the Watch List in 2009.

Executive Summary: IIPA and its members congratulate Costa Rica upon the January 1, 2009 entry into force of the Dominican Republic-Central America-U.S. Free Trade Agreement (CAFTA-DR). This agreement contains a comprehensive intellectual property rights chapter that contains high standards for copyright protection and enforcement, many of which were implemented upon entry into force. Over the past several years, the most pressing problem for the copyright industries has been the complete lack of criminal copyright enforcement taken by Costa Rican authorities. For example, the recording industry did not make any significant progress in the criminal prosecution of music piracy cases during 2008. The lack of priority given by prosecutors in general remains the same. This abdication by the prosecutors should not obscure the fact that it remains the responsibility of all branches of the Republic of Costa Rica to effectively protect and enforce copyright. While it is true that many criminal procedures and sanctions were amended in late 2008 to make prosecutions easier, the industries have not yet seen any promising shifts toward a more proactive enforcement stance from the Attorney General that his office will pursue cases in 2009. It will be important to evaluate Costa Rica's work on taking effective criminal enforcement measures against copyright piracy, as this is an important component of Costa Rica's CAFTA obligations.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Costa Rica in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Create a Public Prosecutor's Office specialized in IP matters and assign resources and personnel to the office.
- Create a specialized IP unit within the police
- Apply the new criminal sanctions for copyright infringement in-practice.
- Improve training of enforcement officials on criminal and civil copyright cases (including police, officials from the Judicial Investigation Office (OIJ), prosecutors and judges).
- Reduce unwarranted delays in investigations, prosecutions and sentencing.
- Implement in practice, the software asset management practices in government agencies called for in the 2002 Decree.
- Engage state and municipal governments in the anti-piracy campaign through the cancellation of operating licenses for any locale selling pirate product.

Legislation

- Create and fund a Specialized IP Prosecutor Office (see above).
- Work with rights holders on developing legislation to the remaining CAFTA issue – implementation of liability of Internet service providers – that is still subject to transition.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

CAFTA implementation in 2008: In order to implement the copyright- and enforcement-related aspects of CAFTA, Costa Rica accomplished amendments to two separate laws -- its Copyright Law (which was included in a broader intellectual property rights reform package) and its Law on Enforcement. In sum, the 2008 amendments to the Law on Enforcement went through the Congress without any problems of process, but a constitutional challenge to parts of the IP reform package (not the copyright components) resulted in a delay of its final adoption until November 2008. Below is a brief summary of these two laws (IIPA has not reviewed English translations of these laws).

The Law on Enforcement (*Ley de Observancia*): 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 that were not TRIPS-compliant and were impediments to effective enforcement.¹ Efforts to amend this law continued for years. Finally, in August 2008, amendments to this Law on Enforcement were adopted (Law No. 8656 of 11 August 2008 amending Law. No. 8039 of 12 October 2000) to implement numerous CAFTA obligations. Below is a summary of some of the key provisions and some of the continuing legal concerns reported to IIPA by its members:

- **Criminal penalties**: The way Costa Rica structured and applied its criminal sanctions has long been a concern of the copyright industries. The 2008 amendments revise the criminal sanctions for copyright and industrial property infringement, but leaves open many continuing questions for copyright owners about their effectiveness in practice.
 - First, the level of economic sanctions (fines) for criminal copyright piracy was generally raised for most infringing acts but the maximum jail terms were lowered in some cases. For example, the new law actually reduced the minimum penalty from one year down to two months, for certain cases. IIPA members had long argued that the minimum penalty for criminal copyright infringement should be increased from one year in jail to a minimum three years, believing that the three-year term was needed in order to ensure the possibility of jail time and not suspension. We understand that point was not reflected in the law, and expect that deterrent level sentences will be imposed in practice.
 - Second, the new Article 55 includes a complicated a four-step provision, linking the amount of the damages to the level of penalty. There is not a single provision in the law that explains how the judges will calculate the damages in piracy cases. The point was deferred to a future decree.
 - Third, the structure of these provisions unfortunately still provides for fines in the alternative of criminal sentences; this historically has allowed judges to decide between prison or fines, and this results, not surprising, usually in the issuance of fines (and hence few jail terms were ever issued). IIPA and its members believe that any fine imposed for infringement should be in addition to the prison sentence, and not in the alternative; it is unfortunate that the new law does not allay our concerns here.
 - Fourth, the copyright industries remain concerned that even with the new amendments, it is not certain that the historical problem of judges issuing suspended sentences because of low minimum sentences will stop. IIPA members hope for a major positive change in 2009 that will result in successful prosecutions and deterrent sanctions for criminal copyright infringement.
- **Ex officio**: The law establishes *ex officio* authority for the police to conduct investigations on their own initiative. This is a critical correction that will hopefully improve criminal enforcement significantly.
- **Anti-circumvention**: It provides protection and remedies against the circumvention of technological protection measures (TPMs) (this was done in advance of 3 years transition for CAFTA Article 15.5.7).
- **Statutory damages**: It also provides for pre-established damages (statutory damages) in civil judicial proceedings (this was done in advance of 3 years transition for CAFTA Article 15.11.8).
- **RMI**: It provides for protection of rights management information (RMI) (this was done in advance of the 2 years transition for CAFTA Article 15.5.8.a).
- **Satellite signals**: The law provides criminal sanctions regarding encrypted program-carrying satellite signals (this was done in advance of the 18 months transition for CAFTA Article 15.8.1.b).
- **Other civil remedies**: The 2008 law provides for civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (this was done in advance of the 3 years transition for CAFTA Article 15.11.14).
- **Injunctive relief**: The law also includes other provisions involving injunctive relief, destruction of infringing materials and equipment, and border measures.

¹ Years ago the copyright industries identified four major deficiencies in the 2000 Law on Enforcement when it was originally adopted: (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 provided that the "minor" (*insignificante*) and "without profit" (*gratuito*) use and reproduction of illegal products will not be penalized. This point may have been the most harmful provision of the law because these terms are undefined and it was easy for pirates to avoid liability by simply reproducing and selling illegal products in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.

Apart from the lack of political will by prosecutors (discussed in the enforcement section, below), there are several other legal deficiencies that have contributed to the massive problems with poor copyright enforcement in Costa Rica through 2008. Additional issues not addressed in the CAFTA implementation packages, but long highlighted by the copyright industries, included the following:

- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This includes providing *ex officio* authority for police. Unfortunately, this has not changed; rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution.
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") was not removed from the Criminal Procedural Code so that it does not apply to intellectual property infringements. Prosecutors are allowed to drop cases based on their particular criteria about the importance of the case.
- Businesses engaged in piracy operations should be closed.
- The unauthorized "use" of copyrighted materials should be made a criminal offense.

Copyright Law of 1982 (as amended in 2008): In 2000, Costa Rica amended its 1982 Copyright Law to comply with TRIPS and some of its WIPO Treaties obligations. Further amendments were developed in 2008 to implement CAFTA, and copyright law amendments were included in a larger intellectual property bill, which was adopted, subjected to constitutional review, and passed again in November 2008. Law No. 8686 (2008) encompassed provisions such as the following: extending the term of protection for works, performances and producers of phonograms; improving definitions; amending certain provisions regarding contracts and transfers; modernizing the scope of certain exclusive rights, and; updating exceptions and limitations, all aimed at comporting with the CAFTA obligations.

Future CAFTA implementation issues: The CAFTA IP Chapter contains several transition periods to implement the following enforcement obligations, and Costa Rica already has implemented most of its obligations (see above). However, one critical obligation, especially in the digital age, still has to be met. Costa Rica is obligated to adopt, within 30 months of the FTA entry into force, provisions on limitations of liability for Internet Service Provider (ISP) liability and notice and takedown provisions (CAFTA Article 15.11.23). The copyright industries believe that transparency in the development of the implementing legislation is important.

Now that CAFTA-DR is in force in Costa Rica, the trade benefits Costa Rica has received under various U.S. programs will be phased out. Costa Rica has been a beneficiary country of several U.S. trade programs, all of which require "adequate and effective" copyright protection and enforcement, such as the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative and Caribbean Basin Trade Preferences Act. During 2008, the following quantities of imports under preferential trade programs entered the U.S. from Costa Rica: \$195.2 million under the CBTPA, \$1.05 billion million under the CBI, and \$99 million under GSP -- a total of \$1.32 billion, or about 33% of all trade with the U.S.

Government software asset management: Government legalization of software is a CAFTA obligation that is due upon CAFTA's entry of force, and the Costa Rican government commenced efforts on this issue years ago. 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. In 2007 BSA was informed that the National Registry's Copyright Office was receiving data from other Government agencies about their software inventories. BSA understands that this process is still ongoing, but does not know what recent steps have been taken towards legalization. BSA and its members look forward to working with the Government of Costa Rica towards the legalization of software used by all Costa Rican government agencies.

COPYRIGHT PIRACY IN COSTA RICA

Hard goods piracy: The recording industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica. The level of optical disc piracy is approximately 60%, which represents almost 2 million illegal units sold every year in this relatively small market. Much of this OD piracy involves CD-R burning. The capital of San José is the main

center of pirate activity, followed by the state of Heredia. There have been no major changes in the distribution channels. Retail sales are concentrated in just two major chains. Several groups are involved in the importation of blank media and equipment, but the local recording industry has not been able to develop a case yet.

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. Software legalization in government agencies should be an important public policy goal, and is a current CAFTA obligation. BSA reports that it has not seen pirated software products on the streets.

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem despite the low penetration of broadband. Over the past year, access to broadband Internet services in Costa Rica increased. There are about 1.5 million Internet users in Costa Rica, about 36% of the population in 2008 (according to www.internetworldstats.com, up from 20% of the population reported in 2007). More home and business users now have access to the Internet, and this also increases access to pirated products being sold for download or in hard copy from the Internet. Internet cafés continue to offer a forum for consumers to download files containing unauthorized copies of copyrighted materials. Thus far the industries are not aware of any actions being taken against Internet cafés.

<p style="text-align: center;">COSTA RICA Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ²</p>										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	14.8	60%	14.5	60%	15.1	60%	18.3	60%	NA	NA
Business Software ³	15.0	60%	13.0	61%	15.0	64%	10.0	66%	9.0	67%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	2.0	100%	2.0	40%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	15.1	60%	NA	NA	NA	NA
TOTALS	29.8		27.5		30.1		30.3		11.0	

COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members over the years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica. Also, enforcement authorities lack equipment (hardware and software) to investigate Internet piracy cases. IIPA members continue to report that in 2008 their working relationships with prosecutors was not very good, primarily because the prosecutors refuse to give any attention or priority to piracy cases, even important cases. The Costa Rican judicial system is very weak. Training programs are necessary for prosecutors, judges and the police authority. It is hoped that the recent legal amendments accomplished for CAFTA implementation (discussed above) will lead to much more proactive work by the entire Costa Rican criminal justice system.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For more information on Costa Rica under the Special 301 review, check out Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

³ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁴ MPAA's 2005 data reflects a methodology that analyzed both physical/"hard goods" and Internet piracy.

Police cooperation is positive but need more resources: The copyright industries continue to recommend that a specialized IP unit within the police (*fiscalia*) be created.

The recording industry's relations with municipal police units remain positive; raids are taking place and infringing materials are being seized (these raids just do not go forward for prosecution). The local anti-piracy team did carry out some actions last year in markets and warehouses with the support of municipal police forces. In 2008, the industry reports 21 raids, resulting in 63,046 music (mostly CD-R) seizures and 36,781 film (mostly DVD-R) seizures and the arrests of 13 individuals; this, however, is a drop from 2007's results when the industry carried out 87 music piracy raids and seized 1.3 million units.

Prosecutors will not take criminal copyright cases: The main impediments to effective criminal enforcement are simple. First, there remains a very negative attitude by the prosecutors in accepting and pursuing copyright cases. Second, there is general problem with lack of adequate resources in the government agencies necessary to conduct any kind of effective anti-piracy campaigns.

For years, the recording industry faced roadblocks by the Office of the Attorney General such that no major prosecutions were conducted nor were convictions issued for over three years. That problem with the Attorney General, along with the lack of *ex officio* provisions in the current law, made it impossible for the recording industry to run any kind of anti-piracy campaign. In 2008, the recording industry did work with the police to conduct some raids against hard goods piracy, but none of these cases have yet moved forward toward prosecution. And, as a result of the serious deficiencies in copyright enforcement, no convictions were issued during 2008, the recording industry reports.

Need for special IPR prosecutors: For years, the copyright industries have supported the creation of a specialized prosecutor's office with nationwide jurisdiction so that criminal IP cases could move forward more swiftly and with more specialized expertise. Historically, long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case. Procedural delays in criminal cases could be avoided if prosecutors were to request and judges were to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs ("*querellantes*"), as allowed by the Criminal Procedural Code.

Given the significant delays and lack of proficiency observed by prosecutors and judges, the creation of this special office remains a priority. The creation of a specialized prosecutor's office is extremely necessary because something is sorely needed to correct the current unacceptable situation with prosecutors. Legislation is needed, however, to authorize budgetary funding for such an office, and pending legislation to accomplish that has fallen off the docket. We are hopeful that the Ministry of Justice will take such action in 2009 to create these IP prosecutors.

The business software industry awaits the opening of a specialized IP section in the Attorney General's office, which has been announced as forthcoming. Until it is launched, criminal enforcement of software piracy will remain weak due to the extremely low priority it receives in the Attorney General's office and because prosecutors decline to bring criminal cases, citing difficult standards in the law (before its 2008 amendments).

Inadequate civil remedies: BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the Law on Enforcement (*Ley de Observancia*, Law 8039) -- before its 2008 amendment -- required the rights holder 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 state 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 used 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 recently bring any civil cases in Costa Rica.

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. This unfortunate practice existed in previous years and continued to occur in 2008. 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.

GREECE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Greece remain on the Watch List in 2009.

Executive Summary: The level of copyright piracy in Greece remained high in 2008. Attempts to combat Internet piracy are frustrated by data protection legislative complications that pose a huge hurdle to pursuing investigations and litigation against infringers, especially in the peer-to-peer file-sharing area. Physical piracy of many copyrighted products remain readily available in the cities and on the streets. Regarding business software piracy, the tax police (YPEE) are working hard, and issued two waves of software audit letters to small- and medium-sized companies in 2008. The unauthorized photocopying of books and journals continues to occur on and near university campuses. Over the past year, Internet piracy became a major threat, no longer a distant fear but a stark reality. Despite some good cooperation between the copyright industries and the police, the overall enforcement system in Greece fails to tackle the endemic piracy problems. Some promising legal reforms were passed in 2007 but are not yet fully in force. For example, both the ministerial decree permitting administrative fines for certain infringing acts (including software and sound recording piracy) and a 2007 ministerial decree granting law enforcement authority to take action against street vendors distributing pirated products have not been fully implemented. Furthermore, lengthy court delays and a lack of deterrent sentences continue to frustrate rights holders. Defendants rarely receive sanctions, and those who do usually get suspended sentences. The industries are hopeful that the new Interministerial Steering Committee, which held its first meeting in May 2008, will open its doors for full input from the copyright sector so that all expertise may be brought to address the serious piracy and enforcement problems in Greece.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Greece in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- The Interministerial Steering Committee should announce a comprehensive national anti-piracy plan and campaign that augments raids, prosecutions, criminal (and non-suspended) sentencing at deterrent levels, training for enforcement officials and public awareness efforts.
- Continue and enhance cooperation with the police on inspections, raids and other anti-piracy activities, and 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 it has begun by sending direct mails (letters) to all Greek companies with more than 10 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. (4) YPEE should make music and sound recording audits when inspecting commercial enterprises such as bars and restaurants.
- Institutionalize a Special Operational Department for IPR issues within YPEE.
- Give law enforcement authorities the mandate and jurisdiction to pursue investigations on university campuses where Internet and hard goods piracy flourishes without significant threat.
- Take action against copy shops making illegal photocopies of books around university campuses, including Athens University of Business and Economics, Aristotle University of Thessaloniki, the University of Patras, the University of Piraeus and Deree College, among others, and coordinate campus policies to prohibit use of illegal materials on campus.
- Encourage Government ministries and agencies to legalize business software usage in public agencies.
- Direct prosecutors to bring cases more swiftly and aim for deterrent, non-suspended penalties.
- Courts should apply all possible procedural measures to guarantee defendants' presence at court hearings.
- Instruct all courts to issue deterrent sentences, including imprisonment and fines as provided by the law, and to not suspend sentences or fines (suspensions of fines are not permitted under the law).



- Judges serving on the new special IP (civil) courts in Athens, Piraeus, and Thessaloniki should be directed to work only on IPR cases and be relieved of their other duties. Such an IP court should also be established in Patras. The scope of these courts' jurisdiction should be expanded to criminal copyright cases.
- Improve IPR training and education for police, prosecutors, judges, and customs officials

Legislation

- Develop legislation to provide Municipal Police with authority to arrest and prosecute street vendors for intellectual property infringements.
- Develop legislation to make the unauthorized camcording of motion pictures in theatres a criminal offense.
- Amend legislation to permit ISPs to reveal identities of copyright infringers consistent with the 2008 European Court of Justice (ECJ) *Telefonica* case decision, including appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights.
- Maintain the civil procedural law provisions regarding ex parte search orders. With respect for cases involving copyright infringement, rights holders should always have the possibility to obtain a search order without summoning the defendant.

<p style="text-align: center;">GREECE Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2005-2008¹</p>								
INDUSTRY	2008		2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business software ²	198.0	58%	109.0	58%	93.0	61%	88.0	64%
Sound recordings & musical compositions	NA	60%	NA	60%	30.0	60%	26.0	60%
Motion pictures ³	NA	NA	NA	NA	NA	NA	72.0	NA
Entertainment software ⁴	NA	NA	NA	NA	30.2	68%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	198.0		109.0		153.2		186.0	

COPYRIGHT PIRACY IN GREECE

Hard goods piracy remains engrained in cities throughout the country, and presents a formidable enforcement challenge, despite many raids and good cooperation between enforcement authorities and rights holders. Internet piracy has become a serious problem, especially in the audiovisual and sound recording sector. Problems continue in combating end-user piracy of business software in corporate settings and unauthorized commercial photocopying on university campuses.

Business software piracy: The Business Software Alliance (BSA) reports that end-user piracy continues to be the biggest piracy threat to its industry in Greece. The widespread use of unlicensed software and distribution of low quality pirated CDs across the country is another problem. BSA notes that the level of software piracy in Greece remains high, but has declined slightly in recent years (from 61% in 2006 to 58% in 2008). To be clear, this level of piracy is still among the highest in Europe (with only Bulgaria and Romania having higher rates). Much of this decline over the last few years may be attributable in part to the work of the Tax Police (YPEE) and their sending software audit letters to small- and medium-sized businesses in Greece. It remains imperative that these letters are accompanied by actual enforcement action, where warranted, in order to press for legal

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on Greece under Special 301, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Greece, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2007), available at www.bsa.org. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

⁴ ESA's reported dollar figures for 2006 reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

software use.⁵ BSA's preliminary estimated 2008 losses due to piracy rose to \$198 million, largely due to a significant increase in the size of the information technology (IT) market for computers.

Piracy of music and sound recordings: The recording industry reports that physical piracy levels for recorded music dropped during 2008, after five years of increases that left the market flooded with pirated product. However, in 2008 Internet piracy (discussed below) grew significantly. In the physical environment, film piracy at video clubs, of which there are far more than record stores, is extensive, as is the problem of street piracy. The cities with the largest problems regarding music street piracy are Patra, Kalamata, Corfu, Crete and Thessaloniki, while the situation in the center of Athens has been substantially improved. Regarding physical piracy there is a clear network of illegal immigrants that operates at all levels from manufacturing to retail distribution of pirate music products, and this accounts for over 90% of the pirate physical market. Piracy of sound recordings and music in Greece represents around 60% for both international and local repertoire. To be clear, the legitimate market for physical copies of recorded music is in disarray. According to a report compiled for the Greek music market by Deloitte, the total loss (state, social security, rights holders, industry, retailers, etc) due to physical piracy for the years 1996-2007 was over €1.15 billion (US\$2 billion). Losses to Internet/mobile piracy cannot be estimated.

Audiovisual piracy: The Motion Picture Association (MPA) and its local anti-piracy organization, EPOE, report that hard goods piracy, principally DVD-Rs and Internet piracy are almost on equal footing in Greece. Local representatives report that they have seen a slight decrease in street piracy of filmed entertainment products due, primarily, to the recent enforcement actions by the Greek government. Retail piracy levels remained unchanged although several pre-released film titles including *Transporter 3*, *Twilight*, *Valkyrie*, *Wendy and Lucy* and *The Wrestler*, have found their way to retail stores, which causes significant economic harm affecting the full life cycle of a film. It is evident that the Internet is the major source of illegal content for street vendors and video retailers. The major problem cities are Athens, Thessaloniki, Patras and some of the Greek islands, such as Zante, especially during the summer months.⁶ Furthermore, mod chips for consoles and region circumvention of DVD players are available in the Greek market. All mod chips are imported, mostly from the Far East.

Book and journal piracy: Illegal commercial-scale photocopying of academic textbooks continues in Greece, causing significant damage to higher education textbook publishers.⁷ 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.⁸ Major universities all over Greece are affected, including Athens University of Business and Economics, Aristotle University of Thessaloniki, the University of Patras, the University of Piraeus and Deree College, among many others. 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. The police do not have jurisdiction to pursue IPR cases on university campuses (academic asylum) where Internet and hard goods piracy flourish, and this poses a difficult political and enforcement problem. These enforcement problems are only exacerbated by the difficulty of collecting evidence of infringement due to the increasing "print to order" nature of the copyshops. At least one court case is pending, after several delays, following a 2007 raid, and authorities should ensure that this case is adequately heard and leads to deterrent penalties.

Internet piracy: As of early 2008, Internet piracy was still in its nascent stages in Greece, and peer-to-peer (P2P) file-sharing piracy had not yet deeply infiltrated the Greek market. However, this changed in 2008. Internet piracy is growing rapidly, mainly via P2P and cyber-lockers (with relevant links offered through forums) and occasionally via illegal sites hosted in Russia (such as music-bazaar.com and legalsounds.com). Leech sites and download sites are also a growing problem.

According to the EETT's (the Greek National Regulating Authority for the Telecommunications) report for the second quarter of 2008, broadband connections by the end of June 2008 were 22.45% higher than those of December 2007 and 63.71% higher than those of June 2007, now reaching more than 1.2 million users. EETT's report of December 2008 shows 1.5 million

⁵ According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Greek economy could be even bigger if Greece's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 1,035 jobs, \$385 million in local industry revenues and \$130 million in additional tax revenues for federal, regional, and local governments. See The Economic Benefits of Reducing PC Software Piracy, released January 22, 2008, and is available online at <http://www.bsa.org/idcstudy>.

⁶ However, problems associated with a particular geographical location should be viewed within the context of other factors such as time of the year, availability of local law enforcement personnel dedicated to piracy enforcement as well as any local surge of other serious crimes at that time.

⁷ Reports indicate that for some books adopted by large classes, sales are less than one quarter of what they should be based on the numbers of students, due to the quick response by copyshops upon finalization of the adoption process.

⁸ Recent examples include "buy four photocopies, get one free" deals, advertised by flyers near major universities.

broadband connections, which represents an increase of over 20% since June 2008. In contrast, mobile piracy is not such a severe problem in Greece as it is in other European countries. Although mobile penetration in Greece has reached a high level of 13.4 million connections by the end of 2007 (for a population of around 11 million people), mobile piracy seems to be low, mainly due to restrictions set either by mobile companies or the hardware itself. There are approximately 3.8 million Internet users in Greece, representing about 35% of the population (according to www.internetworldstats.com). The major legislative deficiency (discussed below) involves Greek legislation which prevents Internet Service Providers (ISPs) from disclosing information their subscribers' names or physical addresses in order for rights holders to continue investigations and pursue legal actions against suspected infringers. ISPs require a court or prosecutor's order to disclose the names of infringing subscribers.

COPYRIGHT ENFORCEMENT IN GREECE

On a positive note, the copyright industries report that their working relationships with the Greek enforcement authorities improved substantially in 2008 compared to 2007. This was promoted by the active involvement of the Hellenic Copyright Office (OPI), the work of the U.S. Embassy and industries' enhanced public education efforts. The principal challenges remain achieving tangible enforcement results through a difficult judicial system and affecting needed legislative/administrative reform (either to implement existing laws or further reform laws).

The Interministerial Committee: Two years ago, a Joint Task Force was established under the OPI. Last year the Task Forces in Athens and Thessaloniki were institutionalized to form a new Interministerial Steering Committee. Led by the Ministry of Foreign Affairs, this Committee's objective is to ensure more efficient coordination of all intellectual property initiatives in order to prevent piracy and counterfeiting. Its first meeting, devoted primarily to organizational issues, was held in May 2008. Unfortunately, none of the private sector organizations that were able to participate in the previous Task Force in Athens have been allowed to participate in this new Interministerial Steering Committee.

The copyright industries support the Interministerial Steering Committee and urges it to develop a national IPR action plan, coordinate enforcement efforts at an operational level, including the effective implementation of the administrative fine regulation and the ministerial decree on street vendors, adopt procedures for ISPs to deal effectively with repeat infringers, and develop and fund public awareness and education efforts, all working with industry. The Committee should receive regular reports of statistics on numbers of actions, level of crime addressed and location of actions from each enforcement body, as well as court statistics from the justice ministry. The committee should publish an annual report of this data. The problem is that this Committee does not consistently cooperate with industry; such cooperation is imperative to the success of any national IPR action plan.

Successful actions with the tax police on business software cases. BSA reports continued good cooperation and communication with the Tax Police (YPEE). Because the BSA program in Greece involves only end-user piracy actions (and not reseller piracy actions), BSA works closely with the YPEE on these administrative actions. The Chief Officer of YPEE changed during 2008, and BSA has established a good relationship with the new Chief Officer. However, the Chief Officer changed once again in January 2009. Two waves of audit letters were sent by YPEE in 2008 to small and medium enterprises (companies with 20–39 employees and companies with 16–19 employees). During 2008, YPEE conducted an undisclosed number of raids. YPEE should publish monthly statistics on the number of such raids, and the number and size of the fines imposed, and provide this data in regular reports to the Interministerial Committee. BSA would like to see a more systematic follow-up of these warning letters and more raids against non-responsive companies. There have been far too few raids and too little actual results. BSA appreciates the work done by YPEE, and expects that in 2009 YPEE will continue to send software audit letters, and even more importantly, YPEE will follow-up in the appropriate cases by: (a) initiating raids against companies, (b) incorporating software audits in the tax controls, and (c) imposing the administrative penalty when illegal copies of software are found. In addition, BSA believes the Greek Government should publicly commit to fight software piracy; no such announcement occurred in 2008. Such a public pronouncement by the government (perhaps coming from the Ministry of Finance) would greatly increase public awareness regarding the risks and illegality of unlicensed software and would codify the government's commitment to protect intellectual property.

Need to implement administrative fines in software and recording piracy cases: Although the Greek Government approved an innovative law amendment in January 2007 that introduced administrative fines for software infringements, the enforcement authorities have not yet implemented this law (see further discussion in legal reform section, below). The National Police and Tax Police (YPEE) have not issued Circulars to adopt the new legal framework on administrative fines nor have they mobilized their resources to inspect for software piracy. For the last three years, the only enforcement activity implemented by the government has been the YPEE's audit letters (mentioned above).

The recording industry also is very concerned with the lack of effective administrative enforcement and the lack of progress on this front in 2008; there has been no progress. Suspects caught with infringing music and software simply refuse to pay the fine for pirated CDs. Pirates prefer to face a full trial, where the Judges issue light penalties, usually suspended, even though the law foresees fines of €1,000–10,000 (US\$1,335–\$13,350), depending on the quantities seized. The Ministry of Culture in its effort to issue a directive adjusting procedural details did not take the suggestions of the recording industry and the local collecting society for music rights (AEPI), two organizations that have a long-standing experience in fighting piracy, into consideration. As a result, the new law is so vague and full of gaps that the police are reluctant to proceed on the basis of the administrative fine procedures, afraid of falling in its many legal traps.

Civil infringement actions on business software: BSA reports that in 2008, as in 2007, it experienced no significant problems related to its civil software cases. Search orders are granted without major difficulties and these cases are usually settled out of court. With respect to BSA end-user actions in 2008, 3 civil raids were executed, 79 warning letters were sent, 18 follow up letters were sent, 4 interim measures were filed, and 5 settlements were finalized. BSA has not filed any civil lawsuits seeking damages, it has filed only applications for injunctions. There is still one case under judicial review, however. In early 2006, a BSA member company conducted a software audit of a Greek public entity that is supervised by a Greek government ministry. Over several years, this Greek entity purchased this software through an annual tender process. The audit found the Greek entity had increased its number of users without purchasing additional licenses and also cancelled several tenders aimed at purchasing more licenses. Follow-up efforts by the company to collect amounts due were not productive. The software company filed a case in court, requesting damages; the first hearing was initially scheduled for November 2008, and was then adjourned until February 2009.

Criminal actions (raids) in the film and recorded music industries: EPOE reports that the audiovisual industry's relations with the local enforcement authorities continued to improve in 2008. Enforcement problems remain three-fold: (1) a lack of coordination between the Municipal Police, the City Police and YPEE; (2) an abundance of criminal offenses that are considered more serious than intellectual property infringements; and (3) widespread suspension of sentences. While there has been an increase in *ex officio* police raids in some cities, there also has been a decrease in police interest to go after pirates in certain areas outside of Athens. In 2008, EPOE conducted 73 raids (with an equivalent number of criminal actions initiated). There were 155 *ex officio* cases, also with an equivalent number of criminal actions initiated by the police; this is a significant increase over 2007 results and may be due mainly to the involvement of the Greek government.

The recording industry reports that its work and relationship with police authorities, especially in Athens, remained very good in 2008. However, this industry has had no cooperation with the fiscal police (YPEE, as reported above). The total number of cases, as per police statistics, dropped from 1872 in 2006 to 972 in 2007. The recording industry reports 588 cases in the first half of 2008 (full year statistics are not yet available).

Difficult problems with the courts--long delays, non deterrent sentences: A major hindrance to effective IP enforcement in Greek is its judicial system. The Greek Interministerial Steering Committee has tacitly admitted that Greek courts do not enforce the copyright law. Addressing the numerous possible causes of the below-discussed problems has been tediously slow, but a few years ago, even the possibility of improving this situation would not be possible, and there appears to be some possibility now.

Few prosecutions: 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. Although this systemic aversion appears to be slowly changing in major Greek cities (such as Athens, Thessaloniki and Patras), it remains a major obstacle to achieving effective deterrence. As one way to address this situation, EPOE has had to utilize the criminal "flagrant crimes procedure" which helps to reduce the court load when a case is postponed indefinitely, but this 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.

Delays and time consuming procedures: There are very long waiting periods for cases to be scheduled for trial. There are also numerous delays or postponements for a number of reasons that might drag a case to run the statute of limitations.

Suspended sentences and non-deterrence: There is a public perception that Greek courts tend to be lenient and with respect to copyright, most cases result in suspended sentences.⁹ For example, the one-year imprisonment sentence provided by law usually becomes three to four months imprisonment, but suspended for three years, and the €3000 fine (US\$3,860) is simply stricken entirely. In the rare occasions of more severe penalties, the defendants file an appeal, managing to put their sentence on hold. Also, 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 piracy cases where 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 translates to a lack of punishment with the only complication for infringers being the loss of their confiscated discs and equipment and the time they may have spent in the court. Fortunately, some First Instance Courts, especially in Athens, Piraeus, and Thessaloniki, are no longer suspending fines – even when they find mitigating circumstances. Unfortunately, however, these fines are often annulled by the Appeals Court. 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.

Special IP Courts: Special IP courts, which hear only civil IP cases, have been established in Athens, Piraeus and Thessaloniki. The copyright industries will continue efforts to expand such courts to Patras. In addition, it would be helpful if judges on the special IP courts could be relieved of their other (non-copyright) duties in order to focus on the IP docket. It also would be ideal if the scope of these courts' specialized court could be expanded to criminal copyright cases.

Supreme Court Circular: Several years ago the Supreme Court issued four judicial circulars to assist in disseminating the Court's view on the importance of IPR protection. This circular was addressed to all the judges nationwide, calling on them to apply properly the copyright law. Unfortunately, this judicial circular failed to have any measurable effect.

Actions against Internet piracy: Internet investigations in Greece can go only so far as identifying an infringing IP address. The relevant law for disclosure of personal data is very strict and limited to a specific range of crimes which, unfortunately, does not include copyright infringement. The Minister of Justice recognizes this limitation and has promised that the law (2225/1994) will be reformed to include felony aspects of copyright infringement. The release of the infringers' identity – among other targets -- is necessary so that the affected rights holders can initiate criminal or civil actions. MPA reports that it has one case pending against a "leech" site.

Cross-industry cooperation on Internet piracy cases: Greek ISPs are currently not cooperating with rights holders on Internet piracy actions, except occasionally on P2P sites hosted in Greece. This inaction does nothing to address the serious problem of P2P sites hosted outside of Greece. Some Greek ISPs even advertise their fast connections using mp3 files as a yardstick, thereby implying that faster connections can give a user easier access to music and movie files.

Over the past year, negotiations between copyright rights holders and ISPs have been underway, done under the auspices of the Hellenic Copyright Office (OPI). OPI is aiming for a result where the ISPs adopt voluntary measures in order to decrease Internet piracy. The three major issues for the copyright sectors consists of the following: (1) blocking access to illegal sites hosted in countries with poor or no IP protection; (2) adoption of 3-steps procedures of termination of P2P users' accounts; and (3) inclusion of felony aspects of copyright infringement in the provisions of the law regarding disclosure of personal data over telecommunications. The Ministry of Justice has promised to act on the third prong. The EETT can play a substantial role in the first two prongs. The copyright sector believes that the 3-step termination and access blocking do not compromise the user's privacy and therefore could be adopted by local ISPs.

Efforts to get other Greek ministries involved continued. In meetings between OPI and copyright organizations, it has been decided that the copyright organizations would send joint letters to relevant Greek authorities. In December 2008, such joint letters, requesting help from Greek authorities regarding ISP cooperation were sent to the Ministries of Justice and Culture and

⁹ First, 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. 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 addition, the appeal courts do not impose any fines. Second, 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. 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.

EETT. IFPI Greece reports that it participated in a meeting with EETT's Vice Chairman who promised a reform of the General Licensing Code and also committed to host a meeting between the ISPs and the copyright organizations.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Greece has revised its 1993 Copyright Act (Law 2121/93) a number of times over the past 15 years. In fact, Greece was the first of the EU member states to complete implementation of the directives in its copyright law, and the copyright industries have been generally pleased with that implementation. Greece also has implemented the EU Enforcement Directive. But because of difficulties and gaps in measures necessary to strengthen anti-piracy enforcement, there have been a variety of legislative and administrative solutions offered by the copyright industries. Some of these have been implemented, and others are still under development.

Pending reform of the Copyright Act in 2009: A Legislative Committee currently operating at the Hellenic Copyright Office under the Ministry of Culture is close to concluding its work to propose further reforms to the Greek Copyright Act. Over the past year, the copyright sectors offered various proposals to this committee. For example, it is hoped that the non-suspension of court-imposed fines and/or stiffer sentences is somehow included in this package. Other proposals include an amendment that court-imposed fines must be paid immediately; establishment of special police units throughout the country to address exclusively copyright infringements; non-suspension of sentences pending appeal; and, ISP coordination on copyright infringement matters. In addition, a provision should be added that those sentenced for a copyright offense should be unconditionally obliged to immediate payment of the fine, failing which they should be kept in custody until the monetary penalty is paid.

This Legislative Committee completed its work at the end of 2008, as expected. However, the Committee's release of the its work for public review has been delayed due to a cabinet reshuffle. Greece's new Minister of Culture will now need to become familiar with the Committee's proposal before making it public. The copyright sector hopes that the expected consultation process to discuss this Committee's proposals will be open and transparent.

Copyright Act Amendments in 2007: The Greek copyright law was amended in January 2007 (Law 3524/2007), which became part of the Copyright Act 2121/93, to give copyright infringers the option of paying an administrative fine in lieu of criminal prosecution. The amendment provides that street vendors caught in possession of up to 500 music CDs and up to 50 software CDs will be given the opportunity to pay an administrative fine of €20 (US\$27) for each music CD and €1,000 (US\$1,285) for each software CD, but the total administrative fine will be not less than €1,000. The law applies to several, but not all, copyrighted materials; it does apply to sound recordings and business software, with the support of those industries. The MPA lobbied for the complete removal of audiovisual products from this law because of its concern that this would only exacerbate the level of audiovisual piracy because it would not be restricted to only first-time offender. Furthermore, a decision by the Ministers of Finance and Culture was issued in September 2007 to provide the procedures of imposing the administrative sanctions, but these have not yet been implemented, due to administrative complications (such as the procedures for destroying the seized items, oversight of product destruction and exact procedures to collect fines, where fines were to be paid, what happens if arrests occurred early in the morning). It is not yet known whether any of the necessary tweaks to these provisions will be included in any future copyright reform package.

Criminal law reform: The Minister of Justice has promised to reform the criminal law (2225/1994) in which felony aspects of copyright infringement will be included. The law has been forwarded by the Hellenic Copyright Office to the Ministry of Justice, but because of recent GOG cabinet reshuffling, it has been put on hold. The copyright sectors are seeking reforms here similar to those reforms they are seeking in discussions with OPI on the Copyright Act.

Administrative fine law: Unfortunately the Administrative Fine, Law 3524, issued in January 26, 2007, has been ineffective. This fine has not been applied in practice, despite numerous complaints from IP rights holders and trade organizations. The recording industry reports that suspects refuse to pay the fine, insisting on a trial, which will take years. The business software industry notes that neither the National Police and Tax Police (YPEE) have issued Circulars to adopt the new legal framework on administrative fines nor have they mobilized their resources to do inspections for software piracy.

Joint law enforcement teams and ineffective implementation against street vendors: Ministerial Decree No. K1-1178, was signed June 25, 2007, and was intended to help remove street vendors from the streets by empowering the Municipal Police, the Tax Police and the regular Police to confiscate and destroy all items protected by the current intellectual property legislation when sold in the streets by street vendors. The Ministerial Decree was a welcome step forward, but its effective

implementation continues to be delayed for several reasons. First, a tri-partite destruction committee must be created to implement the destruction of the seized counterfeit and pirate items, and the Greek Government has been slow to resolve internal administrative problems between the Ministries. It appears to have been quite difficult to get these teams organized (as an aside, the recording industry considers it more effective if the Municipal Police would confiscate and destroy the pirate products, without the need to have any committees). Second, the Municipal Police, who are unarmed and have no authority to arrest people, refuse to go out without armed police escort because they are physically attacked by street vendors. Improved efforts are needed to get the three Ministries involved, that is, Internal Affairs, Public Order and Development, to considerably speed up the implementation process. Reports also suggest that amendments have been proposed to amend this Decree in order to simplify the procedure for the seizure and destruction of pirate products. Given recent reorganizations within the Greek government, this issue is not at the forefront.

Problems with obtaining access to personal data from ISPs: A critical legal issue involves industries' efforts to amend Article 4 of Law 2225/1994 so that ISPs are required to disclose the identity of users suspected of copyright infringement. A standing committee was supposed to deal with the amendment of this data protection law (2225/94), which lays down the principles applying to the disclosure of personal data of violators using telecommunication systems. Copyright rights holders proposals were ignored, and as a result, there is no access to data allowing them to enforce their rights against rampant Internet piracy, in particular P2P infringers. This further exacerbates the situation in a market already devastated by huge physical piracy. The Minister of Justice recognizes this limitation and has promised that the law (2225/1994) will be reformed so that the felony aspects of copyright infringement will be included. Any legislative action should be consistent with the 2008 European Court of Justice (ECJ) decision in the *Telefonica* case, and include appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights.

Immigration control: The industries were told in 2006 that the Ministry of Foreign Affairs intended to introduce legislation whereby immigrant street vendors engaged in any copyright violation would be deported and that Greek Embassies worldwide would be notified so that new visa requests by copyright violators will be denied. Once again, as with so many other initiatives in this area, no step has been taken towards solving this problem, which lies at the root of the pirate retail problem in Greece. Recent report indicated that there has been no movement on this issue and legislation has not been introduced.

Civil procedure law reform: The ongoing reform of the civil procedural law will affect the procedures granting search orders. The legislative committee proposes, in case of an *ex parte* search order, to summon the other party within three days. If this proposal is approved by the committee, this will cause a lot of problems to the issuing of *ex parte* search orders. Rights holders should always have the possibility to obtain a search order without summoning the defendant. This legislation remains pending but there is no estimate as to when it might pass.

Government software legalization: BSA reports no new developments or progress on government legalization efforts during 2008. 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.

IPR TRAINING AND PUBLIC AWARENESS

The copyright industries did offer and provide IPR-related training sessions to Greek enforcement officials. For example, the recording industry (IFPI) and the film industry (EPOE) held training seminars for police and custom authorities and IFPI and EPOE also participated in additional seminars for custom authorities that were organized by the government. BSA reports that in 2008 it offered trainings/seminars on software matters to YPEE. However, unlike trainings which took place in prior years, no trainings in 2008 were scheduled by YPEE. The industries believe that IPR training for judges must be organized by the Greek government. The industries consistently ask that such training be arranged, as it is a critical first step to lead to the proper application of the law which in turn will lead to effective enforcement against piracy.

More IPR training and education for police, prosecutors, judges, and customs officials is urgently needed. We understand that the Hellenic Copyright Office, working with the U.S. Embassy, has moved positively in this direction. The industries also hope that the Interministerial Steering Committee will include IPR training on a permanent basis, including resources and funding provided by the government.

HUNGARY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Hungary remain on the Watch List in 2009.

Executive Summary: Hungarian consumers and even legislators seem to exhibit an attitude that does not fully support copyright. Over the past year, the copyright industries have continued to actively cooperate with Hungarian law enforcement officials on investigations and prosecutions and have provided educational training to police, customs, prosecutors, and judges. The police, who have generally done a good job supporting Internet piracy investigations, are under-resourced and under-equipped to tackle this grave problem. There also are onerous requirements to prove ownership of rights and requests for expert opinions on all goods seized that strain limited resources of both the government and the rights holders. Some criminal cases involving Internet piracy resulted in indictments in 2007 and prosecutions are underway. Prosecutors and judges are still reluctant to treat copyright infringements as serious crimes, and those few sentences issued are not deterrent. The copyright sector is hopeful that the new national anti-piracy structure created by the Hungarian government, along with the national anti-piracy plan developed in 2008, will create results in 2009 that lower the piracy levels of both hard goods and Internet piracy in Hungary.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Hungary in order to improve the adequate and effective protection of copyrighted materials:

Enforcement

- Implement the national action plan against piracy that was developed in mid-2008 through the inter-ministerial task force known as HENT (the National Board against Counterfeiting).
- Allocate more resources to police forces to fight increasing Internet piracy.
- Specify to the police, prosecutors and courts that copyright and intellectual property cases are a priority.
- Take action against piracy in workplaces and educational institutions.
- Ban street sales of pirated products.
- Have the APEH (Tax and Fiscal Control Administration) initiate actions on online piracy cases.
- Develop procedural systems to overcome judicial delays, including streamlining legal investigations.
- Impose stiff criminal penalties to deter piracy.
- Encourage Internet Service Providers (ISPs) to cooperate with content industries in the fight against 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

- Revise the expert opinion system to allow for sampling methodologies, and increase resources allocated to fund the requisite expert opinions.
- Clarify that the private copy exception does not extend to those cases where the persons making the copies have actual or constructive knowledge about the illegal nature of the source.
- Adopt optical media regulations to control optical media production and distribution and to combat pirate optical disc production.
- In view of the reasons for which the European Commission has initiated infringement proceeding against Hungary, adequate norms should be included into the Copyright Law to eliminate the legal monopoly of poorly functioning collective management organizations like the FILMJUS.

COPYRIGHT LAW DEVELOPMENTS IN HUNGARY

Copyright law: In recent years, Hungary has amended its copyright law (the Copyright Act No. LXXVI of 1999, as amended) to comply with international norms and accede to the European Union. It also has implemented the relevant EU Directives, including the EU Information Society Directive, the EU Enforcement Directive, and the EU Resale Right Directive. At the end of 2008, the Parliament adopted a law to amend the Copyright Act (in particular, extending the application of the public lending right and regulating the use of "orphan works"). The bill included a provision that -- similarly to the way this has happened in other EU Member States -- would have clarified that the private copying exception, combined with a levy system, does not extend to those cases where the persons making the copies have actual or constructive knowledge about the illegal nature of the source. This provision was not included in the final law as adopted, unfortunately. IIPA members are concerned that the private copy exception might be interpreted to extend to copying from illegal sources; there is a need for legislative clarification that the exception is not applicable in such a case.

Optical media regulations: The 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 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 plant closure. The copyright industries look forward to working with Hungarian authorities to draft, implement and enforce such comprehensive optical disc regulations.

COPYRIGHT PIRACY IN HUNGARY

Internet piracy: Hungary's Internet user population is approximately 4.2 million people, reflecting about 41% of the population (according to www.internetworldstats.com). Hungary has the highest broadband penetration in Central and Eastern Europe. Internet penetration is approximately 29% nationally, and nearly 54% in Budapest and major cities, with over half of those being broadband connections. Competition among Internet service providers has brought about a slow decrease in prices, and mobile Internet services are on the rise. Internet piracy occurs in two basic ways: (1) marketing and distribution support for offline piracy (ordering burned CDs on the Internet, etc.); and (2) the fast-growing online piracy occurring through FTP (File Transfer Protocol) servers, peer-to-peer (P2P) file-sharing activity, and simple uploading of files to private web pages. More specifically:

- Peer-to-peer piracy: There are an estimated 600,000 P2P users in Hungary. The most commonly used P2P service is DC++, although it is losing popularity. The recording industry, led by ProArt, initiated several criminal actions against operators and major uploaders, and criminal cases against the DC++ hub operators began in 2008. Another file-sharing protocol, BitTorrent, is prevailing. The recording and films industries have successfully filed complaints with police who in turn have run several major raids against BitTorrent and FTP sites.
- Although the number of FTP servers has been reduced, those remaining have more capacity and international connections.
- Video streaming sites (such as YouTube) are gaining in popularity.
- Locally-based FTP servers offering downloads for money (typically via highly priced SMS¹) from local and foreign web-hosting sites is an ongoing problem. The FTP servers typically host content which is available for download through a "store front" website that provides information to users on how to register and pay via SMS for access to the illegal content on the servers. Though some copyright rights holders have had success in shutting down these "store front" websites through takedown notices to ISPs, the associated FTP servers remain in operation as they are typically associated with more than just one "store front." (The actual perpetrators are also very difficult to find in part because homeless people are often used to sign false contracts.)

¹ "SMS" is short message service, which is used in mobile telephone text messaging. Text messaging generates significant incomes for the mobile phone providers.

The Entertainment Software Association (ESA) reports that online piracy, particularly file-sharing and commercial FTP servers offering pirated content, remain a growing concern for the entertainment software industry. Hungary periodically appears among the top 20 countries in which online infringements occur. The industry's one-month P2P monitoring trial on 13 popular titles revealed that more than 50,000 completed copies were made during December 2008. These results placed Hungary 10th on the industry's list of countries with the highest ratio of completed game downloads relative to population. This particularly high level of illegal downloads, which also concerns other categories of works and objects of related rights, confirms the need for legislative clarification concerning the prohibition of private copying in those cases where the persons making the copies have actual or constructive knowledge about the illegal nature of the source.

Domestic "burning" and street/stadium piracy: All the industries report problems with locally mass-produced CD-R and DVD-R pirate materials, which are common because of the relatively low local prices of CD and DVD-R burners and blank CD-Rs. CD-burning is done by private users—especially students and small retail operations, and organized syndicates in the case of music products, that supply many, if not all, of the vendors at flea markets. Although street piracy seems to have declined slightly, it nevertheless remains a serious problem such that the industries continue to request that such street sales be banned. It is increasingly common to find musical albums stored in MP3 format on DVDs; this means that as many as 10-20 albums, even an artist's complete collection, can be obtained on one DVD. The largest market for illegal movie DVD-Rs is the Verseny street market, where as many as 20 vendors may be found each weekend, selling illegal movie copies. In Budapest's largest weekend flea market (Petöfi Hall), there are about a few stalls (2-3 stalls during most of the year, peaking to about 3-4 in December) where customers can place orders for pirate product after consulting lists or inlay catalogs of available titles (a practice also employed by small retail outlets, that also appear to sell legitimate video game product). ProArt requested increased surveillance of flea markets specializing in burned CDs (e.g. at Petöfi Hall, Verseny street market, Gyáli-street market, Veresegyház market), and almost weekly raids now take place there. The Verseny street market and Petöfi Hall are also the primary sources of pirated video game product. Pirate DVD-Rs are also found at other flea markets across Budapest. The special enforcement groups composed Customs, Police and Tax Authorities (APEH—Tax and Financial Control Administration), and led by APEH, will cooperate with ASVA and ProArt to conduct continuous inspections in ten regions nationwide. Piracy appears to occur with even greater incidence in areas outside Budapest.

Entertainment software piracy: In addition to the extensive downloading of games in Hungary described above, ESA also reports that locally burned pirated game discs, produced in small quantities or on demand by mom-and-pop operations in homes and in burning labs, continue to be available at flea markets and through small retail shops that also appear to sell legitimate game products. The small retail shops are also known to accept orders for specific titles, which are then delivered to the customer by messenger or through the post.

Business software piracy: Business Software Alliance (BSA) reports that in 2008, Internet piracy continued to rise (due in part to the declining prices and increased uptake of broadband Internet service) while more traditional forms of software piracy stagnated or even declined. While piracy is declining among businesses, piracy by consumers may be on the rise given the rise in PC sales. BSA estimates that the preliminary trade losses due to business software piracy in 2008 rose sharply to \$92 million, with the estimated piracy rate increasing slightly to 43%. BSA believes its active campaigns in Hungary have helped halt further declines in the legitimate business software market.²

Audiovisual piracy: The motion picture industry also is harmed by the widespread Internet and optical disc piracy problems. The sale of locally burned pirate DVD-Rs at flea markets, by street vendors, in video retail shops as well as in corporate offices remains a concern. Approximately 10 camcording and audio-recording incidents of both Hungarian and Motion Picture Association (MPA) member companies' movies occurred in 2007. MPA has worked with local theaters and police to address this problem. The good news film piracy caused by street piracy appears to have decreased slightly.

Piracy of sound recordings and musical compositions: Online piracy (mostly file-sharing, especially the DC++ system and BitTorrent) is now probably the number one concern for the music industry in Hungary. Although the use of file-sharing systems is widespread, ProArt reports that the number of users has not grown in large part due to its active

² According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Hungarian economy could be even bigger if Hungary's PC software piracy rate was lowered 10 percentage points over the next four years. This would create an additional 1,094 jobs, \$274 million in local industry revenues and \$63 million in additional tax revenues for national, regional, and local governments. See The Economic Benefits of Reducing PC Software Piracy, released January 22, 2008, and posted at <http://www.bsa.org/idcstudy>.

enforcement efforts. Even though music piracy was slowed in 2007, ProArt reports that new piratical developments have developed; there are more and more compilations of a single recording artist found in MP3 format. The online sales of physical copies of pirated recordings continues. A relatively new development in the distribution of burned CDs is that these products are advertised on the Internet. In addition, the more traditional sale of pirate optical discs at flea markets continues. ProArt stills finds high quality pirated copies in the second-hand stores. However, some of these stores have now closed, while others seem to carry fewer copies in response to criminal cases initiated by ProArt against such second-hand stores. It should be noted, however, that neither the police, nor the judiciary have actively followed up on the well-documented complaints filed by the recording industry against these highly organized pirate shops. Cumbersome formalities and a clear lack of drive from the judiciary are slowing down the process. On the commercial side, further shrinkage in floor space dedicated to music at supermarkets occurred along with a significant drop in local releases. Overall sales volume is expected to be nearly flat compared to last year.

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. Universities and enforcement authorities should work together to minimize the impact of this piracy on Hungarian and international publishers.

Optical disc plants: Industry reports that there are three factories that produce optical discs. Capacities have not believed to have changed since 2006. There is no evidence or reason to believe any of the factories are used for illegal industrial activities. 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. Obligatory SID (Source Identification) Codes should be a minimum requirement. For years, the copyright industries have urged the government to set up plant monitoring procedures like others in the region, to regulate the facilities and equipment where optical discs are manufactured. Two years have passed since the Anti-Piracy Coalition of the Music, Film and Software Industry sent an extensive paper to the Hungarian Government, stressing the existing problems and need for action and including a list of key elements of an effective optical media law.

HUNGARY Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ⁴	92.0	43%	75.0	42%	58.0	42%	55.0	42%	65.0	44%
Sound Recordings & Musical Compositions	NA	NA	20.0	35%	20.0	50%	12.0	30%	11.5	38%
Entertainment Software ⁵	NA	NA	15.9	79%	NA	40%	NA	30%	21.5	59%
Motion Pictures ⁶	NA	NA	NA	NA	NA	NA	102.0	73%	20.0	35%
Books	NA	NA	NA	NA	NA	NA	4.0	NA	4.0	NA
TOTALS	92.0		110.9		78.0		173.0		122.0	

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on Hungary under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. See also IIPA's cover letter to this submission at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

⁴ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Hungary, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁵ ESA's estimated piracy level for 2007 in Hungary reflects a weighted average of three forms of piracy: PC piracy, console piracy and handheld piracy. ESA's estimated 2006 piracy rate reflects only 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."

⁶ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

COPYRIGHT ENFORCEMENT IN HUNGARY

Inter-Ministerial Task Force (HENT): In June 2006, a local Anti-Piracy Coalition of the software, music and film was formed, with the cooperation of the U.S. Embassy. This Coalition identified a list of priority actions which was ultimately submitted to the Hungarian Government. In January 2007, at a U.S. Embassy-organized workshop, the government agreed to establish an Inter-Ministerial IP task force. This Task Force, known as the National Anti-Counterfeiting Body (HENT), is under the Ministry of Justice and Law Enforcement and coordinated by the Hungarian Patent Office and is composed of government and industry representatives. HENT's objectives include cooperating in developing the national strategy against piracy and counterfeiting, preparing awareness campaigns, coordinating the activities of the state bodies and non-governmental organizations, and preparing legislative proposals, among others.

The government accepted a new National Strategy on October 1, 2008. The three pillars of the strategy involve: statistics, raising public awareness, and enforcement. The three major industries involved in this strategy are the food industry, the pharmaceutical industry, and the information technology industry. After the acceptance of the National Strategy, the following six working groups have been set up: statistics, criminal, pharmaceutical, trainings, IT, and Internet. One example of public awareness activities arising from this plan is the fixation of warning labels on all computers and equipment warning about the risk of illegal software and the value of genuine products; such warnings were found major electronic device distributor channels/stores starting in December 2008. The formation of HENT and its spearheading of this initiative is welcomed, and the industries hope that this will serve as a significant step in the fight against piracy and counterfeiting.

Criminal enforcement efforts continue as does cooperation with industry: The copyright industries have been working with law enforcement agencies for years. On October 25, 2005, ASVA (the local film industry), the BSA and ProArt (together the three are known as 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. These three groups also signed a similar agreement with APEH (the Tax and Financial Control Administration) aimed at assisting government efforts to crack down on the "black economy" and the losses sustained by Hungary's economy as a result of piracy. Parties to the cooperation agreements provide expert assistance, training and technical information.

For 2008, the industries report good police cooperation on raids and seizures and both the police and customs authority take *ex officio* action. The problem is converting the police actions into full prosecutions leading to deterrent sentencing. Also, a new subdepartment of the Budapest Police was established in 2007 to deal specifically with on-line infringements. These industry groups hope for increased involvement by the tax authorities this year.

The entertainment software industry (ESA) reports that its members active in the country continue to have a positive relationship with law enforcement authorities. In 2008, a video game publisher supported over 200 new cases, based on raids in which the quantity of seized products ranged from 1-200, averaging 20-30 titles per raid. Law enforcement have done relatively well in initiating criminal actions on their own, and then contacting the relevant rights holder for information as to product pricing, title verification and damages incurred. However, such notification and request for information does not consistently occur. It has been the experience of the publisher that early notification and involvement of the rights holder has produced better results as the investigation is then typically pursued further along the distribution chain, with law enforcement more thoroughly pursuing the matter. Transparency is, however, lacking and should be encouraged in law enforcement efforts. In addition to initiating actions *ex officio*, law enforcement also follow leads provided by a rights holder, initiating investigations into targets and organizing raids. Unfortunately, the response has varied greatly, with law enforcement at times slow to respond to rights holder referrals for raids and criminal actions. As IPR crimes are not accorded priority, it sometimes takes months before a raid is conducted on a long-identified target. Raids, however, do result in the confiscation of the pirated products and CD-R burning equipment found on the premises, which are eventually destroyed following any forensic examination conducted by state experts.

On the hard goods side, MPA reports in August 2008, the Budapest XV District Police raided a pirate burning lab, yielding 6 computers, 12 DVD burners, 6,700 pirate DVD-Rs with movies and 300 pirate DVD-Rs with PlayStation Games. This operation was against the main supplier of pirate products to the Verseny Street market located in Budapest. The Verseny Street market is the second largest flea market in Budapest with the highest level of pirated product. The supplier was raided

twice previously and will be criminally prosecuted. Special enforcement groups composed of customs, police and tax authorities, usually led by the tax officials (of APEH), generated positive results for the film industry.

BSA reports that the Hungarian authorities conducted approximately 100 raids in business software cases in 2008. The authorities tend to choose the easier way and start the *ex officio* investigations against small targets, taking only very few against business users, which is the sector that causes the largest commercial harm to BSA members. BSA did refer cases against business users to the authorities, and the authorities ordered the investigations.

The recording industry reports indicate that both police and customs initiated *ex officio* cases concerning piracy. Law enforcement officers were supplied with the Hungarian version of the IFPI/MPA Z-Card which contains practical information for on-the-spot identification of pirate optical discs. As a result, they are handling some of the simpler cases with more efficiency. ProArt has established good working connections with investigative authorities.

Internet cases: Hungarian enforcement officials took some impressive actions against Internet piracy in 2008. The industries reports that cooperation with Hungarian authorities improved in 2008 including with the National Bureau of Investigation, the Internet Department of the Budapest Police, Tax authorities, the Budapest Police Central Captaincy/Division of Economy, and Customs, among others.

Most notably, in December 2008, the Budapest Police raided a Topsite location, seizing two servers. Both the film and recording industries worked with law enforcement in this investigation. This 49-Terabyte Topsite was one of the largest Topsites in existence.⁷ In a separate action, one of the most notorious release groups in Hungary was dismantled and in yet another law enforcement action one of the most popular SMS websites in Hungary was raided and closed down. At least 1 more FTP site and 5 BitTorrent portal sites have gone down.

The recording industry also reports additional Internet actions involving music piracy. For example, a major Internet action took place in March 2008 when Hungarian police took action against two Topsites specializing in the illegal distribution of music on the Internet before it is legitimately available for sale online. The clusters of servers seized by the police were called XXS and Z and contained a total of eight terabytes (8TB) of copyright infringing content that was distributed by several release groups, notably XXL and RAGEMP3. The servers were all hosted by a Hungarian company called Sigmanet. All topsites operated under high security, but technical experts from IFPI (the International Federation of the Phonographic Industry) which represents the recording industry worldwide, and ProArt, were able to infiltrate these servers, gathered proof of infringement and provided the Hungarian authorities with the evidence they required to take action against said sites.

In 2007 and 2008, some criminal cases involving Internet piracy moved forward. Customs officials were involved in online cases and prosecutors issued indictments (such as against DC++). Even though these cases have not yet made it to court, the industries are hopeful that the educational trainings they provided to judges will help them understand the technological and legal elements of these cases.

Many industries report that cooperation with Hungarian ISPs is relatively good. BSA reports good ISP cooperation with its software cases, and in 2008 the ISPs usually fulfilled BSA's notice and take down (N&T) requests without any problems. MPA also reports that two large ISPs have been very cooperative, reacting immediately to MPA's notice and take down letters, providing information to the authorities in a timely fashion, and taking action to limit illegal traffic on their systems (such as removing large volume users). ProArt sent 2,000 N&T requests, of which more than 98% were successfully resolved. An ESA member company also reports positive responses to several of its take down notices, resulting in the prompt removal of the infringing material from the website hosting the pirated games.

Prosecutorial bottlenecks with expert reports: 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 Hungarian Copyright Experts Council (appointed by the Minister of Justice and Law Enforcement and linked to 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

⁷ Topsites are clusters of high-speed computer servers on which copyright infringing material is uploaded for users (who are often involved in "release groups") to distribute further over the Internet.

necessarily fully qualified. ProArt has reported difficulties in trying to convince the authorities to use only qualified experts; the good news is that there has been some improvement in this situation in 2007. In fact, the police and customs are now using better trained experts to help them with online cases, which is clear from the growing number of successful actions in that realm. Rights holders are unable to give expert opinions, as they are considered to be interested parties; at best, rights holders can only act as consultants in criminal cases. Ideally rights holders should be accepted as experts in these cases. It has also been reported that resources allocated to police departments may have been decreased in 2008. If this is true, funding for experts may be among the first cuts and thus, jeopardize any progress made with respect to beefing up the experts' roster. A shortage of qualified experts will likely result in further delays in proceedings.

Delays and non-deterrent penalties: Unfortunately, even given the successes with raids and seizures, prosecutorial delays, weak sentences and non-deterrent penalties (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. In most instances, if the matter only involves small scale infringement and the associated damages not deemed significant, the prosecutor typically only issues a reprimand and terminates the investigation. An ESA member company reports that in 2008, 9 of its cases were simply terminated with a reprimand issued to the infringer (while another 9 were terminated due to lack of evidence).⁸ Where an indictment is actually made, the case often languishes before the court for two to four years, with the rights holders typically uninformed of any developments in the proceedings. Proceedings in Budapest also typically last longer given the congestion in the courts of the capital. For cases that actually reach resolution, the usual sentence is a small fine (a few hundred dollars) and a suspended jail sentence (of up to 2 years) or community service. Where a rights holder claims damages, through a civil procedure that is initiated either after or simultaneous with the criminal procedure, the claimant must pay a duty of 3% or 6% of the claimed damages.⁹

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 border patrol is being integrated into the police. The IPED (Intellectual Property Enforcement Department within Customs) consists of one dedicated IP customs officer in each of the six customs regions. ProArt and ASVA organized special trainings for these officers, and ProArt gave certificates of merit to the most successful customs officers in December 2007. As mentioned above, border officials are also taking part in Internet piracy investigations.

Civil copyright cases: BSA reports that in 2008, the Hungarian civil courts issued approximately 70 judgments in software cases, mostly against targets of smaller significance.

IPR TRAINING AND PUBLIC AWARENESS

The recording, business software and audiovisual industries, individually and collectively, provide trainings for police officials, judges and public prosecutors. In addition, trainings have been held for accountants, CEOs within the framework of HENT's national strategy. As an example, BSA representatives gave a lecture for European officers on a training organized by U.S. State Department Office of International Intellectual Property Enforcement at the International Law Enforcement Academy (ILEA) in Budapest in October, 2008.

MARKET ACCESS IN HUNGARY

Fair compensation for audiovisual producers' shares: Hungary imposes a levy on audio and video carriers and allocates collections among audiovisual rights holders, including authors (scriptwriters), directors and producers. Current Hungarian legislation has empowered local collection society FILMJUS to collect all shares of levies (such as those generated from these levies). The U.S. audiovisual sector has long been concerned over FILMJUS' exercise of monopoly control over levy administration. The European Commission is also concerned with this situation, and it has initiated infringement proceedings against Hungary regarding certain provisions of the Hungarian Copyright Law which guarantee monopoly position for collective

⁸ The game publisher also reports that there was some progress in many of its cases in 2008. 67 of these cases actually resulted in verdicts, with sentences meted out. Though only one resulted in significant jail time.

⁹ The applicable duty rate depends on the amount of damages claimed (if above 1 million HUF – 6%), and on the defendant's denial (6%) or acknowledgment (3%) of the facts.

management organizations. To address these problems, adequate norms should be included into the Copyright Act to eliminate the legal monopoly of poorly functioning collective management organizations like the FILMJUS.

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.

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Now that the Israeli government has passed a new copyright law (effective May 25, 2008), right holders wish the government's focus to return to enforcing their rights and removing barriers to entry for legitimate businesses in Israel. Unfortunately, Israeli law enforcement against copyright piracy waned somewhat in 2008, and what enforcement actions did occur were spearheaded by industry, not (for the most part) by the Special IP Units of the Israeli Police. With few exceptions, Israeli law enforcement takes little interest in enforcing copyright, is ill-equipped to help protect digital copyrights, with inadequate manpower and funding, and has placed little emphasis on training. In the meantime, pirates, many of whom are connected to organized crime, carry on in their high profit, low-risk activities. The effect on legitimate copyright business has been staggering, with an estimated 300 video libraries shut down during the last two years, legitimate sales declining for distributors, and theatrical box office declining since 2001. IIPA remains concerned about the 2007 copyright law, which does not fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, more than 12 years after those treaties were agreed to, and notwithstanding 70% Internet penetration in Israel and high levels of broadband penetration. Other recent legislation, including a troubling Electronic Commerce Bill which would have weakened protection for copyright on the Internet, and a troubling Bill which would have imposed mandatory joint-collection of royalties for different right holders and compulsory rate-setting, should be permanently shelved. Finally, IIPA is concerned about some recent case law developments, including a recent Tel Aviv District Court decision in which the Judge appears to be rewriting the Israeli law in denying copyright protection for filmed sporting events, which could set back copyright protection in Israel and complicate enforcement efforts on the Internet.

Priority Actions Requested in 2009: IIPA requests the following actions by the government of Israel, which, if taken, would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Fortify the Special Police IPR Units, by adding staff, funding, and providing them with *ex officio* raiding authority. A National Police Unit director should be assigned to coordinate districts for effective and sustained enforcement.
- Tackle burgeoning Internet piracy through pro-active Israeli Police pursuance of Internet piracy cases.
- Give copyright piracy cases priority attention, through Israeli Police and prosecutors expeditiously handling copyright piracy files, processing criminal prosecutions of pirates, and seeking substantially higher penalties.
- Apply deterrent penalties at the courts, which historically have been very lenient in copyright cases; establish links to organized crime statutes to heighten these cases.
- Establish national and independent unit specifically to prosecute piracy cases.

Legislation

- Consider copyright amendments to enhance protection, e.g., by adding prohibitions against the circumvention of technological protection measures, circumvention services, and the trafficking in circumvention devices; protecting foreign sound recordings on the basis of national treatment; and ensuring exceptions in the law meet international treaties' tests.
- Pass Bills currently being considered that would provide for closing down operations and confiscating property of those caught selling pirate materials.
- Enforce court decisions ordering Israeli cable operators to make payments for retransmissions of broadcast television signals, and scrap draft law demoting the cable and satellite retransmission right to a mere right of remuneration.
- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.



ISRAEL										
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS)										
AND LEVELS OF PIRACY: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	NA	NA	50%	45.0	50%	28.0	35%	34.0	40%
Business Software	72.0	32%	57.0	32%	47.0	32%	39.0	32%	30.0	33%
Entertainment Software	NA	NA	NA	NA	11.4	84%	NA	95%	12.4	88%
Books	NA	NA	NA	NA	1.0	NA	1.0	NA	1.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	61.0	61%	30.0	40%
TOTALS	72.0		57.0		104.4		129.0		107.4	

PIRACY CHALLENGES IN ISRAEL

Retail Piracy Decreases Slightly in 2008: Sales of pirate CD-Rs, DVD-Rs, and CD-ROMs in stores and in major commercial centers like Tel Aviv, Haifa, Jerusalem, Rishon Le-Zion, Rosh Ha-Ayin, and Herzlia decreased somewhat in 2008. However, sales of pirate disks still take place in markets and street sales stands. Most of the pirate CDs seized in raids are sourced back to local burning activity in underground laboratories throughout the country, as opposed to industrially manufactured. The burned disks are of very poor quality. Such underground laboratories are difficult to locate as they can be set up in small rooms in domestic premises. The extent of the burning problem is increasing with time, due to increasingly easy and inexpensive access to burning equipment. The business software industry also experiences hard-disk loading, by which empty computer hardware is sold for a price, but then is loaded for free (or for a charge for the service) with all the latest software, all of it illegal.

Internet Piracy: Almost 5.3 million Israelis, or 74% of the population, had Internet access as of May 2008 (according to TNS Global), with 1.4 million broadband subscribers as of September 2007 (according to the International Telecommunications Union). As such, it is not surprising that illegal P2P file sharing, sites which offer deep links to illegal downloads, bulletin boards, and direct sharing of files are prevalent in Israel.

Business Software End-User Piracy Remains Relatively Low: The Business Software Alliance reports that due to the high level of awareness in the market about software copyright, and general compliance by businesses with managing their software assets properly, the level of business software end-user piracy remains roughly stable at 32% for 2008. A study released in January 2008 by International Data Corporation demonstrated that a further 10 point reduction in software piracy by 2011 would deliver nearly 2,887 new Israeli jobs, US\$320 million in tax revenues for the Israeli governments, and US\$604 million in economic growth in Israel.² In contrast with the low piracy levels in businesses, the industry reports that piracy levels among consumers remains relatively high due to a lack of enforcement in that area.

Organized Crime and Piracy: There are organized crime elements in Israel involved in local production and distribution of pirate products in main markets such as the central bus station in Tel Aviv, the Carmel market, and Haifa's main street (Ha-Azmout Street). Almost all the stalls in Israeli flea markets where counterfeit and pirated products are sold are controlled by organized criminal organizations. With the decrease in sales in fixed locations in 2008, the involvement of organized crime groups and street gangs in pirate sales has increased. This phenomenon hits music piracy, audiovisual works, clothing, and pharmaceuticals, and includes imported pirate goods. A serious approach to this problem is required, including the deployment of investigators familiar with organized criminal activity, and enforcement of laws aimed at organized crime (and including, where necessary, amendment of those laws to include copyright piracy as a predicate offense).

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Israel. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Israel's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Israel*, January 2008, at http://www.bsa.org/-/media/Files/idc_studies/bsa_idc_israel_final%20pdf.ashx.

Public Performance Piracy: Illegal public screenings of DVDs continue to be a problem in hotels, cafes and pubs, one that has grown since the introduction of pirate DVDs and new sophisticated viewing and display equipment.

ENFORCEMENT CHALLENGES IN ISRAEL

Enforcement by IP Units Deteriorates Somewhat in 2008: Copyright owners report that in 2008, enforcement efforts waned, in part because a number of police officers assigned to the Israeli Police IP Units were reassigned to other units. As of early 2008, there were 30 officers handling all types of intellectual property infringement and spread across four separate districts and one headquarters. The units have historically been under-funded and have lacked coordination and structure, for example, they fail to define proper targets in advance. The Israeli authorities also refuse to act *ex officio*. Where enforcement efforts did succeed, it was largely due to the close involvement of industry.³ Right holders also report that conducting civil raids posed enormous complexities and are very expensive. In mid-December 2008, industry met with the police commander of a special crime unit who expressed interest in consolidating the IP officers into a bigger and stronger unit. IIPA supports such a move and looks to the Inspector General to move on this in early 2009.

Court Cases Reveal Complexities in Internet Piracy Cases: It remains the case that the Israeli authorities show little inclination to assist in the fight against increasing Internet piracy in Israel. The industries report that their capability to operate against Internet piracy is constrained by the lack of appropriate Internet legislative framework and by the lack of the Police's willingness to pursue Internet pirates. Thus far, then, it has been left for courts to determine how the Israeli laws should be interpreted when faced with requests to block sites offering, promoting or facilitating pirate content, and requests for information about alleged infringers. In March 2008, the Haifa District Court ordered that Israel's three largest ISPs block access to HttpShare, a BitTorrent and deep link website.⁴ The Judge ordered the ISPs to "systematically block access to the illicit site, HttpShare, so that surfers cannot enter this site and utilize it in order to impede upon the claimants' copy rights." IIPA applauds the decision, and notes that the site, which is hosted outside of Israel (in the Netherlands), is aimed at Israelis (it is in Hebrew) and clearly was placed where it was to try to avoid liability in Israel.

In another case, in July 2008, the Tel Aviv District Court issued a preliminary "Decision" declining to order service providers to divulge identifying information of a website offering free streaming of Premier League soccer matches beamed into Israel from the United Kingdom.⁵ The judge in the July "Decision" (albeit the judge has requested the opinion of a government of Israel legal advisor) denied copyright protection to the filming of sporting events, as he considered that the originality threshold is not met in film works that consist of live sports events. If this decision is made final, it would not only reverse longstanding Israeli Supreme Court jurisprudence holding that, under the previous law, of course the copyrightable elements in the filming of the sports event are protected and cannot be appropriated by a third party without infringing copyright. IIPA hopes the court will reconsider its opinion, which could have dangerous implications regarding the existence of copyright protection for many other events which are broadcast live. By contrast, the recording industry reports a January 2009 decision, where a court ordered Google and a local service provider to disclose information on online infringers. The case sets a positive precedent for right holders, since the required showing for disclosure to be ordered is that the plaintiff can demonstrate a "real reason to suspect that an infringement of an IP right is taking place." This threshold is reasonable.

Lack of Criminal Prosecutions for Piracy, and Lack of Deterrence: Israeli courts have demonstrated a longstanding reluctance to view copyright piracy as socially harmful activity requiring a deterrent criminal remedy, and unfortunately, due in large part to the lack of seriousness of the prosecutors, most cases, criminal or civil, that are brought before the courts involve small and insignificant offenses, and result in non-deterrent sentences, usually fines and suspended sentences. IIPA believes it is critical that copyright piracy cases be taken more seriously, with prosecutors choosing higher profile cases and seeking maximum penalties allowed under the law. IIPA also believes the State Advocacy and the Israeli Police should file more criminal charges involving multiple counts, including under money

³ For example, the International Federation of the Phonographic Industry reported two successful raids in February 2008 against pirate CD-R burning labs in Israel, both carried out with the assistance of IFPI Israel, which netted dozens of CD-R burners, and because the suspect was known to the Police from previous counterfeiting activities, was expected to result in a severe indictment. International Federation of the Phonographic Industry, *Pirate CD-R burning equipment seized in Israel*, February 21, 2008, at http://www.ifpi.org/content/section_news/20080221.html.

⁴ *Court forces three largest ISPs to take action...*, March 10, 2008, at <http://www.dslreports.com/shownews/Israel-Latest-To-Force-ISPs-To-Block-Piracy-92487>.

⁵ *The Football Association Premier League Limited v. Anonymous*, District Court of Tel Aviv – Yaffo (MCA 011646/08).

laundering or other organized crime statutes, which carry with them the possibility of very serious penalties. There remains a very serious bottleneck of copyright cases at the prosecutorial level, and indictments are subject to huge delays, slowing down the entire enforcement process. IIPA requests that a national, independent unit be established specifically to prosecute piracy and counterfeiting cases.

COPYRIGHT LAW REVISION

November 2007 Copyright Order (United States), 5713-1953 Confirms National Treatment for U.S. Works and Sound Recordings: In November 2007, the Israeli government issued a revised Copyright Order, confirming that U.S. works (including sound recordings which were regarded as works until the passage of the 2007 law) receive national treatment in Israel, whether published or unpublished, and if published, regardless of whether first publication occurred in Israel or the United States. As a result, by virtue of the 1950 Bilateral agreement in force between Israel and the United States and this revised Order, U.S. sound recording producers will continue to receive national treatment in Israel.

Copyright Law 2007: A comprehensive Copyright Law was enacted by the Knesset on November 19, 2007, replacing the old set of Orders and Ordinances (which were largely based on the 1911 Copyright Act of the United Kingdom),⁶ and entering into force on May 25, 2008. The law made some important positive changes, which are not discussed in detail here. Some of the new provisions unfortunately resulted in weakened protection, for example, with respect to foreign phonograms. It is highly unfortunate that the Israeli government did not take the opportunity presented by this legislation to fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, by adding protection against the unlawful circumvention of “technological protection measures,” circumvention services, and the trafficking in circumvention devices. There are also no provisions dealing with “rights management information,” which some right holders choose to use to facilitate licensing. Regrettably the Knesset also rejected other attempts to introduce modern elements of copyright protection into this law such as an extended term of protection for sound recordings. The following is a list of shortcomings in the 2007 Law:

- **Legal Protection for Foreign Phonogram Producers is Seriously Weakened (Sections 8, 10):** Israel has until now protected sound recordings as if they were “musical compositions,” i.e., as “works.” In addition, 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, including public performance and broadcasting rights. Under the 2007 Law, the situation changed, such that foreign right holders in sound recordings (other than U.S. sound recordings which as noted above enjoy national treatment on the basis of bilateral arrangements) no longer enjoy equal treatment, and could be denied rights, and therefore payments, for their sound recordings in Israel. The government should immediately reinstate the protection for foreign sound recordings enjoyed under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals. In addition, the principle of national treatment should once again be applied to all subject matter.
- **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 must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. While the Israeli government has considered this issue for many years, the Law failed expressly to criminalize end-user piracy, although Sections 48 and 51, dealing with “indirect” civil infringements, make it illegal to possess an infringing copy for “commercial purpose,” which we believe may cover certain end-user situations. The government should amend the law to expressly criminalize end-user piracy.
- **Civil Remedies (Statutory Damages) (Section 56):** Section 56 to the Law sets new amounts of statutory damages without need of proving damages between 0 NIS and NIS 100,000 (US\$24,800). 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 regrettable. Also regrettable is that while the “ceiling” for maximum damages was raised from NIS20,000 (US\$4,970), the “floor” was lowered from NIS10,000 (\$2,480) to no minimum. The 2007 Law further

⁶ Copyright in Israel was previously 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). Other ancillary legislation included 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. IIPA has not reviewed in all aspects the extent to which any or all of these are abolished by virtue of passage of the 2007 Law.

provides that multiple infringements will be deemed as a single infringement when determining statutory damages. The latter amendment means that the statute will not have a deterrent impact on virtually all piracy cases, especially in the most damaging cases, i.e., those involving many infringing copies of numerous titles. Moreover, the lack of any floor on minimum damages seriously undermines the deterrent aspect of the damages, at the expense of the copyright owners.

- **Presumption of Ownership for Sound Recordings Omitted (Section 64):** Inflicting a major set-back on enforcement of rights against piracy and wide-spread infringement, the presumption available in Section 64 to the 2007 Law for creators in enforcement proceedings regarding their title in the works in cases where their name appears on the work in the normal manner was amended to exclude sound recordings. Thereby, a new troubling discrimination was created between creators of all other works (for which the presumption will continue to apply) and sound recordings (for which the presumption was omitted). Presumably, since U.S. sound recordings enjoy national treatment in all respects by virtue of bilateral arrangements dating back to 1950, when sound recordings were considered works in Israel, the presumption in the 2007 law applies to U.S. recordings. This change as to other recordings, however, will impose unnecessary hardships on producers in establishing their rights in infringement cases. This totally unwarranted change in the law should immediately be revoked and the former version of Section 64 should be reinstated.
- **Limited Right to Injunctions:** Section 53 seriously limits the ability of copyright owners to enjoin infringement of their rights, by providing that the right to an injunction in copyright infringement cases exists “unless the Court has grounds for not ordering so.” This amendment not only limits the existing wide availability of injunctions in case of infringements, but also undermines the well-rooted view under Israeli case law that the right for an injunction in infringement of IP matters (copyright included) is not subject to exceptions and that it is the primary relief for the IP owner. This amendment raises questions about Israel’s compliance in spirit with TRIPS Article 44.
- **Destruction/Forfeiture Not Adequately Provided (Section 60):** Section 60 of the 2007 Law 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 has so requested, and the court may, if it finds that the claimant is likely to make use of those infringing copies, order the complainant to make payment to the defendant in the manner which it shall prescribe.” This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort,” in that the court may order the transfer and require payment.
- **Term of Protection for Sound Recordings:** Under the 2007 Law, Israel protects sound recordings for only 50 years “from the date of its making.” There is no reason not to afford at least 70 years to the owners of sound recordings.⁷ The international trend is for more countries to amend their laws to provide at least 70 years for sound recordings, and the government of Israel should agree to follow this trend and provide longer term to producers of sound recordings in Israel.
- **Protection for Pre-Existing Works and Rule of the Shorter Term (Section 44):** Section 44 of the Law 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, Section 44 provides, “The period of copyright in a work listed below shall not be longer than the period of copyright prescribed for such work in the law of its country of origin...” 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 Section 44 may 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 Berne Article 18, must be protected in Israel. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.

⁷ 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.

- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 of the 2007 Law would exclude from protection any import for which distribution in Israel is not authorized, i.e., so-called “parallel imports.” The 2007 Law goes further and provides that goods which are considered genuine in their country of origin cannot be prevented from importation to Israel even where the copyright owner in Israel is not the copyright owner of the work in its country of origin and has not authorized the import. 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.
- **Exceptions and Fair Use:** In light of the long list of exceptions in the 2007 Law, the Law should expressly implement the well-established Berne “three-step test” (incorporated into TRIPS), preferably by adding the test in Section 19 and making it applicable to Sections 18-32. 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: other than in special cases; in a way that conflicts with a normal exploitation of the work or unreasonably prejudices the legitimate interests of the right holder. Such a provision would provide the necessary guidance to the courts obliging judges to respect international norms in their interpretation of fair dealing (and other exceptions). Some of the exceptions listed in Sections 19-32 of the Law run afoul of the Berne three-step test, especially if applied in the digital environment.
 - **New “Fair Use” Exception Without Common Law Interpretation; Unlimited Ministerial Discretion:** Section 19(a) of the 2007 Law adopts a common law-type “fair use” test by stating that “Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.” Section 19(b) of the 2007 Law includes a list of factors that are similar to those in place in the United States. Section 19(c) then provides, “[t]he Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.” While IIPA would by no means object to the adoption of fair use as understood in the U.S., and as interpreted through decades of jurisprudence, Israel does not have that carefully-honed jurisprudence, and the adoption of the “fair use” standards without it risks creating gaps in protection that would not be justified in countries having a “fair use” tradition. Also, it is unclear whether, by virtue of this change in Israel, the many years of jurisprudence on “fair dealing” may have been thrown out. At least the provision should be amended as follows: In determining whether a use made of a work is fair within the meaning of Section 19(c), the factors to be considered shall include, inter alia:
 - (1) The purpose and character of the use, *including whether the use is of a commercial nature or is for non-profit educational purposes*;
 IIPA further expresses concern over the Knesset granting the Minister of Justice discretion in Section 19(c) to “make regulations prescribing conditions under which a use shall be deemed a fair use.” Fair use is a case-by-case fact-based inquiry. This discretion seemingly without standard on the part of the Minister potentially opens the door for even broader exceptions to be introduced in Israel. IIPA seeks clarification as to what the possible checks are to this seemingly unlimited discretion.
 - **Public Performance Exception in Educational Institutions (Section 29):** This Section provides an exception for certain public performances of plays, phonograms and motion pictures, mainly in educational institutions. Although the exception was limited in the legislative process to public performances taking place in the institution in the course of its educational activities only, it is still overly broad with respect to sound recordings. As far as sound recordings are concerned, the exception should further be limited as was done with respect to motion pictures, i.e. for teaching or examination purposes only. Equally important, the Minister of Justice has been empowered in Section 31 to define which public institutions are eligible for the exception. It is important that the Minister will confine the exception to public institutions that are official schools only and not to general educational-related establishments as a whole.
 - **Computer Program Exceptions (Backup and Interoperability) (Section 24):** The Draft exceptions as to computer programs should be more narrowly tailored. For example, it is not clear from the language that the back-up copy exception is limited to a single copy. More potentially concerning is the exception allowing for reproduction or adaptation for purposes of interoperability and for other purposes. IIPA previously commented that a useful comparison should be made with the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6⁸ in order to appropriately narrow the exceptions.

⁸ 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. Specifically, Article 6 of the Directive on “Decompilation” provides,

- The exception must meet the Berne Convention three-step test, and, unlike the 2007 Law, the EU Directive does so expressly.
- While the 2007 Law limits the copying or adaptation to “the extent necessary to achieve” said purposes (approximating the “indispensable” language in the chapeau of Article 6 of the Directive), the 2007 Law’s excepted copying or adaptation is not “confined to the parts of the original program which are necessary to achieve interoperability,” as in the Directive.
- The exception in the 2007 Law goes not only to interoperability, but also to a general security exception, i.e., copying or adaptation is permitted for the “[e]xamination of the information security in the program, correction of security breaches and protection from such breaches.”
- Under the EU Directive, it is not permitted to invoke the exception “for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright,” while the 2007 Law prohibits invoking the exception where “said information is used to make a different computer program which infringes copyright in the said computer program.” The words “development” and “marketing” should be added to narrow this exception at least.
- **Rental or Lending Right Exception:** Section 17(b) exempts from liability renting out works by “a public library or a library of an educational institute.” IIPA seeks clarification on whether this is intended to be a “lending” exception. To the extent it is rental and that computer programs and phonograms are subject to the Section 17(b) exclusion, the provision would violate 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 of 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.
- **Temporary Copy Exception (Section 26):** Sections 11(1) and 12(4) confirm that the temporary copies are protected in Israel. The exception in Section 26 is vague enough to cause great concern, e.g., “to enable any other lawful use of the work,” is overly broad, and is not tempered much by the language “provided the said copy does not have significant economic value in itself.” It is unfortunate that such a vague and potentially overbroad exception was adopted notwithstanding industry comments specifically directed to properly narrow the exception to avoid a clash with the Berne Convention and TRIPS standards. Here would be one way to amend the exception to make it more acceptable:

The transient copying, including such copying which is incidental, of a work, is permitted if such is an integral part of a technological process whose only purpose is to enable transmission of a work as between two parties, through a communications network, by an intermediary entity, or *and such is made by a person authorized to enable any other lawful use of the work, provided 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*~~said copy does not have significant economic value in itself.~~
- **Library/Archive Exception (Section 30):** Section 30 as written fails to meet the Berne Convention and TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and the statute must provide assurance

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form ... are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder’s legitimate interests or conflicts with a normal exploitation of the computer program.

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 would risk violating the Berne Convention 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.

- **Point of Attachment – Need Issuance of Order to Ensure Protection:** 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.” This confirms that there is no express point of attachment for foreign creations provided in the Law. Existing Orders implementing the Berne Convention, TRIPS Agreement, Rome Convention and other international treaties signed by Israel, which correspond to provisions in the old law, will have to be amended to comply with the 2007 Law before it takes effect on May 25, 2008.

OTHER COPYRIGHT-RELATED LEGISLATION

Piracy Shop Closure and Property Confiscation: IIPA is in full support of Bills which would provide for closing down operations and confiscating property of those caught selling pirate materials.

Electronic Commerce Bill Needs to be Reworked: The Electronic Commerce Bill that passed first reading in the Knesset in mid-January 2008, is still pending. The Bill includes a number of problematic provisions and would fail to establish proper mechanisms to deal effectively with Internet piracy. It should be reconsidered prior to its further consideration in the Knesset.⁹

Copyright Tribunal Bill Would Have Aimed to Create Troubling Mandatory Collective Management and Compulsory Remuneration and Rate-Setting: A Copyright Tribunal Bill was put before the Knesset in July 2006. The Bill, which represents the first attempt to establish a copyright tribunal in Israel, still awaits review by a Knesset committee. The Bill includes two notable problematic changes. First, it introduces a mandatory joint-royalty collecting system for public performances and broadcasting by a single umbrella organization to be selected by the Minister of Trade and Commerce. This mandatory joint collection would deprive producers of sound recordings of their basic property rights, overrule existing collection mechanisms which have been in operation in Israel for decades, disrupt existing commercial dealings with users, and likely lead to unnecessary conflicts between right owners forced to administer their rights jointly. Second, the Bill would require that the tariffs and royalty rates for broadcasting and public performance for the entire local market be set by a tribunal a pre-condition for their collection. In other words, royalties will not be collectable until after such tariffs are issued by the tribunal. This power in the tribunal would be unprecedented anywhere in the world, will be extremely expensive, and is unnecessary since, in most cases, royalties are agreed upon without legal dispute between producers and users. Both constitute a breach of the basic right to freely associate and the right to freely contract.

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. Specifically, more than eight years ago, AGICOA filed on behalf of its members a significant claim seeking compensation for the retransmission of copyright works by Israeli cable operators. This compensation is contemplated by international treaties including the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty. AGICOA's claim, filed after many years of trying to come to terms with cable operators directly, has gone unresolved. There has been delay caused by upheaval in the Israel cable industry, including bankruptcy filings by the operators, among other factors. It seems clear from the disregard of the Israeli courts and the failure to advance serious settlement discussions that there simply is no political will in Israel that will produce a fair result, namely an agreement or court order that equitable compensation must be paid to copyright owners of audiovisual works where those works are retransmitted without authorization by cable operators. It is imperative that this matter be resolved promptly with fair settlement for past failure to compensate right holders, together with a reasonable agreement with AGICOA for payment going forward.

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide periodic training in the form of seminars for Israeli Customs officials as well as members of the Special Israeli Police IP Units. IIPA staff also met with Ministry of Education international visitors to discuss copyright awareness educational efforts in the United States and to comment and critique the MOE's new Teacher's Guide designed for students on why intellectual property rights are important. Industry provided various packets and documentation our industries use in IPR outreach and public awareness. While not the focus of the MOE Guide, the main topic for discussion was ethical uses of content on the Internet, including the problems of inadvertent file-sharing.

MARKET ACCESS

Television Advertising Restriction Violates Israel's WTO Agreement: IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry. 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.

ITALY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Italy should remain on the Watch List in 2009.

Executive Summary: The continued growth of Internet piracy in Italy has become the top concern for most of the copyright industries in Italy in 2008. At the same time, hard goods piracy remains among the highest in Western Europe. End user piracy of business software remains a major issue as well. Enforcement authorities continue to be generally cooperative in conducting raids, but a lax attitude by the courts, generally non-deterrent penalties, and inadequate legislation have made it difficult for copyright owners to secure effective enforcement and to lower piracy rates and losses. Enforcement deficiencies are particularly acute in the fight against Internet piracy, with right owners having to rely almost completely on a few criminal actions taken by non-technically trained law enforcement. Civil enforcement by rights holders against direct P2P infringers is rendered virtually impossible due to the government's restrictive interpretation of privacy laws and the civil courts' refusal to order the release by ISPs of the identity of their subscribers engaged in significant infringing activity. While ISPs are generally cooperative in taking down the few pirate websites located in Italy, rarely is action taken against foreign websites and against major uploaders in the filesharing (P2P) environment. There is some hope offered by recent reports that a government-sponsored steering committee will initiate hearings in 2009 on P2P piracy with a possible bill to follow requiring ISPs to forward rights holder notices and to suspend and even terminate subscriber accounts of repeat infringers. This could, of course, be supplemented by additional, voluntary cooperation between ISPs and rights holders.

Priority actions to be taken in 2009: IIPA requests the following actions by the government of Italy, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Take steps to encourage the active cooperation of Internet service providers with rights holders to prevent the use of proprietary networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers.
- 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 and end user piracy of business software.
- Effectively enforce the anti-camcording law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.
- 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.
- Clarify the ability of rights holders to gather non-personally identifying IP addresses through appropriate tools, and consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, provide appropriate mechanisms to facilitate the ability of rights holders to obtain the necessary information related to such IP addresses in order to take appropriate civil actions to protect their rights in the online environment (which may necessitate legislative reform).
- 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, including streamlining procedures for calling of witnesses, etc.

Legislation

- Discourage legislative proposals that may undercut copyright protection.
- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law.
- Amend the copyright law to remove "remote videorecording systems" from the levy system, providing exclusive rights.
- Eliminate the stickering requirement, at least with respect to business and entertainment software, and recorded music.



- Amend the copyright law to eliminate the need for “relevant authorities” to order ISP takedowns and implement the EU E-Commerce Directive Article 14 requirement providing that ISPs are immune from liability only if they do not know or have reason to know that they are dealing with infringing content.

ITALY
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2008¹

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	1,242.0	49%	1,067.0	49%	729.0	51%	812.0	53%	779.0	50%
Entertainment Software ³	NA	NA	817.0	64%	647.7	40%	639.2	30%	NA	34%
Sound Recordings & Musical Compositions ⁴	350.0	25%	45.0	23%	48.0	27%	40.0	20%	45.0	23%
Books	NA	NA	20.0	NA	20.0	NA	20.0	NA	23.0	NA
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	161.0	22%	160.0	15%
TOTALS	1,592.0		1,949.0		1,444.7		1,672.2		1,007.0	

COPYRIGHT PIRACY IN ITALY

Internet piracy generally: All copyright industries report an increase in Internet piracy in 2008, making this issue a critical priority for US bilateral engagement in 2009. Broadband penetration continues to grow⁶ and the lack of cooperation by ISPs (discussed in the Enforcement section below) and inadequate legislation/enforcement have combined to make the online piracy situation worse than in 2007. While uploading of infringing content is illegal under the 2004-5 Urbani law, it is a common misperception that downloading is not infringing and that it is not harmful to the creative community. There is a similar misperception that it is not an infringement to provide links to infringing content on foreign pirate sites. Linking of this kind is indeed illegal under recent case law; nevertheless there has also been significant growth in such linking sites, which are particularly damaging to the music and movie industries.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on the history of Italy under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.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.

² BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Italy, and follow the methodology compiled in the BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” See Appendix B of this report.

⁴ The piracy rate for 2008 -- 25% -- reflects the market for physical piracy only. The rate of digital (Internet and mobile) piracy is conservatively estimated at over 95% of the digital market. The loss figure represents losses due to both digital and physical piracy.

⁵ MPAA's trade losses and piracy levels for 2006, 2007 and 2008 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this report.

⁶ There are an estimated 34.7 million Internet users in Italy, almost a 60% penetration rate. <http://www.internetworldstats.com/stats4.htm#europe>. Broadband subscribers are 11.8 million as of 3Q 2008, the 8th largest in the world. <http://point-topic.com/cgi-bin/showdocument.asp?Doc=dslanalysis/bbaq308.htm>

Most, if not all, copyright industries agree that the largest Internet piracy problem is illegal P2P filesharing, but that the number of linking sites to mainly foreign cyberlocker sites is mushrooming, enabling fast downloads of large files. Mobile device piracy, particularly for music and videogames, is also growing rapidly.

State of ISP cooperation. Major ISPs have generally been cooperative with respect to take down requests for websites and auction sites hosting infringing material. But the take down process is cumbersome as Italian law may be interpreted as requiring that takedown procedures be subject to a prior order from a “judicial or administrative” body.

It is a dramatically different proposition with respect to P2P piracy as ISPs have no incentive to cooperate with rights holders with respect to material transiting their networks. Even the mere passing forward to notices of infringement to potentially infringing subscribers is routinely refused. Such an environment makes private sector enforcement efforts particularly difficult, if not impossible in light of a 2008 decision rendered by the Garante per la Protezione dei Dati Personali (Data Protection Authority). In conjunction with the so-called Peppermint Case, the Data Protection Authority ruled that systematic monitoring of P2P users, and the collection of their IP addresses is an illegal activity under Italy’s law on the protection of personal data despite the fact that IP addresses do not personally identify the individual. In the absence of civil remedies (i.e., the ability of rights holders to undertake actions on their own behalf), Internet piracy enforcement necessary falls to the criminal authorities. Unfortunately, criminal authorities do not possess the necessary technical expertise or experience to successfully and efficiently pursue online piracy investigations.

ISP cooperation is, thus, essential to effectively addressing P2P piracy. Although private sector negotiations are ongoing, progress appears slow and it is unlikely that a cooperative solution/agreement will be in place any time soon in the absence of a government presence that compels a reasonable and effective result.

Online piracy of music and sound recordings: The recording industry reports that online music piracy accounts for losses far higher than it generates in legitimate sales -- or losses of over \$300 million in 2008. Last year, the local recording industry associations, FIMI and FPM reported that more than 7 million people use P2P networks for illegal uploading and downloading of music files. According to research carried out in 2006 by the Fondazione Einaudi, more than 30% of the people interviewed replied they have reduced the purchase of music CDs by using P2P networks. While piracy of physical product still remains around 25% of the market, the level of Internet piracy is estimated to be 95%. FPM studies show there was a further decrease of the legitimate market of about 36% due to online piracy. The estimated losses due to music piracy, both of physical product and on the Internet, were \$350 million in 2008

Online piracy of entertainment software: Entertainment software publishers reported in 2008 that Italy, along with Spain and France, consistently remains among the top five countries in which infringement of videogames occurs. BitTorrent and eDonkey continue to be the top two P2P protocols in Italy. In industry studies of infringing P2P activity for 13 top video game titles over a 4-week period, Italy placed number one in overall game download volume, and file sharers in Italy accounted for 17.2% of global game downloads made during the study period (more than 1,100,000 copies). For a popular AAA racing title alone, Italy had close to 590,000 downloads. Telecom Italia’s networks were implicated in 11.6% of the completed downloads observed globally, making it the world’s most heavily utilized ISP in the course of the industry’s study. (Another Italian ISP, IUNet, was the sixth most heavily utilized ISP) It was also found that with greater incidence of video game piracy through P2P networks, there appeared to be a corresponding and dramatic decrease in legitimate sales of entertainment software. Individual member company online monitoring confirms these trends.

The industry is also plagued by the easy availability online of circumvention devices, such as mod chips. This situation was exacerbated by a court decision in Bolzano, Italy, holding that mod chips were not illegal under Italian legislation implementing the EU Copyright Directive. Fortunately, the Supreme Court in 2006 reversed this court decision and found that circumvention devices are illegal under Italian law,⁷ but the damage was done and continues.

Online piracy of audiovisual works: Cyberlocker sites like MEGAVIDEO and links to them have caused a dramatic worsening in online piracy of motion pictures in Italy. The Motion Picture Association (MPA) reports that the video market in Italy declined by 20%, much of this due to online piracy. The industry faces a particular problem -- the illicit recording of the Italian

⁷ *Corte di Cassazione*, Judgment no. 1602 General Register No. 35598/2006.

language audio track in theaters immediately following a film's release. The audio track is then added to good quality pirate video found on the Internet. The local video association, FAPAV, estimates that 80% of the films released theatrically in Italy can be found in the Italian language on the Internet within two days of that release.

Online piracy of business software: The Internet is contributing significantly to the software industry largest source of piracy losses -- unauthorized use of software in business -- by becoming a growing source for those businesses obtaining illegal copies of productivity software. Such software is available via illegal filesharing and from websites, cyberlockers and auction sites. The Internet is also a major source for fake certificates of authenticity (COAs), manuals and packaging.

Online piracy of books and journals: The publishing industry reports significant increases in online piracy of books and journals in 2008, affecting foreign and local publishers alike. Most infringing files are scans of paper originals, but publishers also report an alarming increase in the number of digital primary and supplementary materials made available on P2P networks, offering CD-ROMS that come with dictionaries as a prime example. This surge is likely to continue in 2009, without concerted action by authorities and cooperation of relevant parties.

Piracy of physical product generally: Italy continues to have the highest level of piracy of physical (or hard) goods in all of Western Europe. Organized criminal groups (mainly in southern Italy) dominate the hard goods market for movies, recorded music, entertainment software and counterfeit copies of business software, from production to distribution, often using illegal immigrant networks to sell their products. For example, the organized criminal syndicates belonging to the so-called "Alleanza di Secondigliano" have full control over counterfeiting and piracy in the southern Campania Region. Other organized groups, such as the Camorra and its affiliates, directly manage production centers, also involving a vast network of local poor families that run small private duplication facilities. Pirate and counterfeit 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.

Business software: The level of piracy of business applications software by corporate end-users—the major cause of losses to the business software industry in Italy—remains among the highest in Europe. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Italian economy could be even bigger if Italy's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 6,169 jobs, \$4 billion in local industry revenues, and \$1.1 billion in additional tax revenues for federal, regional, and local governments.⁸ In addition, business software is locally burned onto CD-Rs or imported, often from China, and sold in Italy or transshipped to other EU countries. The sale of counterfeit software products by street vendors continues, often involving people coming from China and from Arab nations who are exploited by criminal organizations to market pirate product. Preliminary estimated U.S. trade losses in Italy due to business software piracy in 2008 rose to \$1.24 billion, with a piracy level of 49%.

Entertainment software: Hard goods piracy appears to be in decline, except in Southern Italy where it still remains a significant problem. The decline, however, appears to be due to the alarming increase in Internet piracy, as noted above, rather than increased law enforcement efforts. Pirated goods still continue to be imported from Asia, destined not only for Italy but also other European markets. The prevalence of circumvention devices, however, remains a critical problem in the country. Unfortunately, law enforcement authorities have done little to address it. These devices appear to be imported primarily from San Marino, considered to be the most active exporter in the region. ESA member companies continue to pursue vendors of such devices and circumvention services civilly, but criminal prosecutions against those engaged in the trafficking of circumvention devices and provision of circumvention services should be undertaken to serve as a better deterrent.

Music and sound recordings: In southern Italy, physical piracy of music and sound recordings remains particularly high. Large illegal burning centers are active all over Italy and consolidated street vendor networks run the distribution network for pirate products. Camorra gangs in Naples are very active in the production and distribution of pirate music on optical discs. Also, the failure to pay for broadcasting and public performance rights for music still remains unacceptably high.

⁸ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

Audiovisual works: MPA also reports no major improvements in the overall piracy situation in Italy during 2008. The problem of sale of pirate DVD-Rs in fleas markets and by street vendors continues. Camcording continues as a huge problem (including the illicit taping of audio tracks in theaters to combine them with video sourced primarily off the Internet). In 2006, Italy adopted the first anti-camcording legislation in Europe. 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. 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 remain at low levels, due to the new Seca 2[®] encryption system.

Books and journals: Unauthorized and uncompensated photocopying continued to plague academic publishers during 2008. Italy's Anti-Piracy law allows a certain amount of photocopying, but only upon payment of remuneration to a collecting society. Industry reports some success with licensing educational institutions (namely libraries), but less consistency with copy shops, which continue unauthorized activities with too little interference. Altogether, abuse of the law's provisions is common, costing Italian and foreign publishers alike substantial sums. 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.

COPYRIGHT ENFORCEMENT IN ITALY

The overall enforcement system in Italy remains weak and myriad deficiencies have resulted in the inability to obtain effective remedies and deterrent penalties against -- in particular -- online but also hard goods piracy, mainly at the retail level. The responsibility for enforcement is split among at least 19 offices and successive government reorganizations have kept enforcement fragmented. For example, in July 2008 the Office of the High Commissioner for Anti-Piracy was abolished in an efficiency move and its functions transferred to the Trademark Department at the Economic Development Ministry which was then merged with the Communications Ministry. However, its jurisdiction and powers are not yet fully defined. While that restructuring is due to be addressed by the government, it is hoped that one agency will be given overall responsibility for copyright matters. Fortunately the Secretary General in the Office of the Presidency (essentially Chief of Staff), Mauro Masi, is a strong ally and it is hoped that he will be able to be effective in strengthening and rationalizing enforcement in Italy.

Enforcement against Internet piracy: Internet piracy enforcement is severely hampered by (a) lack of cooperation from ISPs due to inadequacies in legislation; (b) difficulties in securing criminal enforcement due again to inadequate legislation and lack of will and training, and (c) the practical unavailability of civil enforcement due to the inability to obtain names of infringers from ISPs resulting from Italy's Privacy Code and March 2008 ruling of the Data Protection Authority. Many of these deficiencies also affect enforcement against hard goods piracy.

Criminal enforcement: The recording, audiovisual, entertainment and business software industries all report continued good cooperation with the Italian police forces (including the Guardia di Finanza (GdF) and the Polizia Postale) during 2008. However, the problem of slow court processes and lack of deterrent penalties overall have limited the deterrent effect of police action and cooperation. Courts regularly underestimate the seriousness of copyright violations and, in some cases, issue unclear or not well reasoned decisions which have disruptive consequences on enforcement generally. It can still take months between a raid and the filing of charges to commence a criminal case in court. Once the case is filed, they often take two to three years or more before final judgment, significantly reducing the deterrent value of increased raiding activity undertaken by the police.⁹ Many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where a large corporation owns the copyright. This situation was 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. There are no specialized IP criminal courts.

Furthermore, there is a need for more transparency in the investigative and prosecutorial process. Police do not take many *ex officio* actions but when they do, rights holders frequently remain uninformed about the status of the proceedings.

⁹ An entertainment software publisher notes that it has several cases which have been pending with the courts since 2000.

The recording industry, as represented by its local anti-piracy organization, FPM, reports that coordination with Italian enforcement agencies continued on a positive basis. The relationship with local enforcement authorities has gotten better following a specific agreement that was entered into with the Milan and Rome Municipal Police. There were a number of major criminal actions by the GdF to close down major online pirate operations. For example, in July 2008, the GdF closed down Italy's version of ThePirateBay (Sweden's infamous pirate operation), Colombo-BT.org, the largest BitTorrent tracker site in the country. This site helped to make available more than 390,000 music files and 500,000 movie files, including numerous pre-release titles. The site had more than 400,000 registered users and 800,000 unique users access each month. Three men were arrested and charged with criminal copyright infringement. They accepted online "donations" from subscribers. Several computers were seized and two bank accounts frozen. Also in July, the GdF shut down Downrevolution.net, one of the largest pirate music forum sites in Italy, linking 30,000 subscribers. Content was being made available from cyberlocker sites such as Rapidshare.com and Megaupload.com, responsible for 500,000 downloads. Four people were arrested; they were generating revenue from banner advertising. In October 2008, Operation "Music Box" was undertaken by the GdF and involved the arrest of 46 people for unloading infringing MP3 files through P2P services like eMule and Direct Connect++ (15,000 burned CDs were also seized). The raids were conducted in 13 different provinces and 52 desktop computers, two laptops, and 150 hard drives were seized.

Raids also continued against organized crime targets engaged in hard goods music piracy. In March 2008 the Catania, Sicily GdF seized 63 CD burners from an organized crime operation. Two persons were arrested and criminally charged. In May 2008, twelve people from an organized gang were arrested in Naples and Milan and the raids uncovered six pirate factories, using 350 CD burners. More than 70,000 CDs and DVDs were seized, along with 100,000 counterfeit inlay cards.

Inroads were also made against public performance piracy. In April 2008, 11 arrests of nightclub owners and bar managers that failed to pay performance rights fees were made in Florence, Bergamo and other northern Alpine towns. Criminal charges for copyright infringement, tax evasion and health and safety violations were filed. Dozens of computers and more than 50,000 music files were seized.

The total number of anti-piracy raids (for both online and physical piracy) in the music sector was 210, with the seizure of more than 750,000 CD-Rs/DVD-Rs and 845 CD burners. The police also arrested more than 360 individuals.

The business software industry also reports that its relationship with the enforcement authorities remains generally good, particularly with the GdF, which is the primary agency responsible for software piracy enforcement. However, the industry's sense is that the priority given to software piracy enforcement in 2008 diminished somewhat and it describes its relationship with prosecutors as mixed. Judges remain not particularly concerned with criminal enforcement of IPR violations. In 2008, BSA supported two raids against Internet vendors of pirate software seizing 3,490 illegal products worth over \$2.6 million. BSA provided technical assistance to 144 GdF raids on businesses, 97% of which were successful, involving 5,331 unauthorized software products with an appraised value of \$5.5 million. Other raids were carried out by police forces without BSA support or knowledge, though *ex officio* actions tend to be few.

The motion picture industry, through its local anti-piracy organization FAPAV, reports that the police are generally supportive of FAPAV's efforts. Like for other copyright industries, the primary bottleneck to effective is the dismissive attitude of the Italian judges towards piracy in general.

The legal environment and criminal enforcement: Court cases and inadequacies in the underlying statutory law have also undermined effective criminal enforcement, particularly against Internet piracy. For example, the fallout from a Court of Cassation case in 2007¹⁰ continues to affect attitudes toward Internet piracy. The court ruled that the unauthorized uploading of copyrighted movies, music and video games was not a crime if the accused does not obtain a financial gain from his or her act. The Court applied the law that was in effect at the time the uploading was carried out. The law was subsequently changed, and now punishes uploading even if carried out without any financial gain.¹¹ This was misrepresented in the press as "P2P is legal." Industry sought to clarify the decision in the public's mind but the problem lingers to today.

¹⁰ Sentence No. 1872 of January 9, 2007

¹¹ In April 2002, the Court of Turin sentenced two men to respectively four and five years in jail 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 in

As discussed in the section on legislation below, the 2006 "Pardon" law (and similar actions taken in prior years), granting amnesty for criminal convictions (including for piracy) with jail terms of less than three years, has reinforced the general perception in Italy that the probability of actually being punished is low.

Civil Enforcement: As noted above, civil enforcement against Internet piracy is severely hampered by an interpretation of Italy's Privacy Code made by a Rome High Court in the famous Peppermint cases and a March 2008 ruling of the Data Protection Authority to the effect that use of search tools to gather IP addresses of infringers would violate the Privacy Code.¹² This has severely limited the ability of rights holders to bring civil Internet cases and unless there is a clear legal way to secure such addresses and thereafter the names of subscribers via a civil court order, civil enforcement will be as a practical matter unavailable, since the names of subscribers were not permitted to be made available. Local efforts to reverse this have so far not borne fruit.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. Four civil cases were brought at the end of 2008 resulting in damages of more than \$258,000 in the two cases where the businesses had no licenses whatsoever. BSA also reports that there has been an increasing reluctance of courts to award *ex parte* search orders or to award such orders in a timely fashion. This seriously hampers efforts to take civil action against software infringers.

Specialized civil IPR courts: In late 2002, a law was adopted which would create 12 specialized IPR civil courts. BSA continues to report that some specialized IP Courts do not appear to be keen on receiving software search order requests; and, as noted above, timing to obtain the orders is longer. These courts still have to 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 very slow in some cases. For instance, urgent measures may now take up to eight to ten months (as when the infringement needs the completion of a Court Expert report and the plaintiff requests an injunction or similar remedies).

COPYRIGHT LAW REFORM AND RELATED ISSUES

In early 2007, before the April elections, the Italian Government was considering a number of proposals to reform the copyright law. The various proposals it was considering included:

- A requirement to obtain approval from a governmental body prior to applying digital rights management;
- De-criminalization of P2P file sharing;
- Adoption of a global license for file sharing (in effect, a form of compulsory licensing for Internet distribution);
- Overbroad exceptions (which would violate of the range of permissible exceptions and limitations of copyright protection).

These proposals have stalled or been withdrawn but they show a growing negative attitude toward effect copyright protection, particularly online protection. Amendments that did pass were to Article 70 and to Article 71 *septies* of the copyright

January 2007, a Supreme Court judge overturned the sentence completely, saying their acts were not criminal under the law in effect at the time the act of uploading was carried out, because there was no financial gain to the defendants. This ruling was distorted in certain press accounts, which failed to note that the law had changed. Unfortunately this has added to the already problematic misconception of the public that unauthorized downloading and file-sharing are not illegal.

¹² The Peppermint case was brought by the Germany music publisher Peppermint Jam Records GmbH, and has created a domino effect, on the controversial issue of monitoring P2P networks to acquire IP addresses of infringers. It started with an injunction issued by the Court of Rome (Procedure n. 81901/2006) that required Telecom Italy to disclose about 3,636 names of Italian Internet customers/infringers. The case was based on the use of anti-piracy software managed by the Swiss company, Logistep, on behalf of Peppermint, and the data collected consisted essentially of IP addresses of customers sharing copyrighted files through platforms like eMule or BitTorrent. Peppermint proceeded to send letters to some of the identified infringers with a settlement proposal of €330.00 (US\$424), in exchange for a pledge to refrain from turning the names over to the criminal authorities. There were a number of other similar proceedings brought by Peppermint and a Polish videogame publisher, Techland. While the Rome Court initially sided with the rights holders, in a later injunction proceeding, after intervention by the Data Protection Authority, the court reversed its ruling and denied the rights holders' requests. This eventually led to the March 2008 rule by the Authority that use of such software violated the Italian Privacy Code and the EU privacy directive and the resulting names could not be disclosed.

law. The first provided for the possibility of uploading to the Internet images and sounds without permission or payment, so long as the resolution was low and the purpose was educational. This overbroad exception calls into question Italy's international treaty obligations.

The amendment to Article 71 *septies* extends the private copy levy to "remote videorecording systems" wherein a cable, satellite or other provider of such a service could reproduce audiovisual works on a remote server (presumably at the request of its customer) and then transmit such copy to the customer upon its request for viewing. MPA views this amendment as incompatible with the EU Copyright Directive with respect both to the reproduction and making available right and has sought commission intervention.

Implementation of the EU E-Commerce Directive: In its implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003) Italy requires take-down procedures to be available only upon application to, and order from, the "relevant authorities." This requirement for the intervention by an undefined judicial or administrative authority is contrary to Article 14 of the E-Commerce Directive and is hampering cooperation from ISPs in taking down infringing files. Article 14 requires only that the ISP know or have reason to know that an infringement over its facilities exists to be obligated to takedown the infringing content. The anti-piracy associations continue to seek any opportunity to address and amend this crippling deficiency in the law. In the meantime, Internet piracy continues to grow.

Implementation of the EU Enforcement Directive: Italy's implementation of the EU Enforcement Directive provides a number of benefits for civil actions against piracy. These include the right to obtain the names of infringers in civil cases from ISPs upon court order. However, as discussed above, Italy's interpretation of the EU's and its own privacy laws have created a major obstacle by preventing rights holders from using search software to acquire IP addresses of P2P uploaders. Italy should revisit and reverse this decision so that civil enforcement becomes effectively available to rights holders.

Internet Piracy and the Urbani Law Decree (2005): In 2005, Italy amended the Urbani Law Decree of 2004 creating liability for the making available or posting of protected content over the Internet. Specifically, Article 171 of the Copyright Act imposes 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." This covers P2P uploaders who infringe even without purpose of financial gain but the maximum penalty is only €2,065 (US\$2,685). Despite the low penalty, the criminal nature of the violation is preserved, allowing for investigation by the police. Commercial Internet pirates are dealt with more harshly. Under Article 171, anyone who commits such acts for "financial benefit" is liable to a fine of some €15,000 (US\$19,291) and a sentence of 4 years' imprisonment.

Internet piracy and ISP responsibility: On January 14, 2009, the Italian Government announced the establishment of an Antipiracy Committee (Comitato Tecnico Antipirateria) to tackle Internet piracy. This Anti-Piracy Committee comprises mainly heads of cabinets of various Italian ministries and is coordinated by Prof. Mauro Masi (Secretary General of the Presidency of Council of Ministers/PM's Cabinet) with Salvatore Nastasi, Head of the Culture Ministry's cabinet, as the Deputy Coordinator. The content industry is represented on the Committee. The AP Committee is to coordinate of antipiracy activities; research and draft legislative proposals; and, consider and develop non-legislative initiatives, such as voluntary codes of conduct and self-regulation. The AP Committee will shortly initiate hearings with all interested parties, to be scheduled over a period of a couple of months, and subsequently draft a bill and/or propose specific antipiracy initiatives.

Eliminate the SIAE sticker requirement for business and entertainment software and music recordings: This problem remains a major concern for the business and entertainment software industries and, more recently, also for the recording industry. Specifically, Article 181*bis* of Italy's Anti-Piracy law contains an extremely burdensome (and unnecessary, since software is not subject to collective administration of rights) requirement that requires software producers either to physically place a sticker on each work sold in Italy or to file complex "product identification declarations." Legitimate business software publishers who fail to sticker their products have found their products subject to seizure.

For the recording industry, the SIAE sticker represents an additional and burdensome level of bureaucracy and extra costs for the commercialization of physical music carriers. The sticker system is not useful in the fight against on-line piracy, which represents around 90% of music consumption today. The sticker is also limiting the free circulation of musical recordings within the EU and puts the recording industry in Italy at a competitive disadvantage with respect to other countries.

BSA has asserted that 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 Agreement¹³ 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 with a sticker or declared to SIAE. An amendment to Article 171*bis* of the Copyright Law which deals with criminal penalties for software must also be amended if stickering is eliminated for software. The recording industry calls for the complete exclusion of physical carriers of recorded music from the stickering obligation. Entertainment software publishers have also raised concerns with the SIAE labeling requirement, and have similarly requested that the stickering requirement not be made applicable to video game software.

A recent decision by the EU Court of Justice (issued November 8, 2007, in case C-20/05) held that the stickering rule violates EU rules on transparency. In response, the EU Commission requested further clarification on the SIAE labeling requirement from the government. Hearings on the matter were held by the Ministry of Culture, but its response has not yet been issued. It is reported that the government will likely retain the rule but has promised to subsequently discuss and possibly reconsider it. This is an opportunity to eliminate this requirement and it should be taken.

Other deficiencies remain in the enforcement system and should be eliminated. The 2005 “Cirelli Law,” and the 2006 “Pecorella” and “Pardon” Law¹⁴ all have taken their toll by undermining the deterrent effect of the enforcement system.

IPR TRAINING AND PUBLIC AWARENESS

Industry representatives are active in training Italian enforcement officers. The Italian Federation against Music Piracy (FPM) and the local motion picture association, FAPAV conducted a number of trainings in 2008. For the last two years, BSA has an agreement in place with the GdF to provide trainings on software piracy. The agreement foresees 10 trainings in various cities. Upon request, BSA offers special further trainings. In 2008, BSA held a total of 13 trainings. AESVI, the Italian video game publishers’ association, conducted seven anti-piracy training seminars for the Guardia di Finanza in 2008, training approximately 300 law enforcement personnel in seven critical regions in the country. More training efforts are planned for 2009.

¹³ 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.

¹⁴ A description of these laws is contained in IIPA’s 2008 Special 301 submission at <http://www.iipa.com/rbc/2008/2008SPEC301ITALY.pdf>.

KAZAKHSTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kazakhstan be placed on the Watch List in 2009.

Executive Summary: Kazakhstan has made several notable legal reforms over the past several years, in part, to comply with its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). However, as a result of a “moratorium” on government anti-piracy activity in 2008, at least one copyright industry reports a noticeable decline in the number of enforcement actions – such as raids by the financial police, the regular police forces, and the Justice Ministry officials – from prior years. Additionally, several deficiencies remain in the Kazakh legal regime, including a high burden of proof in criminal cases, and an absence of proper resources – which have contributed to weak criminal enforcement.

In 2005, Kazakhstan made significant improvements in its IPR enforcement regime with the adoption of a package of IPR reforms. Additional reforms and enforcement activities are necessary to address the growing threat of Internet piracy, the on-going problems with hard copy (optical disc) piracy at street markets (in Almaty, Shymkent and Atyrau, in particular, and elsewhere across Kazakhstan), and, for the software industry, to stop the prevalent sale of pre-installed pirated software on computers. Reports persist that organized crime syndicates are responsible for the high piracy levels; enforcement against this problem can only be addressed with effective criminal measures. The development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. The software and recording industries 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, 2005 and 2007. 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); and, it joined the two WIPO “digital” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), effective in 2004. In 2008, the U.S. Government and the Government of Kazakhstan held ongoing bilateral discussions on Kazakhstan’s World Trade Organization (WTO) accession including a dialog on the necessary IPR legal and enforcement reforms necessary for Kazakhstan to fully comply with the WTO TRIPS Agreement.

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 has not properly addressed. Other changes made in 2004 included 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 repealed the requirement that there be proof of “financial gain” for criminal charges to rest – this was a major improvement. Other positive steps (also in 2005) were the changes made in the commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores. In December 2007, the Supreme Court issued a decree pertaining to the implementation of certain provisions on the existing Copyright Law.

Several needed key legal reforms — notably in enforcement — remain. IIPA recommends that the Government of Kazakhstan should adopt the following changes:

1. In the Civil Code: provide proper *ex parte* search provisions for effective enforcement against end-user pirates.
2. In the Customs Code: provide *ex officio* authority for customs officials to seize illegal material and to commence their own investigations and criminal cases.
3. In the Criminal Code (or Criminal Procedure Code): provide for the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods only upon a court order.
4. In the Administrative Code: provide *ex officio* authority for 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 violation as well.
5. In the Copyright law: adopt the necessary amendments to fully implement the WIPO digital treaties (WCT and WPPT). IIPA has, in the past, provided extensive comments to the government on the necessary treaty compatible amendments – especially focused on improving enforcement against Internet piracy. (In fact, “digital piracy” is not defined in any of the IPR laws, which according to some industries, makes enforcement very difficult.)
6. Adopt 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. For the past several years, IIPA has 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 2009.

The Customs Code was completely revised 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, which as noted, is a critical missing element in the enforcement regime. 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.

COPYRIGHT ENFORCEMENT IN KAZAKHSTAN

The Government of Kazakhstan has made strides to improve its enforcement regime, with its noted legislative reforms and with ongoing police activities. However, in 2008, there was a decline in the number of police raids and seizures, and in prosecutorial activity as well. Thus, for another year, there were few criminal cases for IPR offenses (an on-going trend, even according to Kazakh government statistics). IIPA knows of no criminal convictions in 2008 in the music, film, or entertainment software industries; there was, in 2008, one notable criminal case commenced involving a distributor of pirated software (and pornography). There were in 2008, 8 criminal sentences – all suspended – in cases involving the infringement of business software. The copyright industries report in recent years that even though there were some additional 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. As in recent years, some of the industries report good cooperation with and enforcement activity by the financial police, the internal affairs police, and with the various public prosecutors in some cities in particular (Almaty, Karaganda and Astana).

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 have signed a Memorandum of Understanding with the Government of Kazakhstan. There have also been training programs conducted throughout the country. IIPA continues to encourage the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The Business Software Alliance (BSA) reports that there have been, in recent years, reductions in the types of open and notorious piracy that existed five years ago, because those who sell software or computer equipment and devices now generally understand that there are criminal, administrative, and civil penalties for such activities. Piracy is now focused on end-user and Internet piracy. This migration of piracy especially to the Internet, and, a decrease in criminal enforcement efforts (especially a decline in police and prosecutorial activity last year), have kept piracy rates high. The Business Software Alliance reports (based on preliminary 2008 figures), that the piracy rate for business software in Kazakhstan was 77% and that losses were \$63 million.

In 2008, BSA reported that were 22 raids undertaken against optical disc (CD) and hard-disc software pirates, and, one against an Internet pirate, as well as the commencement of 16 civil actions. In one civil case in Popravkin, a vendor of 300 personal computers which were pre-loaded with illegal software was fined approximately \$30,000, in addition to his costs to indemnify the copyright owner (Microsoft) for its losses. The Criminal Code (Article 184(2)) has had limited impact in some instances, because it has been applied to the manufacturing and sale of illegal copies, but has not extended to contemplated but not completed sales; additionally, many cases have been dismissed or delayed unnecessarily.

In 2008, a new form of piracy surfaced pertaining to the sale of pirated stickers of the required certificates of authenticity that must be placed on some IP products, such as software. The Government of Kazakhstan needs to address this form of piracy.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$377.7 million in 2007, and \$295.7 million in benefits in the first 11 months of 2008. In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded its GSP review of IIPA's petition of Kazakhstan. 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.

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 (source identification) 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.

KUWAIT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Over the past four years, copyright protection in Kuwait has improved for most industries due to increased cooperation with the Kuwaiti Ministry of Information (MOI), Kuwaiti Customs, the Kuwaiti Ministry of the Interior (Police), and the Kuwaiti Ministry of Commerce. The key developments in 2008 include increased *ex officio* raiding for the motion picture and entertainment software industries, increased raiding for the business software industry, shop closures in cases of some repeat offenders (although recidivism is a continuing issue), and blocking of many Internet websites offering pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods. As a result, there has been a notable change in overt piracy, as pirate retailers and street vendors operate with a heightened sense of fear of enforcement activity. IIPA commends these efforts of the government to tackle overt hard goods piracy, but calls upon MOI to more evenly process criminal cases to include software and recorded music piracy cases. The book publishing industry continues to report few piracy problems in 2008 and commends the approaches by the government, and universities and schools, toward textbook adoption that have led to this continued success.

The courts in Kuwait remain the weak link in the enforcement chain. While the Kuwaiti government pursued many cases criminally, the lack of mandatory minimal sentencing and deterrent maximum penalties by the criminal courts means defendants still do not fear the outcomes of such cases. Continued problems with the onerous, arbitrary, and lengthy content review processes cost right holders dearly, leaving sales figures stagnant for some industries. The copyright law remains TRIPS deficient, including the lack of deterrent criminal penalties, and IIPA welcomes the Kuwaiti government's efforts to draft amendments to the law to provide mandatory minimum sentencing, but also points out the need to ensure the law is fully in compliance with international standards and is updated to effectively address Internet piracy.

Priority Actions Requested In 2009: IIPA requests that the government of Kuwait take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Continue sustained raiding which is starting to have an impact on retail piracy activity.
- Continue blocking websites engaging in pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods.
- Once the copyright law is amended to provide mandatory deterrent fines and prison sentences, these penalties must be imposed by the courts in criminal cases to drive piracy levels down and defeat recidivism.
- Apply censorship rules for sound recordings and motion pictures fairly, to refrain from using these rules arbitrarily or randomly to block the release of movies or recordings that objectively qualify and/or have been approved in the past. The Ministry of Information censorship department now takes weeks to approve new sound recordings for the Kuwaiti market, while pirated CD-Rs of the same albums are already available in shops and through street vendors.

Legislation

- Amend the copyright law to provide mandatory deterrent fines and mandatory minimum prison sentences, and to confirm that end-user piracy of business software is considered a crime.
- Amend and modernize the copyright law to bring it into full compliance with TRIPS and the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Join the WCT and WPPT.

KUWAIT										
Estimated Trade Losses Due to Copyright Piracy (<i>in millions of U.S. dollars</i>) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	NA	10.0	75%	9.0	70%	8.5	70%	8.0	65%
Business Software	43.0	63%	37.0	62%	33.0	64%	35.0	66%	26.0	68%
Motion Pictures	NA	NA	NA	NA	NA	NA	1.3	82%	12.0	95%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	91%	NA	NA
Books	NA	NA	NA	NA	0.5	NA	0.5	NA	1.0	NA
TOTALS	43.0		47.0		42.5		45.3		47.0	

PIRACY UPDATES IN KUWAIT

Optical Disc Piracy by “Burning” and Importing Factory Discs: The impressive efforts of the Ministry of Information (MOI) against optical disc piracy have had a positive net impact on piracy for most industries. Notwithstanding their efforts, optical disc piracy, both imported factory discs and home-grown “burned” CD-Rs and DVD-Rs, continues to harm copyright owners and remains the chief form of piracy found in the markets in Kuwait, mainly Hawalli and Salmeiah city (and including recidivists operating under the same business names, as well as apparent new businesses). Locally duplicated pirate CD-Rs with foreign music remain available in Kuwait. Indeed, in contrast to games and motion pictures, piracy of recorded music, due to the high rates of sound recordings that either do not clear the censorship system or clear censors only with great delays, remains severe. In many retail outlets the burning of such CD-Rs is “on-demand,” making enforcement more difficult as pirate shops keep very little stock on hand. Some stores also modify consoles to play pirate games, emphasizing the need for Kuwait to amend its law to outlaw circumvention of technological protection measures and the trafficking in circumvention devices such as mod chips, and ensuring that providing the service of “modding” a console is considered illegal. IIPA is now aware of one optical disc production plant in Kuwait. The plant was visited by IFPI staff in 2006 and 2007, and the plant owner fully cooperated with the plant visits.

Internet Piracy: Internet piracy became a greater hurdle in Kuwait in 2008, with industry noting an increase in pirate downloads, peer-to-peer file sharing, and advertising the sale of pirate physical goods. Kuwait had 900,000 Internet users as of March 2008, amounting to a 34.7% penetration rate (according to the International Telecommunications Union). While broadband penetration remains relatively low, estimated at 25,000 users as of September 2007 (according to ITU), the high overall penetration rate has meant an increase in Internet piracy activities in Kuwait.

Business Software End-User Piracy: The business software industry reports no improvement in software piracy levels in 2008. Piracy continues to affect the ability of legitimate software businesses to operate in Kuwait and harms the development of the local IT industry.

Broadcast Signal Theft: The theft the satellite signals, which involves altering set-top boxes to illegally receive broadcasts, and the unauthorized decryption and/or retransmission of pay television through a pirate signal to home and business “subscribers,” both remain problems in Kuwait. These problems are exacerbated by the lack of deterrent minimum criminal penalties, and exist notwithstanding good and improving cooperation with the Kuwaiti government. In particular, the Ministry of Information has taken a very aggressive stance against cable pirates and has raided some targets.

University Practices Help Keep Book Piracy Low: Kuwait retains its position as a leader in ensuring use of legitimate textbooks by students and faculty. U.S. publishers continue to report a high ratio of legitimate sales to known student adoptions due to the transparent procurement and purchase practices of Kuwaiti universities. University

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Kuwait. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Kuwait's Special 301 history, see IIPA's “History” Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

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 2008. Other countries in the Gulf region and elsewhere should learn from this approach.

ENFORCEMENT UPDATES IN KUWAIT

The industries affected agree that the key to resolving the piracy dilemma in Kuwait lies principally in continuing the sustained raiding which is starting to have an impact on retail piracy activity, continuing the blocking of websites engaging in pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods, and seeking the imposition by the courts of deterrent criminal sentences, including deterrent fines and jail terms that are actually served.

Sustained Raids in 2008 Having a Positive Effect on Overall Piracy: IIPA commends the Ministry of Information (MOI) for continuing to run *ex officio* raids against piracy locations in high volume. The sustained raiding has had a noticeable change in overt piracy of motion pictures and entertainment software, since retail pirates and street vendors operate in the knowledge that they can be raided at any point in time. The raids resulted in seizures of pirate product and equipment, and evidentiary dossiers were compiled for ensuing criminal prosecutions. MOI also exercised its authority to close recidivist locations, although recidivism remains a hurdle in Kuwait. The MOI continued to publicize its efforts in the local media, adding to the deterrent effect. Industry would like to see more raids focused on resellers of software and music piracy targets as well as games and motion pictures; in this way, enforcement could be made more uniform resulting in improving piracy levels across the board. In addition, the business software industry reports that not all of its cases get transferred to Public Prosecutors for criminal court actions. This should be remedied. Kuwaiti Customs has also set up an IPR team for border enforcement, and made interdictions on an *ex officio* basis in 2008.

Internet Enforcement Efforts Limit Harm to Right Holders by Blocking Key Piracy Sites: The government of Kuwait has recognized the harm caused by Internet piracy, whether pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods. The record in 2008 (as in 2007) was excellent, with the Ministry of Commerce spearheading efforts and blocking access in Kuwait to many websites containing or providing access to pirate material. However, the recording industry reports that, despite numerous calls for intervention and extensive engagement of the Kuwaiti ISP hosting the illegal files, major illegal Internet site 6rb.com is up and running in Kuwait and providing access to a host of illegal tracks, including well-known U.S. artists, such as R-Kelly, Eminem, Usher, Alicia Keys, Anastacia, Britney Spears, Prince, Bon Jovi, and Beyonce. Definitively blocking access to this site and any of its off-spring, all of which infringe the rights of both local and international right holders, should be a top priority for the authorities in Kuwait and an opportunity to show they are serious about eradicating Internet piracy. IIPA would also request that the Ministry of Information speed up copyright infringement verification, which now takes as long as three weeks, so that takedowns can occur more expeditiously.

Content Review System Exacerbates Music Piracy Problem: The music industry reports less positive results, due to the high rates of sound recordings that either do not clear the censorship system or are clear censors only with great delays. These delays or hurdles leave the music market wide open to pirates to monopolize. Of course, and ironically, the pirate disks are never censored and are openly available in the market while the legitimate disks wait to be reviewed. In addition, MOI officials view music piracy as a very low priority, with virtually no *ex officio* actions against music piracy and only the rare cosmetic anti-piracy raid. The industry proposes that MOI take the same kind of interest in recorded music piracy as it has for game and motion picture piracy, and also recommends that a special IPR cybercrime unit (inspired by the Lebanese example) be formed to handle both physical and Internet piracy investigations involving recorded music.

Courts Hampered by Non-Deterrent Maximum Penalties: All the industries agree that no matter how many raids are run, piracy levels in Kuwait will not significantly decrease until courts are empowered to administer deterrent penalties, including mandatory minimum fines and mandatory minimum prison sentences, as well as deterrent maximum

finer and prison sentences. IIPA calls for the immediate passage of a new copyright law with minimum mandatory sentences and higher maximums.

COPYRIGHT LAW AND RELATED ISSUES

Current Law (1999 Decree) Remains TRIPS-Incompatible and Contains Ambiguities on Important Matters: Copyright protection in Kuwait is governed by Decree No. 5 (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, and that the law fails to comply with TRIPS in certain respects and contains other problems and ambiguities. These include:

Deficiencies in the 1999 Decree

- **Inadequate Criminal Remedies:** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,720) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half][sic] for recidivists”), is not in our view “sufficient to provide a deterrent.” In IIPA’s view, this is the most important element of the law which must be remedied.
- **Unclear Protection for Pre-Existing Works in WTO Members for WTO-Compatible Terms as Required by TRIPS:** Article 44 of the Copyright Law makes the law applicable to works that “exist on the date on which [the Copyright Law] shall enter into force,” making it unclear (since there was no copyright law in existence prior to enactment of the Decree) whether the law provides full TRIPS-compatible protection for older works from WTO countries. Adding the phrase “in their country of origin” will correct this deficiency.
- **Failure to Provide Express Point of Attachment for Performers/Broadcasters, Unpublished Works, and Certain WTO Members:** Article 43 of the Kuwaiti Copyright Law fails explicitly to provide point of attachment for: 1) Kuwaiti or WTO members’ performers or broadcasters; 2) foreign unpublished works (performances or broadcasts); and 3) works of WTO members who are not members of WIPO. This must be remedied.
- **Inadequate Term of Protection for Computer Programs and Compilations of Data:** The Kuwaiti Copyright Law fails to provide computer programs and compilations of data with at least a TRIPS-compatible term of protection. This must be remedied.
- **Berne-Incompatible Compulsory License:** Article 14 of the copyright law amounts to an unacceptable compulsory license in violation of the Berne Appendix (and TRIPS Article 9.1). This must be remedied.
- **Lack of Express Rental Right for Sound Recordings and Computer Programs:** There is no express rental right for sound recordings and computer programs; IIPA seeks clarification from the Kuwaiti Government that Article 4, clause 2, does in fact include a TRIPS-compatible rental right. If not, then this deficiency must be remedied.
- **Lack of Express Provision for *Ex Parte* Civil Searches:** The Kuwaiti Copyright Law does not expressly provide for civil *ex parte* search orders, as required by TRIPS Article 50. This must be remedied.
- **Insufficient Remedy as to “Materials and Implements,” in Violation of TRIPS Articles 61:** Article 42 of the Kuwaiti Copyright Law authorizes the Court “to confiscate all tools used for the illegal publication—if they are suitable exclusively for such publication . . . ,” making it incompatible with TRIPS Article 61, which requires criminal remedies to include “the seizure, forfeiture and destruction of . . . any materials and implements the predominant use of which has been in the commission of the offence.” This must be remedied.

Ambiguities in the 1999 Decree

- **Unclear Criminalization of End-User Piracy of Business Software:** The Kuwaiti Copyright Law does not expressly criminalize the intentional unauthorized use or copying of computer programs in a business setting.
- **Unclear Protection for Sound Recordings:** IIPA understands that protection for sound recordings has been effectuated by protecting “audio-visual broadcasting works” in Article 2(6) of the Copyright Law, but this should be confirmed. The word “sound recordings” should be inserted into an amendment.
- **Absence of Border Measures, Piratical and Parallel Imports:** The Kuwaiti Copyright Law contains no border measures as required by TRIPS Articles 51-59. IIPA is unaware of other laws which may contain TRIPS-compatible border measures. Whatever the government does adopt, it should be clear that Kuwaiti Customs may intercede on an *ex officio* basis in order to effectively enforce against illegal imports and exports. It should also be confirmed that under no circumstances would piratical items be permitted in, and the law should also confirm that

the border measure exception applies only to goods imported into Kuwait with the authorization of the right holder that they be distributed in Kuwait, i.e., that it would never apply to unauthorized (parallel) imports.

- **Potentially Over Broad Exceptions:** Several exceptions are arguably overly broad.
- **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works:** The panoply of exclusive rights for producers of audiovisual works according to Article 25 of the Copyright Law is unclear.
- **Inappropriate “Innovativeness” Requirement for Works:** Article 1 of the Copyright Law provides protection to authors of “innovative” works; such an “innovativeness” requirement is inconsistent with TRIPS Article 9.1. The term “innovative” may be a mistranslation, but in this case, the official English translation in the Copyright Law should use the word “original.”
- **Exclusive Rights Limited to Financial Exploitation (Possibly Inadvertently):** Under Article 4 of the Copyright Law, the right holder is given the exclusive right “to exploit his writing financially.” The attempt was clear to divide between moral rights and economic rights, but the wording makes it unclear whether Kuwait complies with TRIPS. The word “financially” should be deleted from Article 4.
- **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right:** The moral rights provisions exceed what is provided for in Article 6*bis* of the Berne Convention, and arguably nullify the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1.

Amendments Should Be Enacted, and Should Result in Modern Copyright Statute, With Deterrent Criminal Remedy and Protections for the Digital Age: Beginning in 2004, the Kuwaiti government has been considering amendments to its copyright law. IIPA understands that the latest draft (2007) would resolve many but not all of the TRIPS deficiencies described above, and would partially implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, but takes some significant steps backward from a draft prepared in 2004, especially with respect to protection against the circumvention of technological protection measures. The draft would also improve criminal penalties, but not to the extent needed to provide a deterrent in Kuwait. The following bullet point list responds to the 2004 draft and what we understand to be in the 2007 draft.

By way of background, it should be noted that Kuwait, while an original member of the WTO, has joined neither the Berne Convention nor the Geneva (phonograms) Convention. The Kuwaiti government has indicated on previous occasions a desire to enter into FTA negotiations with the United States, and to that end, on February 6, 2004, former U.S. Trade Representative Robert Zoellick and Kuwaiti Minister of Commerce and Industry Abdullah Al Taweel signed a Trade and Investment Framework Agreement (TIFA). While the TIFA may not necessarily lead directly to negotiations toward a Free Trade Agreement, it should be noted that an IPR chapter of any 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; and (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy, including P2P file sharing. Key issues of importance to IIPA that have been dealt with adequately in FTA negotiations to date, and Kuwait should take the opportunity presented by the amendment process to Kuwait’s copyright law to fully modernize its law. Thus, the following bullet point list also addresses some aspects of protection which do not appear in the Kuwaiti draft to our understanding, but should be added to bring it into line with the latest international trends, as reflected in the most recent FTAs.

- **Resolve All Issues Noted Above from 1999 Decree, Including Most Pressingly, Providing for a Deterrent Criminal Remedy:** Criminal penalties in the new law must provide for much higher mandatory minimum fines and imprisonment, and provide for deterrent maximum fines and imprisonment (for example, in the United States, these are \$250,000 for an individual, \$500,000 for a company, and up to five years imprisonment), which should readily be imposed, especially in cases of recidivism. The remedies must be available as to violations of copyright as well as related rights (rights of performers and sound recording producers).
- **Provide WCT and WPPT-Compatible Rights:** The amendment must make the necessary changes to conform the Kuwaiti law with the WCT and WPPT, as is apparently intended by the drafters. For example, it must:
 - Confirm a “making available” right. Drafters should pay special attention to ensure not only that the right of making available is properly spelled out as to authors and related rights, but that the exclusive right is expressly granted in the ensuing provision (i.e., avoid a situation where there is a proper definition but then the rights grant is ambiguous or incomplete).
 - Confirm that “temporary reproductions” are protected under the reproduction right.

- Prohibit the circumvention of technological protection measures and the trafficking of circumvention devices or provision of services related to circumvention. Drafters should ensure that both the act of circumvention and trafficking in devices or services are covered. The should also ensure that both access controls and controls on exclusive rights are covered (e.g., by defining a TPM 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”). Circumvention devices also need to be specifically defined to include “component” parts. Circumvention services should be clearly covered. A non-cumulative test should be employed to determine whether a circumvention device is unlawful.² Both civil and criminal remedies should apply to violations involving circumvention.
- Provide WCT and WPPT-compatible language to protect rights management information.
- Provide a TRIPS- and WCT/WPPT-compatible distribution and “rental” right for works (Article 6(a) and (d) for works), computer programs, and sound recordings. Drafters should avoid ambiguity by making the distribution right express in the related rights provisions.
- **Provide Exclusive “Retransmission” Right:** The government of Kuwait should include an express “rebroadcast” or “retransmission” right. Specifically, the draft should ensure that the 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.
- **Criminalize End-User Piracy of Software or Other Copyrighted Materials in a Business Setting.**
- **Provide for Adequate Civil Compensation, Including Statutory Damages, Attorney Fees, and Costs.**
- **Ensure the Availability of *Ex Parte* Civil Searches and Provisional Measures as Required by TRIPS.**
- **Ensure the Possibility of Confiscation and Destruction of Infringing Goods, and Tools and Implements Used to Infringe.**
- **Provide for Service Provider Responsibility and Foster Cooperation, For Example, Through Statutory Notice and Takedown:** The Kuwait law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The new draft law should include principles of liability to hold those who facilitate infringement on the Internet accountable, and could include specific provisions related to service providers, including notice and takedown (including in the P2P context).
- **Extend Term of Protection in Line with International Trends:** The Kuwaitis should follow the modern trend (more than 70 countries have 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.
- **Provide Parallel Import Protection:** The Kuwaiti law should be amended to provide an exclusive right to authorize or prohibit the importation into Kuwait of copies of works, sound recordings, and performances fixed in sound recordings, even where such copies were made with the authorization of the author, performer, or producer of the phonogram (i.e., parallel import protection).
- **Preserve Freedom to Contract:** The Kuwaiti draft should preserve the rights of copyright owners to exercise their exclusive rights, and should also preserve the freedom to contract, and, for example, should not contain provisions that essentially interfere with the negotiations of two contractual parties.
- **Ensure that the Government Legalizes Software Usage and Use of Other Copyright Works and Sound Recordings:** The Kuwaiti government should address the need to provide that all government agencies use legitimate software and adequately manage government software usage. If such implementation exists in other laws, regulations or decrees, the Kuwaiti government should share this information.
- **Provide Protection for Encrypted Program-Carrying Satellite Signals:** The Kuwaiti law should be amended to 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

² For example, the device or service should be deemed to be illegal if it:

- is promoted, advertised or marketed for the purpose of circumvention of a technological protection measure,
- has only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
- is primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.

- **Provide Presumptions of Ownership and Subsistence of Copyright:** The Berne Convention requires a presumption as to authorship of works (Berne Article 15(1)) and to cinematographic works (Berne Article 15(2)). The Kuwaiti law should be amended to provide appropriate presumptions of ownership and should also provide for presumptions as to subsistence of copyright for works, performances and sound recordings.³
- **Provide for Authorities to Order Information Regarding Those Connected With Infringement:** The Kuwait 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.
- **Criminalize Piracy in Cases of “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 TRIPS requires criminalization even of acts that may not have a motive of financial gain. Kuwait should therefore provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain shall be considered willful copyright piracy on a commercial scale.
- **Ensure Exceptions are Appropriately Narrow:** Any exceptions adopted must meet international standards and the three-step test of the Berne Convention. IIPA understands that the Kuwaitis may be considering software exceptions that allow more than back-up, and to the extent it otherwise allows copying or adaptation of a program without authorization of the right holder, such copy or adaptation should be limited to what is necessary as an “essential step” to use the computer program in conjunction with a particular machine, and subject to the proviso that such copy or adaptation would be destroyed when the machine is no longer being used. The drafters also need to be very wary of any attempts in the amendment to unduly curtail the rights of authors or translators, for example, by deemed rights to expire if they are not exercised within a certain time-frame. Any restriction of rights in this manner would violate the tenets of the Berne Convention and the TRIPS Agreement.

MARKET ACCESS

Apply Censorship Rules Fairly: The Kuwaiti government should change the censorship rules for sound recordings and movies, and should refrain from using these rules arbitrarily or randomly to block the release of recordings that objectively qualify and/or have been approved in the past. IIPA understands that the Ministry of Information refuses to approve content in an overly aggressive manner because National Assembly members have succeeded in sacking Ministers due to decisions to release certain products. As a result, even titles passed in Saudi Arabia are being banned in Kuwait, including films like “Ratatouille” (banned because of an animated kiss). For the recording industry, the censorship authorities take too long in approving new albums for the Kuwaiti market, leaving uncensored pirate versions to capture the market. It has sometimes taken weeks before the censorship department approves the music album being submitted. In the meantime, shops and street vendors sell pirate CD-Rs of the same albums. Unfortunately, other albums or single songs end up being banned in Kuwait. Yet, due to lack of enforcement against piracy, ironically, many shops that burn on demand shops have been detected selling CD-Rs with pornographic movies and/or photos.

³ The law should be amended to 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.

LEBANON

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Lebanon should remain on the Watch List in 2009.

Executive Summary: Lebanon made incremental progress in legitimizing the copyright market in 2008. For example, progress was made on the perennial issue of cable and pay TV piracy, as two companies, through successful lawsuits, have been able to convince many pirates engaged in unauthorized cable retransmission to pay them for both Arabic language channel and U.S. programming. Piracy remains a significant hurdle to legitimate business for record companies, motion picture companies, publishers, business software producers, and entertainment software companies. Since late 2006, the United States and Lebanon have been party to a Trade and Investment Framework Agreement,¹ 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. At the same time, a review remains ongoing by the U.S. government of Lebanon's IPR regime to determine whether Lebanon should continue to receive duty-free treatment for many of its goods imported into the United States. Specifically, the review focuses on: (1) deficiencies in the copyright law in Lebanon that render protection inadequate and ineffective; (2) 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. Unfortunately, reported draft amendments to the Copyright Law would further weaken protection, and IIPA calls upon the government and Lebanese National Assembly to reject any amendments which weaken the law.

Priority Actions Requested in 2009: IIPA requests that the government of Lebanon take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Continue to address cable piracy by issuing a licensing decree and commencing enforcement.
- Ensure that the special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit, continues actively running raids against retail targets, major operations producing pirate product or shops producing "burned" to order discs, and book piracy operations, including photocopying and print formats.
- Ensure that Customs authorities step up *ex officio* actions to interdict and seize pirate product entering the country or destined for export.
- Prosecute criminal copyright cases, seeking maximum deterrent sentences in Lebanese courts under the law.
- Continue to monitor the one known optical disc plant in the country for illegal activity.

Legislation

- Reject recent draft amendments to the Lebanese Copyright Law (1999) which would weaken protection for software and make other detrimental changes. Instead, the Copyright Law should be amended to make it compatible with major international copyright treaties and implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, so that Lebanon can join these crucial treaties for digital-age copyright protection.
- Pass legislation to permit Lebanon to join the Berne Convention (Paris 1971 text) and draft and pass legislation to join the WCT and WPPT.

¹ *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.



LEBANON										
Estimated Trade Losses Due to Copyright Piracy (<i>in millions of U.S. dollars</i>) and Levels of Piracy: 2004-2008 ²										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	3.0	70%	2.8	60%	2.6	60%	3.2	75%	3.0	70%
Business Software	28.0	74%	24.0	73%	23.0	73%	20.0	73%	15.0	75%
Books	NA	NA	NA	NA	NA	NA	4.0	NA	3.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	75%
Motion Pictures	NA	NA	NA	NA	NA	NA	1.0	1%	10.0	80%
TOTALS	31.0		26.8		25.6		28.2		31.0	

PIRACY CHALLENGES IN LEBANON

Some Progress on Cable Piracy by Efforts to Legalize Unlicensed Operators: Cable piracy has long been the major piracy problem for the motion picture industry in Lebanon, as upwards of 600 to 800 of small cable systems had engaged in the illegal retransmission of broadcast programming, charging customers for these “pirate” pay television services. As of 2007, pirate cable operators served over 80% of the Lebanese population through 720,000 subscriptions for an average monthly fee of US\$10.³ Finally, in 2008, a positive breakthrough occurred, since reportedly, two legitimate licensees succeeded to legalize many former cable pirates to pay for Arabic and U.S. programming. Both the Minister of Posts and Telecommunications and the head of the Lebanese Telecommunications Regulatory Authority have taken an interest in the fight against cable piracy,⁴ but despite being provided with a draft decree that would allow the Minister to regulate and legalize the cable market, the decree has not been issued to IIPA’s knowledge. Also to IIPA’s knowledge, no new court decisions regarding cable piracy were handed down in 2008. It should also be noted that the Lebanese Copyright Law already outlaws unauthorized retransmissions by rogue cable companies, so the current Copyright Law on its face is adequate and could be applied to deal with the cable piracy problem.

Book Piracy: Book piracy remains a major problem in Lebanon, with illegal photocopying of academic materials taking over as the primary problem for the industry. Major commercial photocopying enterprises are situated near most campuses 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.⁵ Enforcement and education officials should work together to target the massive illegal photocopying taking place in and around these institutions. Print piracy, especially common in the scientific, technical and medical sectors, continues as well. Authorities have reportedly been somewhat responsive to complaints during 2008; this cooperation should continue in 2009.

Retail Piracy: Although the actions of the CCIPRB 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, entertainment software, and business software. Some of the “burned” CD-Rs are sourced back to Syria – a major transit country for pirated optical discs smuggled into Lebanon – and the Palestinian territories. Goods are smuggled into Lebanon via “military roads” between Syria and Lebanon, which have no effective customs checkpoints. Disturbingly, industry has reported that at least four optical disc plants are operational in Syria,⁶ not only distributing inside Syria, but also exporting heavily to Iraq and also to Jordan and Lebanon. In addition,

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA’s 2008 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Lebanon. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Lebanon’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

³ Each cable operator retransmitted about 100 different television channels, including a minimum of four movie channels that broadcasted motion pictures 24 hours a day. Motion pictures were frequently retransmitted by these pirate cable operators prior to their theatrical release or legitimate broadcast by television stations in Lebanon. As a result, there were instances in which local broadcast television stations cancelled longstanding licenses with copyright owners because they could not compete with the pirates.

⁴ MPT’s website can be found at <http://www.mpt.gov.lb/>. TRA’s website can be found at <http://www.tra.gov.lb/>.

⁵ An illustrative list of institutions where enforcement is due includes Notre Dame University, Haigazian University, Balamand University and Lebanese University.

⁶ There is one known optical disc production factory in Beirut, Lebanon (Skyline), which was visited in 2006 as part of the record industry “IFPI plant visit program,” and reportedly, the plant owner fully cooperated.

several large and small-scale CD-R burning facilities remain operational, while small quantities of pirated pressed discs are still imported from Asia, with some discs from China and Eastern Europe. Pre-theatrical and pre-video release movies reproduced from pirate and parallel imported source copies are common in Lebanon (as are illegal copies taken on camcorders, as reported in previous years). Finally, new information indicates that circumvention devices (to avoid technological protection measures used by right holders to prevent users from accessing or copying works without authorization) are being imported into Lebanon. This phenomenon highlights the urgent need for Lebanese legislators to pass a law amending the Copyright Law to prohibit the circumvention of TPMs and the trafficking in circumvention devices (and related services).

Business Software Piracy: The business software industry continues to suffer from high rates of piracy in Lebanon, attributable to the unauthorized use of software in a business setting as well as the loading of unlicensed software onto hard drives of computers for sale.

Entertainment Software Piracy: Entertainment software publishers have reported a worsening of game piracy in recent years. Both factory replicated pirated optical disc product and CD-R burning is found in the market, and the Internet continues to serve as a medium for advertising pirated products. Pirate 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).

Internet Piracy (and Mobile Device Piracy): Notwithstanding the high cost of telecommunications and significant bureaucratic hurdles, Lebanon's latest Internet usage statistics (according to the International Telecommunications Union, August 2007) indicate there are roughly 950,000 Internet users in Lebanon, or a 23.9% penetration rate. Broadband penetration remains very low, at roughly 170,000 broadband connections, or 4.3% penetration, again mainly due to bureaucratic hurdles. Notwithstanding these numbers, Internet piracy is on the rise in Lebanon. In the past, such piracy consisted 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), but P2P downloading has also increased, as have other websites offering direct downloads of copyright materials. The Lebanese government has regularly been alerted to the existence of these illegal services, but to IIPA's knowledge, has taken no action regarding these sites to date. Mobile device piracy – the unauthorized loading or preloading of illegal copyright content onto mobile devices such as mobile telephones, iPods, other MP3 players, and recordable media such as flash drives and memory sticks – has not become a major issue to date in Lebanon.

ENFORCEMENT CHALLENGES IN LEBANON

Increasing Cooperation with Lebanese Government Agencies: Enforcement efforts have picked up in Lebanon over the past several years, in particular because of the establishment and growth of the special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit. The Unit has remained available and willing to conduct and participate in retail raids. In 2007, the Unit grew from 25 officers (5 ranking officers and 20 junior officers) to 33 total officers (15 ranking officers and 18 junior officers). Like other police units in Lebanon, the Unit does not have a formal budget. The Unit's police officers are generally more knowledgeable in intellectual property and cybercrime than their predecessors or other fellow officers. 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 CCIPRB, copyright owners have been able to request raids prior to filing a formal complaint. In addition to the good work of the CCIPRB Unit, there is reportedly increased cooperation with Lebanese Customs on tackling imports (especially) and with inspectors of the Ministry of Economy and Trade.

Preparing Cases for Court – More Emphasis Needed on Criminal Investigative Techniques: While raiding activity has picked up in the past few years, prosecutorial activity has lagged, evidenced by the fact that, for example, only four criminal cases were filed in 2008 involving business software piracy. Problems start in the investigative process, with investigators leaving behind crucial evidence. For example, in some recent investigations into CD-R burning operations, involving "burn-to-order" businesses, computers and servers were sealed and left at the premises. Because of this, the pirates are able quickly to make back-up copies via USB ports before the authorities return with a court order (sometimes

weeks or months later) to confiscate the computers and servers. IIPA members also have experienced some instances of undue influence on prosecutors resulting in inaction.

Courts Have Failed to Deter or Adequately Compensate for Piracy: The judiciary continues to be the government agency with the least concern about fighting piracy. IIPA members' experience in the courts has been one marred by incessant delays in simple piracy cases, as postponements in court, even of urgent matters, are the norm, leading often to years of delay. Members have also experienced from time to time judges who are unaware of and unsympathetic with the IP laws and copyright claimants. In one cable piracy case of note, a civil injunction was revoked *ex parte* without informing the plaintiff. When cases do reach judgment, the damages (in civil cases) or fines and penalties (in criminal cases) are almost always so low as to be non-deterrent.⁷ The Lebanese government must encourage judicial authorities to adjudicate promptly all intellectual property cases and to impose the maximum penalties allowed under the law. IIPA also calls upon the Lebanese government to seriously consider establishing a special IP tribunal and to assign special IP prosecutors who can specialize and gain expertise in IP cases.

TRAINING AND TECHNICAL ASSISTANCE

IIPA members have provided various training to the government of Lebanon over the past several years.⁸ This has included drafting assistance as to the Copyright Law, assistance to the Ministry of Telecommunications with draft legislation aimed at regulating Lebanon's cable industry, training seminars by industry for inspectors of the Ministry of Economy and Trade, and training for the CCIPRB Unit. IIPA recommends that future capacity building be directed at the CCIPRB Unit, Customs, Ministry of Economy and Trade officials, Ministry of Interior officers, and prosecutors to discuss all aspects of piracy investigations, from the raid, securing the raid site, seizing and removing tools and implements used for piracy in addition to pirate product, and preparing dossiers for prosecution. It is hoped that such trainings could create an enforcement reporting mechanism between ministries. Joint training could be a useful way of promoting close cooperation between CCIPRB (the most effective anti-piracy group thus far in Lebanon) and prosecutors to prepare cases for criminal proceedings. IIPA also recommends judicially-oriented trainings, i.e., training a number of prosecutors who will become experts in bringing copyright cases and training for judges who will be hearing IP cases. Additional training for judges is crucial, to review the basics of IP laws and the importance of deterrent sentencing. Judges should also be sensitized to the significance of IP offenses and the damage IP offenses cause to creators, as well as the impact lack of deterrence in IP cases would have on Lebanon. It is hoped that through such trainings, it could be impressed upon the government of Lebanon that assigning specially qualified judges to hear copyright cases would improve the overall efficiency of the court system.

MARKET ACCESS

Censorship: The censorship rules in place in Lebanon still create barriers to full market access for the recording industry. Although becoming slightly more flexible over the past couple of years, there are still numerous recordings that fail to qualify under the government's opaque content review criteria. These censorship rules should be applied with great restraint, on a non-discriminatory basis, and according to transparent criteria.

⁷ 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.

⁸ Industry continues to be engaged in copyright issues in Lebanon, and providing training. Industry groups (including MPA, BSA and IFPI) organized training seminars for police officers of the Cybercrime and IPR Bureau (this took place in the UK in 2006). Another training seminar was organized in late 2007 in Australia (BSA and IFPI participated). The publishing industry has also been actively engaged over the past two years, working with the MOET to raise awareness on campuses of the importance of copyright. On September 5, 2007, IIPA and MPAA representatives sat down with the head of the Lebanese Telecommunications Regulatory Authority to discuss approaches to effectively addressing cable piracy in Lebanon.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Law of Lebanon Should be Modernized, and TRIPS Deficiencies Fixed; Reported Draft Amendment Goes in Entirely the Wrong Direction: The Copyright Law of Lebanon (effective June 14, 1999) provides a sound basis to enforce against piracy of works and sound recordings, including stiff penalties (in theory) for copyright infringement, stiff penalties against cable pirates, confiscation of illegal products and equipment, the closure of outlets and businesses engaged in pirate activities, and a Berne-compatible evidentiary presumption of copyright ownership. The law also outlaws the trafficking in satellite or cable decoders (i.e., devices that receive, or arrange the receipt of, unauthorized transmissions of broadcasts “dedicated to a section of the public who pay a fee to receive such broadcasting”). The law further provides right holders with a broad communication to the public right (Article 15), but does not fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Lebanese government should be encouraged to fully implement and join the WCT and WPPT as soon as possible. Specifically, the law should be amended to prohibit circumvention of technological protection measures, circumvention services, and the trafficking in circumvention devices used by copyright owners to protect their works from unlawful access or copying. 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.

Unfortunately, the law remains deficient with respect to international standards in several respects,⁹ including:

- 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.
- 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, providing a broad exception allowing copying of software, and 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 legal 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.

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.

Disturbing New Reported Amendment Would Take Lebanon in the Wrong Direction: IIPA has learned of a very disappointing development, namely, a new draft amendment to the Copyright Law which would result in reducing protection for software and other copyright works. IIPA urges the government of Lebanon in the strongest terms to refrain

⁹ 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.

from backtracking on gains already made in its copyright regime, and to shelve any amendments which would weaken protection, subject to reconsideration by all stakeholders.

Bill to Join the Berne Convention (Paris 1971 Text): On September 3, 2007, the Lebanese Government forwarded to the National Assembly a Bill to ratify the Berne Convention (1971 Paris text). Lebanon adheres to the Rome (1928) text, so accession to the 1971 Convention would be a welcome development. IIPA is unaware of the status of this Bill.

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 has noted in this year’s report some progress made to legalize certain unauthorized cable operators; however, the process of cleaning up this market would be further enhanced and accelerated if Lebanon will enforce criminal remedies against egregious illegal retransmission activities.

The GSP program is important to Lebanon. In 2007, Lebanon imported \$49.5 million worth of products into the United States duty-free, or 47% of its total imports into the U.S. In 2008, Lebanon imported another \$48.6 million worth of products into the United States duty-free, or almost 49.1% of its total imports into the U.S. It is in Lebanon’s economic and political interest to take steps to maintain its eligibility as a beneficiary under the GSP program. In October 2007 written and oral testimony before the GSP Committee, IIPA recommended that, given “some signs of improvements in enforcement by the Cybercrime and IPR Bureau, but with courts remaining ineffective and the cable piracy problem remaining largely unchecked,” the GSP Subcommittee should “provide the Lebanese government with some additional time, maintain this petition in the short-term, continue to monitor progress in key problem areas, and ultimately recommend to the President that he determine that Lebanon fails to meet the GSP standards if serious progress is not made in that short-term period.” In the upcoming country practice reviews in 2009, IIPA expects once again to weigh in on progress, and will be looking specifically at the three deficiencies noted above to determine whether enough progress has been made to recommend that Lebanon remain eligible for GSP benefits.

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Malaysia should remain on the Watch List, with an Out-Of-Cycle Review (OCR) to monitor the decrease in the level of attention copyright piracy received in Malaysia in 2008, and to determine whether the Ministry of Domestic Trade and Consumer Affairs (MDTCA) has once again returned enforcement efforts to appropriate levels, including raiding for all types of copyright piracy on an *ex officio* basis and without undue delays.

Executive Summary: A recent article entitled, *The Piracy Goes On*, from one of Malaysia's top newspapers, tells the unfortunate story of piracy in Malaysia in 2008.¹ The piracy situation worsened in 2008, since the new Minister of Domestic Trade and Consumer Affairs (MDTCA) has determined that raids will generally be run only on the basis of right holder complaints, and in some cases, not without the green light of the Secretary General of MDTCA. In addition, some industries report that enforcement decision-making functions are being overseen by officers from the Malaysian Administrative and Diplomatic Service (MADS), many of whom are not trained for this role. The end-result is far fewer enforcement actions in 2008 than during any of the previous five years.² Pirates, seizing upon this gap in coverage, returned to shopping complexes to engage in open and blatant piracy. Photocopying of academic materials by commercial centers near universities also increased. The establishment of IP Courts in 2007 in several cities in Malaysia brought hope for a greater level of deterrence, but the results have not been promising so far. Up until early 2009, the new Minister and Secretary General of MDTCA had even declined to meet with some industry representatives, although meetings are now ensuing. Piracy in Malaysia has harmed the local economy as well as foreign authors and right holders. As an example, physical music sales dropped 20 to 25% in 2008, and as a result, EMI Records shut down its Malaysia operation. Universal Music outsourced its finance operations to India, resulting in the loss of about 35 Malaysian jobs.

Priority Actions Requested in 2009: IIPA requests that the government of Malaysia take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Ensure that qualified enforcement officers from the MDTCA enforcement division return to handling all enforcement operation functions, including copyright inspections, raids, case preparations, and prosecutions. To the extent that officers from MADS who are not well trained on copyright enforcement issues have been given greater responsibility in 2008 over piracy matters, purview over such matters in 2009 should generally return to qualified officers.
- Revert to and improve on the previous proactive enforcement administration system whereby dedicated MDTCA enforcement division officials were empowered to make immediate decisions on an *ex officio* basis, rather than on a complaint-basis, and take actions similar to other government enforcement agencies such as the Police and Customs.
- Commence more cases at the courts, decreasing the huge discrepancy between the number of inspections, reported at more than 100,000 in 2008, and the number of infringement cases, which numbered only slightly more than 1,000 in 2008. Significant cases should be brought against optical disc factory owners, mobile device pirate operations, illegal photocopying operations, and chief financiers of piracy, including landlords of fixed premises. Deterrent sentences should be sought, employing the expertise that should now exist in the new IP courts.
- Instruct the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL) and other like local councils, who are ultimately in charge of licensing night market vendors, to curtail the uncontrolled piracy activities at shopping centers, other fixed premises, and night markets.
- Curb pirate entertainment software exports, and unlicensed use of games in Internet cafés.

Legislation

- Adopt stand-alone legislation to ban use of or intent to use an audiovisual recording device to record a movie in a theater.

¹ *The Piracy Goes On*, The Star Online, January 10, 2009, at <http://biz.thestar.com.my/news/story.asp?file=/2009/1/10/business/2984527&sec=business>.

² *Id.* The Star article reported that the Minister of Domestic Trade and Consumer Affairs, Datuk Shahrir Abdul Samad, when asked if piracy was one of his main priorities, replied that it was not. By November, he was quoted as saying the Ministry was ready to renew its fight against piracy.

- Adopt legislation to modernize the copyright law, including fully implementing the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Join the WCT and WPPT.
- Adopt legislation to combat Internet piracy, *inter alia*, by promoting Internet service provider responsibility, including statutory notice and takedown and mechanisms to deal with all forms of Internet piracy, including P2P file sharing, expeditiously.
- Adopt or amend legislation to enable courts to impose statutory damages for infringements.
- Amend the optical disc laws to ensure source identification (SID) code applies to recordable discs, to prohibit “gouging” of source identification codes from discs and allow inspections offsite and at any time, day or night, and make other needed changes.
- Resolve market access barriers, including lifting the quantitative and investment restrictions on foreign television broadcasts, and lifting the restriction on foreign advertising on terrestrial broadcast channels.

MALAYSIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	26.2	60%	16.0	45%	22.0	45%	38.8	49%	55.5	52%
Business Software	180.0	60%	156.0	59%	159.0	60%	82.0	60%	73.0	61%
Entertainment Software	NA	NA	NA	83%	28.0	90%	23.4	91%	12.9	91%
Books	NA	NA	9.0	NA	9.0	NA	10.0	NA	9.0	NA
Motion Pictures	NA	NA	NA	NA	NA	91%	36.0	50%	38.0	50%
TOTALS	206.2		212.0		154.2		187.4		164.0	

PIRACY CHALLENGES IN MALAYSIA

Hard Goods Piracy Reemerges at Fixed Premises and in Night Markets: Due to declining enforcement actions in 2008, hard goods piracy, including distribution of factory-produced optical discs and the “burning” of illegal content onto recordable discs, has reemerged, with open and blatant pirate outlets mushrooming throughout the country, particularly in suburban areas where enforcement is less concentrated. Night market piracy stalls have continued to flourish in Malaysia notwithstanding significant information supplied to the government of Malaysia on a continual basis. As a result, the music industry has suffered a significant deterioration of its legitimate market. The music industry lost an estimated US\$25.7 million in 2008, with piracy levels increasing to over 60% (compared with losses of US\$16 million and 45% piracy level in 2007). The areas of Kuala Lumpur, Kota Kinabalu, Johor Bharu, Penang and the rest of the Klang Valley remain the hardest hit by hard goods piracy.

Exports of Pirate Entertainment Software From Malaysia Still Detected: Although Malaysia has addressed its export piracy problem with respect to most sectors, the export of pirate discs and pirate entertainment software still was detected in 2008 with numerous seizures of pirated game product at Malaysian borders, including one shipment of 15,500 pirated PC games destined for a foreign market. The problem of pirate movie and music exports, once a major issue in Malaysia, has been mitigated by the presence of industry and MDTCA representatives who are stationed in Kuala Lumpur International Airport to monitor and stop such exports.

Mobile Device Piracy on the Rise in Malaysia: Mobile device piracy, in which infringing files are loaded onto mobile devices at fixed locations, has easily become one of the most serious piracy problems in Malaysia. Mobile penetration in Malaysia has exploded over the past several years and was estimated by the Malaysian Communications and Multimedia Commission (MCMC) to be 93% by the end of 2008. While many fixed locations previously engaging in

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Malaysia. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Malaysia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

unlawful uploading/downloading have legalized their practices, many more have not yet done so. For example, for the music industry, piracy in the form of illegal loading of full tracks and ringtones occurs both over the air through wireless transmissions and through over-the-counter sales. The problem affects other industries as well, for example, publishers report some downloading of reference books and dictionaries onto mobile devices.

Book Piracy Worsened in 2008: The book piracy situation deteriorated in 2008. The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. The level of illegal photocopying increased in 2008 in most areas near campuses. Some changes in the modus operandi of photocopy pirates cause publishers further concern, since pirates can now save soft copy scans of textbooks onto computers or portable hard drives and directly print the books from their computers, thus making detection and identification of infringers more difficult. Other continued attempts to make piracy harder to detect include the setting up of shop facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities, or storing pirate stock in vans for easy delivery and difficult detection by authorities. Certain areas within Klang Valley have worsened, including Subang Jaya campuses, Universiti Putra Malaysia (UPM), University of Malaya (UM) and KDU College. Dozens of shops line each campus, and most academic buildings at universities contain on-campus shops. The problem at universities is further perpetuated through the active involvement of lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for illegal photocopying.

Internet Piracy Broadens: The negative effects of Internet piracy, whether direct downloads from websites, P2P file sharing, deep links, advertising sites (for hard goods sale or delivery), or cyber lockers, are starting to have a significant deleterious effect on legitimate copyright owners' businesses. As of 2008, Malaysia hosted almost 15 million Internet users, which represents 59% Internet penetration. Broadband penetration grew substantially, from 1 million to at least 1.2 million broadband subscriptions by the end of the third quarter.⁴ Music piracy from Internet sources remains most prevalent. One local Malay artist, *Mawi*, noted as early as 2006, "A simple search on the Internet reveals that the whole content of Mawi's first solo album[, *"Mawi...Yang Tercinta"* is] 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."⁵ Pirate business software on the Internet is primarily available through peer-to-peer file sharing services. Publishers have also noted some online piracy, with sites offering scanned copies of books (in PDF or a similar format) for download.⁶ A continuing problem in Malaysia involves the use of websites to advertise the sale and delivery of physical pirated goods.

New Internet Café Server-Based Piracy Surfaces: A major problem for several years in Malaysia involves the unauthorized use of copyright materials at Internet cafés or Internet game rooms. In many cases, such premises set up standalone computers loaded with unauthorized or pirated copies of a game. The cafés then shifted to a "client-server" model, in which the unauthorized software is installed at the server level on-site, and the customers' machines are granted access to the same copy on the server. In 2007, the industry saw the development of a new "scheme," involving Internet café operators entering into arrangements with third parties that provide access to an off-site server hosting or storing the game software. The café's on-site server is then granted access to the game software on the off-site server (which effectively controls all activity related to the use of the game at the cafés), and in turn, the café's server permits access to the same software to the many computer machines located on-site. The off-site server will typically require the on-site server to authenticate itself, and thus, if the link to the off-site server is severed, all services that may be available to the café's computers through the on-site server will be rendered inoperable. Thus, once the link is broken, the café's computers are effectively wiped of all data or evidence of infringing activity. The proliferation of such methods of evasion complicates post enforcement verification and thus emboldens those refusing to obtain appropriate licenses for video game product used in such commercial settings.

End-User Piracy of Business Software Stunted IT Growth in Malaysia: The willful use of unlicensed or pirate software in the workplace in Malaysia continues to cause losses to Business Software Alliance companies, seriously compromising the businesses of resellers and distributors of genuine software, and stunting the growth of the IT sector. The PC software piracy rate has remained essentially flat for the past several years at around 60%. This is below the median software piracy rate for the region.

⁴ Malaysian Communications and Multimedia Commission, at http://www.skmm.gov.my/facts_figures/stats/index.asp.

⁵ Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006.

⁶ Sites particularly noted include piradius.net and eastgate.net.my.

Camcorder Piracy Causes Massive Losses to Film Producers: 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 pirate “dealers” throughout the world and over the Internet. During the first half of 2008, there were eight detections of illegal camcording in Malaysian cinemas. The government should enact stand-alone legislation to criminalize illegal use of or intent to use audiovisual recording equipment in a movie theater to record a film off the screen. Such a law would enable Malaysian enforcement divisions’ officers to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement.

Capacity Remains Too High in Licensed and Unlicensed Optical Disc Plants; Blank Disc Production Needs to be Regulated: There were as many as 30 optical disc production plants as of December 1, 2008, with capacity to produce hundreds of millions of discs per year, and dozens of facilities that produce blank CD-Rs and DVD-Rs. IIPA remains concerned about the high production capacity, which easily dwarfs legitimate demand in Malaysia, as well as the cessation of raids on licensed factories. It is troubling that MDTCA renewed a suspended license of one manufacturer in 2007 despite several pending criminal and civil actions against it. Other problems include the failure of the government to properly monitor blank CD-R manufacturing plants and to require such plants to apply source identification codes. Two main problems leave IIPA and the industries affected concerned: 1) there remain few actions against the licensed plants; and 2) facilities licensed to press recordable-only formats remain exempt under the law from mandatory source identification (SID) codes. Given the instances of pirate production by recordable-only factories, SID Code standardization is considered the best practice.

ENFORCEMENT CHALLENGES IN MALAYSIA

Need to Reverse Overall Slowing of Enforcement Activity: The overall slowing of enforcement operations (especially after March 2008) in Malaysia has much to do with the change of the Minister of Domestic Trade and Consumer Affairs, to Y.B. Dato’ Shahrir Bin Abdul Samad, who unfortunately to date has given lower priority to anti-piracy operations and assigned enforcement to come officers who have little or no legal and enforcement knowledge of copyright piracy matters. Proactive, *ex officio* raiding against piracy appears largely to have come to a halt, as MDTCA’s apparent new policy is that they will only act upon receiving complaint from a copyright owner, and they have indicated that any *ex officio* action from the Ministry is not to be expected in the near future (we note here and below that publishers have always been bound by a complaint requirement). MDTCA statistics indicate that the number of cases launched by MDTCA dropped from a high of 4,390 cases in 2004 to 2,333 raids in 2007, to just 668 in 2008. In 2007, 3,666,060 pirate units were seized, compared with only 1,837,946 in 2008) The music industry, as an example, lodged 951 complaints via an online facility on the MDTCA website relating to hard goods piracy during the second half of the year, but only one quarter of them have even received a response from the Malaysian government.

There have also been tremendous difficulties and delays in obtaining approvals for raids from MDTCA from early 2008. Bureaucratic problems and political interference have hindered enforcement most significantly in Johor. Simple retail piracy raid requests, which easily would have been run within a few hours of lodging a complaint as recently as 2006, now take in excess of a month for mere approval in some cases, or in other cases, result in no response at all or outright rejections. Meanwhile, other industries report that Police continue to run *ex officio* raids on their behalves, and that there has been no deterioration in relationships with other government authorities, like the Ministry of Home Affairs (in charge of censorship certification), the Malaysia Communications and Multimedia Commission (which deals principally with Internet matters). Industry has reached out to all the authorities, including in localities like Penang, Johor and Kuala Lumpur. As noted, the new Minister of Domestic Trade and Consumer Affairs and Secretary General did not meet at all with some industries, although meetings have occurred in February 2009, which is hopefully indicative of a positive change.

While IIPA Applauds Establishment of IP Courts in Malaysia, Problems Remain: IIPA applauds the establishment of specialized courts in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. While in recent years the courts had meted out some fairly significant verdicts in commercial piracy cases, it is hoped that the establishment of these new IP tribunals will spur greater efficacy in the timing and

deterrence of the judicial system. Unfortunately, in 2008, IIPA notes several difficulties in the court system that must be addressed. There remains a significant court backlog, leading to delays in case adjudication. One example involves a civil litigation brought by Columbia Pictures against ODVD, a local licensed factory that is alleged to have produced illegal copies of the film, *Stuart Little*. The case, initiated in 2003, only received a first hearing in November 2008. Despite the suit and an ongoing criminal prosecution, and despite assurances by the previous Minister of MDTCA that there would no further issuance of optical disc plant licenses, ODVD was granted a new license in 2007 to operate their factory, although to date there is no evidence it is back in service. Second, since most cases are focused in Kuala Lumpur, it may be that more dedicated judges are needed there. Third, some industry groups report difficulties in obtaining information from MDTCA about ongoing cases.

Issues in Prosecuting Commercial Pirates: In addition to the overall decrease in enforcement, IIPA has noted for many years hurdles in seeking adequate prosecutorial preparation of cases. In the past, a major concern was lack of resources in the Attorney General's chambers, leaving MDTCA officers themselves to be deputized to handle trials (even when they had no experience conducting a criminal trial). On a positive note, industry reports indicate that sixteen Deputy Public Prosecutors, thirteen for Kuala Lumpur, and one each for Selangor, Penang, and Johor, will be permanently assigned to MDTCA to assist in prosecuting copyright cases. It is hoped that this will lead to a more effective and efficient prosecution of infringers. Other problems involved the choice of cases to criminally prosecute. The most successful recent cases have been those brought against factory owners under the auspices of the Attorney General's office. The least successful have involved raids in which only a few illegal titles were found or no titles were found, but evidence of a much larger operation was not used to investigate "up the chain." With the decrease in raiding activity nullifying any deterrence from raiding the past few years, it is hoped at least that major piracy operations would be targeted for prosecution in 2009 in order to re-establish such deterrence.

Other problems relate to procedural hurdles and mishandling of dockets. Some industries have encountered various problems, ranging from missing documents due to the poor file management of the authorities, attrition leading to a constant flow of new officers who need to re-acquaint themselves with a case file, last minute preparation for cases, prosecutors being ill-informed of the case file, and lack of transparency (often the only way industry knows about a criminal case is through the subpoena of witnesses), and failure of prosecutors to provide status updates. All of these factors may (and sometimes have) resulted in criminal cases being lost. Slow prosecutions of cases are also problematic, leading to cases becoming stale (like the ODVD case which arose from a raid in 2003, but which only went to trial in November 2008) or defendants absconding. Perhaps the most significant problems involve compromises in the system. For example, many instances have arisen in the past in which factory owners came forward to stop an optical disc factory raid, but instead of arresting the owners, the factory workers were arrested. Links to organized or gang-related piracy must also be explored more carefully.⁷ Finally, prosecutors must receive more training and expertise so they can be more confident when faced with aggressive and experienced defense trial lawyers.

A longstanding issue with respect to slow prosecution has been the case against a notorious pirate operation – BASIC Electronics (M) Sdn. Bhd, that is believed to span Malaysia, Thailand, and Singapore, with exports worldwide of pirated PC games. The entertainment software industry has patiently awaited progress on this case for the last five years. A raid in 2004 yielded more than 880,000 pirated entertainment software discs. Several years later, and after procedural missteps (e.g., the charges finally entered in October 2006 were based on less than 1,000 discs that were verified) and several postponements (including three continuances in 2008 alone), the case is now on its sixth set of trial dates. Disappointingly, it was MDTCA that secured one of the continuances in 2008, without notifying industry even after it had previously assured industry that it did not foresee any further postponements and would press for trial to proceed without delay. Industry requested a formal explanation from MDTCA officials regarding the circumstances of the postponement but did not receive a response.

Shopping Center and Night Market Piracy Grow Out of Control: The local industries have supplied voluminous information to the authorities about shopping center and night market piracy over the past two years. Yet, the markets remain open for business. The Ministry of Local Government and Housing, and Kuala Lumpur City Council

⁷ For example, in a raid in 2005, six Malaysian individuals were arrested in Nigeria for optical disc piracy offences, and in addition, evidence has emerged in the past few years between syndicates in Malaysia and the United Kingdom, China, South Africa, Indonesia, Pakistan, and the Philippines.

(DBKL) and other like local authorities, who are ultimately in charge of licensing night market vendors, must take actions to curtail this uncontrolled piracy activities at shopping centers and night markets.

Publishers Bear Burden to Prepare Authorities for Enforcement Efforts Against Book Piracy: While publishers have generally had good relationships with officials at the MDTCA, MDTCA has never taken *ex officio* actions on behalf of publishers, instead placing the burden on publishers to prepare complaints, along with all the necessary evidence and supporting documents in order to initiate a raid. The supporting evidence includes surveillance reports on possible targets, photographs of the targets, and if feasible, trap purchases. While MDTCA officials conduct 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 on how to handle raids, which items to seize, especially contrivances (e.g., book binding machines, photocopying machines and such machines that are idle when raids commence), and how to protect right holders from being harassed or threatened by pirates. Better preservation of evidence by prosecuting officials, and better and more proactive investigations are needed to curtail photocopy piracy in Malaysia, which has increasingly gone underground or become harder to detect or identify. While MDTCA has been open to suggestions and is willing to work hand in hand with the local universities in structuring policies and strategies to eradicate piracy on campuses, the universities themselves have to date been reluctant to get involved, apart from periodic distribution of public awareness information. IIPA would like to see the universities take a more active role in legitimizing practices on their campuses and would like to see more oversight of these efforts by the Ministries of Education and Higher Education.

Internet Piracy Requires a Coordinated Response and Cooperation from ISPs: The relevant authorities in Malaysia should respond to the threat of Internet piracy in a coordinated manner, and service providers should take responsibility regarding online infringements and show a willingness to cooperate with efforts to address online piracy. To the extent advertising sites profit from hard goods piracy, MDTCA should become more proactive in investigating links between the Internet and hard goods piracy. As for other piracy phenomena like P2P file sharing, the copyright law can be used to hold end-users liable and to provide a roadmap for service providers as to what direct and indirect activities are illegal. Specifically regarding service providers, the Malaysian Communications and Multimedia Commission (MCMC) must remain a strong presence in the fight against Internet piracy, and in particular, must help enforce the provisions of the Communications and Multimedia Act (1998).⁸ Section 263 of the CMA requires a service provider to “use his best endeavor to prevent the network facilities that he owns or provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia,” and “assist the Commission or other authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia.” Right holders have traditionally enjoyed good cooperation from service providers, e.g., in 2007 and into 2008, 19 websites notified by the Motion Picture Association to service providers were taken down. Other industries report, however, that noncompliance by ISPs is on the rise, and perhaps this signals a trend that should be addressed early.

Good cooperation with the Malaysia Post Office has also resulted in a decrease in the number of shipments sent out pursuant to orders on websites (in 2007, the Motion Picture Association, Entertainment Software Association, and MDTCA managed to lower the number of shipments from 500 to 800 packages per day to a low of 100 to 300 packages per day). Between January and October 2008, the Business Software Alliance sent 1,334 takedown notices to ISPs pointing out the existence of infringing software on their networks. There remain some challenges involving Internet piracy which must continue to be addressed, and in part can only be addressed with service provider cooperation. For example, identifying the owner of a website is difficult without the help of service providers, since basic information available to right holders is usually false.

Good Cooperation with Authorities Continues Against Business Software End-User Piracy: The Business Software Alliance (BSA), working with MDTCA, was able to conduct more than 30 criminal end-user raids in 2008. BSA notes that 6 criminal cases were commenced out of those 30 raids, and that 116 cases remain pending in the courts.

⁸ *Communications and Multimedia Act, 1998*, at http://www.commonlii.org/my/legis/consol_act/cama1998289/.

Entertainment Software Piracy Remains a Significant Problem: The entertainment software industry's joint anti-piracy program with the motion picture industry entered its second year in 2008. The program's aim remains the reduction of large-scale replication and global export of pirated game product from Malaysia, which remains one of the primary sources of pirated game product in the world. The joint program resulted in raids against one factory, a burning operation, storage centers, cybercafés, and numerous retail shops. Tens of thousands of pirated games for multiple gaming platforms were seized, as well as several replicating lines, numerous stampers and burners and other manufacturing equipment. Thousands of pirated game products, both optical discs and game cartridges, were also seized at the Malaysian Postal Center. The industry expresses frustration with respect to the lack of follow-up with respect to post raid activities. Investigations into suppliers and others further up the chain should be a routine occurrence so as to address higher levels of pirate operations. Instead, there is considerable delay in initiating such investigations, if they are conducted at all. For example, the industry continues to support a case against a burning lab operation that resulted from a raid in 2007 but there has been little progress to date, in part due to what government has described as a manpower shortage.⁹

TRAINING AND PUBLIC AWARENESS

The copyright industries once again demonstrated their resolve and commitment to assist the Government of Malaysia through participation, organization, and devotion of resources to trainings and public awareness activities in 2008. It should be noted in general, however, that the number of trainings went down in 2008, mainly due to lack of interest on the part of MDTCA to meet with or engage in training with industry. Some exceptions included the Business Software Alliance's continued participation in the Ops Sikap Tulen (Original Attitude), which MDTCA started in July 2007 and continued to gain traction on in 2008. The aim of the campaign was to cultivate a lifestyle that respected intellectual property, and to change behavior and mindsets to use only original and licensed software. As part of the 2008 campaign, educational messages and enforcement were expanded to the states of Penang and Selangor. Extensive media coverage included press conferences and press statements on raids conducted to support the campaign. The BSA also commenced an Internet awareness campaign in 2008 called "B4USurf" in June 2008, with the support of the Ministry of Education, targeting youth between 13 and 18 years old. The objectives of the campaign were to raise awareness of the risks and dangers of the Internet and the urgent need for youths to learn how to surf safely and responsibly. It is also directed toward the inclusion of Internet "wellness" education into the general school curriculum. The Motion Picture Association also engaged in training activities, including a seminar for prosecutors held on January 25-27, 2008 in Pahang, involving 50 participants consisting of MDTCA prosecuting officers and DPPs from the Attorney General's Chambers. The training covered aspects of investigating copyright infringement and conducting a criminal copyright prosecution. Another seminar on Internet investigations and prosecutions was held in Penang on August 22-24, 2008, involving 40 participants consisting of MDTCA prosecuting officers and DPPs from the Attorney General's Chambers. The training covered aspects in relation to Internet investigations, computer and Internet forensics investigations, and a basic understanding of telecommunications.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law in Need of Modernizing Revisions: Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2003. The 2003 amendments¹⁰ strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$5,550) 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 on an *ex officio* basis. Unfortunately, as we have highlighted in this report, MDTCA has deemphasized *ex officio* actions in 2008. The 2003 amendments also failed to make other changes necessary to meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall. They failed, for example, to:

⁹ In June 2007, MDTCA raided a clandestine disc-burning lab located in a three-bedroom condominium in Kuala Lumpur, seizing 12 computers and 90 disc burners, nearly 50,000 pirate optical discs containing games, movie and business software, 7,200 blank optical disks, a number of stampers, and various documents and other items. The condominium was vacant during the raid and therefore no arrests were made at the time. The evidence seized indicated that the burner lab may be run by the same syndicate linked to an earlier burner raid. Although MDTCA noted at the time its plans to investigate all leads involving this possible syndicate connection with the goal of prosecution and did obtain some helpful intelligence, significant investigative progress has not been made due to lack of manpower. Industry is concerned that the substantial time lapse since the raid was conducted has left the investigative trail cold.

¹⁰ The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

- Impose mandatory minimum jail sentences for piracy.
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright. Specifically, Section 42 should be amended to afford right holders with presumptions of subsistence of copyright and ownership in practice, and ensure that statutory declarations of ownership and subsistence are not vulnerable to technical challenges by defendants (it should be sufficient that the declaration says "copyright subsisted and continues to subsist at all material times" and the "true copy" requirement is overly burdensome). The maker of an affidavit of copyright ownership or subsistence should not be required to be physically present. 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 a U.S.-Malaysia Free Trade Agreement. At present, the court's interpretation and implementation of Section 42 calls into serious question Malaysia's compliance with its current international obligations.
- Provide for stronger damages in civil copyright cases by providing for statutory damages in civil cases. Statutory damages will act as a strong deterrent to pirates who benefit greatly from infringing acts but are only required to pay a minimum sum for actual losses that the plaintiff is able to prove. Statutory damages could be staggered on a tiered system so that first time infringers pay sizeable but comparatively smaller sums as statutory damages while repeat infringers pay much larger sums.
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.
- Fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, including full implementation of protections against the circumvention of technological protection measures (TPMs) and the trafficking in circumvention devices or services, and expressly protecting temporary copies. Malaysia is one of the few countries in Asia that has not fully implemented and/or joined the treaties yet. IIPA had understood in late 2007 that the government of Malaysia was in the process of preparing copyright law amendments to fully implement the WCT and WPPT aimed for passage in 2008 so that Malaysia could join the WCT and WPPT in 2008 (IIPA also understands that MDTCA made assurances to non-governmental organizations that it would be joining the treaties).
- Extend term of protection to "life plus 70" and 95 years from publication for films and sound recordings etc.
- Extend and/or confirm shopping complex owner liability for the rampant trade of pirated products that still occurs within many commercial buildings. IIPA understands that criminal actions have been filed as test cases against landlords of fixed premises for permitting their tenants to use the premises to sell pirated music. To the extent these cases extend mall owner liability for the rampant trade of pirated products that occurs within many commercial buildings, IIPA believes they will reap long-term, positive benefits in the fight against piracy in Malaysia. IIPA understands that the government intends to file further mall owner actions. We support these actions, and also urge the Malaysian government to create a specific offense for a landlord to permit its premises to be used for infringement of copyright, *inter alia*, the reproduction, distribution or sale of pirated products.
- Amend Section 52 in line with the August 8, 2006 Malaysia Court of Appeals dismissal of an appeal by ODVD Manufacturer Sdn Bhd's, such that copyright holders may file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.
- Issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

Camcording Law or Provision Needed: IIPA understands that a law to ban camcording has been proposed by MDTCA to specifically define the act of camcording or recording in cinemas as a strict liability criminal offense. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in theater without having to establish the ownership or subsistence of copyright in the recorded film, without the need of a formal complaint, etc. The benefit of a standalone provision in Malaysian law is that it would alleviate the necessity to establish the subsistence and ownership of copyright and the act of infringement of the work being recorded. This proposal was pending at MDTCA as of early 2008. IIPA notes the recent decision to prosecute a suspect under Section 41 (1)(g) of the Copyright Act of 1987 for engaging in copyright infringement when he was caught illegally camcording. This involves a recent arrest of a suspect on Jan 29, 2009 for recording a local film in a movie theater. This suspect is due to be charged

in Court on Feb 27, 2009. While IIPA welcomes this decision by the government to address illegal camcording, IIPA likewise fully supports the MDTCA proposal to expressly ban camcording as a standalone offense.

The Need to Establish Statutory Guidelines to Foster Internet Service Provider Responsibility: IIPA suggests that provisions dealing with secondary liability should be adopted in the copyright law, so that Internet Service Providers (ISPs) will take responsibility for Internet-based infringements occurring over their services, and will have incentives to cooperate with right holders in defeating online piracy. We understand that MyIPO may be working on a draft bill to deal with service provider issues. First and foremost, IIPA notes that the Communications and Multimedia Act (1998), while not setting forth with specificity the mechanisms needed to combat online piracy, does state the important principle that network facilities should not be used to break the laws of Malaysia, and even imposes responsibilities on ISPs to “use ... best endeavor[s] to prevent” their services from being used to break the law, and to “assist the Commission or other authority as far as reasonably necessary” to prevent anyone from breaking the laws of Malaysia, including the copyright laws. This language set an extremely helpful framework for any copyright-specific discussion, and should form the basis for going forward.

Specifically, any draft put forward on service provider issues in the copyright context should avoid the following pitfalls, among others:

- Any draft should not provide blanket immunity from liability for ISPs for infringements occurring on their networks or through their services, but can limit monetary damages as long as it preserves injunctive or other equitable relief.
- Any draft should provide incentives to ISPs to cooperate with right holders, by, e.g., providing for independent copyright infringement liability if a service provider knows, or has reason to know, that infringements are occurring over the service/network. Any approach that shields a service provider from liability even in these circumstances allows it to essentially turn a blind eye to infringements. Notice should be one acceptable method, but not the only method, for making a service provider aware of infringement, and a notice should be able to be filed by anyone.
- Any draft should provide for expeditious takedown of infringing activity by service providers in the case of a notice. A “48 hours” requirement is reasonable, as is a requirement that any pre-release material be taken down “immediately.” (Pre-release material comprises movies, music, games, software, or published materials that have not appeared in the market yet).
- Any draft should contain a counter-notification mechanism, so that it is incumbent upon one who has had material taken down to file such a counter-notification in order for the material to be put back.
- Any draft should contain a termination mechanism for repeat infringers.
- Any draft should provide for court-ordered relief, including terminating specified accounts, or taking reasonable steps to block access to specific, non-domestic online locations, etc.
- Any draft should contain a mechanism to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could also be improved to address the changing situation in Malaysia, including, *inter alia*, the need to: 1) ensure that manufacturers or factory owners should not be allowed to import machinery without a valid license from MDTCA, and that MDTCA should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID code from discs; 3) 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; 4) prohibit the unauthorized burning of content onto recordable discs; 5) specifically empower the authorities to shut down factories bases solely on positive forensic examination reports; and 6) ensure that any plants, which indicate that they are producing “recordable” discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand production to recordable discs be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided, even from recordable-only plants. See also the other important improvements sought in the free trade agreement negotiation.

Enact Organized Crime Legislation: With the involvement of organized criminal syndicates in certain 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 fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime/IP nexus in Malaysia.¹¹

FREE TRADE AGREEMENT

While Trade Promotion Authority (TPA) – otherwise known as “fast track” authority – lapsed on June 30, 2007, the U.S. and Malaysian governments have continued to negotiate with each other regarding a possible free trade agreement.¹² The U.S.-Malaysia FTA should include a robust chapter on intellectual property rights, including full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards. These include, but are not limited to, those already embodied in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, the requirement that Malaysia join those two treaties, and the requirement that Malaysia upgrade its copyright enforcement practices. The goal of the enforcement text is 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; and 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.

Some of the key FTA issues include the following:

- Extending term of protection to life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years.
- Requiring the possibility of pre-established, statutory civil damages, in lieu of actual damages, in an amount that provides a deterrent to further infringements, and that is electable by the right holder prior to the conclusion of the trial.
- Providing for presumptions of subsistence of copyright and ownership of copyright, without burdensome documentary requirements or “presence” requirements brought on by groundless defense challenges.
- Criminalizing 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.
- Obtaining commitment by the Malaysian government to immediately join (and implement) the WIPO Internet treaties, the WCT and WPPT.
- Ensuring that use of software in the government is legalized (and that appropriate software asset management is employed), and that government networks are not being used for illegal uses of copyright materials, including over peer-to-peer file sharing (P2P) networks or services.
- 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.
- Ensuring 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, by including an exclusive broadcast right, 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), and in addition, a prohibition against onward distribution of signals without authorization (re-broadcast or re-transmission).

¹¹ Malaysia has the Anti-Money Laundering Act of 2001 (AMLA) of which infringement of copyright is a scheduled offense under the definition of “serious offenses”, and includes attempts and abetments. Unfortunately, despite having received training in the use of and prosecution under AMLA, the government has been slow to use it in copyright infringement matters.

¹² 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 (on March 8, 2006, the United States announced its intention to enter into negotiations toward an FTA with the government of Malaysia).

- Ensuring that the government of Malaysia agrees to take necessary steps to legalize government and other public sector use of software and other copyright materials.

Optical Disc Side Letter: 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 in Malaysia 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 source identification (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.
- Allow right holders to participate in inspections and collect evidence.
- 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, including if the plant is caught illegally replicating discs (finished or recordable).
- Provide that illegal discs found at any factory or licensed premises are presumed to have been replicated by the manufacturer in question.

MARKET ACCESS

Lift Broadcast Quotas and Investment Restrictions: 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.

Lift Onerous Restriction on Foreign Advertising: Malaysia allows only locally-produced advertisements to be aired on terrestrial broadcast channels. Foreign advertisements must therefore be replaced with locally-made advertisements before programs can air. This restriction, which both has a protectionist underpinning, and impedes on right owners’ abilities to freely contract and pursue commercial opportunities in the Malaysian market, should be lifted.

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remain on the Watch List in 2009.

Executive Summary: IIPA and its members support free trade agreements and are pleased that the U.S.-Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009. This agreement contains a comprehensive intellectual property rights chapter that contains high standards for copyright protection and enforcement, many of which were implemented prior to or upon entry into force. IIPA and its members look forward to Peru's practical implementation in 2009 of these measures. To be clear, in recent years the most pressing problem for the copyright industries in Peru has been inadequate criminal enforcement and deficient administrative remedies regarding copyright infringement. Peru's laws prior to TPA implementation were generally solid but were simply not effectively enforced. The continuing test will be whether Peru will take the actions needed--across the board (raids, prosecutions, administrative and civil actions, and judicial sentencing)--to provide adequate and effective copyright enforcement required by the TPA. Piracy in the Peruvian marketplace continues to be a significant business obstacle. Hard goods piracy is rampant, with burned optical discs (infringing content on CD-Rs and DVD-Rs) the favored medium of street piracy. Internet piracy is growing, and already has seriously threatened the viability of the music industry. The government has again postponed (until 2011 -- a six-year delay) the implementation of its program to legalize software within government agencies. Print piracy of a variety of published materials and illegal photocopying of textbooks near university campuses continue to plague book publishers. More police actions are needed, prosecutors should pursue piracy cases, and judges should impose the deterrent-level sentences allowed under the criminal code. Moreover, administrative enforcement by INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) for business software piracy deteriorated in 2008, with various courts having issued dangerous interpretations, especially against the business software sector that relies on *ex parte* inspections as well as for music industry issues involving the collective management of rights and royalty payments. INDECOPI has done a lot of valuable work on public awareness but that has not been enough to reduce piracy. The lack of resources dedicated to intellectual property infringement remains a persistent problem in Peru, and given other national priorities and the current economic climate, it is unlikely that resources will increase in 2009.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Peru in order to improve the adequate and effective protection of copyrighted materials there:

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.
- Instruct INDECOPI to issue deterrent sanctions -- simple warnings and forgiveness of copyright damages are both inadequate remedies, and to enforce compliance with their own decisions (e.g. violators who have been issued fines simply refuse to pay and INDECOPI does not take action to enforce payment).
- Require government agencies and ministries that have not complied with the business software inventory requirements and the licensing of such software to take actions now. The implementation of the original 2004 software legalization regulation has been delayed numerous times and now has a deadline of December 31, 2011. The lack of progress on this important initiative continues to cause economic harm to the legitimate software sector.
- Support more administrative enforcement efforts by INDECOPI against piracy of business software, books, motion pictures (DVD and cable), entertainment software and music.
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including software end-user and retailer actions, and coordinating with INDECOPI on border measures.



- Work with local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.
- Continue the training efforts to the judges in the four specialized IPR courts and appeals court in Lima.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) used in making those products.
- Fully implement the Importation Register for importers of blank media and recording devices and equipment.
- Dedicate significantly more resources to criminal IPR enforcement (e.g., budget reallocation, supporting the special IPR unit of the Fiscal Police) as well as enhancing financial resources for INDECOPI.

Legislation

- Draft and pass legislation that gives the judiciary the authority to enforce INDECOPI's decisions if INDECOPI refuses to execute and enforce their own decisions.
- Issue regulations that would increase the level of fines that could be issued against businesses that refuse to be investigated or raided by INDECOPI. Through Legislative Decree No. 807, INDECOPI already has the authority to level fines against individuals or businesses that refuse to be investigated. Article 28 of this law stipulates that if an individual or business is served with an injunction or receives a fine from INDECOPI and fails to comply, the maximum allowable penalty for the violation will be imposed. If the non-compliance persists, then INDECOPI may impose a new fine, the amount of which will be doubled at established intervals. INDECOPI can file a criminal complaint with the Office of the Public Prosecutor.
- Work, in a transparent manner, with the U.S. Government and copyright industries to develop and prepare legislation to implement those provisions that are subject to the transitions provisions permitted in the Trade Promotion Agreement's IPR Chapter (e.g. such as statutory damages and provisions on ISP liability).
- Consideration should be given for further refinements to the Peruvian Copyright Law. For example, Article 48 should be amended in order to exclude the possibility of considering sharing and use of information as a private copy, and problems with the higher standard for INCECOPI inspections in Article 177 should be resolved.
- Amend Law 28976 on Licenses for Business Preparations to include, as grounds for closure and revocation of licenses, the sale of products that violate intellectual property.

PERU Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Level
Sound Recordings & Musical Compositions ²	58.5	98%	58.5	98%	53.5	98%	66.0	98%	68.0	98%
Business Software ³	52.0	74%	41.0	71%	32.0	71%	22.0	73%	22.0	73%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	12.0	63%	4.0	75%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	9.0	NA	8.5	NA
TOTALS	110.5		99.5		85.5		109.0		102.5	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For 301 information on Peru, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² 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.

³ BSA's 2008 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁴ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

In recent years, the copyright industries' most pressing issues in Peru have involved the inadequacy of its enforcement – criminal, administrative and civil measures. This section summarizes the changes made to the copyright and enforcement-related laws in 2008 and early 2009, all which were necessary in order for the U.S.-Peru Trade Promotion Agreement (TPA) to enter into force in Peru.⁵ Some of the refinements in these laws should, and must, aid in swifter and more effective enforcement by Peruvian authorities in 2009.

A. Legislative implementation of copyright and enforcement issues under the IPR Chapter of the TPA

Given the higher standards of copyright obligations and enforcement measures in the TPA, both the Peruvian and U.S. governments anticipated that Peru would have to make some changes in its law to bring certain provisions up to the obligations of the TPA.⁶ Even before the TPA, Peru's copyright law contained a broad scope of economic rights as well as some of the highest levels of criminal penalties in Latin America.

The TPA's IPR Chapter does contain transition periods for certain elements, described immediately below. Peru has chosen to implement most, but not all, of the TPA's provisions, without transition. For example, ahead of the transition deadlines, Peru amended its legislation to:

- Provide protection and remedies against the circumvention of technological protection measures (TPMs) (this has been done in advance of the 3 years transition to implement TPA Article 16.7.4).
- Provide for protection of rights management information (RMI) (done in advance of the 18 months transition for TPA Article 16.7.5a).
- Provide criminal sanctions regarding encrypted program-carrying satellite signals (done in advance of the 18 months transition for TPA Article 15.8.1.b).

Two issues with transition periods are still to be implemented:

- One important element that Peru will still have to implement is its obligation to provide for pre-established damages (statutory damages) in civil judicial proceedings (18 months transition for TPA Article 16.11.8). This remedy is particularly important to the business software sector. BSA recommends that both the courts and INDECOPI should have a statutory damage remedy and be able to impose those damages. As legislation develops to implement this particular TPA requirement, it is important that the process be transparent and involve the copyright industries because they have the expertise in using this remedy in other markets.
- Another critical issue involves provisions affecting the limitation on liability for service providers and notice and takedown procedures (1 year transition for TPA Article 16.11.29).

Criminal penalties and procedures in Legislative Decree 29263: Peru's criminal code was amended in 2004 to increase 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. Further amendments in 2006 penalized recidivist offenders with stronger sanctions and established additional penalties for more crimes. As part of TPA implementation, additional amendments to the criminal code were accomplished by this decree, published on October 2, 2008, such as:

⁵ After the TPA enters into force, tariffs for both countries will be lowered, and no longer will Peru be eligible for certain U.S. preferential trade programs. Peru has been a beneficiary country of several U.S. trade programs which contain high IPR standards. During 2008, the following quantities of Peruvian imports under the various U.S. trade programs entered the U.S.: \$3.16 billion under the Andean Trade Preferences Act (including the ATPDEA) plus \$271 million under the Generalized System of Preferences (GSP) program.

⁶ The U.S. and Peru began free trade agreement negotiations in May 2004. On June 25, 2007, both nations reached agreement on amendments to the TPA to reflect the bipartisan trade agreement between the U.S. Administration and Congressional leadership on May 10, 2007. On December 14, 2007, the Peruvian Congress delegated the power to legislate and issue regulations to implement the TPA to its Executive, and the Congress set up a Committee to review the Executive's legislative proposals. The U.S. certified Peru's compliance with the FTA on January 16, 2009, and the TPA entered into force in Peru on February 1, 2009. The final text of the U.S.-Peru TPA IPR Chapter is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html. As part of the TPA, Peru also signed four IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

- Adds the right of communication to the public to the list of exclusive rights subject to infringement under Article 217 of the Criminal Code, and included more infringements subject to aggravated penalties in Article 218;
- Empowers judges to order preventative seizures of suspected infringing products and equipment used to make such infringement, as well as the destruction of same;
- Adds, as crimes, the unauthorized circumvention of technological protection measures (products, copy controls and access controls) plus the importation and commercialization of devices and offering of services for these purposes;
- Adds the crime of infringement of rights management information;
- Penalizes the reception and distribution of encrypted program carrying satellite signals;.
- Penalizes the unauthorized use of computer software manuals and licenses.
- Prohibits the production, distribution or storage of pirated material, as well as the production of printed material used for falsely identifying and packing unauthorized copies of copyrighted films, music and computer software.

Copyright-related implementation: Peru passed several pieces of legislation that implemented various copyright and enforcement measures. First, amendments to the copyright law were adopted in June 2008, when it was thought the TPA would enter into force that summer. **Legislative Decree No. 1076**, published on June 26, 2008, amended the copyright law in the following ways:

- Added definitions of technological protection measures (TPMs) and rights management information (RMI);
- Added the right of making available to the public for producers of phonograms (an TPA and WPPT requirement);
- Included several provisions regarding the ability of rights holders and their authorized licensees to take actions to enforce their rights;
- Added explicit provisions on RMIs and TPM protection and the exceptions provided in the TPA;
- Added provisions regarding the ability of judicial authorities to destroy goods at the request of the rights holder and to provide information about the suspect to the rights holder.
- Provided civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products (the TPA allowed 3 years' transition for these elements found in TPA Article 16.11.15).

Additional refinements were included in **Legislative Decree No. 29316**, which was published on January 14, 2009, accomplishing the following:

- Amended the criminal code to protect against decryption and distribution of program-carrying satellite signals;
- Amended the criminal code to protect against the circumvention of technological protection measures and similarly amended the copyright law on TPMs;
- Amended an Andean Community implementation law to allow judicial authorities to order the seizure of suspected infringing products and equipment.

Peru enacted a partial amendment of the copyright law that practically solved the problem with the hierarchy between authors and neighboring rights. It is too early to say how judges will interpret these new provisions.

Government software asset management delayed until 2011: Six years ago, Peru issued its first order on government software legalization⁷, and yet the implementation of that order has been continuously delayed, now until

⁷ On February 13, 2003, the Peruvian Government published the Government Software Legalization Decree (Decreto Supremo No. 013-2003-PCM). The 2003 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. The Government then 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 by December 2006. Then, on January 11, 2007, the Government issued Supreme Decree 002-2007-PCM, postponing the enforceability of Decree 013-2003-PCM until July 31, 2008. That date came and went, and

December 30, 2011. The FTA requires that the government software legalization obligation be in effect upon the FTA's entry into force. BSA urges the Peruvian Government to implement the long delayed software guide and the decree as swiftly as possible.

Legislative Decree 1092 on border measures: This law, adopted in June 2008 and effective upon the TPA's entry into force, implements various border measures for IPR enforcement. Importantly, this law provides customs , exports or in-transit goods; (2) allows customs ex officio authority, as required by the TPA (Peru implemented this element in advance of the 1 year transition allowed per TPA Article. 16.11.23). In addition, this law: (1) establishes a proceeding for SUNAT (customs) officials to stop suspected infringing imports officials to inspect and seize suspected products in-transit; (3) requires customs to implement a recordation system for trademarks and copyrights; (4) requires Customs and INDECOPI to implement an electronic system to exchange information; and (5) clarifies definitions for piracy and counterfeiting.

Legislative Decree 1033 on INDECOPI: This law consolidates and regulates the functions of INDECOPI (Institute for the Defense of Free Competition and Protection of Intellectual Property), strengthens its autonomy and reorganizes its internal structure. This law calls for the creation of specialized committees to address infringements of intellectual property rights instead of the former Bureaus (Oficinas). It is too early to evaluate the impact of this reform on INDECOPI's effectiveness. First, it will be important ensure that INDECOPI's processing of infringement cases does not slow down. There will be a shift of decision-making authority for specific cases from a single individual -- the head of the Bureau --to a collegial body, a panel in charge of each case. Second, BSA notes that it is also important that incentives for companies using illegal software to legalize their operations should be preserved.

B. Other laws used to enforce IP in Peru

National Committee for Fight against Contraband and Piracy: Law No. 29013 was enacted May 4, 2007, to amend the composition of the *Comisión Nacional de Lucha Contra Contrabando y la Piratería*. Participation of CONTRACOPA has been reduced from 16 members to only 3. This has resulted in the exclusion of the copyright industry representatives (like MPA) and has weakened the Commission. The Antipiracy Crusade is a separate and distinct public-private partnership that works in coordination with this Commission and is focused principally on the promotion of legitimate entertainment.

Special courts and IP jurisdiction: In 2006, 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 and one special appeals court with national jurisdiction on IPR crimes ("supranational courts"). In 2007, an administration resolution (Administrative Resolution No. 223-2007-CE-PJ of November 9, 2007) was issued that requires that when tax, customs and intellectual property-related crimes are particularly serious and particularly complex, they are to be heard by Supraprovincial Courts. These courts, which already existed to hear cases involving terrorism and human rights abuses, were charged with hearing IP cases. However, it was determined that these courts would only hear IP cases that involved organized crime. It is often difficult to convince the court that a case which seems to involve "small players" actually involves links to much larger groups. There is the risk that many important cases will be turned back to the regular courts. Judges in these courts are inclined to hand out harsher sentences, due to the other cases that they have heard. There are not specialized IP penal judges in Peru, even in these special courts. Therefore, the training of these judges is very important, and the copyright industries have been involved in judicial trainings in 2008.

Local municipality against street piracy: Ordinance No. 217-MSI (November 16, 2007) was issued by the Municipality of San Isidro (Lima). It provides for a number of actions against pirates including fines, loss of operating license and penalties the seizure of counterfeit products or products whose sale has been prohibited by law. The most important part of this ordinance is that it clearly prohibits the sale of pirate product. In 2008, Antipiracy Crusade supported the Municipality of San Isidro (Lima) in three raids against small stalls in market fairs and street vendors and plans to work again this year with this and other municipalities.

Customs registry and the 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

yet another delay has pushed the deadline for software legalization in government ministries to December 30, 2011 (Supreme Decree No. 77-2008-PCM, published November 27, 2008)

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, but at last report it has not been activated.

Law of the Book (2003): The Law of Democratization of the Book and the Development of Reading (Law No. 28086) was enacted in October 2003, with the goals of protecting the creation and distribution of books and similar editorial products. The law also has goals of improving access to books, promoting the national library system, and promoting the conditions necessary for the legal production of the books, among others. The law created an entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*) within the Ministry of Education.

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 have been unwilling to pay. The industries see an apparent increase in contraband to avoid this levy as well as importation related VATs. The only way to prevent this situation and the loss of tariffs and levies is for Custom agents to take a more aggressive approach to the importation or smuggling of blank media. In 2008, SUNAT was responsible for most of the anti-contraband actions. More than 20 such actions detected the presence of contraband blank discs. SUNAT expects to conduct a greater number of such actions in 2009.

Digital terrestrial television: In 2006, Peru announced that it 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. Discussion still ensues on the standard to be adopted.

COPYRIGHT PIRACY IN PERU

Hard goods piracy: Hard goods piracy remains the most prevalent and visible form of piracy in the Peruvian market. In the notorious 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), pirates operate during daylight hours. There are also some popular shopping galleries and arcades that sell pirate products. The sale of pirate discs through street vendors and small stores and stands located in informal discount retail centers continues to be the main channel of pirate commerce and the one that most affects the audiovisual industry. "Delivery" systems are another channel of distribution to consumers; however, these systems are not yet widespread. Lima, Arequipa, Trujillo, Chiclayo, Tacna have the most wide-spread hard goods piracy problem. The purchase of products through web sites (Internet piracy) is also reported, but this is not widely used due to risks involved in transactions and payments.

Optical disc piracy is a major problem, where large numbers of blank media (e.g., CDs, DVDs) are imported into Peru, and used for burning copyrighted content. It is estimated that only 12% of the optical discs entering Peru are destined for the legitimate market. The legal importation of blank discs has dropped in recent years, with 2007 imports being less than 15% of the 2005 level (16.2 million units down from 127.8 million units) (IIPA does not have 2008 data.) It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in the number of reported imports of blank media in recent years does not necessarily mean that the amount of blank CDs and DVDs used by pirates has decreased. Peru has implemented a levy on each unit of raw blank media, so blank media is now being smuggled into Peru. Smuggled blank media is estimated at approximately 100 million units annually, with most sourced from India. Popular smuggling routes mostly involve Tacna and Puno (south of Peru border with Chile and Bolivia).

Business software piracy, end-user and retail: The business software industry reports that its major piracy problem in Peru remains end user piracy in private corporations (mostly small- and medium-sized businesses) and government agencies. To make matters worse, the government has again delayed the implementation of the Executive Decree first issued in 2004 which required government agencies' legalization of software; the delayed deadline is now December 31, 2008. The Business Software Alliance (BSA) also confronts problems involving high levels of optical disc piracy on the streets and in bazaars. The information technology market is growing at a 16% annual rate, which means that there are more computers in the market that use software, but local purchases of legitimate product do not seem to match that amount of growth.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy of audiovisual content continued to grow in 2008. Pirate optical discs are available even prior to theatrical release in Peru and are distributed via street markets, home delivery, newspaper stands and black market distribution centers. Illegal camcording emerged as a problem in 2008 with Peruvian sourced camcords found in the United States and Chile. Several cases of camcording have been interrupted by cinema employees. Piracy in the home video/DVD industry has resulted in local distributors significantly reducing their profit margins. Continuing a five-year trend, both the theatrical and the home entertainment sectors have reported positive results in 2008.

Record and music piracy: The distribution of legitimate music products has been reduced to a couple of points sale in capital city area. Last year the sale of legal CDs only reached the 200 thousand units, meanwhile the estimated amount of pirate music recordings sold is for about 9.8 million. The main problem is the uncontrolled contraband of blank media entering into the market. The contraband produce a double effect in the Peruvian economy harming not only the tax and duty collections but also destroying all chances for legitimate business to survive. No further cooperation from local governments was obtained and INDECOPi does not have enough resources to combat the piracy problem.

Book piracy: The book and journal publishing industry reports that Peru is one of the region's worst print piracy havens. Book fairs (*campos feriales*), including two large ones in Lima, reportedly permit the sale of pirated books. 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. This commercial devastation also 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. Large-scale photocopying continues to affect the academic sector particularly, and more should be done to ensure use of legitimate academic materials on Peru's school and university campuses.

Internet piracy and cooperation with the ISP community: Notwithstanding the growth in Internet access, Internet-based piracy is still not yet widespread, but it does affect the industries to different degrees. For the music industry, Internet piracy is the most pressing concern because it is the only possible market left for this industry, given that the physical market is totally pirate. The software and film industries continue to report that Internet-based piracy is not yet widespread in Peru. Several auction sites (such as Mercado Libre and De remate) do offer infringing copies of films, software and music. Internet cafes serve as important locations for downloading and burning of illegal files. There are 7.6 million Internet users, representing about 26% of the population (according to www.internetworldstats.com).

Peruvian Internet Service Providers (ISPs) are responsible for the content on Web pages and cooperate significantly with authorities when required. Although current Peruvian legislation has the tools to sanction such unlawful behavior on the Internet, further refinements are needed to clearly specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions. In particular, Section 48 of the Peruvian Copyright Law, Legislative Decree No. 822, should be amended in order to exclude the possibility of considering P2P sharing and the use of information as a private copy.

COPYRIGHT ENFORCEMENT IN PERU

Industry sectors report generally good cooperation with the criminal enforcement authorities (police and tax authorities) but continuing difficulties exist in obtaining prosecutions that result in effective and deterrent sanctions that deter piracy. Problems worsened with administrative enforcement with INDECOPi enforcement and appeals during 2008.

A. Criminal Anti-Piracy Enforcement in Peru

Police actions and prosecutions: The copyright industries indicated that they have excellent relationships with the Fiscal Police as well as with the specialized prosecutors' offices in Lima. MPA reports that the police do take *ex officio* actions; in contrast, BSA indicates that such *ex officio* actions in software cases were rare in 2008 (BSA was only notified of two actions, both of which involved software seized along with audiovisual products).

The copyright industries' concerns in 2009 remain the same as those reported in prior years. They agree that there is a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*División de Investigación de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations and to support the National Police (7th Region) providing troops when large raids are to be conducted in the black markets. The National Police lacks resources to carry out intelligence activities prior to and following raids, and it performs neither intelligence nor follow-up activities. They do not have sufficient personnel to fully prepare findings of their activities, which results in dismissal of cases at prosecutor or court levels. The National Police and the Prosecutor's Office lack adequate warehouses to safely store seized goods. The National Police does not have sufficient personnel to perform counts and prepare findings of their activities, which results in dismissal of cases at the prosecutorial or judicial level. Municipalities and their police forces (Serenazgo) do not assist in raids carried out in their jurisdiction. Municipalities in the Province of Lima are non-reactive in their approach to the sale of pirate products. To date, authorities have neither ordered closure of any stores nor cancelled operating licenses.

Peru has four IPR prosecutors who work with INDECOPI when they are requested to do so. Unfortunately, these IPR prosecutors have restrictions on their jurisdiction, and the filing of the complaint can take four to six months after the raid has occurred in cases where the infringer was not imprisoned.

MPA reports that the Anti-piracy Crusade supported various intelligence activities in 2008 and provided logistics for raids carried out by the Fiscal Police, Public Attorney and INDECOPI. MPA works to help prepare the necessary instructions for the IP Police to optimize their work (the preparation of "Statements") in order to minimize rejections by the judicial authorities. The most important raids included: (a) the Polvos Azules Operative on April 4, 2008; (b) Lima's North Cone Operative (San Martín, Carabayllo, Comas, Los Olivos) on May 5, 2008; (c) the Centro Comercial Mesa Redonda Operative on March 31, 2008; (d) the SUNAT Operative in the North of the Country on January 07, 2008; (e) various Print Shops and Labs (January, February, March and April 2008); (f) actions in El Hueco on September 5 and October 18, 2008; and, (g) Polvos Rosados on July 24, 2008). MPA reports the following for 2008 50 raids against burner labs, street vendors, and OD distributors with seizures of 882,966 burned discs, 1,423,900 blank media, 89 burners, 12 computers, 4 printers, and 26,304 art inlays.

MPA reports that criminal actions were filed against 200 retailers with 30 convictions. Judges tend to be lenient in their sentencing and most sentences of less than four years are suspended. MPA did not pursue civil or administrative actions in 2007 or 2008.

The recording industry conducted 286 raids during 2008 mostly in the well known market of Polvos Azules and other similar locations that lead to the seizure of 889,000 recorded CD-Rs and 184 burners. In addition, some operations were more focused in neighborhood markets such as San Isidro and Miraflores.

Enforcement by tax authorities: MPA reports that SUNAT (the Peruvian Tax and Customs Authority) is extremely cooperative and effective. SUNAT regularly carries out enforcement actions at borders, inspects transportation trucks, conducts warehouse raids, and, in general, participates in market raids involving smuggled, counterfeit and pirate products (such as El Hueco, Polvos Azules, Mesa Redonda, etc). In 2007, SUNAT created a special group to tackle the street piracy problem. In 2008, SUNAT carried out approximately 20 raids that detected of blank discs being illegally imported into the country, and participated in raids with INDECOPI and public prosecutors in Lima and other large cities. These operations resulted in the seizure of more than 1,261,400 optical discs (both burned and blank). BSA notes that the SUNAT has been reluctant to consider software piracy a major problem, and as a result has not taken any action against it.

Organized crime element: There is an organized crime element involved in many piratical activities, and this has captured the attention of the Attorney General, the courts, INDECOPI and SUNAT. For example, there was a 2004 case involving an individual who tried to import more than 3 million optical discs (during that same year, this defendant's companies imported more than 107 million blank optical discs). Furthermore, INDECOPI intercepted seven containers in the Port of Callao which contained cases of CDs and DVDs. This defendant has been charged with drug trafficking and money laundering activities, and at the moment is a fugitive of Peruvian justice.

Anti-camcording efforts started in 2008: MPA reports that distributors and exhibitors met in May 2008 to coordinate with and train movie theater personnel to detect and confront possible camcording activity inside movie theaters. To complement this effort, industry (1) placed posters at ticket booths, movie theater entrances, and visible places, as well as slides about the prohibition of entering the theater with cameras; (2) contracted with a security company to provide undercover

personnel to visit movie theaters; (3) purchased night vision visors; (4) worked with police to discuss this type of piracy and request their assistance; and, (5) established lines of communications between movie theatre personnel, distributors, lawyers and local police. In cases involving arrests, local legal counsel for the film companies will go to the theater or police station to support any necessary legal actions. This initiative has shown delivered some positive results.

Problems with the judiciary -- non-deterrent results, problems with destruction: 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. This sad practice continued even after several positive amendments to the criminal code, including: (a) the 2004 amendments which provided an increase of minimum sentencing to four or more years for copyright infringements;⁸ the creation of four special courts and one special appeal court with national jurisdiction on IPR crimes in November 2006; and (c) amendments made in November 2006 to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes.

The average 2008 sentence was a three-year suspended sentence and the average 2008 fine was S/1000 (nuevo soles, approximately US\$300). MPA has appeared at judicial proceedings related to film piracy, and has managed to stop the judiciary from terminating proceedings, citing incomplete information. MPA actively attempts to prevent this from occurring and appeals some decisions .

Courts do not order the destruction of goods seized until the conclusion of the proceeding and after a designated expert witness determines that the goods concerned are infringing. Legislative Decree 1076 provides that judicial authorities are to provide for the destruction of infringing materials. In 2009, it is expected that expert witnesses will still be required to make a determination before a destruction can be ordered. Further, judges will still be able to make independent decisions on destruction.

Court restructuring: The Peruvian judiciary is in the process of being reformed. On November 9, 2006, intellectual property crimes were redirected to fall within the jurisdiction of four Supraprovincial Courts which handle terrorism and human rights cases (discussed above), which was very encouraging. However, a year later, on November 9, 2007, an Administrative Resolution was published specifying that the Supraprovincial Courts would only hear particularly serious, complex or large-scale tax, customs and intellectual property cases, insofar as they had a national impact or involved criminal organizations. The issuance of this 2007 resolution caused the Supraprovincial Courts to refrain from handling many proceedings relating to IPR, especially those that did not meet the new requirements of severity and complexity. As a result, many IPR cases are being sent back to the ordinary criminal courts. The Judiciary Executive Council established a Provisional System whereby cases already pending before Supraprovincial Courts would continue there until their conclusion and all new cases would be sent to the ordinary Criminal Courts. The Judiciary Executive Council should adopt measures to return all IPR cases back to the specialized courts.

B. INDECOPI and Administrative Enforcement

INDECOPI serves as an administrative enforcement agency for the copyright sector. It has been active in public awareness and educational campaigns. It also serves a role in collecting royalties for the public performance right. INDECOPI 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.

On a positive note, BSA indicates that in 2008, INDECOPI has been supportive of many training initiatives offered for various Peruvian enforcement officials and agencies. Also, INDECOPI participated with BSA in a direct mailing campaigns to end users at the end of 2008. Furthermore, the councils of San Borja, San Isidro, Santiago de Surco, Magdalena, the Molina, San Miguel (Lima), have subscribed agreements with INDECOPI for the execution of operations directed to reduce the street supply of pirate products. INDECOPI has contributed to various trainee programs to the personnel of citizen security of the indicated municipalities.

⁸ An ESA member company reports that several of its cases remain stagnant within the court system, with some dating back to 2000.

INDECOPi's administrative enforcement efforts are ineffective in software actions: During 2008, the business software sector was the only copyright industry that used administrative remedies to combat piracy. And unfortunately, BSA's overall experience with administrative enforcement in 2008 was worse than 2007. In brief, there are three major areas of no progress. First, the government failed to raise the level of sanctions and fines to those companies targeted in end user actions that simply reject INDECOPi entry to their premises to audit their installed software. Any fines issued are so low that the businesses can easily pay them and not change their infringing behavior. Second, INDECOPi merely issues simple warnings and forgives the payment of certain copyright payments. All these gaps result in inadequate and ineffective enforcement of computer software. Third, INDECOPi failed to pass regulations that would strengthen software enforcement, such as establishing the INDECOPi decisions could be enforced by the judiciary in an executive procedure.

BSA notes that, although INDECOPi has been cooperative in several public campaigns as well as administrative raids, this cooperation has not translated into the imposition of deterrent sanctions. Non-deterrent decisions and the failure to collect the fines issued against infringers means no effective deterrence. During 2007, BSA's campaign experienced a high rate of rejections to INDECOPi inspections to gather the evidence of software infringement simply because the targets (end users) simply denied INDECOPi to enter their premises (this happened in about 20% of the BSA cases filed). When this occurs, BSA has to request a second inspection with a search warrant issued by the courts. Getting this second inspection can take a month or more, and in the meantime, the target infringer purchases or deletes the missing or pirated software so when BSA and INDECOPi returns, the evidence is gone. The infringer gets off scot-free and the legal copyright owners do not receive damages or remuneration for illegal software use. Several months later (between three and six months in the Copyright Bureau, plus another six months at INDECOPi's IP Trial Court), INDECOPi may issue a fine for not allowing the inspection, but the fine is so low that the infringer always prefers to close the door rather than allow the inspection. As a result, software piracy continues and there is no effective law enforcement.

Problems with INDECOPi and its incorrect calculation of damages: BSA reports that difficulties with the Intellectual Property Chamber of INDECOPi's Trial Court are its primary source of difficulties with administrative enforcement. First, all fines for software infringement decisions rendered by the Copyright Bureau (the first step in the administrative procedures) have been reduced by the Intellectual Property Chamber of INDECOPi's Trial at a rate of 66%. Second, the fines that are imposed are too low; this is because they are not calculated correctly. They are calculated to be twice the "market average price of the original software", but this "market average price" is 30% of the actual market price. This is due to an incorrect interpretation of the law (Law Decree 822, Article 194). Third, INDECOPi fixes "due copyrights," so-called "*remuneraciones o derechos devengados*," that must be paid by software infringers as part of their penalty. Such due copyrights are some kind of indemnity for the legal holder of the copyright. The problem is that INDECOPi fixes such due copyrights following the same wrong criteria used to fix the fines.

BSA also was surprised by the Intellectual Property Chamber of INDECOPi's Trial Court, which has issued several clearly erroneous decisions removing sanctions that contradict its own case law. For example, two years ago the INDECOPi Trial Court forgave the infringer the amount of the "due copyrights" that according to the law must be imposed jointly with the fine for the copyright infringement (Decision N° 1700-2006-TPI-INDECOPi dated November 2, 2006). There the Court decided to "forgive" the due copyrights because the infringer purchased a legal copy of the software in question after the raid had taken place. To make matters worse, in 2008 three more decisions were issued using this wrong criteria. However, the applicable case law is clear that, once the evidence of the infraction has been obtained (through the raid), the infringement is considered proven and therefore the Court must require collection of the due copyrights. In the same 2006 ruling, INDECOPi did impose the fine: that is a clear contradiction because they can forgive a fine but not the due copyright, which belongs to the copyright holder. In another unexpected decision, the Intellectual Property Chamber of INDECOPi's Trial Court departed from established Peruvian copyright case law, in only admonishing the software infringer (Decision N° 1601-2007-TPI-INDECOPi, dated August 14, 2007). The Court decided to give a simple "warning" because the infringer had allegedly shown "repentance."

BSA believes that such rulings by the Intellectual Property Chamber of INDECOPi's Trial Court severely harm copyright enforcement in Peru, and send the wrong message to consumers. If these decisions were followed by others, they would in effect encourage infringers to wait two years for the process at INDECOPi to wind its course, show "repentance" and buy the software before the Court issues its decision, and INDECOPi would issue a warning and withhold the damages due to the copyright holder. Meanwhile the rights holders will have wasted time and resources trying to bring ineffective enforcement actions.

Incorrect interpretation affecting administrative inspections: BSA reports on another recent problem coming out of a decision issued by the Constitutional Trial Court. There has been a sudden increase in the requirements to obtain an inspection in a software end-user case. Before the Court's new interpretation, inspections were issued immediately based on the evidence that the software company had issued a Cease and Desist Letter to the target end-user and there was no reply. This method complied with TRIPS Article 43 which states that the copyright owner should present reasonable available evidence sufficient to support his claim, considering the substantial evidence of the infringement is in the hands of the infringer. But the interpretation made by the Constitutional Trial Court, and followed by INDECOPI's Trial Court, now considers such inspections to be "provisional measures." Courts can only order provisional measures if there is evidence that the copyrights are currently being infringed, that the infringement is imminent, and that any delay in issuing the provisional measure could cause an irreparable harm to the copyright owner. BSA's local counsel indicates that it is nearly impossible to satisfy these three requirements because the rights holder does not have access to such information unless the inspection occurs in the first place. Inspections should not be considered "provisional measures", but rather a legitimate tool to gather evidence. This new interpretation has caused the nullification of several requests for inspections made by copyright owners as well as the nullification of at least four procedures that did not meet the new standard. It also has caused severe difficulties getting an inspection mandate due to the new requirements imposed by INDECOPI following the Constitutional Trial Court decision.

Collections of public performance royalties: The recording industry acknowledges that INDECOPI is playing an important role for the consolidation of the industry's collective society (UNIMPRO), and is supporting initiatives for the collection of royalties for performance rights. The recording industry did not file any anti-piracy actions in 2007 with INDECOPI; instead they worked with the special IPR prosecutor. The recording industry reports that in 2009, its efforts will be reoriented to the collective licensing of performance rights and away from anti-piracy actions.

INDECOPI should work with others on book piracy: The book publishing industry believes it is critical that, in addition to criminal efforts, the administrative agencies of INDECOPI and the Copyright Office initiate investigations and punish those individuals and businesses involved in book piracy. INDECOPI should also work jointly with local and regional governments, as well as with the National Library and the Ministry of Education, to ensure that significant steps are taken to curb illegal photocopying of academic materials. Such a focus should concentrate on both university photocopying/printing and commercial book piracy.

C. Border Enforcement

Peruvian customs should take actions 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). There is a significant amount of contraband optical discs, most of which enters from Iquique across the border with Chile, and amount to over 100 million units per year. INDECOPI and SUNAT have made inspections and seizures in terminals of customs storage, with the participation of the inspector hired by INDECOPI. (INDECOPI cannot act without a formal complaint, unless there is proof that the discs are destined to the pirate market.)

Peruvian Customs has *ex officio* authority. The copyright industries believe that pirated goods are being exported from Peru to Bolivia, Ecuador and Chile. The copyright industries have recommended (in our 2008 301 report and again here) that several steps could be taken to improve this situation:

- 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. According to 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 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. Given the recent amendments to Peru's customs laws, it is expected that such cooperation should improve in 2009.

- 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. Recent Supreme Court Decree 003-2009 requires the establishment of a new type of registry to be kept at Customs offices, in which rights holders are required to register the properties they hold rights to.

D. IPR TRAINING AND PUBLIC AWARENESS

BSA and MPA have participated and/or held several training programs in 2008. Targeted audiences include police and SUNAT officers, prosecutors, magistrates, customs officials and judges. Seminar topics have covered many issues such as, identification of pirated goods, copyright law issues, border enforcement, and Trade Promotion Agreement obligations. The recording industry has participated in many trainings with enforcement officials to increase expertise on anti-piracy matters. In addition to government outreach, MPA trained 34 theatre personnel on anti-camcording enforcement. The copyright sectors also supported public awareness activities related to Copyright Week 2008, including lectures, awards, destruction ceremonies and related educational efforts and actively support the Anti-Piracy Crusade. In October 2008, MPA awarded INDECOPI's Copyright Director an award in recognition of his work to defend IPR and to raise public awareness about copyright and piracy.

POLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland remain on the Watch List in 2009.

Executive Summary: Copyright piracy in Poland remains widespread in both the hard goods and Internet areas. Local burning of pirated products continues and street piracy and flea markets are sources of manufacture and distribution of this piracy. Open-air markets along the German border sell pirated and counterfeit products that hurt the legitimate industries in Poland and Germany. Although there has been a good amount of cooperation between industry and police to take action against online infringements and hard goods piracy, numerous prosecutorial bottlenecks and an ineffective judiciary cause criminal cases to dead-end. The continuing failure to impose deterrent penalties against copyright infringers only contributes to the piracy situation in Poland. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions in the optical disc regulations and passing anti-camcording legislation, are still needed. Last summer, the Polish government adopted its new IPR strategic plan for 2008-2010, but the government team responsible for the antipiracy elements has not been active, and the private sector is not aware of any actions taken to-date under that plan.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Poland in order to improve the adequate and effective protection of copyrighted materials:

Enforcement

- Implement the strategic goals outlined in the government's annual strategy plan regarding the prevention of copyright infringement.
- Encourage police to take *ex officio* actions in all copyright areas (in addition to the work already done in business software) and expand *ex officio* authority beyond crimes of a certain scale.
- Support the continued cooperation between industry, Polish police, and its information technology team to take actions against Internet piracy. This should include using Government resources to arm the police with additional resources for training and IT equipment.
- Ban the sale and distribution of pirated optical disc products at stadiums, bazaars, outdoor markets and public places, in particular along the Polish-German border, and prosecute those involved in such activity. Ensure that sufficient resources (both technical and personnel) are dedicated to this effort and to improving cooperation with the customs agencies in neighboring countries.
- Direct prosecutors to press for expeditious consideration of criminal copyright cases.
- Appoint specialized prosecutors in each office to handle copyright cases.
- Investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials using existing organized crime legislation.
- Continue working with rights holders on the enforcement of optical disc regulations.
- 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.

Legal reform

- Introduce criminal sanctions in the optical disc decree.
- Adopt anti-camcording legislation.
- Refrain from over-regulating collective management of copyright and neighboring rights.
- Amend the copyright law to correct deficiencies in several key areas, including those that affect copyright protection in the online environment. The amendment process should be transparent and permit rights holders' input.
- Formally withdraw Poland's reservation to Article 12 of the Rome Convention.



POLAND
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2008¹

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	438.0	55%	348.0	57%	251.0	57%	202.0	58%	197.0	59%
Entertainment Software ³	NA	NA	76.0	60%	NA	75%	NA	60%	109.3	94%
Sound Recordings & Musical Compositions ⁴	100.0	27%	28.0	36%	24.0	35%	25.0	31%	36.0	37%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	102.0	66%	30.0	35%
Books	NA	NA	NA	NA	NA	NA	5.0	NA	5.0	NA
TOTALS	538.0		452.0		275.0		334.0		377.3	

COPYRIGHT PIRACY IN POLAND

Internet piracy: Internet piracy is rising in Poland due to increasing broadband penetration and wider Internet household penetration. The estimated number of Internet users there has grown to 16 million, representing about 41% of the population (according to www.internetworldstats.com). Peer-to-peer (P2P) file-sharing networks such as DC++, Gnutella, eDonkey and BitTorrent are popular sources of pirated copyright content online. Infringing files are also distributed through File Transfer Protocol (FTP) servers and one-click web hosting sites (also known as “cyberlockers”) such as rapidshare.com and megaupload.com. The Business Software Alliance (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 also increasing.

Internet piracy continues to evolve and can affect different copyright sectors differently. For example, a research study commissioned in September 2008 by ZPAV (the Polish organization that represents the sound recording industry) showed that downloading music from the Internet is very common; 45% of Internet users in Poland (i.e. around 6 million persons) engage in such activities. However, compared to 2006, the number of peer-to-peer users significantly dropped from 74% in 2006 to 41% in 2008. The main reasons for not using P2P networks for downloading music are: (1) the growing use of other forms of downloading content (such as cyberlockers, blogs, social networking sites, legitimate music sites); (2) the lack of necessary knowledge about how P2P networks function; (3) fears about viruses and malicious spyware; and (4) the belief that such activity constitutes a copyright infringement. The results of the survey also show that the number of Internet users downloading music from legitimate online music services is on the rise. Compared to 2006, this figure almost doubled, from 15% to 28%, a positive sign. Although mobile piracy of music is spreading, Internet piracy is most prevalent.

Hard goods piracy -- optical disc piracy, street piracy, and the outdoor markets: Hard goods piracy of copyrighted materials has shifted toward localized burning of CD-Rs and DVD-Rs. Polish pirates also are burning discs specifically for German consumers, distributing them at markets on the Polish-German border and in Germany. The vast majority of pirate optical discs are sold by street vendors and at public flea markets. The 2007 closure of the Warsaw

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For more information on Poland and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more of IIPA 2009 issues, see our cover letter at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ ESA's reported dollar figures (2007) reflect the value of pirated product present in the marketplace as distinguished from definitive industry “losses.” The above results reflect only piracy of PC games in this market.

⁴ RIAA reports that of its \$100 million overall estimated losses for 2008 in Poland, \$90 million is due to digital piracy.

⁵ MPAA's 2005 estimates reflect a methodology that analyzed both physical/“hard goods” and Internet piracy.

Stadium was a positive step, and some industries report that they have not observed the emergence of any new, stadium-type centers of pirate distribution. The Warsaw Wolumen market became almost free of counterfeited and pirated product after raids against its main supplier of pirated product were conducted in June 2007. Instead, illegal trade has expanded to "bazaars" and public markets in other parts of Warsaw and is highly organized and generally controlled by criminal gangs. Concerted anti-piracy efforts must continue at these street bazaars and flea markets and should include a ban on the sale and distribution of optical disc products at these locations.

There are particular problems at the borders. Pirated discs (both DVD-R and pressed DVDs) are being sold at marketplaces in Poland, including bazaars at the Polish-German border and then smuggled to Germany and possibly other EU countries. In addition, imported pirated discs (CDs, DVDs, and CD-ROMS) continued to enter the Polish market in 2007, but quantities appeared to decline during 2008. During 2008, there were several raids at the border markets. The music industry reported that much lower quantities of pirated music products were less visible last year. Similarly, FOTA has noticed a decrease in the supply of pirated audiovisual discs after the raid in 2008 and seizure of over 70,000 pirated discs and 159 burners.

Several years ago, the problem of domestic production of pirated pressed optical discs diminished. Poland's OD capacity continues to exceed one billion units per year. Despite the overcapacity, there is little evidence to suggest that Polish plants are involved in pirate production of optical discs or are exporting pressed discs. The excess capacity of the Polish manufacturing lines supplies EU markets with legitimate products. Foreign demand for optical discs is so high in the region that some Polish plants sub-contract production to some other countries, including the Czech Republic or Ukraine. (The high production capacity in Poland is mainly due to the presence of one of TechniColor's largest plants which exports almost all of its production.) Nevertheless, such a large production capacity in Poland (bigger than Russia, Ukraine, Bulgaria) requires strong optical disc regulations that contain criminal sanctions, if only to minimize the risk of this capacity being used for illegal purposes. Poland's 2004 OD law does not contain criminal sanctions, and the copyright sector has long recommended that such sanctions be available.

One very recent example shows, however, that in addition to illegal underground manufacturing, some Polish plants are involved in illegal production. Early February 2009 raids by Polish police dismantled an organized criminal syndicate that produced and distributed pirated music and films on an industrial scale. The pirate operation had distributed an estimated 9 million albums, making it what is believed to be the largest copyright infringing disc operation ever shut down by police action in Europe. Officers in Warsaw and southern Poland detained four people for questioning as a result of the raids, including the 38-year-old man thought to have masterminded the operation. The gang is suspected to be behind the *Masterbox* series, which consisted of DVDs containing pirate product, including more than 40 music albums in MP3 format. There have been 38 editions of the copyright infringing series, with the most recent 15 pressed in Poland. The trade value of the music in the Polish pressed editions of this long-running counterfeit series was estimated to be approximately US\$25 million. Officers raided three premises, two replicating plants in Warsaw and Rybnik, and a professional distribution plant in Zabki. IFPI investigators suspected the source of the *Masterbox* series after German customs officers passed on seized counterfeit CDs and DVDs to its forensics team who traced the discs' origins back to the plants in Poland and identified the operator of the clandestine factory who was in the process of buying equipment to increase his manufacturing capacity. Police seized copyright infringing DVDs containing pre-release versions of films such as *Slumdog Millionaire* and *The Wrestler*. Previous volumes of *Masterbox* contained hit albums such as Razorlight's *Slipway Fires* and Andrea Bocelli's *Incanto*.

Piracy of music and sound recordings: Piracy affecting the recorded music industry in Poland remains severe, given both optical disc piracy and Internet piracy. One development has been that fewer pressed pirate discs can be found on the market; in fact, pressed pirate discs with pre-release or newly released content have not been discovered for the last few months. After successful raids by Border Guard officers at local marketplaces along the Polish-German border, the supply of pirate music discs significantly diminished. Since August 2008, ZPAV has observed a return of this border piracy phenomenon but on a smaller scale. The number of pirate products available at marketplaces in the south of Poland (the region of Silesia) has recently increased; pirate discs are also offered at bazaars in Krakow and Wroclaw. At these locations, no ban on the distribution of pirated products has been introduced. ZPAV has not observed any major seizures of pirate carriers at the Eastern borders of Poland. Another development in early 2008 was that a new channel of pirate disc distribution was discovered by the Polish customs administration. Pirate discs were being sent via post in small packages containing not more than 100 units. In response, now all post office customs units have been instructed to open suspicious packages that could contain discs. According to the local recording industry group ZPAV, the estimated level of music piracy

in Poland remains at 25%, with the estimated piracy levels for U.S. music repertoire slightly higher at 27%. Trade losses due to physical piracy are estimated at \$10 million, while an additional \$90 million can be attributed to the digital piracy of music in Poland.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that the pirate market now primarily consists of domestically burned pirated optical disc goods, available largely at flea markets and through street vendors. Internet piracy continues to rise, and in 2008, Poland was again among the top ten (10) countries for infringing download activity. In fact, during a 4-week monitoring period (December 2008), for 13 popular game titles, activities of Polish BitTorrent and eDonkey users were estimated to have downloaded more than 393,000 infringing copies, making Poland the number 5 country worldwide in number of infringing game copies and number 5 in terms of infringing copies made per capita. Networks maintained by Polish Telecom were implicated in 3.6% of the infringing activity estimated to have occurred during the industry studies, placing it 4th on the list of the world's most active ISPs. Online sales of pirated hard goods video game products also continues, particularly on local auction sites such as www.allegro.pl. In 2008, a high volume seller was referred to the police who quickly took action against the seller.

Audiovisual piracy: According to the Motion Picture Association (MPA) and its Polish sister group FOTA, the problems of movie piracy in Poland remained relatively unchanged during 2008. FOTA noticed a decrease of the supply of pirate product on the street markets along Poland, specially in Warsaw, but at the same time Internet piracy is on the rise due to increasing broadband penetration and wider Internet household penetration. Locally burnt discs, which increasingly contain multiple titles, and imported Russian made pressed discs, pose a serious threat to the theatrical and home entertainment markets. Large quantities of DVD-Rs with illegal content can still be found at marketplaces situated along the Polish-German border and some of the biggest cities (Wrocław, Kraków, Poznań). The majority (about 65% in 2008) of pirate discs are recordable (DVD-R and CD-R) and pressed discs (about 35%) are imported from former USSR countries. Websites offering illegal Polish subtitles are also a serious concern as the uploading of pirate copies of new releases are invariably followed by the posting of a Polish language dialogue list, enabling the creation of localized subtitled pirate copies. Usually a single disc includes from 2 up to 8 movies. In addition, camcording piracy has been reported in Poland; for example, locally produced movies such as *Katryń*, *Lejdis*, and *Nie Kłam Kochanie*, were illegally camcordered in Polish theaters, available at local bazaars, and on the Internet days after their local release. As noted above, P2P networks as well as cyberlockers and FTP servers are the most prevalent sources of unauthorized online protected content of movies.

Business software piracy: The Business Software Alliance (BSA) reports that while the unauthorized copying and use of business applications software within legitimate businesses (corporate end-user piracy) continues to be the focus of its Polish anti-piracy campaign and inflicts damaging economic losses, more and more illegal software products are being distributed via the Internet. In fact, the biggest Polish auction site is used for distribution of OEM (original equipment manufacturer) products in violation of OEMs' distribution agreements. Numerous flea markets still sell pirated software. Estimated 2008 losses due to PC software piracy in Poland were \$438 million, with the piracy level at 55%. 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. Efforts to promote the acquisition and use of legal business software would benefit the Polish economy.⁶

Book and journal piracy: The publishing industry reports steady levels of illegal photocopying of academic texts and journals in and around universities. Industry representatives report that they are losing a significant portion of their market to this type of 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.

⁶ See *The Economic Benefits of Reducing PC Software Piracy*, commissioned by BSA and conducted by International Data Corporation (IDC), which was issued in January 2008 and is posted at <http://www.bsa.org/idcstudy>. According to this report, the information technology sector's contribution to the Polish economy could be even bigger if Poland's PC software piracy rate were lowered by 10 percentage points over the next four years. This would create an additional 1,885 jobs, \$1.1 billion in local industry revenues and \$110 million in additional tax revenues for federal, regional, and local governments.

COPYRIGHT ENFORCEMENT IN POLAND

Government leadership on national anti-piracy plan needed: The key Polish enforcement agencies on intellectual property rights issues include the Ministry of Justice, the Ministry of Interior and Administration and Police Headquarters. The Ministry of Culture heads the special governmental team responsible for combating piracy (the "Intergovernmental Team for Counteracting Infringements of Copyright and Related Rights"), and the copyright sectors participate in the meetings of this group.

Last summer, the Polish government adopted its IPR strategic plan for 2008-2010, but the team responsible for the antipiracy elements have not been active. The private sector (led by the Anti-Piracy Coalition, composed of BSA, ZPAV and FOTA) is not aware of any actions taken under this plan nor have any meetings related to its implementation taken place. IIPA is informed that this plan is a 54-page document where the bulk of copyright industry issues are addressed in general terms with broad-brush objectives. However, it is very difficult at this time to assess how and to what extent any of these are being implemented.

Raids with law enforcement. The industry groups continue to report good cooperation with police authorities, border guards and customs officials, the fiscal police and the prosecutors.

The audiovisual industry, led by FOTA, experienced continued cooperation with law enforcement and reports numerous raids were run in 2008. In 2008, FOTA assisted in over 875 investigations which resulted in 863 police raids and 856 criminal cases. As a result of these raids, 89,367 DVDs and 154,532 DVD-Rs and CD-Rs with illegal content were seized. Most of the seized DVDs and DVD-Rs (both pressed and burned) contained between four and eight movies. About 40% of these investigations were dedicated to Internet piracy. 75% of these cases resulted in prosecutions. MPAA reported that during 2008 that the police are taking *ex officio* actions, but only if there is organized crime involvement or if the pirate is a repeat offender aiming to make a profit.

The recording industry (ZPAV) also reports that the police conducted many well-coordinated raids in 2008. According to ZPAV's full year 2008 statistics, 348 cases were instigated, of which 317 by police, 27 by customs and 4 by border guards (29). An additional 703 cases were instigated by police upon ZPAV initiative against file-sharers in P2P networks. In most cases, ZPAV assists the police prior to raids and during the aftermath, when expert product verification is required. The police conducted numerous raids throughout the country against major file-sharers in P2P networks. Law enforcement regularly contact ZPAV if they have doubts about legitimacy of seized products. Unfortunately, the evidence submitted for criminal proceedings have still to be confirmed in a separate document by the police upon a request of a prosecutor. Although the appointment of an independent expert may be justified in P2P cases, in ZPAV's opinion it is unnecessary in cases where pirate carriers, such as CDs, DVDs, CD-Rs and DVD-Rs are involved. The whole process lengthens the proceedings and increases the costs. ZPAV conducted an additional analysis of the cases it has presented to prosecutors (discussed below). In as far as sanctions are concerned, courts most often imposed suspended prison sentences combined with an obligation to pay damages to the injured party, which is not perceived as being sufficiently deterrent.

BSA notes that in 2008 the Polish police were active in investigating cases of software piracy. BSA is aware of 70 raids conducted in Poland in 2008 related to software piracy, and there may have been more as additional cases may have been initiated by the police as *ex officio* actions (which are permitted under the Criminal Code). Over 5,000 CDs and over 450 hard drives were seized in the course of these 70 raids. BSA members have submitted 160 motions for prosecution. There are a lot of *ex officio* prosecutions, as well as prosecutions initiated at BSA requests. There are cases which are terminated by prosecutors, usually due to the fact that they may not identify a physical person responsible within a corporation. Usually, however, cases are continued and end with either conditional termination (which is a generally acceptable solution) or with suspended judgments.

Entertainment software publisher relationships with law enforcement authorities remains positive. Police continue to initiate actions on behalf of video game publishers in the market. In 2008, an ESA member company was informed that law enforcement authorities had initiated 1500 new cases involving its products, though most of the cases involved small quantities of seized products (only 250 cases actually involved more than 10 copies of seized pirated products).

Unfortunately, despite the fact that many cases involved this company's products, in many instances the company was not informed of the filing of the cases.

Internet piracy enforcement: The copyright community participates in a Governmental Group on copyright infringement, done by the invitation of the Minister of Culture to take part as special experts. Working with a team of police officers and court experts, the anti-piracy coalition's representatives prepared a methodology for conducting investigations into Internet copyright infringement cases. Since October 1, 2007, the Police Academy issued a manual for police officers and prosecutors on the operation of P2P protocols, the disclosure of copyright infringements on the Internet, and the collection of evidence. A methodology on how to conduct Internet copyright infringement cases also has been placed on the servers of the Police Academy, following a positive opinion of this from the National Police Headquarters and the National Public Prosecutor.

Internet actions are mostly criminal: The industries report that cooperation with criminal authorities on Internet cases was very good. The police continue to investigate instances of Internet piracy and look for copyright infringers at their own discretion. Although activities conducted by the police to address Internet piracy are praiseworthy, only a few units have the necessary resources and expertise to undertake such Internet actions. In particular, the work of the Wroclaw, Gdansk, and Poznan police as well as the Headquarters of the Police should be acknowledged for positive efforts. In most cases, the rights holders provide the police with information about a possible infringement, including the Internet protocol (IP) address. The police in turn ask the ISPs to provide them with contact details of suspected subscriber.

The motion picture industry indicates that about almost half of its 863 police raids and 856 criminal cases involved Internet piracy. Because FOTA serves as an independent expert, it is required to pass all information to police. As a result, FOTA has not engaged directly in discussions with local ISPs.

Similarly, the recording industry reports that 703 cases were instigated by police in 2008 upon ZPAV initiative against file-sharers in P2P networks. Unfortunately, around 25-30% of these cases are discontinued or dismissed by the courts.

The recording industry has taken additional steps to identify problems with bringing criminal Internet actions. ZPAV analyzed all decisions involving cases that had been discontinued or where there was a refusal to initiate proceedings in Internet copyright infringement cases for the period of October 2006 through September 2008. During that timeframe, ZPAV submitted 783 crime notifications to the police and received 168 decisions to discontinue the cases and 3 refusals to instigate proceedings. In 80 decisions, the reason for discontinuation of the proceedings was the inability to identify the offender by an ISP. In other words, over 30% of ZPAV's cases were discontinued due to the inability to identify the offending subscriber. The Polish ISPs attributed this result to a lack of technical resources to identify particular offenders for the following reasons: some ISPs did not keep the logs, or a given computer was used by an indefinite number of people, or a few computers were connected to one IP address. The ISPs referred to lack of technical resources to identify particular offenders because, among others, they did not keep the logs or a given IP address was used by a few or even a hundred users. Such obstacles make the work of the police futile and therefore require a reform in the telecommunication law in 2009. ZPAV's analysis, together with copies of the decisions to discontinue the case, were forwarded to the intergovernmental team for counteracting infringements of copyright and related rights in order to make an attempt to formulate amendments to the law, including creating an obligation for ISPs to document users' activities on the network in a reliable and detailed manner under the threat of a financial and criminal penalty.

Cooperation with the Polish ISPs on Internet actions: Most often the Polish ISPs react promptly to ZPAV's notices and remove infringing music. As far as P2P networks are concerned, some of the ISPs block DC hubs at ZPAV's request but many refuse to do so. In those P2P cases, the ISPs seem to prefer to cooperate with police in such matters. BSA reports that it does not bring P2P cases; with respect to hosting and auction sites, BSA finds that if they provide the ISPs with reliable information on infringement, they usually take them down.

Few civil Internet cases: Rights holders using civil processes are unable to obtain the identity of a suspected infringer from the ISP upon communication to the ISP of an IP address; however, this information may be obtained from public criminal authorities.

Border enforcement: One of the primary problems is lack of efficient enforcement at the eastern border to curb the flow of pirate products from Russia, Belarus and Ukraine. This shows the inefficiency of customs administration at doing border checks. FOTA also is not aware of any significant seizures done by customs offices in 2008. BSA does not monitor the situation on Polish borders but reports that the customs authorities are taking *ex officio* actions; BSA is notified sporadically about seizures made by customs authorities. In 2008, ZPAV reports that it is aware that only a few seizures of pirated sound recordings were reported at the borders, while many of them have been disclosed in the country. This problem has been discussed at the meetings of the Intergovernmental Group, but has not yet yielded any spectacular results.

Polish Customs started to use an information exchange system called 'Vinci', which is compatible with the World Customs Organization (WCO) program. The government has a plan of developing structures using a risk analysis database to examine smuggling routes of individuals and business entities. Also, it was announced in early February 2009 that there are plans to buy additional equipment for the East border.

Ongoing, systemic problems with prosecutions and the judiciary: The section below identifies some of the longstanding problems in the Polish criminal courts. Most of the cases are sent to the courts but only part of the cases result in a sentence.

Few criminal prosecutions: There continues to be a lack of expertise on the part of Polish prosecutors and criminal courts on copyright matters. The industries' anti-piracy staff constantly works with prosecutors to help prepare the copyright cases, and in other instances, argue before the courts to keep the cases active. There are at least three possible actions that the government could take to improve this bottleneck with the prosecutors: (1) direct prosecutors to press for expeditious consideration of criminal copyright cases; (2) appoint specialized prosecutors in each office to handle copyright cases; and (3) investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials using existing organized crime legislation.

An ESA member company reports that lengthy court proceedings remain an impediment to the expeditious and efficient prosecution of infringement cases. The lack of transparency during the proceedings is also of concern. In 2008, for example, of the many cases initiated by law enforcement authorities, the affected member company was only informed of the outcome at the conclusion of the proceedings when the court had already issued its verdict. Furthermore, the police have also become more reluctant to provide information pertaining to the infringer/defendant to rights holders. Transparency of police actions is essential as rights holders should be given the opportunity to take any additional measures that might be appropriate to securing and enforcing its rights against an infringer. As previously reported, the cases typically do not result in deterrent sentences, but only with the imposition of minimal fines notwithstanding the quantity of infringing material seized. For example, in two separate cases where 11 and 170, respectively, pirated video game titles were seized, only a fine of US\$133 was imposed on the two different defendants. Unfortunately, the likelihood of defendants actually paying the fines and any award of damages to the complainant is low.

Video game publishers also encounter burdensome procedures when supporting cases initiated by law enforcement. When a criminal case is brought on the basis of the Copyright Act, the police typically request that the rights holder confirm that it is the injured party (i.e., the copyright owner), identify the titles seized, provide pricing information on the products seized, and the damages it likely sustained as a result of the infringement. Notwithstanding this information having already been provided to the police, when the case is transferred to the prosecutor, this same information is again requested either in oral or written form before the case is filed with the court. During court proceedings, the rights holder's representative (in about 1% of the cases) may be summoned to appear before the court to re-affirm the information already provided in the sworn statements submitted to the prosecutor at the investigative stage. While this practice decreased in 2007 (compared to the 2006 numbers), requests for such appearances at trial again increased in 2008. This procedure is not only repetitive, it is also rather cumbersome for rights holders, and the courts should be encouraged to review, and revise as necessary, these procedures so as to minimize unnecessary duplication of procedures and make more efficient the prosecution of cases. There was marginal improvement with respect to the number of cases actually going to trial, with only approximately 10% of the cases initiated by the police being summarily dropped by prosecutors (less than the number dropped in 2007). The rationale given most frequently is that copyright infringement cases do not amount to significant social harm, though prosecutors also cite the lack of evidence, failure to apprehend the defendant, or that not all the injured parties have agreed to support the case as reasons for summarily terminating a case.

Expert reports add a bureaucratic layer: Another continuing problem in 2008 involves the courts appointing independent experts to secure proof of ownership even in the simplest copyright cases, even where neither the defendant nor his attorney calls for submission of additional evidence. This judicial practice causes higher costs for the courts and delays prosecutions. As noted above, ZPAV understands that such practice might be necessary in a complex Internet piracy cases, but should not be required for most hard goods cases.

Lengthy delays: Lengthy delays in bringing and completing copyright cases make it difficult to see the effects of anti-piracy activities. Parties have to wait a long time for the date of the main hearing, and all the parties are required to be present. There is also a rather lengthy preliminary investigation stage (prior to the actual court proceeding) which can last several years. In the large cities where most piracy cases are filed, it can take between three to five years before a case is concluded.

Backlogs and lack of deterrent sentencing: Although most 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 as a deterrent measure (in some cases, sentences are simply suspended). 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.

The audiovisual industry FOTA reports that it has over 5,000 cases pending in the court system, but closed only about 200 cases in 2008. ZPAV reports 5,522 criminal cases were pending at the end of 2008. Absent deterrence, pirates will simply continue on with the business of infringement, confident that any penalty imposed will be minimal.

Need for specialized IP courts: The copyright industries believe that specialized IP courts should be established. The film industry also believes that it might be more practical to appoint specialized judges. The bottom line is that more judges with IPR competences are needed in the courts. Reportedly the Ministry of Justice was considering the creation of special IP courts, but industry does not know the status of such efforts.

Civil actions in business software cases: BSA has not conducted any civil actions in Poland for the past several 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. It can take up to three years for a civil copyright infringement case to be closed.

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, but not all, aspects of the WIPO Internet Treaties and of the EU Copyright Directive were published on April 30, 2004. Those amendments contained several improvements of the prior law, including provisions regarding the regulation of optical disc production (issued in June 2004). However, these 2004 amendments failed to fully comply with the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT), and also fail to fully implement various EU Directives. Below is an illustrative listing of some of the troubling issues, where key deficiencies continue to include:

- Inadequate legal protection of technological measures (for example, the law suggests that circumvention for private use might be legal, clear prohibitions should correspond to Article 6(1) and (2) of the EU Copyright Directive, remedies and sanctions should apply to all prohibited acts, and confusing provisions affecting computer programs should be clarified);
- Inadequate protection of rights management information (there are no prohibitions and no provisions on remedies and sanctions)

- Objectionable exceptions to protection, including the private copy exception, which are also far too broad. Specifically, Article 23 contains an overly broad definition of “private” as it includes persons having a “social relationship.” This approach is not in line with the 2001 Copyright Directive and would not be compatible with the three-step test (enshrined in Article 5.5 of the Directive, in the WIPO Treaty and referred to in Article 35 of the Polish Copyright Act). Second, Article 23 should expressly include the condition that the source of the work (to be “privately used”) must be legal. The Polish law should clarify that the private use defense cannot be claimed if the source of the work is illegal. Doing otherwise would not be compatible with the three-step test. It is also very important that the scope of exceptions and limitations of exclusive rights, including the scope of private use, be defined in accordance with the above international treaties. However, Article 35 of the Copyright Act lacks one of the elements of this three-step test, namely language referring to “special cases.” The industries remain 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. Library exceptions are also far too broad.
- Article 117 of the Copyright Act which refers to “criminal liability” is also a source of concern. Section 117 states that “Whoever, without authorization or against its conditions, fixes or reproduces another person’s work ... for the purpose of dissemination” shall be subject to criminal sanctions. In other words, if the work has been “fixed, reproduced...” without any authorization, this violation can only be subject to criminal remedies if the infringement was made “for the purpose of dissemination.” This condition poses a problem because it seems to exclude from criminal remedies a wide range of activities which are very harmful to rights holders. The application of criminal law to copyright infringements is important in terms of procedure; it allows for cooperation/investigation with the police. All copyright infringements should -- at least “on the books” -- be subject to this section. Judges will then use their discretionary powers to decide upon the appropriate sanctions/remedies (depending on the circumstances of the case and the seriousness of the infringement). This provision, enacted before online piracy existed, differentiates between on-line and off-line piracy, leaving a very important aspect of on-line copyright infringement immune from criminal sanctions. This approach results in a conflict with the basic principle of equality before the law.
- Clarification is recommended to improve key definitions (like “reproduction”) and clarify the scope of exclusive rights (e.g. “use” and “exploitation”) to avoid unnecessary and damaging interpretations.
- Article 70 involves a remuneration paid by users of an audiovisual work to a collecting society. It is highly detrimental to motion picture companies, making 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 that additional amendments might be proffered. It is difficult to say when legislation affecting this measure might be drafted and considered by the parliament. (It is unlikely that this article will be included in the reform package, discussed below).

It is expected that work on a more comprehensive reform of the Copyright Law will start soon in 2009.

Copyright amendment bill on collective management (2009): In 2008, the Ministry of Culture prepared extensive amendments of the Copyright Law, dealing primarily with the collecting societies system and the procedures of the Copyright Commission regarding the remuneration rates for public performance. This package has been forwarded to the Council of Ministers for further review.

On January 26, 2009, the Polish Government submitted to the Parliament a Bill of amendments to the copyright law containing a proposal for complex regulation of collective management issues. The Bill provides for user participation in the process of approving remuneration tariffs, a possibility of changing the tariffs by the Copyright Committee and a possibility of submitting appeals to the civil court regarding the decisions of the Copyright Committee. The project also includes a proposal that the collection of remuneration for public performance of sound recordings and audiovisual works shall be managed by only one collective rights management organisation indicated by the Ministry of Culture. The project met with protests of all the collecting societies as it is unfavorable to artists and performers. The first reading of the project will take place on February 19, 2009. This set of amendments clearly represents heavy-handed State interference into a sector of business that should be subject to minimum regulation, in particular where it concerns tariff-setting and the freedom for rights holders to decide when and by which society they want their rights to be managed.

Anti-camcording legislation needed: 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. Such legislation is imperative to curb the illicit camcording in Poland of motion pictures and would significantly benefit the Polish film industry as their work is frequently stolen from theaters. At present, there is no legislative vehicle for camcording legislation, despite conversations with the industry and the Ministry of Culture on this topic.

Optical disc decree and the need for criminal sanctions: Although the current optical disc decree (2004) is an adequate legal instrument for regulating the production of optical discs, the introduction of provisions on sanctions should be considered to ensure optical disc plants' compliance with its provisions. For several years now, the copyright industries have recommended that criminal sanctions be added to the decree, given the widespread nature of pirate optical discs in the Polish market. In fact, the industry submitted a recommendation to add criminal sanctions for the government national IP strategy for 2005, but it was not included. For years, the anti-piracy coalition has repeatedly recommended adding criminal sanctions to the OD decree but without success, and prospects for movement on this 2009 do not seem high.

EU Copyright Directive: The above listing of the deficiencies in the Polish law highlights the significant problems with Poland's implementation of the EU Copyright Directive. To repeat, the primary problems are: (1) inadequate legal protection of technological measures (the language suggests that circumvention for private use may be legal) and RMI; (2) inadequate protection of rights management information; (3) overbroad private copy exception; and (4) other overboard exceptions and no express implementation of the three-step test.

EU Enforcement Directive: On July 20, 2007, Poland ratified and implemented the EU Enforcement Directive by amending both its Copyright Act and the Civil Procedure Code. On a positive note, Poland is one of the few EU Member States providing for pre-established damages of at least double or (in case of intentional infringement) triple the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question. On a negative note, Polish law does not correctly implement Articles 9 and 11 of the Enforcement Directive on injunctions, since it requires the establishment of liability or co-liability of intermediaries. According to both the Enforcement and the Copyright Directives, injunctive relief is to be granted irrespective of the liability of the intermediaries.

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.

IPR TRAININGS AND PUBLIC AWARENESS

The copyright industries continue to participate in seminars for law enforcement agencies. The film industry (FOTA) regularly organizes or participates in trainings/seminars for customs, police and border guard officers. Such seminars focus on the new methods of pirate activity and disclosed smuggling routes. Every year there are more than 15 such seminars or trainings. Similar, BSA participates in trainings for police, prosecutors and customs officials. The music industry (ZPAV) also co-organizes seminars in particular regions of our country, including workshops where our experts show how to disclose and archive evidence material in instances of Internet copyright infringements. ZPAV's seminars are part of the curriculum of the Police Academy in Szczytno and Police Education Centre. Also, every year, the Antipiracy Coalition (composed of BSA, ZPAV and FOTA) organizes with the Police Headquarter a ceremony for the best police units that deal with IP crimes and award the so-called "Golden Badge" prizes. ESA member companies also participated in an enforcement training program for the customs authorities that was organized by the Polish government.

MARKET ACCESS ISSUES IN POLAND

Broadcast quotas: MPA notes that Poland's broadcasters must 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 (even under its new form as the Audiovisual Media Services Directive), negatively affects market access.

Discriminatory tax treatment of U.S. audiovisual works: The 2005 Film Law includes 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, unfairly burdens MPAA member companies with the cost of financing the government's cultural policy. Further, the language of the law appears to place a double taxation burden on distributors, including MPAA members.

Foreign ownership restrictions: Foreign ownership in a broadcasting company is limited to 49% (according to Article 35 of the 1992 Radio and Television Law). MPAA promotes the reduction and elimination of such restrictions in order to stimulate the foreign investment necessary for the continued development of the television industry.

ROMANIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2009.

Executive Summary: Piracy continued to be a serious problem in Romania during 2008, with the problems of Internet piracy, especially peer-to-peer file-sharing and hub sites, growing rapidly. Optical disc piracy (including local burning), a pervasive phenomenon several years ago, has declined somewhat over the two years. While unlicensed business application programs and hard disk loading remain a key challenge for the business software industry, the Romanian government continued to take efforts to legalize software within its offices. Industry cooperation with police authorities during 2008 remained generally good, with Romanian authorities taking raids and actions against both hard goods piracy and piracy online. Recent implementation of the EU Data Retention Directive was also accomplished, and the industries hope that this will continue to support Internet investigations. Unfortunately, the hard work of the police is diminished because enforcement breaks down at the prosecutorial level. Several sound recording and business software piracy cases were closed by prosecutors in 2008 based on a perceived "lack of social harm," among other reasons. Furthermore, actions by the Romanian Copyright Office (ORDA) continues to undermine enforcement; ORDA still supervises the objectionable stickering system and causes substantial delays in delivering its forensic technical reports on pirated materials to the police. A recent government decision, done without any consultation with the private sector, was issued that increases fees rights holders have to pay to ORDA, only making an already broken system worse. For the first time, some deterrent criminal sentences (including jail) in physical piracy cases were issued in 2008, a positive improvement, although more sentences are needed, especially in online cases. Finally, discussions have been held over the past two years regarding possible copyright reform efforts, and rights holders request that their input and expertise be heard in order to close important gaps in the current legislation.

Priority actions requested to be taken in 2009: The copyright industries again recommend that the following actions be taken in the near term in Romania in order to improve protection of copyrighted materials:

Legislation

- It is imperative that: (1) the statutory stickering (hologram) system administered by ORDA be abolished; (2) ORDA's track recordation system for sound recordings should be made voluntary and free of charge; and at the very least, (3) ORDA's tariffs must be substantially reduced;
- Rights holders' organizations should be permitted to serve as court experts in copyright infringement cases.
- Solve the issue related to the need to get a computer search warrant from a judge for searching computers, even in raids targeting companies. 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 clarification on this issue in an amendment to the Copyright Law adopted by the Emergency Ordinance or by Law, mentioned above.
- Avoid any changes to the copyright law and other relevant legislation that will weaken the enforcement tools available to rights holders. Rights holders should be included in any legislative consultation process.

Enforcement

- Senior levels of Romanian Government officials must develop strong political will and express a commitment to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment.
- Have the police, including the anti-organized crime directorate, continue to take consistent anti-piracy enforcement actions against hard goods and online piracy. They should increasingly engage and tackle the roots of the problem: the suppliers of pirated products to the small-scale retail and street vendors and, in the case of business software, the companies distributing unlicensed software pre-installed on PCs. At the same time, authorities should continue in a more determined manner and as a matter of day-to-day activity to pursue big end-users of unlicensed software.
- Continue to support police investigations and actions involving piracy on the Internet.
- Get prosecutors to give high priority to the prosecution of Internet copyright piracy cases in particular, and of IPR cases in general. Ensure that the appointed special IPR prosecutors operate in a transparent manner, retain close contact with



rights holders' representatives and provide results by actively and swiftly initiating criminal infringement cases and forwarding them to courts by instituting indictments, rather than dropping the cases for lack of social harm. Coordination and instructions should be received by the police officers prior to the raids so that weak cases can be avoided. Prosecutors should request that the courts issue deterrent level penalties.

- Instruct judges and prosecutors to cease dismissing criminal cases for "lack of social harm."
- Impose deterrent, non-suspended sentences (in criminal courts) and fines and stop dismissing cases involving repeat offenders.
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are overburdened to handle IPR cases. Establishing specialized courts or at least panels with criminal jurisdiction should also be considered.
- 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 rights holders' organizations.
- Establish a system at the borders to track the importation of blank optical media products. This should involve coordination among all enforcement authorities (police, customs).

ROMANIA Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ²	10.0	40%	15.0	65%	12.0	60%	17.0	80%	18.0	78%
Business Software ³	115.0	70%	91.0	68%	63.0	69%	61.0	72%	32.0	74%
Entertainment Software ⁴	NA	NA	NA	89%	NA	77%	NA	75%	NA	65%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	12.0	NA	8.0	55%
Books	NA	NA	NA	NA	NA	NA	2.0	NA	2.0	NA
TOTALS	125.0		106.0		75.0		92.0		60.0	

COPYRIGHT PIRACY IN ROMANIA

Internet piracy: There are about 12.0 million Internet users in Romania, about 53.9% of the country's population (as of March 2008, according to www.internetworldstats.com). Broadband penetration continued to grow last year, offering cheaper and faster ways to connect to the Internet. Peer-to-peer (P2P) file-sharing phenomenon grew accordingly, and the most popular systems are Torrents, DC++, Stron DC, and Torrents. Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Large amounts of video files are shared over the networks, mainly in Bucharest (463) and other several important cities like Galati, Timisoara, Cluj, Ploiesti, Iasi, Suceava.

The recording industry notes that while mobile business-to-consumer (B2C) piracy has basically stopped, Internet piracy increased in 2008, although at what might be at a slightly slower rate than 2007. The development of the Romanian

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of our Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on Romania under Special 301 review, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of IIPA's submission. For a summary of IIPA's 2009 global issues, see our cover letter at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² RIAA reports that its 2008 estimated loss figure only concerns physical piracy. Loss estimates in 2008 for digital piracy, which is almost 100%, are currently not available. The 2007 estimate does cover both physical and the then-new digital piracy, and took into account the lower U.S. dollar value.

³ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

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

⁵ MPAA's 2005 estimated losses reflected a methodology that analyzed both physical/"hard goods" and Internet piracy.

infrastructure of fiber optics and broadband continued in 2008, and that continued to drive Internet piracy. The main segment of Internet piracy involves P2P (peer-to-peer) file-sharing. During anti-piracy actions taken against user and hub cases in 2008, the recording industry noticed a slight drop in users connecting to DC++ or sharing music materials. However, musical content is still largely made available through DC++ networks in Bucharest (56.3%), Constanza (4.9%), Prahova (2.9%) and Cluj (2.4%). In 2008 alone, the industry brought 74 DC++ user cases in just Bucharest. In fact, Bucharest has the highest concentration of pirate activity. In order to tackle this, much depends on good cooperation with law enforcement and, in particular, the judiciary. However, the industry reports substantially better cooperation in other cities than in Bucharest. This is an area where there is much room for improvement.

The business software sector reports that in 2008, it witnessed a growth of Internet-based piracy of business software applications in Romania, with the most common methods being P2P and Torrents. 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.

Hard goods piracy / optical media piracy: There remains widespread CD-R and DVD-R burning which serves as the main sources of physical piracy in Romania. 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. It seems the levels of optical disc piracy in Romania have declined in the past two years, as internet piracy has grown.

There are no indications that pressed disks are any longer imported into or transshipped through Romania. Three years ago, the Government issued Ordinance No. 25/2006 (entered into force on March 1, 2006) which was approved by Law 364/2006 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. 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. Interestingly, there are indications of activities of illegal studios outside Romania that send their products to accomplice sellers in Romania, who in turn sell these pirate copies through mail order or via alleged "personal collection sales." In 2008, one of these illegal studio cases pointed to a connection in Hungary.

Business software piracy: The Business Software Alliance (BSA) in Romania reports that its market is most adversely affected by end-user piracy (both in companies and in private homes) and illegal distribution (such as hard-disk loading and distribution of home burned ODs). BSA appreciates the work of the Government in taking significant steps to legalize its own software. Hard goods piracy appears to have decreased lately, for two reasons: an increase of Internet piracy and concerted enforcement actions. Internet piracy of software products was fast growing in 2008. BSA reports that estimated trade losses for business software piracy in Romania in 2008 rose to \$115 million with a 70% piracy level.

Record and music piracy: The recording industry (which is represented by the national trade organization AIMR and the collecting society UPFR) reports that the level of Internet piracy in Romania is so high that the music industry is struggling to develop its legitimate on-line services. With respect to physical piracy, very few stores, commercial centers or markets sell pirated music. The street ban appears to be working, as less pirated materials appear on the streets, but there were indications of more couriers selling products on the street, slightly more than the previous year. The operating method of selling pirate products changed and is now concentrated around illegal burning studios in private apartments and related sales of burned disks locally and through mail order. A few test purchases indicated that the products sold this way are indeed made at local underground studios. Unauthorized music is also advertised on Internet or specific closed circuit channels. The recording industry reports that in 2008 they were in the exact same situation regarding digital piracy as they were in 2007. The digital music piracy rate is almost 100%. The situation is exacerbated by the fact that, even those cases that have been conducted successfully by the police, have been sent to the court. Sales dropped about 20% in 2007 compared to 2006 and with 35% in 2008 compared to 2007. Simply said, piracy is the main cause of the drop in sales.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that the predominant piracy problems faced by game publishers in the market is the continued use of pirated games at Internet cafés, and retail sales of locally burned pirated video game product (though at levels less than that in 2007). An ESA member company reports that 114 new criminal cases were initiated on its behalf in 2008, less than the number of cases (190) it supported in 2007. 20 of the

cases begun in 2008 reached the trial stage, 6 of which resulted in a verdict/judgment. 34 cases initiated in 2007 or earlier also achieved disposition in 2008.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy remains a significant problem in Romania. 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. Moreover, peer to peer piracy has increased with deepening broadband penetration. Illicit blue ray discs are also readily available.

COPYRIGHT ENFORCEMENT IN ROMANIA

Given the depth of piracy problems in Romania and the importance of rule of law, senior levels of Romanian Government officials need to commit to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment in-practice. The main agencies responsible for criminal enforcement are the police and the prosecutors (the Public Ministry). The General Police Inspectorate – Antifraud Department includes a unit dedicated to intellectual property rights, and other agencies include the Border Police and the Gendarmerie. The Romanian Copyright Office (ORDA) has the responsibility to provide forensic examinations/expertise reports, to store the pirate products during trial and destroy them after the trial is concluded, as directed by the court or prosecutor.

An Intellectual Property Working Group has been in place since 2006; is a formal structure of private-public partnership. Led by the IP Department of the Public Ministry (General Public Prosecutor's Office), this group includes all the public authorities having IPR enforcement jurisdiction along with representatives from the private sector, and meets almost every month.

Business software reports good work with police and prosecutors during 2008: BSA reports that its relationships with the Romanian enforcement authorities was good in 2008, resulting in some excellent raids against large targets. The enforcement authorities became more receptive to industry's needs and requirements during the EU accession process. However, BSA is concerned that the level of attention and prioritization may have slackened off a bit, and currently is not as strong as it was in 2006. For instance, there was a discussion inside the General Public Prosecutor's Office about dissolving the coordination side of the IPR department; fortunately, this did not happen, proving that the authorities did consider the importance of anti-piracy work. BSA also believes that for much of 2008, ORDA improved its capacity for conducting expert reports.

BSA reports that the authorities took *ex officio* actions and were receptive to private industry's referrals. In 2008, BSA had more than 470 new raids involving end-user and reseller cases. Big companies were targeted (for instance, there was a raid targeting a company that had three office locations and more than 700 PCs) and there was a constant number of raids against hard disk loaders (another BSA priority). In fact, there were 3 cases of resellers convicted and sent to jail for software copyright infringement (one of them to 6 years and 7 months). BSA reports that there were 41 convictions in software cases in 2008, with the average sentence being 1 year of suspended imprisonment. BSA notes that last year the number of suspended imprisonment sentences outnumbered the criminal fines sentences, which is a plus, compared to prior years.

For 2009, BSA believes that actions against large end-users (companies) and hard-disk loading cases need to continue. In addition, time is long overdue to address a longstanding problem. When preparing for a raid, a computer search warrant must be issued in order to search computers at businesses (not in private houses) 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 has been reported since 2005 and four years later it is still unsolved.

Recording industry has good rapport with the police, but problems continue with prosecutions: In 2008, the recording industry reports good cooperation with police officers both in Bucharest and outside Bucharest on physical piracy cases, and have obtained positive results. As most police officers now have good knowledge regarding investigatory

procedures in physical piracy cases, they now start *ex officio* cases, most of which end up in court. However, there still are occasional problems involving establishing the ownership of rights in the various music tracks on the illegal physical products during trial; as a result, the courts often dismisses these cases even though the copies in question are clearly illegal.

The local music industry organizations (both UPFR and AIMR) report the following legal actions taken in 2008. UPFR filed for damages in 221 criminal files. This is a procedural possibility for rights holders through which their damage claim gets addressed in connection with the criminal infringement case. In addition, AIMR reported the following enforcement actions with law enforcement officials: 52 raids (on both illegal studios and DC++ user homes) through which a total of over 48,000 products were seized (pirate CDs, DVDs, inlays), 5 laptops, 16 central units possessing multiple optical writing devices and 26 hard disk drives.

Despite all these raids, far fewer went forward to the prosecutorial stage. With respect to physical piracy cases involving recorded music, AIMR reports that during 2008, 236 music piracy (hard goods) cases were dropped, discontinued by the prosecutors. 89% of those 236 cases concerned cases from 2007, 7% cases from 2006 and 4% cases from 2008. Aside from those, 39 criminal cases introduced in 2008 have been sent to the court and are under trial. Of all the criminal music piracy cases sent to the court in 2006-2008, there were 43 convictions and 4 acquittals. The most successful cases included sentences of between 1 and 5 years with a 6-year suspension. One important case concerned repeat offender Adalbert Daniel Kiss, who was convicted to 5 years and 6 months of prison and fined civil damages of 2444,04 lei (~US\$745) to be paid to UPFR. This case is important because the court imposed the execution of the prison time as opposed to the judicial practice of suspending the sentence.

Entertainment software industry also works well with police but not so with prosecutions: ESA member companies report that local police (in the criminal fraud investigation unit under the prosecutor's office) continue to initiate criminal cases on their behalf. Relationships with law enforcement continue to be positive and cooperative, with police actively seeking member company assistance in the course of investigations. Although settlements are permitted (though procedurally only the civil damages aspect of a criminal case), there were less requests made by defendants and thus, fewer settlements entered into in 2008. Typically, an investigator, prosecutor, and at times, even the judge, will encourage the defendant to seek a settlement with the complainant. Although the settlement should pertain only to the civil aspect of the criminal case, when such a settlement is entered into, in practice, the entire case will typically be dismissed for "lack of social harm." Prosecutors also continue to dismiss cases for "lack of social harm," even where no settlement is entered into – though this number has decreased when compared to previous years. In 2008, 40 such dismissals occurred, about 50% more than the number of cases settled. Unfortunately, there is little recourse for complainants when a prosecutor dismisses a case for "lack of social harm." A member company reports that all of its appeals (since 2002) against the dismissal of cases at the prosecutor level have been rejected by the courts. Another problem involves the lack of coordination at the prosecutor level. An ESA member company reports that the same defendant or infringer may be the subject of multiple proceedings before different prosecutors, but there is no systematic procedure for consolidating the different cases under investigation. Notwithstanding this lack of coordination, a prosecutor did consolidate five (5) investigations against an Internet café operator and instituted a criminal case against the operator on the basis of the five separate criminal investigations. Transparency, or the lack thereof, continues to be problematic. Rights holders are rarely informed of the status of a case, even though more than half the cases have been pending for several months, some even years. The government should make more transparent its enforcement efforts, and improve communication with rights holders particularly as they are likely to be of great help in supporting a case.

Criminal Internet cases are being investigated but no completed prosecutions yet: Internet investigations may take place only in the course of a criminal investigation (which, according to the law, may be opened based on some evidence).

With respect to criminal Internet actions involving business software applications, BSA believes there are two overarching problems. First, it is very difficult to gather evidence, as the traffic data (e.g. Internet protocol addresses) may be obtained as part of a criminal investigation, based on an order, and such criminal investigations may not be opened unless there is sufficient proof of infringement. It is not always easy to gather such evidence while complying with all the regulations on privacy, in order to get the criminal investigation opened and a judge order. Second, Internet piracy is still perceived as an infringement lacking the level of social harm necessary to start a criminal investigation, and this is a huge roadblock for both prosecutors and judges.

The recording industry reports varying results in different cities. In Bucharest, the enforcement problems arise once the police require the identity of the infringer. The ISPs do whatever they can to delay providing this information, even though the IP address is made available. Even with all the relevant data at their disposal, prosecutors there are still reluctant to provide a search warrant. It also happens that the case advances so slowly that the user can no longer be found and, as a result, the case is dropped. Because most of the major piracy problem is in Bucharest, much is at stake and police cooperation is important. The industry filed 74 DC++ user cases in 2008 in Bucharest alone. More positive results were obtained by the music industry in other Romanian counties. For example, AIMR has had successful P2P user and hub cases, most notably: (a) 5 raids in Cluj; (b) 19 raids in Sibiu; (c) 8 raids in Hunedoara; (d) one HUB takedown involving about 500 users in Prahova; and (e) 2 raids in Botosani. The industry has numerous other Internet cases underway.

The music industry (UPFR) reports that in 2008 there were 128 criminal complaints for music Internet piracy, of which 13 have been dropped. Interestingly, as concerns Internet piracy -- in particular P2P piracy -- it seems that users avoid having music content in their share folders. They noticed that several distinct users we were monitoring had their music content removed, while other protected materials were still present in their share folders. However, as in previous years, no digital piracy cases made it to the court in 2008.

BSA reports that one criminal complaint was filed in 2008, and there were preparatory discussions with authorities on several other cases. Romanian authorities showed interest in addressing software Internet cases, but as the legislation is in course of changing, it is a matter of time and procedures.

Local industries report that although the Romanian copyright law covers both uploading and downloading, there is some lack of clarity regarding the responsibility of Internet service providers. For example, there is an unclear reference of such liability in the copyright law.⁶ However, Romania's Law on Electronic Commerce (Law No. 365 of 2002) provides that the ISP should suspend Internet access for the client when the ISP is being notified by the authorities that his client is performing an infringement. At their request, the ISP is obliged to suspend the Internet account of the respective subscriber. The ISP can suspend a client's services only through the disposition of the public authority defined as such (ANRCTI) or through a court order, based on a complaint of one interested party. However, this authority (ANRCTI) cannot act in response to infringements of the copyright law, but only in cases of infringement of the E-Commerce Law. The E-Commerce Law is, unfortunately, ambiguous. It provides for the liability of ISPs in cases where they do not take action if they learn about the illegal/infringing nature of information stored or if the access to such information has been facilitated (by search instruments and links). Such illegal/infringing nature, however, needs to be confirmed by a competent public authority, in the case of the information to which access is facilitated. With respect to hosted information, it is not very clear what are the criteria upon which the ISPs have to consider the information as being illegal/infringing; local counsel indicates that this uncertainty may cause problems in practice. The law also provides for the general obligation of ISPs to alert authorities about the apparently illegal activities of their clients; should an ISP fail to do so, they are subject to administrative liability. Rights holders are concerned that this very broad and un-specific obligation is unenforceable.

BSA reports that the ISPs are rather indifferent to the problem of Internet piracy on their networks. No official negotiations were started between the rights holders and the ISPs. The recording industry filed one civil action against an ISP and is awaiting the court decision.

Recent action worsens ORDA's problems with stickers and forensic examinations: The Romanian Copyright Office (ORDA) is an independent Government agency that has had various administrative enforcement powers rise and wane over recent years. The copyright industry has objected to two particular practices of ORDA for years.

First, ORDA has had a strangle-hold over the objectionable hologram system and tracking system. The copyright industries, led especially by the music industry, have argued that this dysfunctional and outdated hologram system and track registration system for sound recordings should be abolished. 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

⁶ See Article 143² --a crime punishable with imprisonment from 6 months to 3 years includes the act of the person who, without the consent of the rights owner and knowing or having to know, permits, facilitates, provokes or hides an infringement of a right provided for in this Law.

anti-piracy activities.⁷ In addition, ORDA registers every sound recording and videogram that is released to a commercial circle for the purposes of issuing holograms (this requirement was introduced by the Government Ordinance No. 25/2006). As expected, the procedure is extremely complicated and time-consuming. The registration of each recording and videogram is taxed by ORDA, and the amount includes an additional 10% fee for a national cultural fund which is another state fee alongside the hologram fee. In March 2008, ORDA organized public consultations on the matter of either preserving or setting aside the hologram system. During the meetings it is questionable as to whether or not opinions were in favor of the system, however the informal message after the process was that the market wishes to continue with the system. There is no summary of the survey taken by ORDA on the matter publicly available and drafting of the survey does not reflect that of the respondent's true answer.

Second, ORDA does have some enforcement authority. After raids are conducted, the police send the seized product to ORDA for verification (forensic examination). ORDA examines the seized products and issues its technical report certifying which goods are pirated. This technical procedure with ORDA is still often lengthy; however, rights holders reports that these delays are not as long as they used to be. The average seems to be in the 2-3 months' timeframe, although in one unusual case, the verification process and the issuance of the technical report took only 10 days.

Rights holders, however, are still not involved in the verification process. After ORDA finishes its examination of the products, the prosecutor decides whether to file charges and prosecute the case if he/she considers there to be sufficient evidence for conviction. The simple solution here is to follow the prevalent practice in Europe and other countries, and to transfer this forensic examination task to the copyright industries, who are true experts in their respective products.

Rather than take action to minimize bureaucracy, delay and costs, the Government of Romania made matters worse late last year. Without any rights holders consultation, the government passed Decision No. 1086 of November 14, 2008, which reinforces the already troubling ORDA system of prohibitive tariffs (see further discussion in legal section, below).

The need for deterrent sentences: Many criminal copyright cases over the years have been terminated with the prosecutor dismissing the case. Common reasons used by the authorities have included: perceived difficulties in presenting appropriate evidence to get a search warrant or to make a case; the lack of "social harm" involved; fear that taking a particular case might trigger a negative reaction in the media; and fear and reluctance to bring the first Internet case. During 2008, the recording industry reported that many pending cases were dismissed, and at the same time, more cases in the physical piracy realm were filed. Now, as more cases make it to court, it is hoped that more convictions will be issued. Above are a few examples of recent deterrent decisions issued last year. However, those appear to be more the positive exception to a problem rule -- still prosecutions are few and deterrent sentences rare. Romanian courts must take action to fully enforce their laws.

Romanian courts remain reluctant to impose deterrent penalties, with small fines, minimal damages, and suspended jail sentences continuing to be the norm. There was, however, one case where the court imposed a 3-year jail sentence, which was not suspended, for illegal reproduction of copyrighted materials. Although in this particular case, the defendant was a recidivist, having been previously convicted of copyright infringement, and under a suspended jail sentence. In another case, which remains pending, a non-suspended jail sentence was imposed on repeat infringer, though this was later commuted to the mere payment of a fine. Notwithstanding the convictions, and the corresponding award of damages contained in the judgment and sentence, none of the defendants have complied with the order and collection of damages remains difficult given the need to initiate a separate garnishment proceeding.

Lengthy court proceedings: Criminal judgments of even minor fines against copyright infringers still require considerable time and effort in Romania. The time from the police raid to the transfer of the case to the court is never less than

⁷ 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. Moreover, considering the expected decrease in physical piracy, the justification for having any hologram system is disappearing. 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 over how the holograms it issues are actually applied by the users. This reinforces the futility of the system as it currently stands.

3-4 months, and on occasion may exceed ten months. The average amount of time needed to obtain a criminal court decision is between 1 and 1½ years. At least two or three hearings are needed before reaching a court sentence. Some companies report that they have a number of cases initiated in 2006 or earlier in which no decision has yet been communicated to its local counsel. There was, however, an exceptional case before the Timis County Court where the proceedings were concluded in just over 5 months, with only three hearings before the judge issued a verdict against the defendant for illegal commercialization – though the prison sentence was suspended. Appeals take even longer.

COPYRIGHT LAW AND RELATED ISSUES

Data retention and ISPs: In November 2008, Romania passed Law No. 298 of 2008 on data protection in order to implement the EU Data Retention Directive. This law addresses data retention issues, including data processed by providers of electronic communication services meant for the public or for communication networks. The law entered into effect on January 20, 2009. The copyright industries view this law as favorable because it obligates Romanian ISPs to retain their subscriber and network data for six months and to communicate it to the authorities, upon court order, in cases of crimes committed on the Internet or through other communication systems. These data crimes are considered “serious crimes” regardless of whether or not they were performed by a criminal organized group.⁸ It is expected that P2P cases are covered by this law.

New Decision on ORDA actions (new high fees for enforcement functions): There is a new Government Decision No. 1086 of 2008, which entered into force on November 14, 2008. This Decision contains various provisions regarding tariffs, the use of expert reports, and the use of the “encouragement” fund for the personnel of the Romanian Copyright Office (ORDA). This unfortunate decision was adopted without any consultation inside the IPR Working Group, and the copyright sectors were not notified.

ORDA and new expensive tariffs for stickers (holograms): This decision regulates the procedure of registering recorded music titles and videograms in the National Phonogram Registry. The recording industry has for many years called for an abolition of the entire ORDA registration and hologram system, given its historical ineffectiveness regarding enforcement and its penchant for corruption (note: registration is required before being able to obtain the necessary holograms). However, this government decision shows that the Romanian government (and in particular, ORDA, which see this new measure as a welcome source of income) has no intention of getting rid of this cumbersome and, from a practical point of view, ineffective system. So for example, the new tariff to register a sound recording produced in Romania is 50 RON each (~US\$15) (per Article 7 of this Decision). To register sound recordings imported or otherwise introduced into commerce have different tariffs according to volume: (a) up until 20 phonogram titles – 50 RON (~US\$15); (b) between 21 and 50 titles – 75 RON (~US\$23); (cc) between 51 and 100 titles – 100 RON (~US\$30); and (d) over 100 phonogram titles – 150 RON (~US\$45). Simply put, the copyright industries believe that this latest decision by ORDA to line its coffers should be ended. Romania should (1) abolish the statutory hologram system; (2) make the track registration system voluntary and free of charge; and (3) substantially reduce ORDA’s tariffs and allow rights holders’ organisations to act as court experts in copyright infringement and piracy cases.

ORDA and expert reports and high costs: This Decision No. 1086 also regulates ORDA’s performance of forensic examinations and the provision of expert reports. Both activities have prohibitively high tariffs, which in turns constitutes a serious impediment to copyright enforcement. This Decision provides for two types of expert analyses and reports:⁹

(1) *The ones requested by the criminal enforcement authorities* -- Such forensic studies should be paid, according to the decision adopted by the Government, “by the person indicted, in case his/her guilt was proved” and the expert analyses should aim at clarifying the genuine or non-genuine nature of the product. Unfortunately, this provision is not enforceable, as it provides for several contradictions: the guilt is proved only at the end of the trial; the indictment is passed later in the criminal investigation and not in the beginning, when such expert analyses are necessary; and one cannot consider

⁸ This outcome was the result of a coordinated private sector effort to inform the legislative process when the matter was under consideration.

⁹ Here is another way to look at these two kinds of reports. Point (1) refers to what local representatives used to call “technical minutes” which are requested by the prosecutor to check if seized goods are genuine or not in 100% of the cases. When the person under investigation is found guilty, he/she must pay, otherwise the state is responsible for payment. The legal language states precisely at the request of the prosecutor. Point (2) is the situation where the rights holder and any third party are in the position to pay if they ask for forensic exams. In Romanian criminal procedure, there is a clear difference between technical minutes, technical reports, and forensic examination.

a person to be guilty or even to pass an indictment against him/her until the genuine or pirated nature of the goods is clarified (while, according to the provision, first you need to have a guilt proved and only afterwards the products are analyzed if they are genuine or not). It is very unclear how this would apply in practice, and because so far no practical experience on the matter exists, uncertainty reigns as of early 2009.

(2) *The ones requested by the interested parties (including the rights holders)* -- These are examinations that should be paid for by the requesting parties. This element revises existing practice, and adds the new element of price. Industries' concerns and fears here are that, since the first case (above-mentioned) seems to be unclear and, thus, unenforceable, the only applicable case of expert analyses and reports would be this second one. In such situation, the rights holders might be asked to pay for the expert analyses and reports, which will result in a high financial burden for protecting their rights. According to Article 18 of this decision, ORDA specialists perform forensic examinations, at the parties' expense, on various subject matter.¹⁰ For example, the charge ranges from 5 RON (US\$1.50t) for every since optical disk examined (CD, DVD, etc), 500 RON (US\$150) for a single computer hard drive, and 1000 RON (US\$300) for each computer software program. Also, the decision allows the option that, if the interested parties request ORDA's examinations to be conducted at other cities, that is possible and the rights holders must pay all travel expenses. So, in a raid in a city other than Bucharest that results in seizures of several hundred or several thousands of suspected infringing products, the forensic examination by ORDA not only takes time, but imposes significant financial burdens on rights holders as part of a criminal investigation undertaken by Romanian criminal law enforcement.

During discussions inside the IPR Working Group, after the Government Decision No. 1086 was adopted, the authorities (the General Public Prosecutor's Office and the Romanian Copyright Office) clarified that the industries shall not be charged for the forensics reports, unless they expressly request re-examination. The costs shall be advanced from the state budget and, in case of conviction, they shall be recovered from the infringer.

Search warrants: For many years, BSA has reported that one of its major enforcement obstacles is the legal prerequisite regarding search warrants. The search warrant can be issued only by the court and only after the commencement of the criminal investigation (Law No. 161 of 2003). The catch here is that the criminal investigation can only be commenced if sufficient evidence exists, and in-practice it is difficult to gather the evidence on suspect's premises in the first place. BSA has been concerned that this will reduce or limit the number of *ex officio* police raids will decrease dramatically because police raids depend upon input from the rights holders. This problem is still unresolved. The solution is simple -- the law amendment should provide that the mere verification of the existence of software installed on computer should not require such a search warrant.

Copyright Act of 1996, as amended: The 1996 Romanian Copyright Law has been consistently amended a number of times in the past decade. Various amendments were made in 2004¹¹, 2005¹², and 2006¹³, many of which were aimed at

¹⁰ Here is a listing of the subject matter and costs in Article 18 of this Decision: (a) optical disk (CD, DVD and other similar supports) – 5 RON per piece; (b) audio cassette – 3 RON per piece; (c) video tape – 4 RON per piece; (d) inlay (phonogram, video or software product) – 2 RON per piece; (e) hard disk – 500 RON per piece; (f) portable storage device (flash drive, memory card and other similar products) – 300 RON per piece; (g) computer programs – 1000 RON per piece; (h) works written on paper support (excepting computer programs) – 4 RON per page; (i) newspapers, magazines and other periodic publications, Internet pages – 200 RON per page; (j) photographic works, as well as any other works expressed through a photographic like procedure, no matter the support – 150 RON per picture; (k) music works with or without text – 300 RON per piece; (l) dramatical works, musical-dramatical, choreographic and pantomime works – 500 RON per piece; (m) cinematographic works as well as other audio-visual works – 350 RON per piece; (n) graphic or plastic art works – 400 RON per piece; (o) architectural works – 1000 RON per piece; (p) canvas, graphical works and miniatures that form architectural works – 200 RON per page or piece; (q) maps and topographical, geographical or general science drawings, no matter the support – 300 RON per piece; and (r) access control devices – 250 RON per piece.

¹¹ In 2004, Romania passed amendments to its 1996 Copyright Law (Law 285/2004) which came into force on August 1, 2004. 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.

¹² In 2005, the copyright law was revised through an Emergency Ordinance No. 123/2005 which entered into force on September 21, 2005. Although these amendments were far from ideal, there were some positive elements, such as: (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 rights 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. For example the withdrawal of the

coming into compliance with EU Directives. However, some problematic provisions reported by local industry colleagues remain, such as 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 11*bis*(2) and the Trade Related Aspects of Intellectual Property Rights (TRIPS). As a result, the overall legal structure is generally good but unfortunately 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.

Street piracy ban: In 2006, a street ban was adopted; Government Ordinance No. 25 of 2006 prohibits street commerce of copyrighted goods (original or pirated). According to the copyright industries, this street ban was a positive move at that time and remains so. Legitimate sales dropped substantially during the last years and they are still dropping. In this context, if this measure would be abolished, it would not improve the situation for the industry in terms of sales. In Romania there are no longer any specialized stores selling recorded music. Music is nowadays sold in supermarkets, hypermarkets and gas stations. Retail piracy moved from the streets to the newspaper stands or to closed circles in housing compounds and offices.

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.

Criminal Code reform: A large part of the Criminal Code reform in 2006, including the intellectual property chapter, was postponed until September 1, 2008 and now, again, until September 1, 2009. In a positive move, Law No. 278 of 2006 introduced criminal liability for legal entities and also provides for the general limits of criminal fines. However, there were some problems in this law. For example, the criminal code still does not sanction the possession of infringing materials, including the possession of the equipment used to make infringing material.

Government software legalization (2004): BSA appreciates the work the Government has undertaken to legalize its own software use under Decree H.G. Number 470/01-04-2004. The business software industry looks forward to continuing to work with the Government in 2009 and beyond to ensure that the gains made through this effort continue into the future.

IPR TRAINING AND PUBLIC AWARENESS

In May 2008, Business Software Alliance organized a training seminar for 50 Romanian police officers and prosecutors. The results were positive, as the quantity and the quality of software raids improved. In addition, BSA representatives also participated in trainings organized by the authorities. The recording industry offered several seminars for police officers and prosecutors, and also provided training materials and in-depth explanations of the process of evidence gathering, which is particularly important in Internet piracy cases. In addition, the music collecting society UAMI launched an anti-piracy campaign on radio and television aimed at informing the general public about the issues of music piracy.

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. 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*."

¹³ The 2005 Emergency Ordinance was voted in the Parliament and became Law No. 329 of 2006, which was aimed at making the Copyright Law compliant with the new Romanian Criminal Code. The copyright law now provides that criminal offense are also punishable by criminal fines, and the level of such fine is to be established according to the Criminal Code provisions. This 2006 law also expressly introduced the competence of the Romanian Gendarmerie to conduct raids.

SAUDI ARABIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Saudi Arabia should be placed on the Watch List in 2009 with an out-of-cycle review (OCR) to monitor progress toward meeting key near term enforcement benchmarks.

Executive Summary: Saudi Arabia continues to have the highest piracy levels of any other country in the Gulf region. For years, sporadic raiding activity would occur but information as to what happened thereafter remained unknown to rights holders due to the government's non-transparent practices. Fines were woefully low; deterrence was non-existent. Efforts to engage the Saudi government met with a number of commitments, followed by a frustrating lack of any action to reform the system. The legitimate market came close to disappearing in 2007.

However, some welcome signs began to appear in early 2008. The Minister of Culture and Information took a personal interest in these issues and named his Deputy Minister to oversee the implementation of a transparent reporting system by placing all raid cases on a public website and permitting rights holders to participate fully as cases were adjudicated in the Ministry's Violations Review Committee. This has yet to be fully implemented and greater progress must be made. The Deputy Minister has recently ordered a program of constant raiding of the local markets against street vendors, which, has had a significant impact. Additionally, over the last year the authorities have orchestrated many actions against source piracy seizing hundreds of thousands of CDs. Finally, the adjudication process is starting to become more transparent; rights holders and their legal counsel can now track cases through litigation. These hopeful signs must now be followed through to conclusion. If the leadership that has been shown to date continues and is followed by concrete actions, there is a chance that the Saudi market can become what it should be, the best in the Gulf.

Priority actions to be taken in 2009: IIPA requests the following actions by the Kingdom of Saudi Arabia, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Transparency

- The Ministry of Culture and Information (MOCI) must complete the task, by the end of the OCR period, of uploading all 2008 and 2009 raids, hearing and Violations Review Committee (VRC) judgment/penalty data on the MOCI website in both Arabic and English. (OCR benchmark)
- Rights holders must be allowed to participate fully in the MOCI enforcement process, including the right to prepare written submissions and appear at all hearings before the Committee. Rights holders should be allowed to present written and oral evidence and argument with respect to issues relating to administrative liability, the level of penalties to be imposed, and on the level of damages/compensation to be awarded the rights holder, as required by the TRIPS Agreement. (OCR benchmark)
- As now provided by MOCI procedures, rights holders shall have the right to appeal, at their discretion, inadequate, non-deterrent sentences or compensation awards to the Board of Grievances. (OCR benchmark)

Deterrent Enforcement

- MOCI, through its inspectors and in partnership with the police, must continue high levels of raiding activity throughout the Kingdom. HE A.R.A. Al-Hazzaa, has spearheaded a major effort to root out street vendors in Riyadh. His clear and forthright zero-tolerance policy should be continued throughout the Kingdom until street vendor piracy becomes a *de minimis* problem. (OCR benchmark)
- Administrative penalties imposed by the VRC should be increased to provide more deterrence, under the guidance of Minister and Deputy Minister Al-Hazzaa.
- Police Committee in Riyadh should be duplicated in other major cities to assist with street vendor raids and to investigate large producers and distributors of pirate product. Greater police involvement must be ensured.
- The Saudi government should cooperate with rights holders in bringing a test case involving a major seizure before the Board of Grievances (BoG) to secure a deterrent sentence of imprisonment by the end of the OCR period, as a



demonstration of deterrent BoG criminal sentences generally. The Minister and the BoG should work together to ensure that high fines, and especially imprisonment, become the norm in the Kingdom for serious acts of piracy. (OCR benchmark)

- A special cyber crime unit within the Police Committees and an Internet piracy unit at MOCI should be established,¹ and the MOCI should work closely with the Communication and Information Technology Commission (CITC) to take actions against Internet piracy.
- The CITC must begin closing down websites, not just for pornographic content, but for copyright violations and, if it is a local website, subject the owner to deterrent penalties.
- The MOCI, the police and rights holders should cooperate to develop a plan to convert the compounds to legitimacy, bringing Pay-TV piracy in the compounds to an end.
- The customs system must be reformed to establish an IPR Task Force and customs officers must be provided with *ex officio* authority to suspend the import of pirate product into the Kingdom. This is especially relevant against pirate optical discs and decoder boxes that circumvent encryption technologies.
- The government's determination to reduce piracy levels, including these actions, should be widely publicized throughout the Kingdom.

Ensure Legal Use of Copyrighted Materials

- Led by the King and MOCI, the KSA government should make significant progress toward legalizing software use in government ministries and should enter into agreements with software companies to purchase legal software (OCR benchmark)
- Authorities should collaborate with relevant supervisory sections of the Ministry of Education/Higher Education to ensure that all state and private universities demonstrate that their educational materials used on campus have been purchased from legitimate suppliers.

Copyright Law Reform

- Amend the Copyright Act to fully implement and ratify, the WIPO Internet Treaties.

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

¹ Such unit could be based on the model in place in Lebanon.

² <http://www.iipa.com/pdf/2009SPECIAL301HISTORICALSUMMARY.pdf>.

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

SAUDI ARABIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2008⁴

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	NA	25.0	60%	20.0	50%	20.0	50%	15.0	35%
Business Software ⁵	126.0	54%	97.0	51%	115.0	52%	105.0	52%	73.0	52%
Motion Pictures ⁶	NA	NA	NA	NA	NA	NA	95.0	95%	20.0	40%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	95%	NA	68%
Books	NA	NA	NA	NA	8.0	NA	10.0	NA	14.0	NA
TOTALS	126.0		122.0		143.0		135.0		122.0	

UPDATE ON PIRACY IN SAUDI ARABIA

Optical disc and other hard goods piracy generally: For at least each of the last five years, piracy levels have increased, including in 2008. Saudi Arabia now holds the dubious honor of having the highest piracy levels in the GCC -- over 90% for videos, videogames and recordings. At the retail level, this is also true for business software which is openly available for hard disk loading in computer shops or from street vendors. Estimates of unauthorized use of software in government ministries and in private business are over 50% of the market. Local licensees -- all Saudi companies -- report diminishing revenues, significant closure of retail outlets and warehouses for legitimate product, and that they cannot maintain themselves in business unless something is done about piracy immediately. Pirated copies of videos, musical recordings, and videogames are brazenly sold in retail stores and by street hawkers in the larger markets in all major cities. Legal product is limited only to the expensive stores usually in malls, frequented by well-to-do Saudis and even here the number of copies sold are minimal for the market. The vast majority of pirated video and music product is locally "burned" OD product sold with obviously photocopied inlays and covers, with some imported product from South and Southeast Asia. However, for videogames the ratio is about 50-50.

Motion pictures: For the motion picture industry, a comparison of sales figures for various markets in the GCC demonstrates vividly the problem in the KSA. The launch of a Hollywood blockbuster might result in sales of 3000-5000 legitimate copies in Saudi. By contrast the same video will sell for the same amount in Qatar. Qatar has a population of 1 million, the KSA 28.2 million. Another blockbuster sold 5000 copies in Saudi Arabia and 25,000 copies in nearby UAE which has a population of 4.4 million. In meetings with local video licensees, IIPA was told that a single pirate retailer alone sold 25,000 copies of the pirated video of a major Hollywood action blockbuster, with little fear of raids and no fear of substantial penalties, beyond loss of inventory. Pirate DVDs can contain up to 30 theatrical films and sell for a mere US\$6.50. Were it not for one high-end store with 15 outlets, these licensees would have almost no legitimate sales. This one chain accounts for 70% of the legitimate sales of video product. Customers are wealthier people who would rather buy the original for US\$24, than a cheap looking and possibly camcorder pirate copy for US\$3 or even less. Because video stores have a higher chance of getting raided than stores dealing in videogames, the former exhibit their wares in catalogues from which you order and then a courier runs out the back and returns with your copy.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on the history of Saudi Arabia under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission.

⁵ BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Saudi Arabia, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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.

⁶ MPAA's trade loss estimates and piracy levels for 2006 through 2008 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

Entertainment software: The situation is even worse for entertainment software; pirated copies are sold openly everywhere. Businesses engaged in the sale of legitimate video game product are severely undermined by the ready availability of pirated game product in the market. Licensees report that there is a marked contrast between sales of entertainment software for platforms that have been hacked and those platforms that, to date, remain impervious to hacking attempts. For example, sales of legitimate games for the Sony PS3 platform, which remains un-hacked, are actually higher than the sales of legitimate games for the Sony PS2 platform, for which circumvention devices have long been widely available (even though the price for the legitimate PS3 game is naturally higher than that of the legitimate PS2 game). Unless the situation greatly improves, vendors of legitimate video game product face an uphill battle to remain in business. Such a situation inevitably takes a toll on employment in the retail business as well as the ability of rights holders to establish a foothold in the legitimate market.

Music and recordings: It is much the same for the music industry. International repertoire makes up 20% of the market, Arabic language product 70% and Indian 10%. One of the licensees reported that it went from 13 retail shops and 3 warehouses a few years ago to 2 remaining retail stores and only one warehouse in 2008. The licensees estimate the piracy rate for sound recordings at over 90%.

Books and journals: In 2008, the publishing industry experienced increased levels of piracy in Saudi Arabia. Print piracy presents the single biggest problem to publishers. Reportedly, some of pirated books sold in the Kingdom are imported from neighboring countries such as Jordan, Lebanon and the UAE, but printing locally for the Saudi Arabian market continues as well. Thus, pirated copies of books, especially higher education textbooks and English language teaching (ELT) materials, continue to be available on and around university campuses. Illegal photocopying continues to plague this market as well. Furthermore, some publishers note that universities are prone to view book piracy lightly, with one public university threatening a publishing distributor with wholesale photocopying of its products if the legitimate versions were not supplied quickly enough. This betrays an attitude about book piracy from public officials that is simply unacceptable. By contrast, other universities presented a good record again in 2008, regulating purchase practices to ensure compliance with the law (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 and AAP hope to see the remaining institutions legalizing their acquisition processes by buying centrally as well. Failing to do so invites an overrunning of the market by pirate copies, supplanting legal purchases. The industry also faces increased online piracy, with websites regularly offering unauthorized downloads of their products. Saudi Arabia is one of the biggest potential markets for the book and journal publishers in the Gulf region, and should be protected. However, based on industry experiences the few investigations and enforcement actions conducted against suspected cases of book piracy have been protracted and convoluted.

Business software: While the piracy rates for business software continue to be roughly constant, dollar losses to the software industry have gone up each of the last three years, due to strong IT growth and government and company use of unlicensed software. Losses increased to \$126 million in 2008 with a piracy level of 54% of the total market, with the retail market segment much higher.

Organized crime: Piracy in the Kingdom can also be linked to organized criminal elements in Saudi Arabia. For example, IIPA reported last year that, in mid-December 2007, the authorities conducted a raid against four warehouses in Riyadh. In addition to the seizure of close to 500,000 units of pirated music and video cassettes, VCDs and DVDs, the police found a large cache of explosives and weapons. Fifteen individuals were arrested.⁷

Theft of Pay-TV signals in the compounds: Signal piracy of premium services like Showtime, Orbit, and ART in compounds continues to be a very serious problem in Saudi Arabia. The compounds may have upwards of hundreds/thousands of homes under a single management which centrally controls and operates the cable service within each compound. The compounds utilize a smart card, installing it in their centralized head end and then redistributing Pay TV channels to hundreds/thousands of homes. The management of these compounds are very influential and can clearly

⁷ IIPA also has reported that early in 2005, for example, HE Prince Salman, the Governor of Riyadh, ordered a series of raids in the Al Batha area 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.

afford to pay for premium channels. But it is very difficult for even the police to enter these compounds quickly and easily; they are heavily guarded by private security firms and 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. Another major issue effecting the Pay TV stakeholders is the illegal redistribution of decoder boxes that circumvent encryption technologies.

Internet piracy: Internet use and broadband penetration rate in the Kingdom is growing and piracy is growing with it. Most pirate sites originate from outside Saudi Arabia. Because the Internet is completely filtered by the government through the CITC, any site can be blocked by making a request to the agency. While CITC will block sites containing pirate material, it is never clear whether it is done for this reason or because the site or service provides or links to content otherwise deemed objectionable. Many popular BitTorrent services and warez sites were blocked in 2008. In one action in September 2008, sites containing 104,000 movie titles, 50,000 game titles, 106,000 music & album titles and 2,850 TV shows, were blocked by the CITC. While foreign and local sites have been routinely blocked upon request (as in the case just mentioned) from the Arabian Antipiracy Alliance (AAA) which represents various U.S. rights holders in antipiracy actions in the KSA, the CITC has little training in IP matters and eventually it will be necessary to involve the MOCI in advising CITC on infringement issues. Because the Internet is growing by over 35% per year in the Kingdom, an Internet piracy unit should be created at MOCI to work with CITC to ensure that sites or services dealing in infringing material will not be available to consumers in the Kingdom, but that legal services will be available.

Enforcement in Saudi Arabia is totally inadequate; but recent actions show hope for change: Until 2008, there was no reform taken in an already inadequate and non-deterrent enforcement system. As a result, piracy levels got higher and losses to rights holders increased significantly. The MOCI, which is principally responsible for copyright enforcement⁸, ran raids generally upon request, but after the raid was conducted, the system became completely non-transparent. Rights holders were not able to learn anything about what happened after raids were run until the end of the year when the Ministry published statistics of how many raids it ran, and the total amount of the fines that were assessed. We now know that very few administrative prosecutions were actually commenced and brought before the Violations Review Committee for adjudication. In 2007, the backlog of cases were discovered to be in the hundreds and very few, and always very low, fines were imposed.

To show how ineffective this system was, the Arabian Anti-Piracy Alliance (AAA), decided to conduct a “fear factor” survey in 2005-2006, to show how the pirate community and the public reacted to raids and MOCI actions. The survey found that 89% felt that the owner of a pirate establishment would never be imprisoned; 70% felt that the retail establishment would never be closed; and 85% felt that a pirate many of whom are foreign workers would never be deported. Few believed that the level of fines offered any deterrence to the pirate trade whatsoever. The study resulted in an increased awareness among rights holders and the public of the problem of piracy.

Piracy levels are high and increasing because (a) there is no transparency in the system; the public has no idea what the government is doing, and the pirates believe the enforcement system and the fines are the proverbial “cost of doing business;” (b) there were few cases adjudicated and fines were always low and non-deterrent; (c) there was no criminal punishment nor the threat of imprisonment; (d) MOCI was understaffed and for the most part untrained; and (e) the police, that had the resources to deal with sources of piracy, were rarely involved.

Up until the first quarter of 2008, there was virtually no progress made in securing reforms at MOCI or in the enforcement system generally. In 2006, after a USG mission and a visit to the Kingdom by an IIPA delegation, King Abdullah issued a “circular” that directed that transparency and deterrent penalties should be established in the Kingdom and that government ministries should legalize their software use. Despite this clear message from the King and promises to the USG and an IIPA delegation that had travelled to Riyadh, 2007 saw no progress whatsoever in implementing any of these reforms. By the end of 2007, transparency in the administrative enforcement process at the MOCI had not been established and the VRC had failed to issue deterrent fines.

⁸ MOCI is generally responsible for licensing retail outlets. Only the police have jurisdiction to raid distributors and production facilities or arrest street vendors. While MOCI is a key component of the KSA enforcement system, the police are also essential to lowering levels of piracy.

In its 2008 Special 301 submission, IIPA outlined the history of the USG and IIPA discussions with the Ministry and the KSA government's IPR Committee on the issues of transparency, including why the WTO TRIPS Agreement required it. IIPA highlighted the need for deterrent penalties and provided a detailed description of how that penalty structure should be used. We cited to a raid involving seizure of over 2 million units of pirate product which was never even brought before the VRC.⁹ We noted that no case had ever been taken before the Board of Grievances (BoG) which has the power to review and increase fines, impose fines over the VRC maximum (100,000 Riyals or US\$26,661), and can impose a sentence of imprisonment.¹⁰ We noted that in September 2006, the Saudi government promised to provide transparency by establishing an "electronic gateway" or web portal on which they would post all raids, hearings and VRC judgments and penalties.¹¹

As of the filing of IIPA's 2008 submission, the website existed but had no data on it. As far as we knew, the VRC had not imposed deterrent fines (the average fine was 10,000 riyals (US\$2,666) and the highest fine ever imposed was 50,000 riyals (US\$13,330). No case had been referred to the BoG as the Copyright Act provided and there had never been a jail term imposed on a pirate regardless of how serious the offense. We also highlighted that the King had mandated that the KSA government use only legal software but that, in fact, the software piracy rate in the government was an estimated 75%. We continued to commend the Saudi government and the MOCI for its raiding activity but set out our frustration at the almost complete lack of progress on any other front, despite promises made over one year previously.

In March 2008, another IIPA delegation went to Riyadh and met personally with MOCI Minister Madani, joined by representatives from the U.S. Embassy. After much debate and discussion, the Minister concluded that the MOCI and VRC enforcement process should be made fully transparent and that would include placing all cases and judgment on the Ministry's website which would be fully available to the public in Arabic and English. He appointed his Deputy Minister HE A.R.A. Al-Hazzaa to oversee this process. Press releases were issued thanking the Minister and rights holders were hopeful that, with this support from the Minister, it was just a matter of time before these commitments would be met.

IIPA has since met on at least two occasions with HE Al-Hazzaa as have the local representatives of U.S. rights holders. The following actions have been taken in 2008 due to the leadership and perseverance of the Deputy Minister:

- There have been raids against source piracy resulting in hundreds of thousands of CDs seized.
- The VRC has eliminated its backlog and provided rights holders with the judgment and the amount of the fine in close to 100 of these backlogged cases.
- Some cases have been placed on the website but only those originating in Riyadh and still only available in Arabic. The Ministry was offered assistance by the private sector, but that invitation has not been taken up.
- Deputy Minister Al-Hazzaa took the initiative to join two Ministry raiding teams in order to understand the full impact of the high levels of piracy in the marketplace.
- He has sent four letters to compounds in Riyadh asking them to cease their infringement. We expect further actions to be taken.
- He has ordered the Ministry to commence constant raiding at the Olaya market and in other markets. Tens of thousands of copies of pirate product have been seized and these raids are continuing as of the second week in February 2009. IIPA and local rights holders asked that there be a zero-tolerance policy against street vendors of pirate product. The Ministry is moving aggressively on that request.
- Working with the Deputy Minister, rights holders have commenced the process of taking a major piracy case through the process for eventual decision by the BoG and will ask that imprisonment be imposed.

IIPA commends both the Minister and the Deputy Minister for taking these actions. They have not yet resulted in a lowering of the piracy rate in the Kingdom, and given the 90% piracy levels there, IIPA continues to recommend that Saudi Arabia be maintained on the Watch List. However, we also recommend that an out-of-cycle review be conducted in

⁹ The raid in this case was run in May 2005 in Dammam

¹⁰ Members of the Board of Grievances with whom IIPA met in January 2006 (and in meetings in Washington DC since that time) assured the IIPA delegation that if a case were brought to them, either directly by the VRC or as the result of an appeal by a rights holder, they would impose deterrent penalties.

¹¹ This detailed discussion can be found on pp. 118-120 at <http://www.iipa.com/rbc/2008/2008SPEC301SAUDIARABIA.pdf>

the fall of 2009. The industries believe, given the above progress, that it is realistic to expect that the government can, given what has been done to date by the Ministry, take the following actions by the end of the OCR period:

- Fully populate the website with data on raids, hearing dates, judgments and penalties commencing at the beginning of 2008 through the present, in both Arabic and English;
- Allow rights holders' legal representatives to appear before the VRC at all hearings and to present evidence and argument, particularly on the appropriate level of penalties;
- Continue a zero-tolerance policy toward street vendor piracy in the major cities until it becomes a *de minimis* problem;
- Shepherd, in cooperation with rights holders, a case involving a major seizure through the Board of Grievances and impose a sentence of imprisonment, thereby signaling to citizens that from then on piracy crimes will receive deterrent penalties and especially imprisonment in appropriate cases;
- Make significant progress toward legalizing software use in the KSA government;
- Publicize widely all these actions, including press statements by high government officials that piracy will no longer be tolerated.

COPYRIGHT AND RELATED LAWS

Amendments to adopt all obligations in the WIPO Internet Treaties' requirements: While virtually all the deficiencies in the Saudi Copyright Law have been remedied in the new implementing regulations adopted in 2005,¹² IIPA has continually impressed upon Kingdom officials the importance of developing the legal infrastructure for electronic commerce by fully implementing, and then ratifying, the WCT and WPPT. The initial reception to this suggestion was positive, and industry and the U.S. government should work closely with the responsible agencies (including MOCI) to assist with advice and training. During the 2006 meetings in Washington, DC, 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 implementing legislation. Since then we have not heard of any further progress. This process should begin immediately by seeking the advice of WIPO.

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 do not follow the law and bring in movies that the Saudi government has never had an opportunity to review for content or had any say in their distribution.

Video outlet license requirements: Video outlets must be licensed by MOCI. 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.

¹² 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. In the 2006 IIPA meeting, the MOCI Acting Minister indicated a willingness to propose raising these terms in the near future. Nothing further has been done since that time.

SOUTH KOREA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that South Korea remain on the Watch List in 2009.

Executive Summary: Ratification and implementation of the copyright provisions of the Korea-US Free Trade Agreement remains a top priority. But South Korea should not wait for that before taking additional steps to tackle its massive online piracy problem, and there are encouraging signs that its government understands the importance of addressing this without delay. Korea's world-leading Internet environment remains the venue for unacceptably high levels of piracy affecting every copyright sector. While there are some signs of progress, much more enforcement effort is needed before legitimate services can expand the toehold they are starting to gain in this important digital marketplace. In order to address piracy and to thereby expand the opportunities for legitimate commerce in copyright materials, Korea should be encouraged to begin to fulfill the ambitious commitments against online and book piracy that it undertook in FTA side letters. Copyright law modernization, including consolidation of copyright responsibilities in one agency and adoption of a practical regime for administrative sanctions against persistent online infringement, is another goal to be achieved in 2009.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in South Korea in order to improve protection of copyrighted:

Enforcement

- Step up the fight against Internet piracy, by devoting more resources to it; enhancing specialized training of prosecutors and police; and giving formal investigative and enforcement powers to the Copyright Protection Committee of the Ministry of Culture, Sports and Tourism.
- Ensure that investigative and prosecution resources, especially against online piracy are made fully available to foreign right holders and their representatives; and take steps to encourage Korean online service providers to take more active steps to cooperate in the fight against online piracy.
- Continue vigilant enforcement actions against business end-user piracy.
- Cooperate with international book publishers to help ferret out underground photocopy and print operations, and re-engage the Ministry of Education on the fight against piracy of academic materials, assuring that universities deliver and implement action plans to achieve greater legalized use of published materials.

Legislation

- Ratify and fully implement the copyright law and enforcement provisions of the Korea-US Free Trade Agreement.
- Complete the proposed integration of the Computer Program Protection Law into the Copyright Act, consolidating copyright responsibility in a single agency, while ensuring that the owners of copyright in computer programs are not prejudiced as a result.
- Adopt improvements to the administrative sanctions regime against online infringement.

SOUTH KOREA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	284.0	40%	302.0	43%	220.0	45%	200.0	46%	276.0	46%
Entertainment Software	NA	NA	461.9	66%	353.5	68%	415.1	55%	349.0	43%
Books	NA	NA	44.0	NA	45.0	NA	43.0	NA	42.0	NA
Records & Music ³	NA	1%	NA	NA	0.3	7%	1.3	13%	2.3	16%
Motion Pictures	NA	NA	NA	NA	9.0	7%	NA	7%	40.0	20%
TOTALS	284.0		807.9		627.8		659.4		709.3	

RATIFICATION AND IMPLEMENTATION OF THE KORUS FTA

On June 30, 2007, the U.S. and South Korea signed the Korea-US Free Trade Agreement (KORUS FTA). On the issues of copyright law reform and copyright enforcement, the KORUS FTA is one of the strongest and most progressive trade agreements ever negotiated. It also includes important steps to further open the Korean market to U.S. copyright industries. If these copyright and market access provisions of the FTA come into force, and if they are fully implemented by the Korean government, the positive impact on U.S. copyright industries will be significant.

IIPA fully recognizes that some aspects of the KORUS FTA, completely unrelated to copyright, have proven highly contentious in both countries. Nonetheless, IIPA still strongly believes that ratification of the KORUS FTA by both parties, and full implementation of its provisions in Korean law, should be a top priority for 2009.

From IIPA's perspective, some of the critical provisions of the KORUS FTA include:

- Online service provider liability. Article 18.10.30 of the FTA includes a critical undertaking to provide legal incentives for service providers to cooperate with right holders in deterring piracy. Korea should be encouraged to take significant steps forward toward a more effective system for combating the high levels of online copyright infringement that prevail in that market by enhancing online accountability, and by ensuring that cooperation between rights holders and service providers extends to all forms of content delivery, including through peer-to-peer (p2p) and other services.
- Enforcement against Internet piracy. In a particularly significant commitment, contained in a side letter to the FTA, Korea agreed to make internet piracy a law enforcement priority, with specific references to cooperation with the private sector and to the need to prosecute not only direct infringers, but also those who "profit from developing and maintaining services that effectively induce infringement." This commitment is especially appropriate given the ubiquity of online infringement throughout Korea's highly networked digital marketplace.
- Enforcement against book piracy. In another side letter, Korea agreed "as soon as possible" to take specific steps to increase its efforts against book piracy and other copyright infringements on university campuses,

¹ The estimated range of collective trade losses is IIPA members' best estimate of the range of economic harm caused by copyright piracy to U.S. copyrighted materials distributed in this market. This collective estimate is a conservative one, and does not include any estimates of losses caused by internet piracy. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at <http://www.iipa.com/pdf/2009SPEC301METHODOLOGY.pdf>. For information on the history of South Korea under Special 301 review, see Appendix D at (<http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALPLACEMENT.pdf>) and Appendix E at (<http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA's prior country reports on South Korea are posted on the IIPA website at <http://www.iipa.com/countryreports.html>.

² BSA's 2008 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in South Korea, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at [ww.bsa.org](http://www.bsa.org). These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ The 1% piracy rate for sound recordings applies to physical piracy. The online piracy rate for sound recordings in South Korea is approximately 70%.

ranging from stronger institutional copyright policies to enhanced training and public education campaigns, and to step up law enforcement training and enforcement activities against underground book piracy operations.

- Protection of temporary copies. Korea today stands almost alone among nations in refusing to apply the copyright owner's exclusive right of reproduction to cover the making of temporary copies, such as those made in the Random Access Memory of a personal computer. In light of the ever-increasing economic importance of such copies in the digital networked environment, in which the making and use of such temporary copies is rapidly becoming the primary means by which many copyright works are consumed by the public, this is a significant gap in current law. IIPA is pleased that, in Article 18.4.1 of the FTA, Korea has committed to closing this gap by giving the reproduction right a scope that accords with world copyright standards.
- Technological protection measures. Article 18.4.7 commits Korea to repairing the deficiencies in its current legal framework for safeguarding the technologies that right holders use to control access to and use of their works. Such protections are a critical aspect of global minimum standards for copyright protection, as embodied in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Exclusive rights for sound recordings. Korea will be obligated, under Article 18.6.3 of the FTA, to bring all means of digital dissemination of sound recordings to the public – including webcasting, streaming and digital broadcasting – within the scope of the exclusive rights of recording producers. Implementation of this FTA commitment should help to dispel uncertainty about the reach of current law, and promote a robust legitimate market in licensed use of these new media to disseminate sound recordings.
- Extension of term of copyright protection. Article 18.4.4 of the FTA, when implemented, will bring Korea in line with the global trend toward extending the term of copyright protection, thus removing the potential irritant to international trade that results from divergent terms among trading partners in a globalized marketplace.
- Contractual rights. Under Article 18.4.6 of the FTA, Korea is obligated to allow all right holders to exercise economic rights in their own names. This could provide a strong legal counterweight to provisions of current Korean law that mandate collective administration of exclusive rights or rights to remuneration.
- Protection for encrypted signals. Article 18.7 of the FTA commits Korea to providing both civil and criminal remedies against those who decode program-carrying satellite signals without authorization, an important new legal tool to be wielded against signal theft.
- Statutory damages. In a major step forward, Korea agreed in Article 18.10.6 of the FTA to supplement its system of civil damages for copyright infringement with a regime of pre-set statutory damages, a reform that will encourage civil enforcement by providing a predictable and deterrent remedy against infringers. To work effectively, the level of statutory damages must be of deterrent value.
- Other civil remedial provisions. A number of provisions in paragraphs 7-10 of Article 18.10 of the FTA will enhance the remedies available to right holders in civil litigation in Korea, including seizure and destruction of infringing copies and the materials and implements used to make them; requirements for defendants to identify third parties in the production or distribution chain of pirated products; and the award of costs and attorneys' fees to prevailing parties.
- Outlawing "camcording." Implementation of Article 18.10.29 of the FTA will help to ensure that Korea does not become a source for unauthorized master digital copies of motion pictures through illicit in-theater camcording.
- Ancillary offenses. Korea agreed in Article 18.10.28 of the FTA to provide criminal remedies against trafficking in counterfeit or illicit labels, documentation or packaging associated with pirate product.

PIRACY AND ENFORCEMENT UPDATES IN KOREA

Online Piracy: In the Internet-savvy environment of the Korean market, copyright industries face extraordinary enforcement challenges because of the prevalence of all kinds of pirated materials online. Korea continued to make some progress in combating online copyright piracy in 2008, but much more remains to be done.

Statistics submitted by the South Korean government to the OECD show continued growth in the already high levels of a broadband penetration that have kept the country in the top ranks for this statistic globally for many years. With over 31 broadband subscribers per 100 inhabitants, broadband penetration in Korea far exceeds that of any other market of comparable size.⁴ Even more significantly, South Korea far outstrips any other market in the world in the penetration of the highest speed online connections using optical fiber or LAN technology: for every 100 South Koreans, 12.2 subscribe to such services.⁵ The level of Internet access through mobile devices is, if anything, even more striking. Although legitimate services for online distribution of copyright works continue to gain a foothold, Koreans still use their ubiquitous and high-bandwidth access to the Internet to consume unrivalled amounts of infringing copyrighted materials of all kinds. The ongoing challenge is to legitimize the use of these materials by Korea's huge online population.

Every sector of the copyright industry is impacted by online piracy in Korea. Although the specific means of piracy constantly change with technological advances and enforcement pressures, the overall trend is clear: online piracy continues to grow. Statistics from the government's Copyright Protection Center (CPC) show an increase in identified pirate product online across every copyright industry sector. The 52% increase in identified pirate music between 2007 and 2008 is dwarfed in the CPC statistics by jumps of over 312% for movies and nearly 276% for published materials. The Internet is also being used to distribute "look-alike" knock-off versions of popular videogames, and unlicensed Korean versions of these games, using translation patches.

Online piracy in Korea takes some characteristic forms. "Web-hards" or "cyberlockers" are 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. (A few sites provide free downloads, but at slow speeds.) 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 particularly popular with audio-visual pirates, since they make it easy to store even the very large files that digitized movies demand. (The movie industry also reports widespread use for the Internet as a marketing mechanism for sales of pirate physical product.) The web-hard systems are also extremely problematic for the video game and recording industries, and other software applications also show up on web-hard services.

Online piracy of entertainment software remains very high, with the vast majority of infringements occurring through web-hard sites. Peer-to-peer piracy is a smaller but significant problem. From March to December 2008, the ESA detected over 626,000 infringing listings for a small group of ESA members' most popular titles in Korea. The ESA sent notice and takedown requests to the relevant service providers, demanding the expeditious removal of those infringing listings. Many, but not all, of the service providers complied with the notices, which has resulted in a reduction of listings detected by the ESA over the last few months. Nonetheless, the concern is that smaller and newer web-hard service providers that enter the market will be less willing than some of their well-established and larger counterparts to take measures against online game piracy.

While web-hard services remain the leading source of online music piracy, the recording industry reports a growing problem with community portal sites, of which Naver, Daum and Cyworld are leading examples. Participants in these online communities post infringing music files in community forums as well as on their own individual blogs. Finally, small peer-to-peer (p2p) services remain a significant source of piracy, and their growing use to swap pirate movie files and scanned books and journals is a disturbing trend.

The government's main effort to deal with the growing assault of Internet-based piracy on all copyright industry sectors was to consolidate several separate enforcement agencies into the Copyright Protection Center (CPC) within Korea's Ministry of Culture, Sports and Tourism (MCST).⁶ CPC was assigned to deal with online piracy in September 2005, and has been increasingly active in the online arena. By now, all pre-existing enforcement teams in the online environment have been merged into the CPC. Its efforts certainly seem to have enhanced public awareness of the problem, and some copyright industry sectors, notably the music industry, report improved cooperation with CPC in 2008. But CPC's progress is limited by its exclusive identification with the established "copyright trust and management" entities.⁷ Major foreign rights holders do not belong to these agencies, and thus

⁴ See <http://www.oecd.org/dataoecd/21/35/39574709.xls>. The corresponding figure for the U.S. is 25 subscribers per 100 inhabitants, according to the OECD.

⁵ Id. The corresponding figure for the U.S. is 0.9.

⁶ In a government reorganization in early 2008, the new MCST took over the copyright portfolio formerly held by the Ministry of Culture and Tourism (MOCT).

⁷ Examples of these entities include the Korean Association of the Phonographic Industry for sound recording producers, and KRTRC for book publishers.

online enforcement activities by CPC on behalf of foreign rights holders are limited. CPC has recognized this problem, has promised to take more actions against pirating of foreign repertoire and titles, and appears to have done so in at least a few instances involving one international music label and the Korean subsidiary of an ESA member company. IIPA urges Korea to undertake aggressive enforcement against online piracy of foreign works, and to keep the concerned copyright owners fully advised of the results. Otherwise, Korea's commitments in the TRIPS Agreement to national treatment in enforcement activities could be questioned. In this regard, Korea's pledge in the FTA side letter to carry out online enforcement activities on behalf of U.S. works, and to do so in a transparent manner, is warmly welcomed. Korea should begin to fulfill this pledge, in the words of the side letter, "as soon as possible."

MCST also established a Copyright Protection Team in 2008, to supplement the activities of CPC. But neither this new team, nor the CPC, have any formal investigative or judicial powers. They must rely on the police and prosecutors to open criminal investigations and to prosecute infringing activities. While a police cyber-crime unit has been formed and is involved in anti-piracy investigations, overall the criminal effort falls far short of what is needed to make an effective response to the huge problem of online piracy. The police lack the professional training and technical expertise to carry out complex investigations of online piracy, and Korean prosecutors have failed to take effective actions against mass online infringements occurring in release groups that host networks or clusters of high-speed computers.

Recent press reports provide encouraging news about prosecution activities against online infringement. Prosecutors have summoned some portal operators for questioning about their awareness of rampant music piracy on their community forums and blogs. IIPA understands that some 40 operators of forums and blogs were investigated, and were each fined about KRW 1-2 million (US\$710-1420). Thirty high-volume uploaders were also reportedly indicted in connection with the investigation and will be fined. More recently, in December 2008, the Seoul central district public prosecutors' office announced indictments against some major portal sites, charging that these portals neglected to act in response to take down notices against illegal music files sent by CPC and right holders. The portals are being charged with negligence, aiding and abetting. The prosecutors' office assessed KRW 30 million (US\$21,300) as a fine against each portal and the working level managers involved. It has also been reported that a few p2p and "web-hard" operators have been arrested for urging uploaders to make infringing content available. We hope that these cases are the harbingers of more vigorous efforts by police and prosecutors against serious cases of online piracy.

The services provided by Internet service providers, portal operators, and similar businesses is essential for all the various types of online piracy services to survive, much less thrive. Consequently, cooperation from such service providers is also indispensable to an effective effort to reduce the prevalence of online piracy. Unfortunately, the attitude of most Korean ISPs can best be described as passive. While most will respond to takedown notices when particular pirate files are identified, they are reluctant to take any more proactive measures. This passivity was noted by prosecutors in the criminal investigation of portal-based music piracy described above. IIPA urges the Korean government to take more active steps to encourage ISP cooperation in combating online piracy, including through the use of the administrative powers in Article 104 of the CAK to act against "special online service providers" engaged in piracy.

Offline Piracy: Piracy problems in Korea are by no means limited to the Internet, at least for most industries.⁸

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 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

⁸The negligible offline piracy rate reported by the recording industry reflects the virtual disappearance of the CD -- legitimate or pirate -- from the Korean music marketplace.

use massive numbers 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 still prefer to go to a copyshop to get a hard copy of a book rather than use online versions, 2008 saw increasing instances of digital piracy. Copyshops are now 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.

Over the past few years, the Korean government has taken some important steps to recognize and start to address the serious book piracy issues. The CPC's supposed assumption of duties related to enforcement against commercial photocopy centers from the Korea Reprographic Transmission and Rights Center (KRTRC) should have eliminated the "conflict of interest" that plagued KRTRC enforcement efforts, since licensing and enforcement functions were separated. As noted above, however, CPC's main focus is online, and its willingness to act on behalf of foreign right holders (who do not participate in KRTRC) is still questionable. KRTRC remains in charge of enforcement against "offline" infringement, such as unauthorized photocopying. Regarding pirate printing, the publishing industry had continued success in 2008 in tracking down both photocopying and underground printing operations, leading to significant seizures.⁹ However, the burden of initiating, investigating and carrying through enforcement actions remains on right holders, and penalties following cases are all too often non-deterrent. Meanwhile, piracy is spreading to smaller cities outside Seoul, and pirate enterprises are constantly adapting their practices.¹⁰ IIPA urges the Korean government to commit more resources to fighting book piracy in 2009, and to act more boldly by initiating its own enforcement actions.

The Korea-U.S. FTA's side letter on book piracy contains important statements about Korea's commitment to tackle underground piracy and reduce campus-based infringements. The side letter builds on an initiative begun in 2005 with the cooperation of the Ministry of Education. Unfortunately, the Ministry's early efforts have not continued, and it has shown little interest since 2006 in promoting the legal use of published materials at higher educational institutions. This is a disappointing turn of events, as South Korea had been on track to be a regional leader in this type of initiative. The issuance of several Ministry of Education letters requesting every university to devise an action plan for reducing book piracy on campus resulted in several positive responses from universities. Others failed to respond, though, and several responses lacked significant substantive measures. While the letters were a good start, steps toward implementation of the initiatives they signaled have been utterly lacking ever since, with no evidence of concrete implementation of the action plans or meaningful follow-up by the Ministry. From all that appears, universities' reporting deadlines have gone unheeded and unenforced. Measures such as adoption of strong pro-copyright policies, monitoring on-campus photocopy shops, and crafting educational campaigns remain words on paper, at best. 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 conditioning certain funding decisions on full cooperation. Since on-campus infringements tend to spike around the beginning of academic terms – March and September – those periods are critical for the success of the Ministry's pro-copyright initiative, and IIPA urges the Ministry of Education to revive its efforts ahead of the upcoming term. IIPA also hopes the CPC will work with industry to devise an appropriate response to raise public awareness about illegal use of published materials at primary and secondary schools, as well as English language teaching 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 sector suffers losses due to sales of "burned" optical media (DVD-Rs or CDRs) with their copyright product on them.¹¹ Street vendors continue to hawk these products, especially in (or supplied from) the Yongsan area of Seoul and they are also sold over the Internet. Retail hard-goods piracy is a low priority for Korean enforcement authorities, and the vendors are rarely caught with much pirate product (only catalogs and empty cases). Increasingly, Korean authorities show a willingness to take action against the dispersed underground labs where the discs are burned in order to supply the vendors, and against warehouses and similar sites. While the individual labs are hard to find and neutralize, cumulatively they amount to a significant force, particularly in the audio-visual marketplace. While the authorities, including the CPC, appear to have

⁹ Late 2008 raids included action in the vicinity of a number of different campuses, including Korea, Han Yang, Kwang Woon, Choong Nam, KAIST, Gyeonggi, Aju and Woosuk Universities. One defendant in the resulting cases has been indicted, with a fine of KRW 3 million (just over US\$2000).

¹⁰ AAP recently heard of several reference and educational materials being marketed door to door at homes in major cities.

¹¹ With the complete collapse of the offline market for sound recordings, hard goods piracy in this sector has become rare, though pirate music vendors can still be found at subway stations and highway rest stops.

stepped up their efforts to address optical media piracy, 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 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 2008, the police and prosecutors conducted over 2,000 end user actions. The current enforcement system works well and it is important that the Government maintain this level of enforcement activity.

Entertainment Software: With much of the piracy problem having migrated online, video game hard goods piracy, while it still exists, has become somewhat less of a problem. However, the availability of circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in video game consoles, remains extremely problematic. These devices are widely available for sale on the Internet (on major auction sites, including eBay Korea) as well as at retail. There are also a number of online forums that provide information as to where such devices may be purchased as well as providing instructions on how to install them. The ready availability of circumvention devices goes hand-in-hand with online piracy, specifically downloading of infringing video game software. For example, a subscriber/consumer can download a video game from a one-click hosting site (also known as a cyberlocker), and through the use of a circumvention device called a DS game copier, that infringing video game would be playable on a DS handheld device. Playing a pirated video game on a console would be impossible without the use of circumvention devices. There appears, however, to have been some progress with respect to enforcement efforts against the importation of such devices. Korean Customs authorities recently began enforcement efforts against such shipments, and have referred cases to prosecutors for further action.

UPDATE ON LAW REFORM

Revision of the Copyright Act of Korea

The status of copyright law reform in South Korea is complex, due in great part to delay in achieving ratification of the FTA with the United States.

The starting point for reform is the current Copyright Act of Korea (CAK), which was comprehensively rewritten (for the first time in 20 years) in legislation adopted in December 2006. As IIPA has noted, while the new act, which entered into force in mid-2007, contains some significant improvements, in many other ways it represented a missed opportunity for Korea to bring its laws into closer compliance with 21st century global minimum standards.

Following negotiation of the KORUS FTA, the Korean government in 2007 released an extensive draft amendment to the CAK, intended to implement the significant obligations that the ROK agreed to take on in the FTA. To a considerable extent, the draft amendment achieves this objective. However, in some areas it needs improvement.

In 2008, an entirely different draft amendment to the CAK was released by the Korean government. Its main goals were (1) to bring into the CAK relevant provisions of the Computer Program Protection Act (CPPA), which for more than 20 years has been the law governing computer software copyrights, under a bifurcated legal system unique to Korea; and (2) to strengthen administrative enforcement and sanctions against online copyright infringement. Two significant amendments to this draft have also been proposed on behalf of the majority and opposition political parties in Korea.

Both pieces of legislation remain pending before Korea's National Assembly. With that body in turmoil over ratification of the KORUS FTA, the timetable for action on both bills is uncertain, as is how they will be integrated upon enactment. Meanwhile, since the consolidation of the CPPA with the CAK has not yet occurred, a draft amendment to bring the CPPA into compliance with FTA standards also remains pending. We discuss each piece of legislation in turn.

FTA Implementation Amendments to CAK

IIPA noted in comments submitted in October 2007 that the FTA implementation legislation needed improvement in some areas.¹² A revised version of the amendment was submitted to the National Assembly at the end of December 2007 appears to have left most of the shortfalls of the earlier draft intact.¹³ Some of the most significant problems include:

- While the draft explicitly recognizes the copyright owner's exclusive right to make temporary copies (article 2(22)), a broader and more flexible formulation, more closely tracking the FTA language (FTA Art. 18(4)(1)) and expressly covering reproduction "in any manner or form", would be preferable.
- The exception to protection for temporary copies in proposed Article 35-2 should be narrowed to exclude copies made in the course of a transaction not authorized by the right holder (independent of any knowledge requirement of the infringing nature of the copied work), and to make the exception subject to the internationally recognized "three-step test" for permissible limitations on copyright.¹⁴
- The draft leaves unchanged provisions of current law (Art. 83) that deny sound recording producers an exclusive right to control webcasting, subscription digital broadcasting, and other "digital sound transmission services." Some exceptions to these rights may be introduced in a manner consistent with the FTA, but a blanket compulsory license for these digital services does not comport with the requirements of the FTA. To be consistent with Korea's FTA obligations (art. 18.6(a)), any exceptions to these rights must not conflict with the normal exploitation of sound recordings, or create unreasonable prejudice to the legitimate interests of sound recording producers and performers.¹⁵
- Significant gaps remain in the amendment's treatment of liability of Internet service providers (ISPs). To comply with the FTA obligations, availability of injunctive relief against ISPs should be confirmed, and it should be clarified that the new safe harbors against monetary damages do not provide a blanket exemption from all liability of the ISP. The circumstances under which an ISP should "take down" infringing content in order to benefit from liability limitations should be further detailed and, in particular, the knowledge standard should not only include situations where the ISP has actual knowledge, but also when it is aware of facts or circumstances from which infringement is apparent. In order to qualify for the safe harbor, an ISP should be required to designate publicly (not just to its users) an agent to receive claims of infringing activity. The criteria for the "mere conduit" and caching safe harbors, as well as the limitations on injunctive relief against ISPs that fall within a safe harbor, should be adjusted to track the FTA, and the discussion of monitoring requirements (which may legitimately be imposed under other provisions of Korean law) should be clarified.
- Statutory damages against those found liable for trafficking in tools for circumventing technological protection measures should be based on the number of devices or services involved, rather than on the number of works affected.¹⁶

¹² See <http://www.iipa.com/pdf/IIPASubmissionreCAKAmendments100307.pdf>.

¹³ Additionally, some provisions of the earlier draft that were necessary to achieve FTA compliance may have been omitted from the December 2007 version. For instance, under Art. 18.10.29 of the FTA, Korea must make it a criminal offense to attempt to camcord a film in a theater without authorization from the right holder. Proposed Art. 138-4 of the earlier draft amendment covered attempts, but the corresponding provision of the amendment bill submitted to the National Assembly (proposed Art. 104-6) does not – at least in the unofficial translation IIPA has reviewed.

¹⁴ The bill also includes an exception (proposed Article 35-3) modeled on the four-factor fair use exception in U.S. law. Fair use is a creature of the U.S. common law legal system, and was not codified until 1976. Since Korea is a civil law system which generally lacks the precedential background against which the U.S. fair use exception has developed, implementation of any new "fair use" statutory provision will be extremely difficult and is likely to increase sharply the unpredictability of Korean copyright law. This issue must be closely monitored to ensure that a balanced and predictable approach is applied.

¹⁵ As a policy matter, statutory distinctions based on whether or not a service is classified as "on demand" or "interactive" are 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 a 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.

¹⁶ The revised version of the amendment now provides that statutory damages provisions should apply to violations of the TPM provisions *mutatis mutandis* to their application against acts of infringement. It should be clarified that using a different metric than the number of works involved fits within the *mutatis mutandis* criterion.

- Criminal penalties – particularly for trafficking in devices or services to circumvent technological protection measures or to decrypt broadcast signals, or for unauthorized commercial distribution of encrypted signals – should be reviewed to ensure that they provide the needed deterrence.

2008 Proposed Amendments to CAK

Integration of CPPA Provisions

The decision to centralize copyright law in one statute, under the direction of one ministry, would bring Korea's legal regime into the world mainstream, and could help to minimize inconsistencies with regard to different categories of copyright works. It appears that the proposed amendments accomplish the goal of melding the CPPA with the CAK, for the most part. However, when the two laws are integrated, a provision along the lines of current Article 30(1) of the CPPA should be included, so that the act of circumvention of technological measures that control access to any type of copyright work will be explicitly prohibited.

The interests of computer program copyright owners would also be affected adversely by the change with regard to the complaint requirement for criminal prosecution. Article 48 of the CPPA currently requires a criminal complaint to be filed by the rights owner as a condition for prosecuting most criminal offenses under the Act. Copyright owners in computer programs have incorporated this requirement into their enforcement strategies to achieve the most efficient and effective methods of bringing end-user business software pirates into compliance with their legal obligations; nearly all such cases have resulted in settlements requiring the infringer to convert to legal software and pay damages for the violations. This has led to a steady decrease in the business software piracy rate in Korea.

However, the proposed amendment would eliminate Article 48 of the CPPA and make computer program infringement cases subject to Article 140 of the CAK, under which a formal complaint is not required for criminal prosecution in a number of situations, notably cases that involve "habitual" infringements "for commercial purposes." While IIPA strongly supports Article 140 within its current scope of application, applying it to computer program infringement cases would be problematic, because eliminating the complaint requirement will make it much more difficult to settle corporate end user piracy cases. The resulting increased burden on Korea's judicial system means that current high levels of enforcement activity will become unsustainable. The inevitable result would be decreased levels of enforcement. IIPA urges the drafters to exclude computer programs used in business from the exception to the complaint requirement under CAK Article 140, paragraph 1, or, at a minimum, to apply the principle of "vindication of right holder's will," whereby prosecution of cases of end user piracy will not proceed over the right holder's objection.

Administrative Enforcement Against Online Piracy

The second aspect of the legislation proposed in 2008 would have significantly enhanced the administrative sanctions that MCST could impose on those who repeatedly engage in online infringements, or upon those who encourage users to do so (such as by providing illicit p2p services, and other "online service providers of a special type" as defined under Article 104 of CAK). This was an ambitious proposal that had the potential to improve the effectiveness of enforcement against the widespread and serious problem of online copyright piracy. It included a system of escalating sanctions against online service providers that had shown by repeated violations that they were not willing to cooperate with right holders in combating online infringement. While supportive in principle, however, IIPA raised a number of questions about the proposed new Articles 133-2 and 133-3. These included a concern about whether the administrative procedures could be imposed promptly enough to have a real impact in the fast-paced environment of online piracy. IIPA also pointed out several ambiguities in the legislation and urged that these be clarified.

In November 2008, a ruling party legislator proposed significant amendments to this aspect of the legislation. The next month, an opposition legislator proposed an opposing set of amendments. Both packages of amendments would weaken the underlying legislation, including in the areas previously identified by IIPA as problematic.

For example, the majority amendment would build long waiting periods into the administrative sanctions process, thus exacerbating the problem that the administrative regime would not be nimble enough to be effective in the online arena. The November amendment would also inject greater uncertainty into the administrative sanctions available. For example, MCST's

power to order some “information and communication service providers” to block the access of the most seriously offending online businesses to their networks would be diluted to requiring service to be limited “to the minimum extent necessary.”¹⁷

The opposition party’s proposed amendment would be even more problematic. Among other things, it would recast the definition of “special OSPs” under Article 104, to add a requirement of “commercial benefit.” (Currently, MCST uses a broad administrative definition of service providers subject to Article 104, including not only peer-to-peer services but also other business models prevalent in the online pirate marketplace in Korea, such as web-hard services that use a point system or “cybermoney” as payment for illegal downloads or streaming.) The re-definition could have the effect of removing many harmful services from the ambit of administrative sanctions altogether, if it could not be proven that they were offered with a commercial motive. The opposition amendment would also appear to give MCST an inappropriate role in developing and mandating the use of specific database management technology.¹⁸

At this point, it appears that the provisions of the amendment originally proposed in mid-2008, at least as to administrative enforcement against online infringement, have been superseded by the dueling amendments put forward in November and December. While both these proposals are inferior to the original language for new Articles 133-2 and 133-3, IIPA urges that any new legislation in this area be anchored in the practical reality that administrative sanctions are at best a supplement to clear, and vigorously enforced, civil and criminal copyright infringement provisions. Furthermore, any administrative sanctions regime must be readily invocable by right holders, and it must enable authorities to move swiftly and firmly, not only against online infringers, but also against service providers who repeatedly enable their activities.

Other CAK Issues

In addition, IIPA remains concerned about a number of provisions of the CAK that are not addressed by any of the draft amendments summarized above. These include:

- Educational exceptions under Art. 25, as expanded by the 2006 amendments to include allowing students as well as teachers at any level to “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, and without any compensation to the right holder for such transmissions on the secondary school level.
- Mandatory collective administration of rights of remuneration created under several provisions, including for “digital sound transmission” and conventional broadcasting with respect to sound recordings¹⁹; reproduction or transmission by libraries; or use of copyrighted material in school textbooks, or online by post-secondary educational institutions. To improve transparency and forestall 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.²⁰

¹⁷ Other aspects of the November amendment that require closer scrutiny include an expansion of the educational exception in Article 25(2), and a proviso to Article 141 that would relieve a corporation or principal from criminal legal responsibility from acts or omissions of its employees or agents if the corporation or principal “exercised due care and supervision.” While the latter provision may not be objectionable in principle, it carries with it a considerable risk of abuse.

¹⁸ Like the ruling party amendment, the minority party amendment includes troubling provisions on issues other than administrative sanctions. For example, a proposed amendment to Article 136 would eliminate criminal liability for infringements “if the total resale price of violated right is KRW one million [US\$710 currently] or less.” Such a provision could be especially mischievous in the online environment, e.g., in the case of high-volume uploads of single copies that may result in a much higher number of infringing downloads.

¹⁹ Although Article 82 of the law for the first time allows foreign sound recording producers to claim remuneration payments for conventional broadcasting, 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 and must be changed.

²⁰ 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, which discriminates against foreign music publishers and composers. Foreign music publishers should be accorded a nondiscriminatory opportunity to qualify for “trust licenses” under Article 78 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.

- Sweeping exceptions that allow 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.
- The private copying 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. 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.

Computer Programs Protection Act (CPPA) Amendments

Unless and until Korea's unique bifurcated copyright law regime is changed, fulfilling the requirements of the KORUS FTA will require amendments not only to the CAK, but also to the CPPA, which governs computer program copyrights, and which is administered by the Ministry of Information and Communications (MOIC). A draft amendment to the CPPA was issued in August 2007, and an amendment bill was submitted to the National Assembly in mid-December of that year. IIPA's review of an unofficial translation of this legislation indicates that its handling of several issues needs improvement, including the following:

- Temporary copies and exceptions. While the amendment bill explicitly includes temporary reproduction within the copyright owner's exclusive rights, it also provides an exception whenever temporary reproduction “incidentally occur[s] as an essential part of the technical process which uses programs” (proposed Art. 12(2)(2)). This exception is too broad. For example, even though the government has stated that one purpose of the change to recognize temporary copying is to reflect the move toward accessing software on the servers of application service providers rather than physically possessing a copy, this exception could allow the customer of an illegitimate ASP to escape infringement liability, since the temporary copy made by the customer could fall within the scope of the exception. Although the exception does not by its terms apply when the end-user knew or had reason to know that the source of the temporary copy was itself infringing, that limitation does not fully address the ASP scenario. IIPA urges that the provision be amended so that the exception does not apply in a transaction that has not been authorized by the right holder. Similarly, the blanket exception for temporary reproductions made in the course of transmitting or receiving a computer program (proposed Art. 12(2)(1)) should also be narrowed to exclude its application in the case of an unauthorized transmission.²¹
- Statutory damages. Proposed Art. 32-2(1) appears to impose two conditions on the availability of pre-set statutory damages. First, this option seems to be available only when the right holder “cannot easily provide the amount of damages involved.” Second, statutory damages are only available for infringement of a work that has been registered with MOIC prior to infringement. It should be made clear that statutory damages are available “on the election of the right holder” (per KORUS FTA Art. 18.10.6), and the prior registration requirement should be reviewed. Additionally, it is questionable whether the maximum statutory damage amounts provided (KRW 30M/ US\$ 21,300 and KRW 100M/ US\$ 71,000 for intentional for-profit infringement) are sufficient to provide the needed deterrence. These caps should be reviewed.²²
- Online service providers. Although proposed Articles 34-4 et seq. largely implement the applicable FTA provisions, a few important adjustments are needed. First, the text should be reviewed to ensure that it consistently reflects the fact that qualification for the safe harbor is a shield only against award of monetary damages, not a complete exemption from liability (see, e.g. proposed Art. 34-4(2)). Also, ISPs providing storage services should explicitly be required to take action against infringements when they are aware of facts or circumstances from which infringement is apparent, as required under FTA article 18.10.30(b)(v). Further, a copyright owner should be potentially liable under proposed Art. 34-5(5) only if it makes a knowing material misrepresentation in its takedown notice (see FTA Art. 18.10.30.b.ix), not on the broader ground of acting

²¹ As noted above with respect to the CAK, the proposed “fair use” exception in the CPPA (see proposed Art. 12-4) also requires careful monitoring.

²² Note that these caps have lost about one-third of their value in US dollars since they were formally proposed fourteen months ago.

“without any proper legal basis.” Proposed Art. 34-7 should also be reviewed to ensure that the procedure it creates for applying to the Minister for an order to disclose the identity of an online infringer is in fact “expeditious,” as required by FTA Art. 18.10.30.b.xi. Proposed Art. 34-4(1)(1) needs to more closely track the FTA definition of a provider that transmits, routes, or provides connections for copyright material (see FTA Art. 18.10.30.b.i.A), rather than one that “provides access” to such material.

- Technological protection measures. Here again, the CPPA amendment largely implements the relevant FTA provisions. However, proposed Art. 34-9 (2)(4) needs adjustment, since the exception stated there should not apply if circumvention of an access control enables any unauthorized party to access the program in question (or any other copyright work), including the party that is carrying out the circumvention (see FTA Art. 18.4.7.d.v).
- Criminal penalties. Korean authorities should be encouraged to consider whether all the criminal penalties in the amendment are sufficiently stringent to provide deterrence. For example, one who traffics in forged labels for computer programs, or who intentionally removes copyright management information for profit, would face under proposed Art. 46(1)(3)(4) and (6) a penalty of no more than one year in prison or a fine of KRW 10 million (US\$7,100).

Other legislation

IIPA understands that legislation for a public performance right in sound recordings was presented to the National Assembly in November 2008, was passed by the Committee on Culture, Sports, Tourism, Broadcasting & Communications on February 5, 2009, and may be considered by the full National Assembly as soon as March. IIPA has not been able to review an English translation of the proposal, but based on press reports it is a positive development that deserves prompt and favorable consideration. Unlike the existing broadcasting right, the proposal for a public performance right grants the right to foreign producers irrespective of reciprocal protection to Koreans in the foreigner’s country. We look forward to reviewing the full text.

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 (KM RB) 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. IIPA is advised that an amended proposal on enforcement regulations was submitted in December 2008, but we have not had an opportunity to review an English translation.

MARKET ACCESS ISSUES

The KORUS FTA contains commitments that will improve access to the Korean market to producers and distributors of audio-visual products and services. Although the structure of the existing foreign content quotas applicable to broadcast, cable, related media and theatrical exhibition has not been changed, the screen quota has been halved, and the other quotas would be locked in at the least restrictive level allowed under current law. Two commercially meaningful liberalizations are the decreased domestic content quotas for animation and film broadcasting, and the increased quota for single-country sources of foreign broadcast content. Some important foreign investment restrictions would also be phased out, leading ultimately to 100% foreign ownership of many program providers (channel operators), and investment in delivery of television via Internet Protocol (IPTV). Disappointingly, however, Korea has retained the right (though subject to some procedural and substantive conditions) to impose foreign content restrictions on new services and delivery platforms, ranging from video on demand (VOD) to IPTV and other forms of streaming and downloading via the Internet. IIPA hopes that these issues will be re-examined in the near future, with the goal of phasing out quotas in favor of letting market forces determine the content presented to Korean consumers.

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Spain remain on the Special 301 Watch List in 2009, and that an out-of-cycle review (OCR) be conducted this summer.

Executive Summary: Internet piracy in Spain continues to worsen, such that many of the copyright industries believe that Spain has the worst per capita Internet piracy problem in Europe and one of the worst overall Internet piracy rates in the world. Exacerbating the high piracy levels are the Spanish government's policies of: (1) "decriminalizing" P2P file-sharing (as reflected in the 2006 Circular issued by the Attorney General) and (2) failing to establish the minimum EU-level requirements regarding liability for Internet service providers under the E-Commerce Directive so that rights holders have the necessary tools to enforce their rights on the Internet. As a result, the police have ceased taking Internet enforcement actions given the legal uncertainties, and the Attorney General has requested dismissal of current criminal cases against illegal portal and link sites. Importantly, negotiations between rights holders and the Internet service provider (ISP) community to find ways to prevent infringing content from being distributed over the ISPs' services and/or networks finally started in 2008, and a satisfactory conclusion must be reached soon. The Spanish government should continue to press for conclusion of these negotiations because some legal reform will likely be required. In addition to Internet piracy, pirated hard goods are still offered in the streets and there remain strong links to organized criminal syndicates; enforcement authorities are taking action against street piracy involving physical goods but more work is needed to attack organized syndicate connections. Book publishers report ongoing illegal photocopying of academic materials on and around university campuses. The business software sector remains concerned about the availability, cost and speed of civil enforcement measures.

Certainly the status quo in Spain is unacceptable, and active leadership by the Spanish government is needed on all fronts -- law reform, enforcement and public education -- to address this dire situation harming the copyright industries. To support continued momentum in Spain, IIPA recommends that USTR conduct a Special 301 out-of-cycle Review regarding progress made on the following two benchmarks. By summer 2009, the Spanish government should:

1. Conclude development of an effective action plan to reduce the availability of unauthorized content online and to govern ISP responsibility, in particular the adoption of an effective system to educate subscribers and provide for deterrent sanctions against repeat infringers and effective site blocking or removal.
2. Begin the legislative and regulatory process to provide the legal framework within which anti-piracy measures and ISP responsibility can operate.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Spain in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Achieve, as mentioned above, an agreement among ISPs and content owners to effectively prevent infringing content from being distributed over the Internet. This effort should include the immediate and effective implementation of graduated response procedures (contractual or administrative procedures affecting consumers who abuse their ISP accounts), including any necessary related legislative changes, effective notice and takedown procedures (for removal and blocking of sites engaged in copyright violations) and, where appropriate, for the use of available technologies to identify and prevent repeat infringements.
- Reverse or rescind the Chief Prosecutor's May 2006 official instruction (Circular) that "decriminalizes" peer-to-peer (P2P) downloading.
- Seek additional personnel for the Ministry of Interior for investigation of Internet activity and assign additional human resources for Internet investigation from the Guardia Civil and National Police.
- Consistent with the 2008 European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, take appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights in the online environment (this may include legislative reform).

- Take appropriate steps so that the 2008 decision of a Valencia court finding circumvention devices are not illegal does not provoke similar resolutions in other courts (whether this may involve legislation that clearly criminalizes circumvention).
- Continue to take 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.
- Improve interagency cooperation on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing. This also includes the involvement of regional governments in the anti-piracy fight.
- Establish and fund training seminars for prosecutors as well as criminal and civil judges to increase their knowledge of intellectual property rights and the impact of piracy. Intellectual property courses should be incorporated into law schools' curricula.
- Develop and implement a national campaign on the importance of intellectual property rights through educational, press and similar public outlets. This should be undertaken at the most senior levels of government.

Legislation

- Develop legislation to allow rights holders to obtain the necessary information to take civil actions in Internet piracy cases in order to protect their rights, consistent with the ECJ *Promusicae v Telefonica* case
- Amend Spain's e-commerce laws to establish a workable notice-and-takedown procedure and eliminate the current definition of "actual knowledge", which limits the application of the EU Directives. Specifically, amend 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").
- Amend the Data Protection legislation so that rights holders can enforce their rights on the Internet, in both civil and criminal proceedings;
- Amend Spanish Intellectual Property legislation in order to make clear that compensation of damages must be valued, at least, for the full retail value of the infringed goods or copies.
- Amend civil procedural legislation to (1) avoid bonds for *ex parte* raids for software copyright infringement (keeping bonds only for *ex parte* raids based on anonymous evidence) and (2) permit anonymous evidence to be used to justify *ex parte* raids.

SPAIN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2005-2008 ¹								
INDUSTRY	2008		2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound recordings & musical compositions ²	13.4	20%	16.7	20%	25.0	22%	27.0	22%
Entertainment software ³	NA	NA	510.0	35%	111.5	48%	135.3	43%
Business software ⁴	624.0	42%	542.0	43%	471.0	46%	417.0	46%
Motion pictures ⁵	NA	NA	NA	NA	NA	NA	253.0	32%
Books	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	637.4		1,068.7		607.5		697.0	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For the history of Spain and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2009 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² 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.

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

⁴ BSA's 2008 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁵ MPAA's 2005 data used a methodology that included both hard goods and Internet piracy loss estimates.

COPYRIGHT PIRACY IN SPAIN

Rampant Internet piracy: There are now approximately 25.6 million Internet users in Spain, amounting to 63% of the population (a significant increase from the 2007 statistics of 22.8 million Internet users and 55%, according to www.Internetworldstats.com). Some 51% of households (7,700,000) have broadband access (that is an estimated 17 million users) which represents a growth of more than 1 million connections and an 11% increase in number of users from the previous year (source: INE – Instituto Nacional de Estadísticas, the Spanish government, National Statistics Institute).

Internet piracy reached epidemic proportions in Spain in 2007 and has continued to escalate at an alarming rate. Comparative studies by the music, videogames and motion pictures industries demonstrate that Spain has one of the worst Internet piracy problems in the world. In fact, tracking illegal exchanges of motion picture product consistently places Spain among the top five worst countries in absolute downloads and nearly always the number one major country in the world in terms of per capita exchanges of illegal copies of films.

The sound recording industry reports that its most serious problem in Spain involves illegal downloads on the Internet. Estimates indicate that some 2 billion music tracks were illegally downloaded in 2008, an 80% increase compared to 2007 (when 1.1 million tracks were illegally downloaded, according to CIMEC; see 2008 download data, below). Although the widespread downloading of illegal music files through peer-to-peer (P2P) file-sharing continues (Emule and BitTorrent being the most popular), 2008 saw a sharp increase in direct downloads of files from websites that provide direct links to music files hosted in cyber lockers of a third country. The quality and speed of these downloads are why users increasingly opt for this method. According to a recent qualitative research about the penetration of piracy in Spain (GfK study, June 2008), three points are stunning: (1) 67% of the Spanish Internet surfers (8.77 from 11.48 million) admit to downloading illegal copyright content from the Internet; (2) of Internet users under 24 years of age, 81% admit to downloading files illegally with P2P programs in the Internet; and (3) 62% of the Internet surfers (7.12 million people) download music illegally, 58% are men, and two in every three are people between 16 and 34 years old. Also, 2008 saw the offering of illegal music files for mobile phones, with the appearance of the first companies and websites that offered content without license. Illegal mobile downloading in Spain is not yet as wide-spread as Internet piracy, but this is clearly a phenomenon that must be closely monitored as the number of mobile phones with a higher and better transmission, storage and reproduction capacity of digital formats continues to grow.

The damage to the legitimate recording industry in Spain is huge. The value of recorded music sales in Spain have decreased from €626 million (US\$807 million) in 2001 to just €257 millions (US\$331 million) in 2007, which means a 59% decrease in value. In unit terms, sales were 73 million in 2001 and only 31 million in 2007, a drop of 57%. According to IFPI (the International Federation of the Phonographic Industry), the physical market in Spain continued to slide, and was worth €225 million (US\$290 million) last year, a year-on-year decrease of 12.4%. Because of these falling sales, 50% of the employees of the music sector have lost their jobs in the last few years. Looking just at the digital market, the following facts illustrate these challenging problems. First, for 2008, digital sales accounted for just 11.5% of the overall legitimate music market in Spain, compared to 10.5% in 2007, while worldwide this figure was 20%, compared to 15% in 2007. This is because most of the digital sales come from mobile, where piracy was very limited in the past, but this market was almost flat in the first half of 2008; full year results were expected to be worse as mobile sales of full tracks and real tones were declining. Second, although online sales in Spain were increasing in 2008, they were still very far behind the average of the main European markets. For 2008, IFPI reports that online sales in Spain represented 4.2% of the overall market for recorded music and 36.9% of total digital sales of the recorded music market, compared to an average of 4.6% in the Top 5 European markets). Third, in 2008 an estimated 2 billion tracks were downloaded illegally in Spain, as mentioned above (based on studies by GfK). Compared to an estimated 2.2 million *a la carte* legal downloads, this means a mere 0.1% of all tracks downloaded were legal. Said another way, the music piracy levels on the Internet in Spain represent a staggering 99.9% of the local market. Furthermore, this piracy affects music publishers; the National Music Publishers' 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), report that widespread Internet-based piracy in Spain undercuts the legitimate market for music publishers and their royalty collections.

The Motion Picture Association (MPA) similarly reports that, according to the same third-party survey (GfK), the situation for Internet piracy of filmed entertainment worsened during 2008, with film downloads increasing to 350 million in 2008, up from 240 million downloads in 2007. As broadband penetration climbs in Spain, some MPA member companies are

pioneering electronic sell-through partnerships with ISPs, however such ventures have had almost no success because of the high rates and easy availability of free illegal copies.

The Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain worsened in 2008. According to the same 2008 GfK study, 50 million infringing copies of videogames were downloaded in 2008, a huge increase from the 20 million reported in 2007. P2P is still the most prevalent form of piracy affecting this sector, along with illegal link sites. More and more of these sites are beginning to include cyberlocker links for direct downloads. Online piracy is now the primary problem for this industry, with illegal downloads clearly overtaking the hard goods piracy problem. A private sector market study also found that the number of pirated games sold illegal through informal retail outlets was at only 500,000 in 2008 (source: FAP-Federation for the Protection of Intellectual Property, with data from GfK and the European Information Technology Observatory). In contrast, the number of illegal downloads from IP addresses located in Spain of a popular racing title in the month of December 2008 alone was already well over 480,000. Furthermore, during a 4-week industry online monitoring trial (December 2008), there were estimated to have been more than 974,000 completed downloads made by Spanish subscribers of 13 game titles covered by the study, representing 15.1% of the game downloads completed globally during the study period. Spanish downloaders were also responsible for 14.4% of downloads made of the two most heavily copied game titles. Overall, Spain was the second most active game downloading country by overall volume as well as on a per-capita basis. With three Spanish ISPs (Telefonica de Espana, Jazz Telecom S.A. and Uni2) included among the top 10 ISPs whose networks were used to facilitate this file sharing activity, meaningful efforts to cooperate with rights holders and stem infringing activity on P2P networks would make a significant difference in the level of online piracy in the country. Widespread availability of circumvention devices (and of circumvention services) also significantly contributes to growing Internet piracy as downloaded infringing video game software can only be played on consoles modified by such devices.

Street piracy and the influence of organized criminal syndicates: Efforts to combat street piracy are having a positive effect, as the National Police and the Guardia Civil have been working hard to combat street piracy. Pirate networks running illegal sale activities in the streets and flea markets seem to be mostly selling film DVDs now. Still, according to the record industry, Spain has the worst pirate CD-R problem in Western Europe, and the piracy of DVD music videos is also very high. Police actions against “mochileros,” who sell out of backpacks, remain more difficult than actions against the street “manteros,” who sell from blankets and are relatively fixed in location and maintain more product.

Street piracy is highly structured with links to organized crime elements. This aspect has fostered a more pro-enforcement attitude by both the police and the public. The Chinese syndicates are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), 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 Chinese plants. Product consists primarily of international releases, although albums of some important national artists have also been detected. The depth of the street piracy 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, Granada, and reportedly in Girona, Tarragona, and Alicante. Significant increases in pirate activity have occurred in Granada, Seville, Oviedo and Gijón.

Hard goods piracy of music and sound recordings: Estimated trade losses due to physical music piracy in Spain last year were \$13.4 million for U.S. repertoire. The recording industry reports that the 2007 trend of declining music piracy in the streets and markets continued in 2008. There are two principal causes for the gradual decrease of this kind of street piracy. First, more police action is being taken against street sales, in particular from local police. There were also several major police actions taken against organized criminal networks (either national and international operations) in 2008 and that has temporarily reduced the supply capacity of the local groups. Second, there appears to be a trend that indicates that movie DVDs have taken the place of the music CDs in the requests to “top manta” or “top mochila.” The simplicity of downloading music on the Internet has increased this imbalance between CD and DVD piracy (or at least until network broadband penetration grows more). The national average piracy level of CD and DVD piracy was slightly above 20%, with piracy levels varying in the cities, for example: Andalucía 32%, Granada 55%, Sevilla 38%, Valencia 27%, Alicante 31%, Madrid 22%, Cataluña 21%, and Barcelona 22%. In these cities, there still are permanent illegal sale points in the streets, and municipal and police authorities (both national and local) have failed to stop those sales. To be clear, there is no doubt that physical piracy is also being affected by digital piracy through the Internet. The expansion of Internet connectivity and increase of broadband access not only affect the legitimate market, but also the physical piracy market as illegal downloads are burned onto CDs.

DVD piracy and camcording: The MPA, working with its local anti-piracy organization, FAP, reports that hard goods piracy of audiovisual products in Spain continues to hurt the local markets. In 2008, some 25 million pirate DVD-Rs were sold, compared to the legal market barely distributing 30 million legal DVDs. Some municipalities have adopted a very effective solution by forbidding street vendor activity. Madrid, Barcelona, Valencia, Malaga, Sevilla are some of the cities where piracy is of greatest concern. FAP reports that the police and municipalities are very active against this type of street DVD-R piracy. However, judicial cooperation is poor and FAP has to provide experts and evidence storage in most cases; some raids are even conditioned to FAP's provision of such services. As mentioned above, Internet piracy, especially of film titles that have not yet reached the Spanish theatrical market, is very harmful. It appears that even exchanged P2P movies are now initially produced locally via camcording in Spanish theaters. Shockingly, 52 films were illegally camcordered in Spanish theaters in 2008., *Star Wars: Clone Wars*, *Quantum of Solace*, *Body of Lies*, *Made of Honor*, *Hancock* and *Madagascar: Escape 2 Africa* were all stolen from Spanish theaters the very same day of their theatrical release in Spain and uploaded to the Internet. MPA has also found Spanish-sourced copies in other markets, particularly in Latin America. FAP data indicates that the Spanish film market contracted by 21% in 2008.

Entertainment software piracy: Though much of the video game piracy problem has migrated online, hard goods piracy and trafficking in circumvention devices does remain a problem. Mod chips and game copiers that bypass the technological protection measures employed in console hardware and handheld systems, respectively, are prevalent in Spain. Prosecuting individuals or entities engaged in the trafficking of circumvention devices and/or the provision of services related to them is subject to new difficulties despite the fact that such devices are clearly prohibited under the EU Copyright Directive and Spanish law itself contains similar prohibitions. Though there have been several successful actions against mod-chipping, a 2008 decision before a Valencia court found this type of circumvention device not to be illegal. The court held that since such devices purportedly could be used for other purposes, they could not be considered per se illegal. Fortunately, this decision, though enthusiastically reflected in the media, is still an isolated pronouncement among many others that postulate the opposite. Similarly, importers and distributors of game copiers, even users, claim the legality of such devices by uttering that they are intended for providing handheld systems with new functionalities and/or for making them able to play homebrew applications. No judicial decision has declared the illegality of game copiers in Spain, nevertheless, an entertainment software publisher has recently attended the first police actions against the commercialization of game copiers. These actions, in response to a major video game company's complaint against a chain which distributes computer equipment all around Spain, resulted in raids against fifteen stores, the detention of a number of individuals, and the seizure of hundreds of game copiers. The operation was carried out by members of a special unit for prosecuting offences against intellectual property of the Spanish National Police, with collaboration from officers of the Regional Police Headquarters of Cataluña, Valencia, Castilla León and Castilla La Mancha.

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 large companies in Spain have policies to implement a reasonable legal use of software, with only some under-licensing problems. However, piracy at smaller enterprises 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). The software industry in Spain is formed by about 12,000 companies, which generates a market volume of €2.9 billion, or -US\$3.7 billion in 2007 (source AETIC), employs directly 80,000 people, and generates 300,000 more indirect jobs (source AETIC). While the Internet is one of the main sources of piracy against business software, Spain is not to be considered one of the top pirate countries in Western Europe for business software Internet piracy. BSA's preliminary estimated trade losses due to U.S. business software piracy in Spain in 2008 amounted to \$624 million, with a 42% piracy rate. Last year BSA's Spanish Committee also conducted a regional piracy study, establishing the piracy levels for business software in different Spanish regions (Comunidades Autónomas) in order to develop better contacts with the responsible departments of regional governments, some of which (such as the Basque Country, Cataluña) have their own police forces. During 2009, meetings will be held with all regional governments in order to seek their cooperation in the fight against software piracy.

PROBLEMATIC GOVERNMENT POLICIES REGARDING INTERNET PIRACY

The lack of action by, and indeed the inaction of, the Spanish government (legislative, executive and judicial branches) has contributed to the Internet piracy problems.

More leadership needed to implement the Spanish national anti-piracy strategy: The Spanish government needs to become far more active in implementing its own national antipiracy strategy. The Parliament made a formal call to the Administration in December 2008 to establish a clear anti-piracy plan, but the Administration has not yet responded. Parliament's formal call suggested that the Interministerial Anti-Piracy Committee, coordinated by the Ministry of Culture, be the focus for the development of this plan. However, other than coordinating (on its own) related media campaigns and assisting the Ministry of Justice in a "Best Practices" Manual, this Anti-Piracy Committee has had a poor history of coordinating with other Ministries (such as Interior, Justice and, especially, Industry) and has not accomplished its own goals. For example, its efforts to foster negotiations between the content industry and ISPs was a complete failure with little attempt, or ability, to effectively broker those discussions. Both REDTEL (a coalition of Spanish Internet service providers) and the Content Industry Coalition requested membership in this Committee in the Spring of 2008 but have not been invited to join. This Interministerial Anti-Piracy Committee is not a sufficient forum for leadership unless other Ministries (such as Industry) step up in a leadership role, and the Administration, at the vice presidential level as a minimum, also makes a strong commitment to an effective process. For Internet piracy, it is clear that leadership must come from the Ministry of Industry, including the Secretary of State for Telecommunications (see more, below).

The Ministry of Justice should take steps to increase its involvement in providing solutions to the many problems with criminal copyright enforcement addressed in this report. More resources and practical trainings on copyright piracy issues and criminal and civil enforcement are needed for prosecutors and judges. The Ministry of Interior is responsible for the police forces and must encourage more investigation of web sites. Another key agency is the Ministry of Industry, which is also in charge of the information technology industry. BSA has a good relationship with this Ministry, which has, at BSA's request, approved and funded a program to train and prevent the software piracy in the illegal retail channel; this program will be deployed during 2009.

In the Internet context, a potentially important government entity is the Secretary of State for Telecommunications (SETSI), a entity within the Ministry of Industry, which regulates telecommunications, including ISPs. The Intellectual Property Department within SETSI should be commended for its proactive outreach to the content industry in 2008, including the investigation of solutions for Internet piracy. However, their effort appears to be minimized within SETSI as SETSI's upper levels seems to prefer denying that a problem exists. SETSI, in fact, appears to dedicate more time to producing written arguments dismissing the scope of the problem and defending its non-action than it does to producing any useful recommendations suggestions or proposals. SETSI's focus on Internet and technology issues could be extremely valuable to resolving the Internet piracy problem if it were to be more open to evaluating all Internet interests. For example, SETSI's private sector consulting commission, CATSI, does not have any content industry representation on it, yet SETSI would propose that CATSI approve any Internet anti-piracy plan forwarded by the content industry. Despite its potential leadership position, SETSI's tendency toward defensiveness, its refusal to recognize the scope and impact of the Internet piracy problem, and its apparent unwillingness to balance its Internet interests has significantly reduced its credibility to-date on these issues.

The 2006 Attorney General's Circular is still being used to justify no criminal actions in P2P cases: In May 2006, Spain's Office of the Prosecutor-General (Attorney General) issued a Circular (Circular 1/2006) to all district attorneys. This Circular explains why the profit-making criteria in the Criminal Code (Article 274) should be considered "commercial profit." It concludes that the use of new technologies to communicate or obtain copyright protected materials by uploading or downloading through the Internet or sharing files via P2P systems does not meet the requirements for consideration as criminal offenses, unless such acts are "for commercial profit." Said another way, this 2006 Circular de-criminalizes P2P piracy.

The Spanish government has stated that the Circular is "not binding" on any judge. Nevertheless, in spite of that assertion both the police and some criminal courts have pointed to the Circular as justification for not taking action against P2P infringers. Police actions against websites and pages offering links to files on P2P networks are being derailed because of the 2006 Circular. Those few police actions against organized networks and companies that were clearly obtaining a direct or indirect gain from Internet piracy are now being dropped as a consequence of the requirement to establish commercial intent. This is all the more unacceptable since these sites do generate income through advertising related to the number of visits of the web page, as well as the number of persons signing in to use the service. This means that a clear profit is derived from the illegal offer and, as such a clear commercial intent. Most of the cases never even reach the trial stage.

Furthermore, recent decisions have been issued by Spanish courts in criminal actions against websites with links to P2P platforms, declaring that there is no criminal responsibility for these kinds of infringements. Such cases include *Elitedivx* (Cartagena) and *Indicedonkey* (Madrid), and pending cases include *Spanishare* (Madrid), *PS2Ripnet* (Barcelona), *en tramite de acusacion Emwreloaded* (Malaga), *Elitetorrent* (Malaga), *FenixP2P* (Bilbao), and *InfoPSP* (Rioja). The Circular also has been mentioned in other decided cases.⁶ The Circular has not been changed or rescinded, despite rights holders' efforts to lobby the Government to do so. In fact, the Attorney General has refused industry requests to meet with him to discuss this Circular.

As an additional example of the negative impact of the Circular, the Technology and Internet Division (BIT) which has successfully engaged in raids against Internet sites that facilitate copyright infringement (and which the Spanish Government has used to demonstrate its commitment to fight Internet piracy), will no longer engage in such raids and is reducing its focus on Internet piracy. In 2008, in contrast to 2006 and 2007, the BIT investigated several cases, but took no action beyond turning the evidence over to the appropriate Judges should the Judge wish to take action. It is expected that no action will be taken and as a result 2008 can be marked as a year in which the Spanish government took no criminal action against Internet piracy.

Inadequate requirements for actual notice undermine removal of infringing content online: The legal loophole in the LSSI (Law 34/2002--the Information Society (Services and Electronic Commerce) Act), combined with inadequate ISP liability provisions in the copyright law, result in a failure to implement the minimum obligations of the EU Directives and undermine the legal framework necessary for content owners to do business and commercially survive in the online environment. A law amending the LSSI, supported by ISPs, was adopted by the Congress on December 28, 2007. With respect to ISP liability, Article 16 of the LSSI establishes liability for the ISP if it has effective knowledge of the infringement and does not act diligently to avoid access to the infringing content. However, "effective knowledge" involves submitting evidence to a competent authority (a court) that has previously declared the illegal nature of such content. As a result, these 2007 amendments failed, again, to effectively implement the EU E-Commerce Directive, leaving Spain without effective notice and takedown procedures and with a confusing and unachievable rule requiring "actual notice" by ISPs for the removal of unauthorized content.

Spanish data protection law used to block identification of users in civil cases: Spanish legislation does not provide a means for identifying holders of Internet protocol addresses in the context of civil proceedings, whereas in criminal procedures the judicial authority issues a warrant. The *Promusicae vs. Telefonica* decision, issued on January 29, 2008, by the European Court of Justice, considered whether Community law permitted Member States "to limit to the context of a criminal investigation or to safeguard public security and national defense, thus excluding civil proceedings," the duty of Internet access and service providers to "retain and make available connection and traffic data" is in line with EU law. The ECJ decision responded to the reference made by a Spanish court in the course of national proceedings between *Promusicae* and *Telefonica*, concerning the latter's refusal to disclose data on its subscribers who had shared or uploaded large music files via the Kazaa network. The ECJ ruling establishes that Member States are not obliged to provide for rules on disclosure of personal data in the context of civil proceedings. However, when transposing and implementing Community Directives, Member States must allow a "fair balance to be struck between various fundamental rights protected by the legal order," which in this case involved the "right to respect for private life" and the "rights to protection of property and an effective remedy" (for copyright infringement).

The Spanish court has ruled that the Spanish E-Commerce law, which provides that personal data can only be disclosed in criminal proceedings, is in line with EU legislation. Now that the Spanish court has decided against disclosure in the context of civil proceedings, rights holders will experience severe problems in obtaining any effective remedy in Spain, in particular with regard to P2P file-sharing infringements, due to the Attorney General's 2006 Circular decriminalizing P2P (see above), which would seem to put even criminal proceedings out of reach. It should be noted, however, that Spain had not yet implemented the EU Enforcement Directive when the *Promusicae vs. Telefonica* case was initiated. The Enforcement Directive has been implemented, but the Data retention law, which implements the EU Data Retention Directive, only allows retention and disclosure of personal data for serious crimes. According to the Spanish Criminal Code, serious crimes are those punished

⁶ For example, the Circular has been mentioned in the following decisions: (1) Court of Appeal (n° 1°) Cantabria, Ruling n° 40/08, February 18th, 2008 (Jose Manuel Lanza); (2) Court of Appeal (n° 2) Madrid, Ruling n° 582/08, September 11, 2008 (Sharemula); (3) First instance Criminal Court n° 4 Madrid, December 20, 2006 (Sharemula); (4) First instance Criminal Court n° 4 Cartagena, April 17, 2008 (Elitedivx); and (5) First instance Criminal Court n° 4 Madrid, November 12, 2008 (Spanishare). In the following case, the Circular is not expressly mentioned but that cases say that there is no commercial aim of profit or that the profits are not direct but from the publicity: (1) First Instance Criminal Court n° 1 Madrid, 19th March, 2008 (Indicedonkey); (2) First Instance Criminal Court n° 20 Madrid, 12th January 2007 ("Elitetorrent").

with a prison term of more than five years. However, the punishment provided for intellectual property crimes in their most serious form is four years. As a result, they can never be considered serious crimes and therefore disclosure of personal data in intellectual property crimes is not possible. Evidently, the Data Retention Law also prevents personal data disclosure in civil proceedings and therefore this law prevents the possibility to sue P2P users, both in the civil and in the criminal courts.

In brief, the Government of Spain should provide for an efficient mechanism through which rights holders have the ability to obtain the information necessary to protect and enforce their rights. As the Spanish court has determined that present law permits no such disclosure, the Government should move quickly to adopt legislation, in accordance with the ECJ decision, to permit disclosure of the appropriate information so as to facilitate rights holder action.

Slow progress on negotiations between copyright rights holders and the ISP community: Spain's inadequate legal framework has not been conducive to voluntary agreements between rights holders and ISPs. For much of 2007, the copyright industries requested the leadership and involvement of the Spanish government to promote such negotiations, as Spanish ISPs have little legal incentive to cooperate with rights holders.

In early 2008, a coalition of rights holders composed of authors and their collecting societies, producers of sound recordings and audiovisual producers, was formed to negotiate with the ISPs. This content coalition engaged in negotiations with the ISPs association (known as REDTEL) to reach agreement for coordinating activity involving a graduated response system as well as notice and take down procedures and site-blocking measures. Publishers of entertainment software recently joined the content coalition.

The content coalition has grown frustrated by an apparent lack of good faith and by the constant obstacles presented by the telecommunications industry through REDTEL. At last report, the ISPs are against disconnection or suspension, and instead want a formal (and slow) procedure for notifications from an administrative body created *ad hoc*. It is possible that a minimum agreement outlining only general concepts will go to the Government in February 2009, accompanied by more detailed proposals from the content industry, consistent with what is gradually being accomplished in other countries.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

This section discusses criminal and civil actions taken, and results achieved, by the industries in cases involving both hard goods and Internet piracy in Spain.

Criminal actions in general: Approved in 2006, the Government created an Anti-Piracy Plan, the structure of which involves 11 Ministries, with much of the operational antipiracy coordination given to the Ministry of the Interior. Other agencies involved in enforcement are the Tax Agency (including the Customs Department) as well as local police forces. Rights holders groups, such as FAP, Promusicae and BSA, all report good cooperation with, and highly satisfactory work results from, Spanish police forces on criminal cases. This includes the fine work of the National Police, Regional Police and Civil Guard. The industry groups report, however, that there continues to be a lack of intellectual property awareness among many in the judiciary. Industry has organized several seminars for judges and public prosecutors, but these have had only limited attendance; in contrast, attendance by police at similar seminars have been very high.

The Spanish government issued a Best Practices Manual for the prosecution of intellectual property crimes in July 2008. The document is officially named "Manual de Buenas Practicas para la persecucion de los delitos contra la Propiedad Intelectual" ("*Manual of Good Practice for Prosecuting IP Criminal Offences*") and was released by the "Subdirección General de Propiedad Intelectual," a specialized agency on IP issues that depends on the "Dirección General de Política e Industrias Culturales," a section of the Spanish Ministry of Culture. It was made public on July 10, 2008 and is intended to improve the efficiency and coordination of the Administration of Justice and the Spanish Security Corps and Forces' actions against IP crimes in Spain. The Manual has four sections containing: (i) statistical input and main consequences of piracy on the Spanish market and society; (ii) best practices to be implemented by the Security Forces and in Court when IP rights are involved, and information on a number of international bodies and institutions which cooperate with the police; (iii) information on the dissemination and continuity of the Manual; and (iv) a list of collection societies and associations for defending IP rights. Dissemination of this Manual is being carried out by a follow-up Commission formed of representatives of the Ministries that coordinated the Manual's first draft, that is, the Ministry of Culture and the Ministry of Justice. This Manual is a commendable

undertaking, but because of its recent release, it is too early to determine its impact. It should be widely distributed by the appropriate authorities.

Criminal actions involving Internet enforcement: With respect to Internet enforcement, both the National Police (BIT unit) and the Guardia Civil (UCO, cybercrime unit) have shown exemplary commitments to fight against Internet piracy, and that is much appreciated by the copyright sector. However, due to the 2006 Circular and various court decisions, the police have basically stopped all criminal actions against Internet piracy and prosecutors are not pursuing cases. As a result, there are no known judicial convictions issued in 2008.

The motion picture industry, though FAP, reports that the few police actions in 2008 against Internet piracy revealed the existence of organized structures offering music and movie files, including pre-releases, on-line, using registered companies covering up their illegal activities whilst obtaining important profits, mostly from the publicity these websites offer to their users. The content is presented in a professional way, very similar to certain illegal networks of physical piracy.

The *Sharemula* ruling needs only to be read (the ruling, not the press interpretation) to understand the frustration with Spain's judicial process. In *Sharemula*, the Madrid First Instance Criminal Court No. 4 dismissed the case before the plaintiffs could file their accusations charging Sharemula's administrators with a direct infringement of communication to the public right (specifically, the making available right); this decision was upheld by a higher court. The holding was that this website (the site itself had no illegal content but merely provided links to P2P channels from which downloads could be obtained) did not carry out a criminal offense under Spanish Criminal Code because its activity could not be considered as a communication to the public. Further, the court found that the site and its administrators had not engaged in copyright infringement for publishing links to P2P networks as such act had no commercial purpose. Moreover, the *Sharemula* case adds two confusing additional rulings: links to protected works do not facilitate copyright infringement and link sites are Internet safe harbors. This Madrid court held (in a non-appealable ruling), as a new issue not previously addressed, that a link site is an Internet safe harbor, but cited no analysis, no legislation and no precedent to support that statement. In addition, in ruling that links do not facilitate copyright infringement, the court based its holding on a previous *Navarro* case that specifically limited its holding to links to other websites, and specifically excluded its conclusions from P2P links and links to content protected by traditional copyright (such as books, music and movies). Some rights holders are currently analyzing the legal grounds in order to take a decision regarding a possible civil action.

Several more criminal courts have since ruled in favor of defendant link sites for two reasons based on the Circular: neither the public communication right nor the intent to profit were found. The copyright industries believe such rulings run counter to rulings involving similar facts in other countries where liability has been found. This is a very troubling situation because past years' criminal Internet cases are now making their way through many courts in Spain, and such decisions will set bad precedent, making Internet enforcement in Spain even more difficult.

Police actions and prosecutions involving physical piracy: FAP reports a slight increase in hard goods raids during 2008. For the first three quarters of 2008, the film industry, working through FAP and with the police, conducted over 4,000 raids involving mostly street actions plus raids DVD-R labs and distributors. MPA was pleased with the December 2007 passage of a new Film Law prohibiting sound and image recording in theaters. During the first three quarters of 2008, there were 3 camcording investigations, resulting in 2 raids and 2 arrests (no sentences have yet been obtained).

For the first three quarters of 2008, the entertainment software industry (working with FAP), conducted 172 investigations, including against street vendors, mod-chip distributors, as well as cyber actions, resulting in 152 raids. Given the absence of readily available pirated copies of videogames on the streets, *ex officio* actions are unusual.

Promusicae reports that for the music industry, over 90% of the police actions carried out in Spain (4,833 actions in 2008, which led to the arrest of 1829 persons) are executed *ex officio* by the various enforcement agencies. The statistics of these actions are informally compiled by Promusicae because official statistics are lacking, in particular where it concerns actions carried out by local police forces. The biggest bottlenecks in IP enforcement in Spain are the following: (a) slowness in the judicial proceedings (an average of 2 to 3 years as average to obtain a judgment), which is (b) exacerbated by the lack of interest of the prosecutors as a result of the Attorney General's Circular, and (c) the lack of deterrent sentences, which undercuts the work of the police actions.

The recording industry also notes the severity of criminal activity involved with optical disc piracy. The industry appreciates the work done by its investigators and the Spanish government to uncover a massive operation last year. According to IFPI, in June 2008, Spanish police broke up an organized criminal syndicate based in Madrid that was producing counterfeit CDs and DVDs on an industrial scale.⁷ The gang operated burners that could produce €600,000 (US\$773,200) worth of pirate CDs and DVDs each day. More than 50 police officers were involved in raids on two warehouses and four homes in the Madrid area that were being used to store vast numbers of blank CDs and DVDs, industrial photocopying machines, CD and DVD burners and other equipment. The raids led to the arrest of 32 members of the gang involved in the production and distribution of these counterfeit discs. Police also seized 466,000 blank discs and 306,500 recorded CDs and DVDs, as well as 506 burners during the raids. The production capacity of the seized burners is estimated at 150,000 units daily and they were operating on a 24-hour basis. In sum, this single ring was generating over US\$400 million a year from piracy. To put this in perspective, this is roughly equal the sales volume of the entire legitimate music industry in Spain last year, including both physical and digital sales (an estimated US\$423 million). It is 25% more than the value of legitimate discs sold in the Spanish market.

BSA reports that its work in 2008 with the police forces continued smoothly. Usually the police request BSA support in order to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids. During 2008, BSA started 356 legal actions against alleged business software infringers, according to the following details: 34 cease and desist letters to alleged Internet infringers, 36 cases referred to police forces against alleged illegal distributors or resellers of unlicensed software, 277 cease and desist letters to end user infringer companies allegedly using unlicensed software, and 9 civil raids against end-user infringing companies, which resulted in a total amount of damages of \$717,031.

An additional concern affects street piracy actions: criminal gangs are populated by illegal immigrants and there is a general problem in prosecuting persons without fixed identification or housing. Some judges consider street vendors "victims" at the bottom of an organized system with no criminal liability, and these decisions create further uncertainty, and certainly no deterrent.

Civil actions and the commercial courts: BSA reports that in addition to its criminal cases, its civil actions in Spain are working in an acceptable manner. With respect to end-user cases, BSA ran 7 civil raids and sent 168 letters to companies suspected of using unauthorized software and sound legalization and then compensation of damages. As result of these prosecution activities, a total amount of €546,305 (US\$704,000) in damages have been obtained, and €157,608 (US\$203,000) in software purchases were generated. The commercial (civil) courts act reasonably quickly in the granting of *inaudita altera parte* search orders. However, BSA report that several other problems remain when they work with the civil courts.

- 1) High bonds: Nearly all ex-parte searches are submitted to the previous postings of bond, in order to cover potential damages in the event target company was not illegal. After successful raids, these bonds cannot be returned to copyright holders until the closing of the case. Although amounts requested are reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested have been so costly (€120,000—approximately US\$154,600—in one instance) as to make it impossible to bring the case. BSA reports that the maximum amount it recently posted was €36,000 (US\$46,400).
- 2) Calculation/valuation of damages: The usual rule in calculating damages involves the full retail price of the product. However, a recent decision from a court of appeal (against the company "In Hoc Signo Vincens"), might have negative effects in this respect. This decision reduces the valuation of damages because there rightholder companies are based outside Spain. Since the benefit obtained by such companies directly from the Spanish market was arguably not the same as the full retail value, the valuation of damages was permitted to be reduced. This might have a negative impact for future cases. The correct definition of valuation of damages appears within article 140 of the Spanish Intellectual Property legislation, and it is clear that the valuation of damages must correspond to, at least, full retail value. Meanwhile, the judgment in this case is fine, as the Supreme Court has rejected requests for appeal.
- 3) Raids granted based on anonymous information: Before the civil courts were empowered to handle intellectual property issues in 2005, civil courts had no problems in granting raids based on anonymous information. However,

⁷ See IFPI Press Release, "Organized pirate CD crime network smashed in Madrid," 5 June 2008 posted at http://www.ifpi.org/content/section_news/20080605.html.

some civil courts (mainly in Madrid and Barcelona) refuse to accept anonymous information as evidence to grant a raid, even if a bond is offered. In comparison, other courts in Spain have no such problems in granting raids on the basis of anonymous information. This is making it more difficult for the software industries to pursue actions in these two major markets.

- 4) Delays: There are long delays in the civil courts. At the beginning of 2008, a general strike affecting all courts generated massive delays in the judiciary. Recovery from that strike has not yet happened, as the delays are now worse because the commercial courts are busy handling a huge influx of insolvency and bankruptcy cases.

Public performance piracy in restaurants and bars: In addition, the recording industry reports that the national government, through its Anti-Piracy Plan, agreed to negotiate with restaurant and bar associations to encourage actions against on-site piracy sales, but no action was ever taken by the government. The only agreements of this type that have been completed are due to the work of the various associations contacting local municipalities directly.

TRAININGS and PUBLIC AWARENESS

The content industries regularly offer training sessions and enforcement assistance in Spain. For example, FAP organized seminars, provided experts for judicial procedures' reports, provided evidence storage and closely cooperated with police forces during investigations. Promusicae organized and carried out 40 training seminars and courses for a total of 6200 police and custom officers, judges and prosecutors. Some of these seminars were co-organized with other copyright industry sectors. What is clearly needed is more government involvement in such seminars particularly to increase the participation of judges and public prosecutors.

With respect to media and public awareness, there are several ongoing activities. Over the past two years, the Spanish Ministry of Culture has been involved in implementing its public campaign, called "take a stand against piracy. Defend your Culture." For example, its 2006-2007 budget was €2.8 million (US\$3.6 million). During Christmas 2008, a new advertising campaign with a budget of well over US\$1.0 million was launched; this campaign, with the slogan "If you are legal, you are legal," will continue through March 2009. That Ministry also has started a program for secondary school students to support respect for copyrighted content. The Ministry of Industry, Tourism and Trade has been engaged in a public campaign to support the use of legitimate software. An Internet website run by the Spanish Patent and Trademark Office (SPTO), www.oepm-antipirateria.es, has been created to engage public awareness on piracy and ways to protect intellectual property rights.

BSA notes that during 2008 it successfully generated the publication of more than 600 press reports specifically devoted to business software copyrights and/or piracy, an amount double of news published for 2006 (341), and implies a 30% more than those published during 2007 (431). BSA suggests that the full involvement of the Ministry of Industry in the funding of extensive campaigns against business software piracy, the support of the Ministry of Culture to business software copyright protection in its nationwide PR campaigns against piracy, plus the organization of the National IT Police Congress, are clear indicators of this recommendation.

COPYRIGHT LAW IN SPAIN

EU Enforcement Directive (2004): Proper implementation of the EU Enforcement Directive is especially important because it aims to strengthen enforcement, particularly in the digital environment. Spain's weak and improper implementation of this Directive basically conditions the right of information to a commercial activity. The "right of information" afforded in Article 8 of the Directive allows rights holders to identify infringers and obtain information about infringements. This right is supposed to extend to ISPs and to allow rights holders to obtain an order requiring the disclosure of the user's identity, where it appears the user has been committing infringements. This is a critical tool in Internet piracy enforcement.

However, the "right of information" in the Spanish law suffers a defect in that it has a dual commercial scale requirement -- applying to both the services provided by the ISPs as well as to the infringements committed by the user. The Spanish formulation thereby misses a fundamental principle of this Directive, which is that the commercial scale requirement

should only apply to the services provided by the ISPs and not to the infringements committed by the user. In sum, this erroneous implementation of this Directive in effect leaves ISPs largely off the hook for any potential liability.

E-Commerce Directive (2000): In December 2007, the Spanish Parliament approved amendments to the Information Society (Services and Electronic Commerce) Act (LSSI) as part of the government's "2006-2010 Information Society Development Plan." Two points must be made. First, the positive point of the new law (Article 11.2) refers to the possibility of preventing access from Spain to a specific service or content provided from a non-EU State when the "competent authorities" have requested the removal/interruption of such content/service.

Second, the most important amendment concerns the redefinition of who is a "competent authority" to notify ISPs. The former LSSI gave the possibility that the Ministry of Industry could be the "competent authority," but now that possibility has been removed. The new wording is not clear, but implies that such a competent authority must be either an administrative or a judicial body. Moreover, Article 11.3 says that in situations where the Spanish Constitution, or the laws concerning freedom of information and speech, give competence "exclusively" to the courts, then only the courts could impose restrictions. It is possible, however, that the new law opens the possibility of creating (probably by new legislation) a "competent authority," other than current administrative or judicial courts. Unfortunately, the Spanish government, in tune with the ISPs and Internet users associations, appear to support the idea that this provision mandates that only a court order can impose restrictions.

Data Retention Law (2007): The Data Retention Law implementing the Data Retention Directive only allows retention and disclosure of personal data for serious crimes. According to the Spanish Criminal Code, serious crimes are those punished with a prison sentence of over five years, and the punishment provided for intellectual property crimes in their most serious form is four years, which means they can never be considered serious crimes. As a result, disclosure of personal data in intellectual property crimes is not possible. Moreover, the Data Retention Law also prevents personal data disclosure in civil proceedings and therefore this law prevents the possibility to sue P2P users, both in the civil and in the criminal courts

Film Law (2007): On a positive note, and demonstrating that Spain can take positive anti-piracy steps, on December 28, 2007, the Spanish Legislature approved specific legislation prohibiting camcording movies. Although camcording has been addressed previously as a general violation of the Copyright Law, this legislation is more specific and expansive and clarifies the problematic private copy defense. The legislation, contained in the Film Law (*Ley de Cine*, Section 5, Article 15.3), states clearly that recording movies (image and/or sound) is prohibited. The prohibition on recording is beneficial to enforcement efforts.

Copyright law reform: As discussions move forward on limitations on ISP liability, possible amendments to improve Spanish implementation of the EU Directives as well as the ECJ decision, it is imperative that the Spanish government work with the copyright industry groups in a transparent and cooperative way.

Furthermore, a hallmark of reform should be that copyright legislation be adopted in manners consistent with the two WIPO Internet treaties (the WCT and the WPPT). 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." Also, the right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represented an erosion of the value of the exclusive rights of rights holders that were already granted in accordance with the requirements of the WPPT and WCT, and should be eliminated in future copyright law reform.

SWEDEN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Sweden be placed on the Watch List in 2009.

Executive Summary: In 2008, IIPA sought a Watch List placement for Sweden for its failure to reform its underlying legal and enforcement infrastructure so that the government and rights holders could begin to take effective action against some of the highest levels of “source” and P2P file-sharing piracy in the world. A bill currently awaiting action in the Parliament would correct some of these deficiencies but its passage is not certain. If the owners of the notorious P2P BitTorrent site, ThePirateBay, are convicted in a trial to start on February 16, 2009, that could have a significant impact in deterring widespread Internet piracy. Sweden’s general societal attitude that online piracy is an acceptable cultural phenomenon complicates local rights holders efforts to improve intellectual property protections for their works. Sweden should adopt the necessary amendments to its copyright law that would provide for injunctive relief and the right of information and devote greater resources to criminal enforcement. While the direction is positive, until that happens, IIPA recommends again this year that Sweden be placed on the Watch List.

Priority Actions to be Taken in 2009: IIPA requests the following actions by the government of Sweden, which, if taken, would result in the most significant commercial benefits to the copyright industries:

- Adopt the copyright law amendments on injunctive relief against ISPs and a “right of information” to permit rights holders to obtain the identity of suspected infringers from ISPs in civil cases
- Prosecute to the fullest extent the owners of ThePirateBay
- Increase the prosecutorial and police manpower devoted to criminal Internet piracy enforcement
- Commence a national criminal enforcement campaign to target source piracy and large scale Internet pirates
- Ensure that rights holders may pursue the new civil remedies easily and quickly
- Take an active role fostering ISP-rights holder discussions to effectively prevent protected content from being distributed without authorization over the Internet

UPDATE ON PIRACY AND ENFORCEMENT IN SWEDEN

Internet Piracy: Sweden has become a notorious Internet piracy safe haven.¹ Source piracy and illegal file-sharing is widespread and growing, and a number of deficiencies in Sweden’s legal infrastructure and enforcement system make effective enforcement difficult to impossible. Insufficient police resources are available for Internet enforcement and as a consequence there are now estimated to be over 1.3 million and 2 million people uploading and downloading illegal movie and music files, respectively, throughout the country.²

Topsites, highly specialized pirate servers with massive storage capacities, high bandwidth and lightening speeds are used by Encoding/Release Groups for the first release of pirated content on the Internet (these same releases often fuel hard disc piracy in other countries). This source content is then passed down using a series of couriers from Topsites to IRC (Internet Relay Chat) channels, 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, it is estimated that there are approximately 300 and that an estimated 65 of them (22%) are located in Sweden, making it one of the most active countries in the world for organized release groups. The country ranks among the top three countries globally in the number of DirectConnect hubs (P2P facilitators) and the largest percent of DirectConnect users per inhabitants in the world. Sweden is

¹ 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 (fortunately less than was expected) and they are campaigning heavily to get into the European Parliament in 2009..

² Mediavision Report for Q3 2008



home to *Rizon*, one of the world's largest IRC networks. Other forms of Internet piracy are also increasing in popularity in Sweden, with users increasingly streaming illicit content from leeching sites and downloading directly from cyberlockers.

Sweden is also host to *ThePirateBay.org*, one of the world's largest BitTorrent tracker sites and one of Sweden's largest web sites (it currently ranks 117 on the Alexa ranking). The site reportedly has over 25 million users and is financed through advertising revenues. It has been translated into over 34 languages, impacting legitimate markets around the world. The owners of the site boast that it is the biggest tracker of its kind and for years have mocked rights holders in their efforts to take actions against the site. The site was finally raided in mid-2006 by the Swedish police and servers were seized, but the site and its tracker were temporarily moved to the Netherlands and quickly up and running soon thereafter, but are now back in Sweden. MPA estimates that 95% of the material transmitted over ThePirateBay is infringing.

The Swedish police, after an 18 month investigation following the 2006 raid, charged the four owners of ThePirateBay for criminal copyright infringement. The trial is scheduled to begin on February 16, 2009, but will only cover infringements before the date of the raid itself. The four individuals are alleged to have committed the crime of aiding and abetting "preparation" for copyright infringement. The plaintiffs, music and movie companies, have claimed damages of over 10 million euros (US\$12.89 million). The owners do not profess to be worried at all; the site continues to operate today.

Swedish ISPs have become well known for their lack of cooperation with rights holders in taking down infringing content upon receiving cease and desist letters. Although most ISPs had been forwarding these letters to alleged infringers whose sites they hosted, all ceased doing even this after the public debate about peer-to-peer (P2P) piracy arose, claiming that they are not obligated by law to do so against P2P infringers. The Government has initiated discussions between rights holders and ISPs and several meetings have been held but, to date, these discussions have not yielded any forward movement. Unfortunately, the Government has chosen not to participate in these meetings. It is imperative that stakeholders collaborate in good faith and expeditiously to effectively prevent protected content from being distributed without authorization over the Internet. This effort should include, at a minimum, the immediate and effective implementation of graduated response procedures and effective notice and takedown procedures.

MPA reported in 2008 that, according to two market research studies, there are approximately 15-24 million movies illegally downloaded every year in Sweden. The entertainment software industry reports that Sweden is typically among the top ten countries for which online infringements are consistently high, on a number of protocols (be it BitTorrent, other P2P networks, or websites). For example, in industry monitoring of file-sharing activity via BitTorrent and eDonkey of 13 member-selected titles during a one-month period, Sweden accounted for more than 63,000 downloads, placing it number 8 on the industry's list of countries with the highest ratio of completed game downloads relative to population. Industry studies confirmed an unusually high ratio of console game downloads (69%) to PC game downloads (19%), which circumstantially confirms an extraordinarily high prevalence of console circumvention devices in the Swedish market. In additional monitoring performed by member companies of four top game titles over an 8-10 week period, Sweden accounted for 2% of the total number of global downloads monitored on the BitTorrent network.

AAP joins its fellow copyright industries in reporting that piracy has deteriorated in the book and journal publishing market due to the continued activity of ThePirateBay. Industry representatives estimate that 85% of all newly published Swedish fiction is freely available from this site and it impacts international publishers greatly in all sectors. Publishers report also that a copycat site has been set up to target academic materials particularly.

Internet Enforcement: Although movie rights holders have brought around 170 cases to the police, only ten cases have been pursued and the convictions received have resulted in a severe public backlash. IFPI Sweden has brought 10 cases against Direct Connect hubs but none of these have been tried yet. Some of these cases were brought to the police as early as November 2005 and April 2006. Out of all pending cases from previous years, only four convictions have resulted. Another case was dismissed this fall due to evidentiary problems. Slow procedures at the police and prosecutor levels seem to be the main reason for the delays in moving these cases ahead. In June 2007, the Swedish Court of Appeals upheld the very first conviction for Internet piracy which, however, only involved four songs and a total fine of about \$2000.

Law enforcement officials do not undertake *ex officio* actions even though they have the power to do so. In 2005, the Ministry of Justice tasked the Swedish Prosecution Authority, the Swedish Economic Crime Bureau and the National Police Board to review enforcement against Internet piracy. Its report, published in September 2005, recommended the establishment of specialized units of prosecutors and police officers with information technology knowledge. The copyright industries have

continuously pressed for the creation of this unit, which finally occurred in Spring 2008 when just two prosecutors were named. Moreover, investigators are not tied to particular cases which complicates their ability to get investigative support.

Rights holders contemplating legal action against Internet pirates in Sweden face grave 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, which is critical to effective Internet enforcement, can only be obtained by a public prosecutor or the police in the course of a criminal investigation, although even this procedure is unavailable unless the offense being charged carries the possibility of a sentence of imprisonment.

COPYRIGHT AND ENFORCEMENT LEGISLATION

A number of legislative deficiencies have contributed to the growth of Internet piracy in Sweden and to the growth of this "lawless" attitude toward illegal file-sharing among the populace. This has also helped foster Sweden's reputation as a piracy safe haven.

Injunctive relief in civil cases -- 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 has been the lack of a specific injunctive relief remedy against ISPs as required under Article 8.3 of the Copyright Directive (and Article 11 of the Enforcement Directive). Proposed legislation to provide such a remedy is now pending in the Swedish Parliament. If adopted by the Parliament, the amendment would go into effect on April 9, 2009. This will resolve one of the major deficiencies that rights holders have faced and which IIPA highlighted in its 2008 submission.³

The "right of information" -- EU Enforcement Directive: Also pending in Parliament is an amendment to provide for a "right of information" (Article 8 of the EU Enforcement Directive) or the right to obtain, upon court order in a civil case, the identity of a suspected infringer after providing the ISP that person's IP address. Without this right, bringing a civil case against P2P file-sharers had been, for all practical purposes, not possible in Sweden since only the ISP could match the IP address with the name of the actual person, whom the rights holder could then name in the civil complaint. While such names could be released in the context of a criminal investigation, as noted above, that is limited to only those cases where the alleged offense carries a sentence of imprisonment. The combination of these deficiencies meant that any person could regularly upload or download infringing files without fear of legal consequences so long as it was not done at a level that carried a jail term. Even then, it was well-known in Sweden that the enforcement authorities had little inclination, much less the manpower, to take action against such conduct. This helped to create the climate of "lawlessness" described above.

The path to finally providing a "right of information," which has been an ongoing obligation for Sweden under the 2001 EU Copyright Directive, was given a boost when, in September 2007, Chief Judge Cecilia Renfors issued a report ("Renfors Report") recommending that Sweden implement this obligation. However the government only decided to do so after the release of the European Court of Justice's *Telefonica* case holding that the "right of information" did not per se conflict with the Privacy Directive and that Member States were free to determine that the release of an alleged infringer's name would not violate that person's privacy rights.

The copyright industries strongly support passage of this legislation and its effective implementation thereafter.

The Renfors Report also contained a recommendation that a system be put in place for ISPs to suspend or, as necessary, ultimately terminate the accounts of repeat infringers. This suggestion was rejected by the government at the time the copyright bill was released by the government. IIPA is extremely disappointed in this decision but we urge the government to revisit that decision in the context of overseeing the discussions between rights holders and ISPs to work out a cooperative system for dealing with the scourge of P2P piracy. ISPs have an obligation not to let their facilities be taken over by illegal conduct, in the copyright or any other area. A balanced solution of cooperation and ISP responsibility must be sought by all parties. Progress, however, does not seem to have been made in these negotiations, and it remains to be seen whether the

³ <http://www.iipa.com/rbc/2008/2008SPEC301SWEDEN.pdf>

Swedish government will take a more active role in ensuring that some progress is made. Industry believes that absent progress in the near term, the government should explore options beyond private sector negotiations.

NEXT STEPS

IIPA looks forward to passage of the Bill now pending in Parliament to correct some of these major legal deficiencies in the country's enforcement regime. But this is only the beginning of the process, not the end, given the current culture and lack of enforcement that has pervaded the system until now. A conviction of ThePirateBay with deterrent penalties will start the process, but prosecutor and police resources must be strengthened to enable the commencement of a major follow-up campaign of criminal investigations and prosecutions to restore the rule of law in this sector in Sweden. Source piracy must be attacked aggressively by the enforcement authorities and major uploaders must also be targeted and deterrent penalties imposed. The implementation of the "right of information" must be smooth and allow rights holders to enforce their rights in civil cases effectively and quickly. Only by taking these actions -- and by overseeing and promoting the discussions between rights holders and ISPs and by demanding a result which will involve ISPs in responsible behavior in the P2P environment -- can the Swedish government reverse the climate of lawlessness that has taken over the country in this area. Such actions will be unpopular among some segments of the citizenry but this is the only way to restore the rule of law that has been so undermined to date in Sweden.

TAJIKISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Tajikistan remain on the Watch List in 2009.

Executive Summary: In 1993, Tajikistan and the United States concluded a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on November 24, 1993. Tajikistan has never fully implemented the IPR obligations in that agreement.

In April 2008, 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 encouraged the Tajik Government to “take the necessary steps to fully implement the TRIPS Agreement as part of its ongoing efforts to join the WTO.” The U.S. Government announcement noted the many shortcomings of the Tajik IPR legal regime including, most notably, its failure to provide protection for U.S. sound recordings, its denial of protection for pre-existing works (before 2000) and sound recordings, and the absence of criminal penalties for IPR violations. The U.S. Government urged Tajikistan to work through the Trade and Investment Framework and the ongoing WTO accession negotiations to rectify these and the other noted legal and enforcement shortcomings, many of which Tajikistan obligated itself to undertake almost sixteen years ago in the Bilateral Agreement. On January 5, 2009, the Government of Tajikistan notified the WIPO of its deposit of its instruments for accession to the WIPO Copyright Treaty (WCT), effective April 5, 2009. This is positive news, but unfortunately, Tajikistan did not also deposit its instrument of accession to the other WIPO “digital” treaty, the WIPO Performances and Phonograms Treaty (WPPT). On May 19, 2008, Tajikistan joined the Rome Convention, but because it has not yet adhered to the Geneva Phonograms Convention, or the WPPT, Tajikistan does not currently provide protection for any U.S. sound recording.

Legal Reform Deficiencies: In 2000, Tajikistan adhered to the Berne Convention. However, the Tajik Copyright Law (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 authors’ 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. IIPA recommends the deletion of the onerous contract regulations, and the addition in the Copyright Law of protection for 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).

Many other amendments are necessary for the IPR regime in Tajikistan to be consistent with international obligations, including compliance with the WIPO digital treaties. IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan:

- 1) Adherence to the Geneva Phonograms Convention (or, in lieu, the WPPT).
- 2) Amending the Copyright Law to provide protection for pre-existing works and sound recording 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.”
- 4) 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.



- 5) Amending the Criminal Code to set the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 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 provision for effective enforcement against end-user pirates.
- 11) Adherence to the WIPO Performances and Phonograms Treaty (WPPT) – plus enacting all of the appropriate implementing legislation in the Copyright Law for WCT and WPPT compliance.

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. These regulations are cumbersome and an ineffective tool that IIPA recommends should be repealed.

There has not been a single criminal IPR case reported under the existing laws. Nor has there been a single case reported under the Administrative Code. The Administrative Code, last revised in 1999 (Article 158-2), provides levies, fines, and seizure of illegal copyright and neighboring rights material. 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 recommends that the Government of Tajikistan affirm this statement by meeting its obligations and amending its relevant IPR laws and engaging 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.

TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: In the past two years, the government of Turkey once again took some incremental positive steps in the fight against copyright piracy. Piracy levels in Turkey improved slightly for some industries, although they remain extremely high for some others, in large part due to recidivism. Recidivism persists in Turkey in part due to court cases that last for years, often on appeal, and that usually end in amnesties or non-deterrence. In recent years, several cases involving repeat copyright infringers resulted in unsuspended prison sentences, but these cases are the exception. One major raid conducted in June 2008 yielded not only significant amounts of piracy activity by an organized criminal gang, but also revealed the extent of corruption in the piracy business in Turkey, as several Police officers were held in custody with the pirate group. Internet piracy has worsened in Turkey due to high Internet and broadband penetration. Estimates indicate that 85% of all Internet traffic in Turkey consists of peer-to-peer file sharing. Book piracy involving illegal commercial photocopying and the organized printing of books, and end-user piracy of business software remain serious concerns. Unfortunately, the 2008 amendments to the Copyright Law call into question whether Police have the authority to conduct raids on an *ex officio* basis. A formal circular confirming that the amendment did not change the *status quo ante* would be important. Turkey joined the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, effective November 28, 2008, yet another sign of a maturing copyright system. The government continues along its path toward EU accession, considering legislation to fully adopt the EU Information Society Directive, and thus also, toward putting into place modern copyright protection.

Priority Actions Requested in 2009: IIPA requests that the government of Turkey take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Reconfirm that Police and Inspection Committee members have *ex officio* raiding authority under the amended law, if necessary, through issuance of a formal circular.
- Speed criminal trial process in copyright cases, and work to defeat recidivism by significantly reducing number of suspended sentences and speeding up the appeals process.
- Significantly reduce Internet piracy, including peer-to-peer file sharing, through strict application of the laws and continued cooperation by government and service providers to take down pirate materials, deep link sites, P2P services, bulletin boards, cyber lockers, and the like, and, e.g., encourage the termination of accounts of repeat infringers. Meetings of affected sectors to work more cooperatively will be helpful.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.
- Take significant steps to legalize businesses engaged in end-user software piracy, including large and medium sized businesses, and to stop hard disk loading.
- Take urgent action to legalize all use of software in the public sector, by government agencies, employees, contractors and grantees.
- Run market sweeps to clear the shelves of product with fraudulent banderoles, and permit rights holder associations to administer the banderole or, if they choose, to forego the use of banderoles as appropriate.

Legislation

- Amend the Copyright Law to ensure that private copy levies are collected and fairly distributed to right holders; at present, right holders do not receive anything, as all amounts accrue to the Ministry of Culture and Tourism, which does not even use the money for useful anti-piracy purposes or in ways helpful to right holders.

TURKEY										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRIES	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	239.0	65%	201.0	65%	184.0	64%	157.0	65%	107.0	66%
Books	NA	NA	23.0	NA	23.0	NA	23.0	NA	23.0	NA
Records & Music	NA	NA	22.0	80%	20.0	80%	18.0	80%	15.0	70%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	29.0	NA	50.0	45%
TOTALS	239.0		244.0		227.0		227.0		195.0	

PIRACY CHALLENGES IN TURKEY

Internet Piracy a Growing Phenomenon: Turkey now boasts 26.5 million Internet users as of March 2008, amounting to a 36.9% penetration rate, and an astonishingly high 3.2 million broadband connections as of September 2007 (according to the International Telecommunications Union). Internet usage of copyright materials has thus begun to displace physical product in Turkey, and unfortunately, as a result, Internet piracy has significantly worsened, with 85% of all estimated Internet traffic in Turkey consisting of peer-to-peer file sharing.² Internet piracy takes on many forms, including P2P file sharing, video hosting sites, forums providing direct download links, and torrent sites (employing swarm technology for faster downloads).³ All creative content owners – of music, movies, software, and books – are victims of Internet piracy. The trading of hard goods through websites, mostly auction sites, or through newsgroups also remains of concern. Hard good sale lists primarily offer copies of pirate versions of television series (*Lost*, *Prison Break*, *Nip/Tuck*, *House*, *Grey's Anatomy*, etc.) rather than movies.

Book Piracy Problem Remains Severe: While Turkey should be a good market for English language teaching (ELT) materials and a growing market for higher education textbooks, it is unfortunately plagued by continued illegal commercial photocopying and organized printing of books. Virtually all types of books are affected, including fiction, non fiction, school books, college textbooks, supplements, dictionaries, English language teaching (ELT) texts and scientific, technical and medical (STM) materials. Illegal photocopying is especially prevalent in and around most university campuses, and authorities are often reluctant to enforce against them. Turkey also suffers from pirate imports from Iran over the Eastern borders.

Mobile Device Piracy Increases in 2008: Mobile device piracy, in which content of all types – music, audiovisual works, software, and even published materials – are loaded onto MP3 players, mobile phones, PDAs, iPods, portable hard drives, and the like, now harms right holders in Turkey. Stores now engage in this service of recording illegal content, including that illegally downloaded from the Internet, directly onto customers' mobile devices.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Turkey. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Turkey's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² The following chart is instructive of the overall shift from physical to online in Turkey. It demonstrates that the number of banderole stickers (intended to be used to distinguish legitimate product from pirate product) has steadily decreased while broadband connections have increased.

	ADSL SUBSCRIPTION	BANDEROLES
2004	450,000	43,934,423
2005	1,520,000	31,413,374
2006	2,800,000	25,801,106
2007	4,500,000	20,272,489
2008	6,000,000	14,612,952

³ According to the data on consumption of daily content from TTNET, the ADSL service of Turkish Telecom, users generally access P2P websites and file sharing web sites, such as those employing BitTorrent technology and sites like Emule which reportedly has around 3 to 5 million users. See <http://en.wikipedia.org/wiki/EMule>.

Retail Piracy, Optical Disc “Burning,” Imports: Pirate physical media remain a major issue in Turkey, although the problem has been curtailed in part by the growth of Internet piracy. There are essentially three forms of pirate optical discs found in the Turkish market today: local burning of pirated works onto recordable media, imports of pirate optical discs produced elsewhere (IIPA understands that while borders are better patrolled now, it remains easy for pirates to bring goods to Turkey from Iran on the Eastern border, but with some discs also likely emanating from Asia), and (to a lesser extent) locally produced factory discs. The significant decrease in street sales of locally burnt discs has pushed piracy under-the-counter in retail shops where shop owners burn CD-Rs or DVD-Rs to order, especially in cities outside Istanbul and Ankara, such as Izmir and Antalya. Shops also capitalize on Internet connectivity to engage in CD-R burning of content downloaded from the Internet, burning compilations on-demand to CD-Rs.

Business Software Piracy, Both End-User Piracy and Hard Disk Loading, Harming Right Holders: Unauthorized use of business software by corporate end-users, as well as hard disk loading, by which computers sold at retail are either pre-loaded with illegal software, or are sold “stripped” and later loaded with pirate software, cause significant losses for copyright holders in Turkey. Unlike other industries, which have benefited from market sweeps, the unauthorized use of business software in corporate settings requires a different approach, including campaigns aimed at getting information about 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. Hard disk loading is used to increase sales volumes of hardware. Sometimes, consumers apply pressure to lower the price by loading the hardware with pirate software, although awareness about piracy seems to have increased slightly in recent years.

Unauthorized Public Performances of Audiovisual Works: Unauthorized public performances of new and popular films using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theatres are still 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 and signal piracy of motion pictures also exists.

“Mix” Piracy Recordable Discs Remain a Concern, While Music Broadcast Piracy Wanes: On-the-spot music piracy remained a serious concern, especially in Turkey’s tourist hot spots: hotels (including well known international hotels), bars and clubs. In this form of piracy, illegal CD-R copies of the music played at such venues are sold “on the spot.” Moreover, most of the source music played in bars and discos derive from illegal copies or Internet downloads. Music broadcast piracy in Turkey has diminished over the past year. Collecting society MÜ-YAP signed a protocol with RATEM (the Radio TV Broadcasters’ Association). As a result, more than 700 radio and TV stations will be licensed by MÜ-YAP. Furthermore, most of the national radio and TV broadcasting has been licensed by MÜ-YAP (there are 32 national radio and 12 national TV stations in total).

Organized Crime and Corruption in Piracy Activities: IIPA learned that on June 23, 2008, the Istanbul Police Department Security General Directorate and the Organized Crime Branch Directorate ran raids against 86 locations in Istanbul in an operation named “Yarasa.” The target was an organized criminal group involved in the manufacture and distribution of pirate discs in various districts of Istanbul. The raids resulted in the seizure of more than 200,000 burned disks, 112 disc burners, and more than 4 million inlay cards. A number of law enforcement officials (a few police officers, a court usher and one officer from the Istanbul Inspection Committee) were among the 46 persons arrested and held in custody after the raids. The intelligence gained during the investigations showed that some of these law enforcement individuals were selling confidential information about planned raids to members of the gang, while others were re-selling seized pirate discs stored in the Inspection Committee’s warehouse to the pirates. The gang leader, who was also arrested, is well known to industry as his retail shop had already been raided seven times in the past. This example of organized crime and corruption is unfortunately not an isolated case in Turkey and IIPA recommends that the government take necessary measures to secure raids (for example, by keeping locations and dates secret from officers, removing mobile devices prior to raids) and to punish those found to be engaged in organized crime, e.g., through adding copyright infringement as a predicate offense to an anti-money laundering statute or to trigger asset freeze provisions.

ENFORCEMENT CHALLENGES IN TURKEY

Lack of Clear Authority to Run Raids on an *Ex Officio* Basis, Urgent Issuance of Circular Needed: In previous years, the specialized IP units established under the Ministry of Internal Affairs, Security General Directorate of the Police (a national and armed civil force) had no difficulty exercising their authority to conduct raids on an *ex officio* basis, and it has chiefly been through such raids that street and retail piracy has decreased. Unfortunately, under Law No. 5728 which went into effect in February 2008, the express *ex officio* language was changed, and while IIPA understands that it was not the intention of the legislature to remove previously held *ex officio* power from the Police, some officers refuse to run raids without a complaint, indicating that they are unsure the law still provides them with such authority. IIPA strongly urges the government to issue a formal circular stating that the amendment did not change the *status quo ante*, in other words, confirming that *ex officio* authority still exists as it had with the law prior to the amendment adopted in Law No. 5728. Authorities are taking raids *ex officio* but only under the banderole system, i.e., when pirate materials do not bear the obligatory banderoles. The motion picture industry group AMPEC conducted 693 investigations and 586 raids as of the end of December 2008. As a result, a total of 625,729 pirate DVD-Rs, 263,326 pirate CD-Rs, 10,418,434 covers, 253 CD-writers, 390 DVD writers, 59 duplicators and 41 computers were confiscated. A total of 576 cases have been initiated by AMPEC lawyers as of the end of December 2008. MÜ-YAP conducted 983 raids, netting 67,602 pirate optical discs, 1,673 MCs, 1,267,998 VCD/DVDs and 5,516,365 inlay cards.

Recent Criminal Convictions and Special IP Courts Notwithstanding, Courts in Turkey Fail to Defeat Recidivism, Need More Deterrent Sentencing: IIPA members report generally good relationships with the Police, Customs, and local authorities,⁴ but note some procedural and bureaucratic hurdles along the way. The problem begins and ends with the court system – the weak link in enforcement in Turkey against copyright piracy. At the outset, it should be noted that several positive verdicts have been achieved in recent years,⁵ and it is hoped that these will eventually lead to more verdicts like them and to a gradual reduction in piracy levels in Turkey. One positive development in the last several years has been the establishment of specialized IP courts, and five more IP courts were established in 2008, bringing the total number to 23. There are now IP courts in: Istanbul – 14 IP courts (seven criminal and seven civil); Ankara – six IP courts (two criminal and four civil); and Izmir – three IP courts (two criminal and one civil). Notwithstanding these positive developments, it is largely due to the very long litigation period and appeal stage that Turkey still suffers from a serious repeat offender problem. In almost all cases, criminal convictions result in suspended jail sentences or small fines, and even then, since almost all cases are also appealed, most pirates never pay the fine initially imposed. Due to continued court backlogs at the appeal level, many cases never get affirmed, are subject to amnesties, or are thrown back to the lower court since the law under which the defendant was convicted has been amended. Industry also reports that the specialized IP courts are seeing their cases overturned on appeal or negated through amnesty. Several other problems plague copyright cases headed for court:

⁴ For example, the municipalities and local police take actions to prevent the sale of pirate copyright material in public places such as streets, parks etc. Furthermore, there are administrative boards which are organized by the City Governorships, which take actions against sale of pirated material in public places.

⁵ For example, IIPA notes the following three cases, and also notes that according to the motion picture association group in Turkey, AMPEC, over 20 persons sentenced to fines for copyright violations were sent to prison since they were unable to pay the fines.

- **Uçar CD Plant:** Out of a series of raids in 2005, on January 17, 2006, the defendant owner of the Uçar CD Plant was sentenced to a term of imprisonment of 5 years, 7 months and 15 days, and was also fined approximately US\$120,000. Although the defendant appealed to the Supreme Court, his conviction and sentence sent a very important message to Turkey's pirate community.
- **Recidivist Video Shop Convictions:** On March 9 2005, two video shop owners in Istanbul were 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 were recidivists.
- **Recidivist Street Vendor Case:** An AMPEC operation against a street vendor in 2005 resulted in the defendant being sentenced to 14 months imprisonment and a fine.
- **Recidivist Video Shop "The End":** On April 9, 2007, the owner of a video shop, "The End", located in Istanbul was sentenced to an unsuspended prison term of two years, four months by the Istanbul Specialized IP Court. The defendant had been raided 36 times by AMPEC and the police (yielding cumulatively more than 130,000 pirate discs). The defendant was also ordered to pay attorney's fees and costs. The defendant lodged an appeal.
- **Halilogullari Case:** From 2003 to date, AMPEC organized 25 raids on the pirate shop "Film Dunyasi/Gumus Dunyasi" operated by the Halilogullari family, seizing more than 43,704 pirate CD-Rs, 18,157 pirate DVD-Rs and 1,311,320 pirate covers. In a landmark court decision at the Istanbul IP Court in 2007, the defendant, with a long history of IP offenses, was given an unsuspended prison sentence of two years, one month upon conviction for repeat offenses. The court refused to suspend the sentence in view of the likelihood that the defendant would commit another offense, and its suspicions were justified when three business addresses belonging to the same family were raided on September 17, 2007, netting more pirate product. The latest raid against the same shop was on December 18, 2008, and although the owner was in prison, the shop was full of pirate CD-Rs and DVD-Rs as well as covers.

- **Burdensome Attorneyship Law Requirements:** The Attorneyship Law remains problematic for right holders, as it forbids private entities from protecting third parties without having a local lawyer act on behalf of them as an intermediary. Specifically, the Law requires a local lawyer to be hired to act on behalf of the right holder for five key phases of any case: (1) to file an initial complaint with the public prosecutor; (2) to obtain a special search warrant from the judge; (3) to obtain a search warrant from the public prosecutor; (4) to conduct a raid with the police; and (5) to have the public prosecutor press charges and to provide assistance in the courtroom to obtain a conviction. Following the raid and the public prosecutor pressing criminal charges, the industry association's lawyer must immediately submit a petition of intervention to become a party to the case, or else cases which are lost in court cannot be appealed. This requirement should be relaxed in copyright cases, since industry expertise is important to the success of these cases. Otherwise, prosecutors will have difficulties proving their cases because of a lack of access to right holders' documentation.
- **Difficulty Obtaining Search Warrants:** Search warrants for criminal raids are difficult to obtain due to procedural rules requiring them to be obtained not from the newly formed specialized IP courts but from an ordinary criminal judge (in practice, the criminal judge requires far greater evidence than would be required from the specialized judge). Some right holders are finding it easier to obtain search warrants and decisions in relatively shorter time periods due to the growth of specialized IP courts. For some industries, public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case.
- **Evidence Left Behind:** Even when warrants are issued, prosecutors, especially outside the major cities, often will not accept large quantities of evidence, and in some cases for some industries, even by the order of the judge, pirate copies and evidence are left behind at raid sites with the accused.
- **No Presumption of Ownership in Some Cases:** The courts in small cities having untrained judges still do not, on many occasions, provide presumptions of ownership to rights holders, but instead impose burdensome documentary requirements on right holders to prove ownership. For example, 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. The notaries in Turkey charge inordinate fees. The audiovisual industry has experienced similar problems. These requirements at least violate the spirit of the presumption in Article 15 of the Berne Convention and Articles 11 and 80 of Turkish Copyright Law (which provide presumptions of ownership).
- **Evidence collection:** The process of collecting evidence should be eased, including, if necessary, legal provisions to grant private sector experts the competence to identify infringing materials, rather than leaving this to external experts appointed by the civil courts.⁶

Internet Enforcement Challenges Being Met; More Needs to be Done: IIPA members report largely solid cooperation among service providers in fighting Internet piracy, in no small part because of the government of Turkey's support in this effort, and because of a strong provision (Additional Article 4) of the Copyright Law which was added in 2004.⁷ In 2006, the Turkish government was one of the first in the world to facilitate blocking action against the "piratebay" website through Turkey's largest service providers, although wily users could still access the site through other means. The cooperation on Internet matters signaled a welcome level of support and led to more Internet enforcement against other websites involved in piracy in 2007 and 2008. In addition to working with Turkish Telecom to block certain access points to piratebay, in 2008, access to 287 websites was blocked upon the motion picture industry group AMPEC's applications based on the improved Copyright Law. An additional 1600+ websites have been blocked following injunction proceedings initiated by the recording industry group MÜ-YAP since August 2005. Nonetheless, some right holders sometimes face difficulties submitting evidence including Internet web pages for preparation for criminal prosecution, since some prosecutors still do not consider such pages as strong evidence. IIPA recommends that a cybercrime unit be developed and trained to handle cases specifically related to Internet-based piracy. IIPA urges the government to take steps to encourage the active cooperation of Internet service providers with right holders to prevent the use of networks for

⁶ In line with the Twinning Project's goals, such changes would bring Turkey's practice into line with similar practices adopted in the European Union.

⁷ Additional Article 4 of the Copyright Law No. 5846 specifically addresses the responsibilities of content and Internet service providers. Once an infringement is detected on a site, a cease and desist letter is sent to the site requesting the site to cease infringement within 3 days. If, after this period, infringement continues, a folder containing (a) the printouts of the site showing the infringements; (b) an investigative report about the site; (c) the "ownership license of work of art" related to the titles; (d) the WHOIS details of the site administrator. That folder is provided to a prosecutor together with a formal application to block the site in question. The prosecutor sends the "decision of closure" in no longer than one week (to Turkish Telecom), and access to the sites in question is blocked. Industry notes that Article 4 provides for "rules and procedures" to be issued by the Ministry, but these rules and regulations still have not been completed.

the commission of infringing acts, including but not limited to termination of accounts of repeat infringers. As an immediate first step to achieving this objective, the government should convene meetings of affected sectors to discuss ways to work cooperatively toward halting the transmission of illegal copyrighted materials on telecommunications networks.

Book Piracy Enforcement: In 2008, enforcement efforts remained consistent, with engagement between the book and journal publishing industry representatives and the Turkish government. In recent years, publishers have received significant, if occasionally inconsistent, cooperation, generally leading to good outcomes that send a deterrent message to potential and existing pirates. Efforts were reportedly made in 2008 to meet the needs of publishers, although independent enforcement action remains elusive.

Business Software Piracy Enforcement: The business software industry reported generally good cooperation from enforcement authorities in 2008 in seeking to improve the end-user software piracy problem. The business software sector seeks the assistance, as do others, of the specialized IP units established under the Ministry of Internal Affairs, Security General Directorate of the Police (a national and armed civil force) to combat end-user piracy infringements. Business software right holders appreciate their collaboration during raids, which are conducted on the basis of search warrants, against resellers of pirate software and end-user of pirate software. In 2008, Business Software Alliance members conducted a number of raids against corporate end-user piracy targets, which resulted in seizures of pirated material, and financial settlements paid by infringers.

Business Software Legalization Decree: IIPA welcomes the government of Turkey's issuance of a legalization decree for software in July 2008, and now calls upon the government to implement the Decree and set an example for businesses and consumers in Turkey. This follows a previous circular published by the Prime Minister calling upon all government agencies to legalize.

Banderole System Should be Administered by Rights Holders, and Right Holders Should Choose Whether to Forego Banderole Use As Appropriate: The banderole (sticker) system still does not function well as an anti-piracy tool for some industries in Turkey, although this is not universally the case (e.g., this is not the case for the motion picture industry). Indeed, it should be noted that, with the current uncertainty regarding *ex officio* authority, the banderole currently provides the only clear *ex officio* authority in the Police and Inspection Committee members, pursuant to Article 81 of the Copyright Law, and note that for products that do not carry Ministry banderoles, a complaint from the right holder is currently required to start an action. 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 there have unfortunately been very few cases against the unauthorized use of banderoles. One reason the system is not operating as well as it could is that development of an online banderole database at the Ministry of Culture to track stickers to particular titles, and which was scheduled to be put into operation by 2008 (and shared with Police), was postponed until the end of 2009. As such, the Ministry is left with searching paper files. Some plants have in the past held unnecessarily large quantities of unused banderoles, which were not secured adequately. This does not seem to be a major issue anymore, but the government must always be vigilant to the existence of fraud with these stickers. IIPA continues to urge the government to allow right holder associations such as MÜ-YAP and AMPEC (and others) to administer banderoles in 2009, but IIPA understands that this too has been postponed until the end of 2009.

Publishers note that the banderole system does not work for books at all, in that it does not work to curtail piracy as intended, and creates additional burdens and costs associated with doing business in Turkey. The government has hinted at possibly removing the banderole requirement as to published materials only, and IIPA supports such a change. It should also be noted that as copyright moves into the digital age, there is a marked decrease in the number of banderoles issued simply due to the decrease in physical product.⁸

⁸ The following tracks banderole issuance in Turkey between 2005 and 2008:

Banderole Issuance in Turkey 2005-2008				
	2005	2006	2007	2008
Local CD	12,526,294	13,558,571	13,495,433	10,358,441
Local Music Cassette	15,806,517	9,010,990	4,557,232	1,917,200
International CD	1,780,370	1,788,003	1,452,421	1,951,869
International Music Cassette	637,707	300,510	41,200	6,600
TOTAL	30,750,888	24,658,074	19,546,286	14,414,110

Storage Shortage for Seized Goods: 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 they recently leased a bigger warehouse to be used to store pirate materials. In addition, the new Director of the Istanbul Inspection Committee has also promised to secure a larger warehouse for storage, so it appears the situation is headed in the right direction. The following chart highlights some anecdotal information from the Security General Directorate on seizures arising out of their raids run in 2007-2008.

SECURITY GENERAL DIRECTORATE ENFORCEMENT STATISTICS 2007 AND 2008		
	2007	2008
TOTAL OPERATIONS	3,741	2,847
ARRESTED PERSONS	4,132	3,226
SEIZED MATERIALS		
CD/VCDs WITHOUT BANDEROLES	2,143,635	1,466,835
DVDs WITHOUT BANDEROLES	490,195	1,297,777
BOOKS WITHOUT BANDEROLES	234,715	575,243
VIDEO CASSETTES WITHOUT BANDEROLES	388	242
MUSIC CASSETTES WITHOUT BANDEROLES	27,785	8,153
PORNOGRAPHIC ISSUES	84,598	78,791
CDs/VCDs WITH BANDEROLES	12,165	6,046
DVDs WITH BANDEROLES	1	705
BOOKS WITH BANDEROLES	10,681	22,042
MUSIC CASSETTES WITH BANDEROLES	54,900	15,024
CD/VCD/DVD INLAYS	8,218,632	24,166,033
TOTAL SEIZED	11,285,567	27,636,891

TRAINING AND PUBLIC AWARENESS

Trainings in 2008: Copyright owners continued organizing regular trainings (e.g., for Police, Customs, prosecutors and judges) and participated in other events in Turkey in 2008. One notable event was a Ministry of Culture & Tourism and Ministry of Justice two day seminar for judges and prosecutors in Cesme/Izmir on May 12-13, 2008, in which various aspects related to the implementation of 2008 amendments (discussed below) to the Copyright Law were discussed. Around 60 judges and prosecutors from different cities and regions as well as chief police officers from key provinces were in attendance. An AMPEC representative made a presentation about the problems in practice after the new amendments passed, and suggested solutions. AMPEC also discussed the lengthy pendency rates of copyright infringement cases on appeal (many since 2004). A second notable event was a two week training seminar on intellectual property enforcement for judges and prosecutors held by the Ministry of Culture and Tourism, Ministry of Justice and Bilgi University in Antalya. The seminar topics included the importance of intellectual property protection, Turkey's specialized IP courts, prosecution of intellectual property crimes, the problems and solutions surrounding crimes against intellectual property rights, and enforcement. Participants included Supreme Court judges and prosecutors, and 50 other judges and prosecutors from various Turkish cities. AMPEC was one of the participating private sector organizations.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law and Related Laws Provide Mostly Adequate Protection, Including ISP Provisions: Copyright protection in Turkey derives from Law No. 5846 (1951), which was last amended in 2008 by Law No. 5728. The 2001 amendments (Law No. 4630) brought Turkey's copyright regime considerably closer to international treaties standards and implemented many of the requirements of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. IIPA welcomes the news that Turkey joined the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, effective November 28, 2008, but hopes that the government will amend the law soon to protect technological protection measures against circumvention, circumvention services, and trafficking in circumvention devices. Also, as noted above, under Law No. 5728 (February 2008), it is now unclear whether Police have *ex officio* raiding authority, an issue which IIPA urges be resolved quickly by a formal circular confirming that the amendment did not alter the previous *ex officio* raiding authority. One noteworthy development has been the enactment of Additional Article 4 in

2004 which, along with Law No. 5651 Regarding Regulation of Publications on Internet and Struggle With the Crimes Committed Through Such Publications in 2007, provides very strong takedown provisions to which service providers must adhere. However, infringement of intellectual property rights is not explicitly included. Therefore, these provisions fail to provide an ultimate solution for service provider cooperation in fighting online piracy. Article 4 foresees the introduction of a new regulation in this field, but so far, nothing has been put forward.

EU Twinning Project – Still Awaiting Results: Turkey participated until late 2007 in a European Commission “twinning partnerships” in which funding is given to Member States to work on institution building (legislation, administration, and implementation), and in respect of intellectual property rights, Turkey entered into a twinning partnership with Greece. There were 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, 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. Among the issues raised in the Information Society Directive implementation work area were 1) provisions on technological protection measures which would effectively implement the WCT and WPPT and ensure harmony with the Directive; 2) a reproduction right that is made expressly applicable to related rights; 3) provisions on exceptions, including an express provision stating the three-step test shall be applied to all exceptions and limitations, and narrowing other exceptions to meet international standards; and 4) ensuring provisions on private copy levies are in line with international standards, and in accordance with EC Directive 2001/29, to provide, *inter alia*, for the direct distribution of the relevant remuneration to right holders. IIPA looks forward to seeing the ultimate legislative results of this Project.

Private Copy Levy System: IIPA members do not generally believe private copying levies are the best way of addressing private, non-commercial copying, and it is critical that they address no more than such forms of copying in any event. However, Turkey has chosen to implement a private copy levy in the Ministry of Culture and Tourism “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” (April 13, 2006). As such, it is important that the levies are in fact collected and fairly distributed to right holders. Unfortunately, right holders do not receive any of the levies collected. Instead, the Ministry of Culture and Tourism collects and keeps the fees paid for recording equipment and blank media. This collected amount is not even used for useful anti-piracy purposes or in ways helpful to right holders. The system in Turkey should be changed as a matter of priority and in a way to make it compatible with international conventions and EU Directives.

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” (April 18, 2005), requiring facilities involved in recording (including optical disks), exhibiting, and distributing copyright works to receive certificates from the MOCT. 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 only 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. There are several grounds for cancellation, for example, if “it is determined that the certified facilities no longer meet the requirements for obtaining certificates,” or if “there exists a finalised court conviction arising from having violated the law” which is notified to the 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, since back in 2005, MOCT could not get all plants to register. 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.

RTÜK (Radio and Television Supreme Council of Turkey)⁹ Failure to Enforce Licensing As Pre-Condition to Broadcast: Radio and Television Supreme Council of Turkey has not taken necessary steps to fulfill its obligations under Law No. 3984 (which stipulates that conclusion of licenses with right holders is a pre-condition to engaging in broadcasting activities), since it has not enforced against broadcasters who do so without a license.¹⁰ Under that Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from TL125,000 (US\$76,000) up to TL250,000 (US\$152,000) and closure of the radio-TV station.

Proposed Trademark Law Provision Would Have Exempted 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 provision, with the possible intent of avoiding application of Turkish law to extraterritorial acts, would actually result in a violation of TRIPS at least as soon as such goods enter the Turkish border and infringement ensues. Parliament passed a new Trademark Law on January 28, 2009, but IIPA has not had a chance to review the new law to see if this amendment made it into the bill as passed; if so, it could prove quite problematic for IP owners in Turkey.

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

⁹ The Radio and Television Supreme Council – RTÜK, was founded as an impartial public legal entity that has broad competencies and responsibilities compared to its former position pre-1994. It is a statutorily mandated Council responsible for the regulation of the radio and television broadcasts all across Turkey. The Supreme Council is composed of 9 members who are elected by the Grand National Assembly of Turkey. See http://www.rtuk.org.tr/sayfalar/icerikGoster.aspx?icerik_id=be70e800-a512-4dd8-803f-857b504fd1f9.

¹⁰ The amendment in Article 37 of the Law on Radio and Televisions No 3984 provides that broadcasting organizations shall sign agreements so as to get an authorization from right holders or their Collecting Societies of which they are members, within the framework of the Law on Intellectual and Artistic Works No. 5846, and to pay the royalties.

criteria, including that the country provide "adequate and effective" copyright protection. Turkey enjoys enormous benefits under this program. Specifically, during 2007, almost \$1.13 billion worth of Turkish goods, or 24.4% of Turkey's total imports into the U.S. enjoyed duty-free GSP treatment. In 2008, \$916.7 million worth of Turkish goods, or almost 19.8% of Turkey's total imports into the U.S. enjoyed duty-free GSP treatment. Turkey must meet the discretionary criteria for adequate and effective copyright protection under the GSP statute in order to continue to qualify for this duty-free benefit.

TURKMENISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Recommendation: IIPA recommends that Turkmenistan remain on the Watch List in 2009.

Executive Summary: In 1993, Turkmenistan and the United States concluded a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on October 25, 1993. Sixteen years later, Turkmenistan has not implemented the IPR obligations in that agreement.

In April 2008, 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. Sixteen years after 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 not a member of the Berne Convention, the Geneva Phonograms Convention, or either of 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 to our knowledge.

IIPA recommends the following IPR legal reforms in Turkmenistan:

- 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 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, to 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 in practice to be meaningful.

- 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 infringers.
- 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, the Turkmen authorities must, at a minimum, commence police raids and seizures and 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), there are no known optical media plants in Turkmenistan.

The U.S. Government and Turkmen Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Watch List in 2009.

Executive Summary:¹ The persistent problem of physical piracy in Ukraine's many open air markets and street stalls, and the sharp increase in peer-to-peer and website-based Internet piracy, in combination with ongoing enforcement problems, continues to undermine the development of a healthy legitimate market in Ukraine. Illegal copies of recorded music, films, games and software are readily available at markets and shops throughout the country – and irregular criminal and border enforcement is causing material to flow freely in Ukraine, as well as to and from Russia and other territories. IIPA recommends that the Ukrainian Government re-double its efforts on-the-ground, and that it work to fix the investigative and prosecutorial systems, as well as undertake other legal reforms to improve enforcement, especially criminal enforcement, in Ukraine. One major positive development in 2008 was the establishment of a Music Industry Working Group at the initiative of Prime Minister Tymoshenko, which rapidly led to the signing of a Memorandum of Understanding between the Government of Ukraine and the music industry to work cooperatively to address the problem of hard-copy, Internet, and broadcast piracy. IIPA is hopeful that 2009 results in measurable and lasting progress as a result of this initiative.

In May 2008, Ukraine acceded to the World Trade Organization (WTO) and is thus obligated to fulfill the legal and enforcement standards of the TRIPs Agreement. In order to do so, and to improve the marketplace for the copyright industries, IIPA recommends that the Ukrainian government undertake the following critical steps to improve criminal enforcement and to enhance the IPR legal regime in Ukraine:

First, it should address its serious open air and street market piracy, focusing on the big outdoor markets like Petrovka and Radiolubitel in Kiev, Maya in Donetsk, Knyzhka and Sedmoy in Odessa, and Pivdenny in Lviv, as well as other sales occurring in the streets – and with long-term, not temporary, closures of illegal businesses. This will require public government pronouncements that such piracy will not be tolerated, followed by frequent and effective raids against these markets and, in particular, the many warehouses that supply them. Law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed. Stores, kiosks or warehouses found with illegal material should be closed down, and, after initial raids against these establishments, follow-up raids should continue with regular unannounced checks to clear these venues of illegal material. The target for raids should include retail stalls at or around underground stations, near local shops and supermarkets, as well as against retail stores that now regularly sell illegal product.

Second, the Government of Ukraine should follow raids and seizures, as well as Internet website takedowns, with criminal prosecutions and convictions against illegal retail or production operators, websites and others involved in commercial piracy. In fact, the Government of Ukraine should undertake criminal (not administrative) prosecutions, and impose deterrent penalties against those involved in retail piracy and all other types of commercial piracy – that is, against stall owners and operators, suppliers, and any large-scale distributors of pirated product, including over digital networks. Unfortunately, in lieu of deterrent criminal sanctions, large-scale operators and repeat offenders continue to be treated lightly by the courts, or not at all with respect to online piracy, and despite the fact that this issue has been discussed frequently in bilateral meetings, the Government of Ukraine has to date otherwise relied heavily on non-deterrent administrative penalties.

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALSUMMARY.pdf> See also the previous year country reports at <http://www.iipa.com/countryreports.html>.

Third, the Government of Ukraine should properly implement the Customs Code amendments adopted in November 2006 (in force February 10, 2007) which provided customs officers with *ex officio* authority. The adoption of these provisions was a positive step. Now we recommend that the government expand the specialized intellectual property rights unit within the customs service, and that it provide it with sufficient resources to effectively stop illegal material at the border since much of it is coming, at present, from Russia by train, car, and courier. The Government of Ukraine should 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 with specialized customs units.

Fourth, the Government of Ukraine – acting on the Memorandum of Understanding signed in 2008 – should make it a priority of enforcement agencies, prosecutors and courts to move decisively and effectively against Internet pirates, by targeting and taking down illegal websites, engaging Internet Service Providers to cooperate more actively with rightholders on enforcement (something they agreed to do for the first time in 2008), and acting against illegal peer-to-peer services. In addition, the Government of Ukraine should move more aggressively against on-line public performance, broadcasting as well as all other forms of Internet piracy – with a combination of legal reforms and improved enforcement.

Fifth, the Government of Ukraine should continue improvements in its optical disc media enforcement, most importantly, with the imposition of criminal penalties against producers of optical disc media at plants or CD-burner operations.

Sixth, Ukraine's hologram system should be substantially improved or repealed. The system has lacked transparency, and has serious loopholes and is not properly enforced resulting in wide-spread counterfeit holograms. The transparency problem seems to have been recently resolved through amendments to the hologram law (in October 2008), but the Government of Ukraine should urgently revamp, in close cooperation with rightholders, other parts of the existing hologram system and allow rightholders to play a key role in its administration and implementation, or it should eliminate the system entirely.

Seventh, the Government of Ukraine should ensure that Article 176 of the Criminal Code (and/or the Copyright Law) is amended to apply to all forms of piracy – for all works and uses on the Internet or other digital networks, including the copying and distribution of software, whether in physical or digital copies. Currently, the law only (clearly) applies to the illegal manufacturing and distribution of hard-copy works and sound recordings.

Eighth, the Government of Ukraine should amend its law to make camcording illegal (under the Criminal Code), and then move decisively against camcording operations in Ukraine

COPYRIGHT ENFORCEMENT IN UKRAINE

The Nature of Piracy in Ukraine in 2008: In addition to the rapidly growing problem of Internet piracy, one of the biggest problems in Ukraine for the copyright industries – of music, film, videogame and business software – remains the wide-spread availability of illegal material in open-air markets, such as Petrovka and Radiolubitel (in Kiev), Mayak (in Donetsk), as well as in Odessa, Lviv and other major cities. There has been little change in this problem in the past few two years.

Several years ago, the top priority for copyright enforcement in Ukraine was the unregulated production and distribution of optical discs. In 2005, Ukraine adopted significant improvements to its optical disc laws, and it agreed to participate cooperatively with the copyright industries on enforcement — including the commencement of joint surprise plant inspections, and the implementation of stronger criminal enforcement. 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. As a result of optical disc regulations, and mostly good cooperation between recording industry (IFPI/UAMI) inspectors and state inspectors (from the State Department of Intellectual Property, SDIP), there has been no new evidence of illegal production at the licensed optical disc plants in 2008.

One special court case involving optical disc production and distribution should be noted: the Rostok plant, was sued by rightholders in 2006 (in several separate cases) based on forensic evidence of large-scale production of illegal music CDs after it refused to permit inspections by IFPI, so that its production could be properly monitored. Early in 2008, in the first of several (nearly identical) cases, the Commercial Court of Appeals held that Rostok had illegally manufactured pirated CDs (musical recordings) in violation of the rights of the copyright owners (record labels). The court – reviewing the relevant forensic evidence – ordered Rostok to pay damages of 1.05 million UAH (approximately US\$135,400). This was a very positive development, correcting an on-going problem, as well as some serious misapplications of the Ukrainian law by the lower court. Rostok appealed the decision to the Higher Commercial Court of Ukraine. In June 2008, the Higher Commercial Court – ignoring or misreading the procedural rules and applicable laws, overturned the Appeal Court's decision, as well as the Court of First Instance's decision, ordering a complete re-trial of the case by a new panel (i.e., a different judge). In July, the rightholders filed an appeal with the Supreme Court of Ukraine to quash the Higher Commercial Court's decision – based on its misapplication of the procedural rules and law. Before the Supreme Court could rule, the Higher Commercial Court sent the case back to the Court of First Instance. The entire proceeding to date shows the deficiencies in regulating optical disc production and distribution as a civil, rather than a criminal, matter and the shortcomings of civil enforcement. The other cases against Rostok brought in 2006 are still awaiting consideration in the lower court.

While large-scale illegal industrial optical disc production has diminished significantly from its peak in 2000, large quantities of illegal optical disc material are still widely available in Ukraine. Some of it is being imported, predominantly from Russia, but most of it is being produced at underground CD-R burning operations in Ukraine.

In some cases, the smuggling operations and the CD-R production in Ukraine appear to be well-organized, which can only be effectively combated with criminal enforcement. For example, U.S. and Ukraine rightholders report that there are 50 stalls and kiosks at the notorious Petrovka markets owned by three individuals. The stalls/kiosks are regularly (weekly) re-stocked, and are especially and reliably supplied with pre-release CDs and DVDs. Rightholder groups also report a steady supply of material from Russia, through Ukraine (and sometimes, though to a lesser degree, in the reverse direction), as well as across the border from Ukraine into Poland and then to other countries of the European Union. The recording industry estimates that the bulk of the industrially manufactured pirated material available in Ukraine originated in Russia. Thus, there is the need for better border enforcement by Ukrainian authorities.

In addition to wide-spread hard copy piracy, there is wide-scale and rapidly growing peer-to-peer hosting and illegal websites located in Ukraine, for target audiences primarily in the countries of Western Europe and the United States, causing significant damage to US copyright industries, including the notorious torrent www.demonoid.com and several well-known paid illegal MP3 sites. These include free and pay-per-download musical and video websites, as well as streaming services.

Broadcasting and public performance piracy is estimated to be over 90%. Despite the fact that the Ukrainian Copyright Act provides for broadcasting and public performance rights, and collecting societies are in place, the overwhelming majority of users in Ukraine - radio and TV stations, restaurants, bars, shopping malls, dance schools, sports clubs, etc. – refuse to pay royalties to the relevant collecting societies. Thus, this is a very substantial problem.

Another on-going problem for the recording industry has been the proliferation of rogue collecting rights societies – such as Oberi'h – which falsely claim “licenses” to repertoire. Oberi'h lost its operating license in a lower court decision last year, and in January 2009, lost its appeal before the Kiev Administrative Appeals Court, to have its license reinstated. This means that Oberi'h is prohibited from operating as a collecting society; this will allow societies that are supported and licensed by the recording industry to strengthen their position in the legitimate marketplace. It is encouraging that the Ministry of Justice – as part of the Memorandum of Understanding Working Group process – has taken a position in support of the legitimate collecting societies, with an aim toward improving the licensing procedures and criteria for collecting societies (requiring societies to have a representative amount of licensed repertoire to be certified). We encourage the Government of Ukraine to work with the copyright industries to criminally prosecute the rogue societies and their operators that claim to offer “licenses” that they do not have, as well as to move against websites that rely, in bad faith, on these false licenses.

In 2008, the motion picture industry (Motion Picture Association of America, MPAA) reported its first-ever case in Ukraine (actually, two cases) against websites offering movies, music and games for pay-per-download. Criminal investigations have commenced in these cases. In the past, the MPAA reports that the only Internet cases brought were against websites offering pirated optical discs for sale (by mail).

One hindrance to effective enforcement against Internet piracy is the Law on Telecommunications (Article 40, paragraph 4 on the "responsibility of operators") which blankly states that Internet Service Providers (ISPs) "do not bear responsibility for the content of the information transmitted through their networks." Additionally, Article 38 states that ISPs can disable end-users from the Internet, or block access to (i.e., take-down) infringing websites only with a court order. In the past, the ISPs (the Internet Association of Ukraine, IAU) – citing this statutory language – have taken the position that rightholders need to go after illegal websites directly, without ISP assistance or cooperation. The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to work cooperatively to take-down illegal websites and slow illegal peer-to-peer traffic which accounts for 70% of the Internet use in Ukraine. In December 2008, the IAU agreed to work more forcefully with rightholders to reach mutually acceptable solutions to help stem Internet piracy. This is a positive step, further reinforced by a 2008 decision by the Prime Minister to establish a music industry working group, tasked with, among other things, finding solutions to effectively address Internet piracy. The recent Memorandum of Understanding signed between the Ukraine music industry and the Ministry of the Interior to work cooperatively in order to "systematically tackle Ukraine's endemic music piracy" is the first result of this working group. The Memorandum of Understanding provides a "framework" for dealing with Internet piracy and is a very strong statement and positive step undertaken by the Government of Ukraine – its goal is to include the facilitation of regular meetings on solutions to the problem, as well as drafting legislative changes as needed. In addition to this, it is essential that the Government of Ukraine (at the highest levels) encourages ISPs to pro-actively cooperate with rightholders in the fight against on-line piracy. If such cooperation and concrete results fail to materialize, then we would recommend legislative measures to do so.

An example of the problems confronting the industries is one from the Ukrainian recording industry which brought a case in 2007 against a Ukrainian illegal website (www.mp3.ua). At the lower court level, the case was successful. Then, on appeal, the case was later dismissed on procedural grounds, and the clearly-illegal website continues to operate. We urge the Government of Ukraine (Ministry of the Interior) to commence a criminal proceeding against this website operator and any other Internet service provider hosting pirate sites. In addition to criminal enforcement, Internet service providers should be civilly 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. In late 2006, cooperative efforts between ISPs, rightholders and the police, were effective in taking down some websites. Now with the 2008 Memorandum of Understanding, and the IAU pledge to work cooperatively going forward, IIPA hopes that Internet piracy will get the attention it deserves and that 2009 will be a year of improved enforcement.

In addition to downloading piracy, another common type of Internet piracy is via mail order – with orders placed on-line and delivered by mail. The Business Software Alliance (BSA) continues to report on the troubling increase in Internet-based piracy of business software. 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.

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, implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. According to official information from the SDIP (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 Ukrainian 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. Overall, the BSA reports (based on its preliminary figures) that piracy rates are at 85% and annual losses last year were at \$308 million.

The hologram stickering law adopted in 2000 failed to become an efficient solution for physical piracy in Ukraine. The eight-year history of this law shows that its inconsistent and haphazard implementation by the government has on many occasions seriously harmed the interests of legitimate copyright owners. At the same time, it has permitted suspect companies to receive thousands of holograms for foreign releases (music, film, entertainment and business software) for which they have no licenses despite objections from the legitimate licensees. Very often, the holograms are issued on the basis of false contracts and licenses which are not adequately verified. In such instances, pirate products are *de facto* authorized by the state for distribution and cannot be seized by law enforcement officials. Moreover, the problem of false holograms of superior quality exists, leading to the conclusion that the hologram stickers are not protected enough from counterfeiting. Practice shows that one out of every two products seized is labelled with a false hologram. The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$15 to \$20 for DVDs, compared to the pirate price of \$3 to \$4) and printing materials in Cyrillic for local distribution. However, rightholders cannot compete against the pirates without effective enforcement by the Ukraine Government to address the piracy problem, and to stop the misuse of the hologram system. IIPA recommends that the hologram system be completely revised by making amendments to the Law "On distribution of specimen of audiovisual works, phonograms, videograms, computer programs and data bases" which would bring transparency to the hologram sticker administration procedures and properly enforcing it, with input from rightholders.

All of the copyright industries – music, film, entertainment and business software companies – report problems with the administration of the current hologram stickering system. According to SDIP, this matter is being seriously considered by the Government of Ukraine. The Parliament is in the process of considering a new draft law that would obligate SDIP to publish on its official website information about all current applications for stickers, and to indicate both the names of the applicants as well as the names of all works (CDs) seeking labels. This publication would assist rightholders in tracking applications and could help to prevent the issuance of stickers for pirated discs. The copyright industries support this notion of transparency in the process; it would be a very good step forward to fix the stickering system, but other steps also need to be taken in the proper administration of the program in order to rid it of its current problems.

Entertainment software publishers (Entertainment Software Association, ESA) report particular and ongoing problems with the hologram stickering program. The hologram program, as it has for other industries, has been implemented in a haphazard manner. Stickers are issued to companies with little scrutiny as to the identity of the real rightsholder or controls over the appropriate issuance of such holograms.

The 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.

The major piracy problem for the motion picture industry, (MPAA) is hard-copy piracy of DVDs – often multi-title discs (some with up to 20 films) – sold at the major outdoor markets in Kiev, Donetsk, Odessa, Kharkiv, Dnipropetrovsk and Lugansk. In addition, pirated discs are sold at retail stores and kiosks, which are regularly stocked with new and pre-release material. The illegal material consists of professional pressed discs made in Russia and imported into Ukraine (due to poor border enforcement), as well as discs pressed at Ukrainian (CD and DVD) plants containing games and movies that the plants sometimes claim to be legal or "grey" discs (i.e., made for other markets), but which are illegal. 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 pirated and other product without authorization. Internet piracy is a growing concern of the motion picture industry with several sites offering movies (as well as music and

games) for downloading. In addition, almost every major motion picture released in theaters in Kiev or Dnipropetrovsk was vulnerable to illegal camcording (video recording) in the theaters – these illegal copies then make their way to the Internet. There is no anti-camcording legislation in Ukraine law, which means the police will not act, absent the passage of a law specifying this activity as illegal.

In 2008, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels remaining at around 60% for international repertoire, and losses estimated at over \$35 million (including losses from Internet piracy and mobile phone piracy in Ukraine). In addition, the music industry reports that only about 8% of the market is properly paying broadcasting and public performance royalties. Apart from the thousands of large and small public venues that do not have a license to play music, there are hundreds of broadcasters, including the largest state-owned broadcasters, who also operate without paying any copyright or related rights licenses.

For entertainment software publishers, a continuing concern is piracy at Internet and cyber cafés or “game clubs,” where pirated and/or unlicensed versions of videogame software are in wide use. Piracy of entertainment software persists despite recent efforts by police to initiate actions and raids, and to seize pirated videogames at retail outlets, warehouses, and Internet cafes. Enforcement, unfortunately, stalls at the investigative stage, with officials from the Ministry of Internal Affairs who have been largely uncooperative with most rightsholders. Investigations are unduly lengthy, costly, and non-transparent with little or no information shared with rightsholders about the progress of a case. Some cases, for example, that were first initiated in 2006 against retail operations and warehouses, are still on-going; these cases involve seizures of anywhere from 10 to 2,500 discs (although most cases average seizures of about 40 to 50 illegal discs). Even then, despite long investigations, it is rather common for cases to be simply dismissed or terminated without explanation.

Factory-replicated pirated entertainment software products on optical disc continue to be locally produced (and, with the flawed hologram system “legalized”) for sale in the market; some material is exported to Russia (although some illegal videogame product also continues to enter the country from Russia). Pirated entertainment software is generally available at large outdoor markets, through street vendors, and in retail establishments (which claim that the products are, to their knowledge, legitimate since they often bear holograms).

Effective Criminal Enforcement is Needed as a Follow-up to the Legal Reforms: The major “missing” component of the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing. This, coupled with ineffective border enforcement, has allowed wide-scale commercial piracy to continue in Ukraine. In some cases, commercial piracy operations act in concert 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, now that Ukraine is a member as of May 16, 2008.

Optical Disc Piracy and Enforcement: Although there is currently no evidence of large-scale industrial production of pirated 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. 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 could and should be used effectively against all forms of pirated product.

One positive step, which IIPA noted in the past, 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). Rightsholders report good cooperation from and with this unit. Another previously noted positive step was the General Prosecutor’s decision to reconstitute economic crime status to criminal violations of author’s and neighboring rights.

Complaints by right holders against the Rostok plant and CD Master plant in 2004 and 2005 were mishandled by the Ukrainian authorities. The plants should not have been allowed to continue their operations after detailed complaints were filed by the recording industry (IFPI), and the plant owners and managers should have faced criminal investigations and prosecution. However, in the absence of any action against Rostok by the government, the recording industry was forced to take civil (copyright infringement) action against this plant. As described above, these proceedings have proven

to be highly unpredictable and unsatisfactory for rightholders. Civil proceedings (with all of their procedural hurdles and obstacles) should not have been the primary tool to stop this illegal activity – this could more effectively be accomplished with proper criminal proceedings.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide sufficient 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, and enforcement actions are limited. In addition, as noted above, 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.

There are, at present, nine optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine – a total of 27 CD and/or DVD 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 70 million units per year, which far exceeds the estimated demand for legitimate CDs and DVDs in Ukraine.

Raids, Seizures and Other Enforcement Actions in 2008: The Government of Ukraine reported that, in the first 11 months of 2008, there were 998 intellectual property cases considered in the courts – 442 of which were for copyright and related rights violations, and 500 were for cases concerning the illegal distribution of optical discs. Additionally the government reported 646 IPR-related criminal cases (under Criminal Code Art. 203-1) were initiated which lead to some sanctions in 2008 (not specified in the report). Separately, 5,198 administrative protocols were issued based on intellectual property violations including the distribution of illegal audio and video tapes as well as discs. Over one million units of pirated audiovisual products were seized with a total value of 19 million UAH (US\$2.4 million), and counterfeited trademark products with a total value of 7.7 million UAH (US\$974,000). A total of 91 illegal underground production facilities were closed down, 48 of which produced pirated audiovisual products. Further, four Internet sites were raided -- two of these were sites selling optical discs and the other two against servers selling downloadable content (including film and music materials). However, the copyright industries reported that no criminal case (under Article 176 or 203-1 of the Criminal Code) resulted in an actual sentence served (even for repeat offenders).

The State IP inspectors reported that, in the first 11 months of 2008, 665 companies were inspected, including CD/DVD retailers, TV and radio companies, computer game clubs, and public performance outlets. These inspections resulted in 366 administrative sanctions, and the seizure of over 200,000 units of pirated product with a total estimated value of 3.6 million UAH (US\$455,000). The government further reported that, in these cases, the Administrative Code resulted in court-ordered seizures and the destruction of pirated goods. Last, the State IP inspectors carried out 74 inspections of Optical Disc plants and facilities in the first 11 months of 2008, according to the government (although they did not provide information of the number of surprise inspections, or the seizure and disposition of material at these plants and facilities). The copyright industries note that, at present, there are only 18 State IP inspectors nationwide for all IP matters. As such (and for a country of 46 million), we recommend that the government fund additional resources for IPR enforcement.

Overall, there have been an increasing number of raids and seizures over the past several years, but unfortunately, not enough action has been directed at large-scale commercial piracy. As a part of the 2005 amendments, Article 203-1 of the Criminal Code was modified to permit the police to initiate their own criminal actions without rightholder complaints. This positive step however, has not led to the type of effective enforcement envisioned. So even with an upsurge in seizures and investigations, this has not had a marked impact on the piracy problem in Ukraine. Similarly, although there were more administrative actions undertaken against stores, kiosks and other street piracy than in recent years, these actions were not coupled with severe enough penalties to deter these crimes. As in years past, almost all of the actions were directed against small-scale sellers and distributors.

In 2006, amendments to the Criminal Code Article 176 significantly lowered the previously too-high threshold for criminal prosecution (which had resulted in more administrative, in lieu of criminal, actions). However, the current threshold at 5000 UAH shows that any monetary threshold can serve as a bar to effective criminal enforcement. That is because it is so difficult – especially for Internet piracy matters – for law enforcement agents and prosecutors (and the

courts) to calculate the value of illegal file-sharing; thus, the threshold serves as a bottleneck to initiate criminal investigations and prosecutions as there is no official methodology for proving damages suffered by rightsholders for unauthorized online distributions. Additionally, the enforcement officials have applied the existing threshold on a per-rightsholder basis, which means that when illegal material is seized, if the material for each rightsholder does not exceed the threshold, the criminal case does not proceed. As a result, the hoped for criminal, rather than administrative proceedings, have not yet materialized. In addition, IPR-related offenses continue to be hampered by procedural problems such as the use of expert evidence. Additionally, there should be clear provisions for the automatic criminal prosecution of repeat offenders. Last, there needs to be clear sets of rules guiding procedure, and as needed changes in the Criminal Code or Criminal Procedure Code to facilitate better investigator and prosecutorial activities to avoid delays and case dismissals (as a result of delays), and practice guidelines issued by the Supreme Court for judges to develop expertise in Internet (and other IPR) cases. Although rightsholders and many Ukrainian government officials recognize the need for these amendments, there has been resistance from some in the Ministry of Justice, which is unfortunate.

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. Criminal sanctions (added effective March 2006) created additional penalties (of up to 7 years imprisonment) for organized crime syndicates.

The motion picture industry reports that over the last several 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 pirated products. According to MPAA statistics, in 2008, more than 985 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions applied against 5,568 individuals. In 2008, more than 1 million optical discs were seized by the police, almost all of which were copies without hologram stickers.

One ESA member company reported that in 2007, there were 20 cases involving its pirated videogame products. These cases involved the seizures of illegal games – ranging from 5 to 800 copies of the company's titles (noting that the total number of materials seized was likely higher as it included products from other entertainment software publishers). Unfortunately, of the 20 cases initiated in 2007, 14 remain pending with a prosecutor; two cases were initially dismissed, but on appeal were remanded to the prosecutor's office for further investigation. In 2008, ESA learned of only three new cases that were initiated by the police against retail outlets and warehouses. Enforcement is generally slow with investigations unduly lengthy in duration. Although the procedures call for an investigation (conducted by investigative officers of the Ministry of Internal Affairs) to be completed within 2 months, investigators can, and do delay cases for years, then terminate the cases – after 3 years – citing an inability to find culpability. For example, one ESA member company reports that a case initiated in January 2008 (involving over 2,500 seized games) is still pending due to pre-trial investigative delays at the Ministry of Internal Affairs, whose investigators exhibit a general unwillingness to proceed with criminal cases. Similar delays occur at the prosecutorial level. Court procedures – should a case get to court – are generally more efficient (typically the court issues a verdict after two to four hearings), although deterrent penalties are not meted out. For example, most court cases result in (up to two years of) suspended sentences. In 2008, one ESA member company reported that four of its five cases handled in 2008 resulted in a criminal verdict with damages awarded, but with suspended sentences. (One case was dismissed by the court but the court did order the destruction of the pirated product). The courts usually order the destruction of the illegal material after a verdict is rendered, but when cases do not proceed to court, the seized pirated product is routinely returned to the infringer, even when the rightholder's attorney requests the destruction of the clearly-illegal product. The pirated product then typically re-enters the retail market.

The copyright industries provided the following examples of raids, seizures and criminal investigations undertaken in 2008, including some against web operations:

- On February 20, 2008, the antipiracy organization (UAPA) assisted the security services and police in the investigation and closure of one well-known website (www.uadvd.com.ua). This website, first launched in 2006, distributed new release and pre-release motion pictures.
- On August 18, 2008, in Kiev, the police in cooperation with UAPA, raided a DVD-R laboratory. The raid resulted in the seizure of 12 DVD-R burners (with a capacity of 200 discs a day), plus three color printers,

2,000 blank DVD-Rs, 10,000 inlays, 2,000 jewel boxes, and 5,000 recorded DVD-Rs. A criminal case has been opened in accordance with Article Art. 203-1 ("Illegal distribution of optical discs without hologram stickers") of the Criminal Code.

- After months of joint cooperation and investigation with UAPA and the Economic Crime police in the city of Zaporozie, in November 2008, the police raided and closed a Ukrainian Internet website (www.link.zp.ua). The website (a content hosting site) offered users movies, music and games for downloading on the bases of subscription fee (a pay-per-download system). The service was run by a company called "KM LINK" in Zaporozie which maintains, develops and assembles computer networks, as well as acting as a service provider for downloading content. This was the first action undertaken by law enforcement in Ukraine against a pirate downloading website (all prior actions were against on-line sites selling hard-copy discs). A criminal case has been commenced (with the help of UAPA). Analyses of the servers revealed about 10,000 movies, music and games titles that were being offered as part of the download service. The police are proceeding with a criminal case in accordance to Article 176 of the Criminal Code. The company (KM LINK) employed 10 people; the person in charge of running the IPR unit responsible for the website was taken into custody and interrogated, and all the employees have been told that they are part of the investigation underway.
- Last, one of Ukraine's biggest sites (boasting over 1.5 million users), www.infostore.org, was closed by the police in December 2008. This site hosted child pornography which was the principle reason for the raid; an investigation is ongoing.

Internet Piracy: The rise in Internet piracy has finally drawn the attention of the Government of Ukraine with the establishment of the Music Industry Working Group and the subsequent signing of the Memorandum of Understanding between the music industry and the Ministry of the Interior in 2008. The motion picture industry would also like to sign a similar memorandum with the ISP association (IAU) to, among other things, set procedures for notice and takedown of illegal material. This is also a priority for the software industry – both to get cooperation with the ISPs, and to establish the rules of liability for users (and distributors) of software. It is estimated that there are over 400 ISPs in Ukraine and that over 150 of these support sites offering pirated DVDs (for, on average, US\$2 to \$5). In late 2007 and again in early 2008, for example, actions against ISPs, with cease and desist letters, showed that it is possible to act against Internet piracy, and 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. It is hoped that this issue, at least for the music industry, can be resolved in the new Working Group. The software industry, for example, reports that the lack of cooperation with the ISPs is the reason it has – temporarily – abandoned its focus on Internet piracy and focused instead on hard-copy piracy. In general, the copyright industries report that the lack of clear prosecutorial and court procedures for Internet-related cases is hampering the ability of the enforcement officials to act effectively against digital piracy. Or they report that existing procedures are too difficult to be used effectively. For example, the procedures require that prosecutors must know the exact name of the website owner and the local network user(s) to commence a case. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes.

Ineffective Border Enforcement: Ukraine still fails to properly police its borders. As a result, 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 – continues. There have been some minor seizures by customs authorities of CDs and other materials over the past several years, but cooperation with right holders is still not ideal and activity has not been nearly enough to stem the flow.

Some of the copyright industries report customs cooperation at 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 (MPAA), for example, continues to report that piracy persists as 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 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 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 (and do so as well, under Article 176 of the Criminal Code) — this disparity needs to be corrected. Without proper implementation of this authority by police and border officials, and without proper confiscation of pirated 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. Some of the copyright industries report that *ex officio* authority has not resulted in improved customs enforcement because of the successful smuggling of CDs and DVDs across borders, without passing through inspections and official declarations.

GSP BENEFITS

In 2007, \$44.5 million worth of Ukrainian goods benefited from the GSP program. In the first 11 months of 2008, that figure was over \$93 million.

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 full TRIPs compliance now that Ukraine is a member of the World Trade Organization) 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; (3) the adoption of an ISP responsibility framework that lays out the role and responsibilities of ISPs with respect to cooperative efforts with rightsholders in addressing Internet piracy; (4) the addition of key administrative remedies; (5) a major overhaul or abolition of the hologram stickering program; and (6) criteria for collecting rights societies (so that, only organizations with a relevant repertoire of material can be certified). 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 revised Civil Procedure Code (since the Civil Code does not apply to administrative remedies).

Copyright Law: The Copyright Law of 2001 fixed several major deficiencies, but some problems remain, 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. The Government of Ukraine has pledged that it will give rightholders and U.S. Government experts, at an early stage of the next consideration of the draft bill, an opportunity to comment. We commend this procedure as it will help to ensure that any new law is compatible with international norms and business practices.

Criminal Code and Criminal Procedure Code: The Criminal Code was completely revised in the past several years, including amendments in 2007 (May 31, 2007). The 2006 amendments lowered the threshold for criminal

responsibility under Article 176 to one-tenth their former level. This was a very positive step. The criminal code provisions sanction both copyright and neighboring rights violations. The 2007 amendments (to Articles 176 and 203-1) require the compulsory destruction of seized pirated material, as well as production equipment, in criminal cases. This was another positive step.

There are several key provisions that still need to be added. First, as noted, Article 176 of the Criminal Code does not clearly apply to many forms of piracy (i.e., on the Internet), but only (clearly) to hard-copy piracy – this must be fixed urgently. Article 176 is often interpreted by law enforcement authorities as only applying to the manufacturers and distributors of illegal copies, but not to businesses which regularly use illegally copied software. In addition, a provision for “administrative recidivism” should be revised so that a repeat infringement (within 12 months) would automatically lead to a criminal, not administrative, prosecution.

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), in force in March and May 2002, respectively. 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. IIPA continues to urge the Government of Ukraine to 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 2,538 UAH (US\$321) to close to 5,076 UAH (US\$642) – 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 entered into force on January 1, 2004; it was again amended in 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 1,319 UAH (US\$167) (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 2,032 UAH (US\$257) for the first application; 1,015 UAH (US\$128) 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.

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, and there were no new developments in 2008.

UZBEKISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Uzbekistan remain on the Watch List in 2009.

Executive Summary: In November 1993, Uzbekistan and the United States signed a bilateral Trade Agreement (in force, January 13, 1994). The agreement conferred Normal Trade Relations (then known as “Most Favored Nation”) status on Uzbekistan, in exchange for Uzbekistan agreeing to adopt critical IPR legal reforms, and to comply with international copyright treaty norms. In a series of meetings with IIPA and the U.S. Government in 2002 and 2003, the Government of Uzbekistan pledged to finally adopt its 1994 commitments into its IPR legal regime. It never did, and now fifteen years after the 1994 Trade Agreement, some of the most basic protections continue to be denied rightholders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention, it does not provide any protection or rights for U.S. or other foreign sound recordings; further, it does not protect pre-existing foreign works prior to 2005 as a result of a reservation it made when it joined the Berne Convention (in contravention to the Convention and the 1994 Trade Agreement).

In April 2008, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List, noted ongoing concerns “about Uzbekistan’s lack of progress on IPR issues” in particular, its Article 18 reservation pertaining to Berne Convention accession, and its failure to join the Geneva Phonograms Convention or the WIPO “digital” treaties (WCT/ WPPT). The U.S. Government announcement noted many legal and enforcement reforms that Uzbekistan needs to enact in order to comply with its international obligations (including, the 1994 U.S.-Uzbekistan Trade Agreement). The USTR noted that “IPR enforcement in Uzbekistan remains weak.” As a result, a decision should finally be made to deny Uzbekistan trade benefits and preferences including its eligibility to participate in the Generalized 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.

LEGAL REFORM DEFICIENCIES

The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional copyright law amendments were adopted in 2000. Separately, Uzbekistan adopted a Law on Computer Programs and Databases, which was amended in 2002. In July 2006, Uzbekistan adopted a new Law on Copyright and Related Rights (in force, July 20, 2006).¹ The 2006 Copyright Law was aimed – according to the Government of Uzbekistan – at harmonizing Uzbek law with the requirements of the Berne Convention and WTO/TRIPs, which the government hopes to accede to at some future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technological protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and, extensive provisions and regulations involving collective administration (chapter 4 of the law). The Copyright Law could have benefited from more input by copyright rightholders, and as a result, is either missing key provisions (protection for pre-existing works and sound recordings), or has several unclear or incomplete protections (such as, those pertaining to technological protection measures).

In 2005, Uzbekistan finally adhered to the Berne Convention (effective April 19, 2005). Unfortunately, as noted, 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

¹ Note, IIPA has and bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have English translations of these laws/regulations).

Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne (and the 1994 Agreement). Uzbekistan must withdraw its reservation immediately and provide clear protection for pre-existing works (and separately, for sound recordings as well).

On November 30, 2005, IIPA testified at the GSP country practice hearing regarding Uzbekistan's legal deficiencies. After that hearing, the U.S. Government asked IIPA for a list of "steps that the Government of Uzbekistan should take with respect to protecting IPR in order to retain GSP eligibility." IIPA provided the U.S. Government with eight recommendations for improving IPR in Uzbekistan, in a written response on December 14, 2005. Those steps – then and now – are:

1) Notifying the WIPO that the Government of Uzbekistan removes its reservation to Article 18 of the Berne Convention so that Uzbekistan can properly provide protection – as required by Berne and the U.S. Bilateral – for pre-existing works.

2) Joining the Geneva Phonograms Convention.

3) Clarifying in the Uzbek Copyright Law that pre-existing works and sound recordings are protected in Uzbekistan for a minimum of 50 and preferably for 70 years (the U.S. provides over 70 years of such protection to foreign works and sound recordings).

4) Ratifying and fully implementing the WIPO Copyright Treaty ("WCT"), and the WIPO Performances and Phonograms Treaty ("WPPT").

5) Fixing the deficiencies in the Copyright Law including: (1) the absence of an exclusive public performance (or making available) right for producers of sound recordings, at a minimum for digital transmissions (in lieu the current law provides only a right of remuneration for the public communication of the recording, broadcasting, or communication to the public by cable); and (2) delete the onerous provisions that over-regulate the terms and conditions of authors' contracts.

6) Adopting clear civil *ex parte* search procedures into the Uzbek law.

7) Amending the Customs Code to provide customs officials with the proper *ex officio* authority (including not adopting a proposed registration system for customs enforcement which will weaken, not strengthen, enforcement at the border).

8) Amending the Criminal Code (and/or Criminal Procedure Code) as follows:

i. To provide for liability for infringement of neighboring rights violations (i.e., crimes involving the pirating of sound recordings).

ii. To toughen the existing penalties which are too weak because: (1) there are currently 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. The IIPA recommends that the first provision be deleted; and the second (50 to 100 times) be raised considerably to at least 500 times the minimum wage.

iii. To add the proper *ex officio* authority for police and prosecutors to commence criminal copyright cases.

IIPA again testified at the U.S. Government's GSP country practice hearing regarding Uzbekistan's legal deficiencies on October 4, 2007. Over three years after we created the list above, and after two rounds of hearings on this matter, to the best of our knowledge, Uzbekistan has failed to undertake at least seven of these eight steps. It did adopt a copyright law (step #5), which as noted, still has deficiencies.

Recommended Legal Reforms

IIPA recommends the adoption of the following legal reforms and treaty accessions in Uzbekistan in order to provide for effective copyright protection and enforcement:

- 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.
- 12) Correct deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
 - i. Providing protection for pre-existing works and sound recordings.
 - ii. Adopting an exclusive right of public communication for sound recording producers for the recording, broadcasting, or communication to the public by cable (which appears to be limited to a right of remuneration in Article 51).
 - iii. A clarification about the scope and application of the rental right for audiovisual works and computer programs (Article 21).
 - iv. Improvements, consistent with the digital treaties (WCT and WPPT), to the provisions pertaining to technological protection measures (Article 63) and rights management information (Article 64).

v. Deleting the onerous provisions (found in Articles 38 through 42) that over-regulate the terms and conditions of author's contracts.

Other Legal Reforms

Although Uzbekistan has proposed and/or made changes in some of these areas previously, these proposed changes were not always adequate to fix the deficiencies. 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 — this latter problem appears (in the unofficial translation) to have been corrected by Article 4 of the 2006 law.

IIPA is unaware of any recent amendments to the Criminal Code following passage of the 2006 Copyright Act to adopt deterrent penalties for intellectual property violations. Drafts to amend the Criminal Code were circulated several years ago, but, to our knowledge, never adopted. In fact, a 2004 draft would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties are 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 — are much too low to be deterrent penalties as needed. If a similar draft is proposed, IIPA would recommend that the first provision be deleted, and the second provision (regarding the minimum wage), be raised considerably to at least 500 times the minimum wage, as has been done in other countries.

A (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.

ENFORCEMENT PROGRESS AND (GSP) TRADE BENEFITS

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 the first 11 months of 2008, Uzbekistan benefited from \$1.9 million worth of GSP benefits (compared with \$2.7 million for all of 2007). 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. The IIPA recommends that the U.S. Government should remove Uzbekistan from eligibility to receive GSP benefits because Uzbekistan is not complying with the IPR eligibility requirements for GSP benefits, namely the requirement to provide "adequate and effective" copyright protection and enforcement. Further, 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, and pre-April 2005 works (i.e., books, films, music, software) it needs to commence enforcement actions. Such actions should begin with police raids and seizures at a minimum, and it must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions. There are reports of some actions against retail shops that sell pirated product, which if true, are a positive step.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), illegal musical CDs produced in neighboring countries 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.

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should remain on the Watch List.

Executive Summary: The recent article in CNET, “Vietnam: Where Pirated Apps Match Personal Budgets” speaks volumes about the piracy situation in Vietnam.¹ Piracy remains an open and often brazen commercial act in Vietnam providing high profitability and little risk to pirates. Vietnam has among the highest piracy rates in the world and mounting losses due to piracy. The Internet represents the new horizon, and there is too much activity to expect an *ad hoc* approach by the government to be effective. IIPA commends the government of Vietnam in 2007 for agreeing to procure legal software, acting administratively against the unauthorized use of software by businesses and government, and helping to reduce signal theft by removing pirated international channels from local operator VTC. Notably, it appears that corporations, that once infringed with impunity, now take IPR more seriously and are willing to discuss settlements to avoid sanctions. In 2008, unfortunately, less enforcement activity ensued against end-user business software piracy, and music and other forms of piracy soared, especially on the Internet, despite some cooperation from the government in detecting and removing online piracy. In 2007, the United States signed a Trade and Investment Framework Agreement with Vietnam, and in May 2008, Vietnam formally applied to the United States Trade Representative for eligibility to receive benefits under the Generalized System of Preferences trade program. Vietnam also has expressed interest in joining the Trans-Pacific Strategic Economic Partnership Agreement. Now more than two years after joining the World Trade Organization, the government of Vietnam must demonstrate that it plays by the rules and deserves the beneficial treatment accruing to GSP beneficiaries and free trade partners, and that it has the will to recast itself from its current label as a piracy haven.²

Priority Actions Requested in 2009: IIPA requests that the government of Vietnam take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Adopt a more coordinated and better financed ‘zero tolerance’ policy to reduce online piracy, including a regulatory approach (e.g., notice and takedown) and further cooperation among service providers. Target cases should be prosecuted at court against egregious cases of Internet piracy, and administrative authority should be exercised to prevent unfair business practices and address activities of commercial entities that actively facilitate infringement. Government-run networks (including university networks) should be monitored closely to minimize infringing activity.
- Reduce physical piracy through devotion of greater resources and manpower to provide a deterrent against infringement, including targeting sources of pirate production like CD-R burning facilities, pirate distribution warehouses, pirate retail shops selling CDs and DVDs, businesses engaged in end-user piracy of software, and illegal reprinting or photocopying facilities. Remedies should include tough administrative fines under the 2008 Revised Ordinance, license revocations, shop closures, and criminal penalties through prosecutions at court under the February 2008 Criminal Circular.

Legislation and Market Access

- Retain criminal remedy provided under the Criminal Circular (February 2008).
- Join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Afford U.S. right holders with access to the market in Vietnam, by eliminating foreign investment restrictions and other barriers to entry with respect to production, importation and distribution of physical product, and importation and distribution of product online and through mobile networks, in order to provide a legitimate alternative to pirate product.
- Pass optical disc licensing regulation.

¹ Dong Ngo, *Vietnam: Where Pirated Apps Match Personal Budgets*, at http://news.cnet.com/8301-17938_105-10122530-1.html.

² In June 2008, on the occasion of the visit of Vietnamese Prime Minister Nguyen Tan Dung, a Joint Statement noted, “two-way bilateral trade topped \$12 billion in 2007 and that the United States is Vietnam’s top export market.” Office of the Press Secretary, *Joint Statement Between the United States of America and the Socialist Republic of Vietnam*, June 25, 2008, at <http://www.whitehouse.gov/news/releases/2008/06/20080625-4.html>.



VIETNAM										
Estimated Trade Losses Due to Copyright Piracy (<i>in millions of U.S. dollars</i>) and Levels of Piracy: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	123.0	83%	120.0	85%	53.0	88%	21.0	90%	30.0	92%
Books	NA	NA	17.0	NA	18.0	NA	16.0	NA	16.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	10.0	NA
Records & Music	NA	95%	NA	95%	NA	95%	NA	95%	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	123.0		137.0		71.0		37.0		56.0	

PIRACY CHALLENGES IN VIETNAM

Internet Piracy Exploded in 2008: In 2008, Internet piracy exploded in Vietnam. Vietnam has seen rapid growth in Internet usage as well as mobile device penetration. Vietnam now boasts over 20.2 million Internet users (23.4% penetration) as of June 2008, up from 18 million in 2007, according to Vietnam Internet Network Information Center. This number is well above the regional average of 15.3% and with a higher penetration rate than either Indonesia or Thailand. According to VNNIC, as of August 2008, Vietnam had nearly 1.8 million broadband Internet connections, a 50% increase over the previous year. Industry has notified the government of Vietnam of many sites that provide illegal content, including music, movies, software, games, and published works (with reports of growing electronic piracy of textbooks and dictionaries, among other published products). University networks are increasingly used for dissemination of infringing content. Vietnam's national television station has also been negatively impacted by online piracy. As an example, the station held the rights to broadcast the "Ms. World Pageant" live. However, after the pageant's organizers discovered that many online sites had infringing content or rebroadcasts on their websites, they cancelled the contract. As a result, most of the "Ms. World Pageant" was not shown, causing many of the advertisers to pull out of their ad deals.

Industry sources indicate Internet piracy comes in the form of illegal downloads from hosting websites, deep links, in which a website contains links to pirate material hosted by third-parties, with Socbay and Zing as examples, piracy-oriented search engines, peer-to-peer (P2P) downloading services, and cyber-locker solutions, whereby users can store all their illegal copies on a server available anytime to them from anywhere. Pirates do not discriminate between Vietnamese and foreign works, and the Internet pirates involved offer large number of infringing files including local, regional and international works.

Mobile Device Piracy Also Soared in 2008: With mobile penetration also skyrocketing in Vietnam, estimated at 52.4 million mobile devices as of October 2008 (according to the International Telecommunications Union),⁴ or 60% mobile penetration, it is no wonder Vietnamese are obtaining their content from digital sources, since so much of it is being used on mobile devices.

Physical Piracy Dominates the Market, Although Major Cities Improved Marginally: The markets in major cities like Hanoi and Ho Chi Minh City remained mired in physical piracy, although with the development of the Internet, some physical piracy began to migrate to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên where Internet connectivity is less developed. As a result of piracy, all industries suffered, leading to further deterioration of an already strained economy for local Vietnamese working in the creative industries. Press reports have prices in Hanoi for movies at about VDD15,000 (US\$0.87) per DVD, and half of that for an audio CD. The author of a recent article on the topic notes, "[t]hese shops are open, just like any legitimate business."⁵ In fact, for the music industry, with piracy levels still

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Vietnam. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

⁴ *Vietnam Mobile Market Shows Skyrocketing Growth Despite Economic Turmoil*, at <http://www.itu.int/ITU-D/ict/newslog/Vietnam+Mobile+Market+Shows+Skyrocketing+Growth+Despite+Economic+Turmoil+Vietnam.aspx>.

⁵ See *supra* note 1.

over 90%, financial returns dropped so deeply in 2008 that the companies involved were unable to invest in new albums and artists. Instead, companies operating in Vietnam have shifted their focus to different revenue streams, such as ring tones, ring-back tones, ancillary revenues for personality rights, and music channel licensing. Even the Copyright Office of Vietnam understands that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights”.⁶

Optical Disc “Burning” and Some Factory Production in Vietnam Continue to be Major Irritants: Optical disc pirates continue to operate, as technological advances in Vietnam and lax enforcement of the laws have made Vietnam an attractive place for pirate optical disc manufacture in recent years. The government of Vietnam understands (and has been informed by U.S. contractors) that eight optical disc plants operate in Vietnam, with an estimated production capacity of at least 42 million discs per year. This capacity dwarfs any rational legitimate domestic demand. Where factory discs are not available, piracy storefronts are more than happy to supply any content on recordable discs, complete with hacking or cracking instructions for those products embedded with technological measures to protect the original discs from being illegally accessed or copied.⁷ Vietnamese-sourced pirate products flood the domestic markets and have been found in other Asian countries, Canada, the Czech Republic, and Poland in recent years. The industries have intelligence that syndicates outside Vietnam have established replication facilities in the Mekong River countries (Laos, Cambodia, Myanmar, Thailand, PRC and Vietnam) largely in response to Vietnam’s booming economy. Apparently these underground plant operators are increasing production in order to respond to higher disposable income rates in Vietnam and a resulting desire among Vietnamese consumers for the latest western music and movies.

High Levels of Business Software End-User Piracy Persist in Vietnam: The rampant use of unlicensed software in the workplace by businesses continues to cause the greatest revenue losses to the software industry, thereby stunting the growth of the IT sector. Retail piracy and hard disc loading continue to cause losses as well. Most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots.

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers continue to suffer from overwhelming piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copy shops all sell illegal copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers who engage local production. 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 also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. This type of misuse hurts legitimate local and foreign publishers alike, resulting in distribution of unauthorized books through the mainstream state bookshops. Government publishing houses could help reduce piracy by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy. Universities, likewise, should play a role in reducing piracy of academic materials. Online piracy of books and journals grew significantly in 2008, with university networks among the biggest hosts for illegal content (e.g. hcmut.edu.vn).

Signal Piracy: IIPA is pleased to report that Vietnam saw a “dramatic fall” in illegal pay TV connections. The improvement has been attributed largely to the removal of pirated international channels from local operator Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telecommunications. Nonetheless, industry reports that there remain challenges in this market that continues to rapidly evolve.

ENFORCEMENT CHALLENGES IN VIETNAM

Overall Lack of Resources and Deterrence Equates to Continuing Prevalence of Piracy: The Vietnamese government continued to cooperate with certain right holders to try and curtail piracy in 2008. Nonetheless, the Copyright Office of Vietnam admits that the Ministry of Culture, Sports and Tourism “has made every efforts [sic] but is unable to

⁶ Copyright Office of Vietnam, Overview of Copyright in 2008, January 19, 2009, at <http://www.cov.gov.vn/English/viewNew.asp?newId=217&rd=20090202or146>.

⁷ See *supra* note 1. The author is quoted notes regarding the pirate software found in neighborhood shops in Hanoi, “These software applications, of course, come with “crack”—a hacking application that allows for bypassing the vendors’ antipiracy mechanism. All are guaranteed to work; if not, you’ll get another copy that does or get your money back.”

meet the requirements to establish order in the field of copyright and handle strictly the organizations and individuals who violate copyright, related rights.”⁸ Aggregate statistics provided on the website of the COV (<http://www.cov.org.vn/Vietnam/home.asp>) in its 2008 report indicate that the Ministry has “examined and settled” 20 cases involving copyright piracy (both physical and Internet apparently included), meting out administrative fines of a grand total of VND 225 million (US\$37,087).⁹ Under any circumstances, given the amount and scope of piracy in Vietnam, these amounts cannot have provided a deterrent to further infringements in the country. While intentions seem positive, the lack of effort and results, and frankly, the *de minimis* level of fines being meted out, indicate to IIPA that the government has thus far failed to organize itself in a way that will allow it to significantly reduce piracy in Vietnam. Finally, notwithstanding the existence of a criminal remedy (under the Criminal Code, and under the February 2008 Criminal Circular, discussed below), no criminal convictions for copyright piracy have ever been meted out in Vietnam.

Devotion of More Resources to Defeat Physical Piracy Required: Simply, the government must devote greater resources and greater manpower in order to achieve significant reductions in physical piracy. While *ex officio* actions commenced in 2007 in the form of unannounced sweeps of shops dealing in pirated DVDs, VCDs and CDs, such activity waned in 2008. Only a ‘zero tolerance’ campaign against open and blatant piracy activities of all kinds, with deterrent administrative fines, meted out to their maximums (including new maximums under the Revised Ordinance on Administrative Penalties, effective August 1, 2008), license revocations, shop closures, and criminal penalties, can result in a significant reduction in piracy in Vietnam. Regarding book piracy, the publishers note that so far, universities have been relatively passive in legalizing usage of published materials on campuses, except for some positive steps in this regard by particular universities in Hanoi. Universities need to become more active in ensuring that and that campus facilities, photocopying machines and networks alike, are used for only legitimate purposes.

Internet Piracy Requires Coordinated Response from Well-Trained Professionals: The government of Vietnam needs to devote additional resources, time, expertise, and equipment, in order to build capacity, train its officers, and ultimately, take needed actions to reduce Internet piracy in 2009. In 2008, MOCST, Ministry of Information & Communication Inspectors, and Police officers inspected several infringing sites, resulting in some administrative punishments. The COV reported fining FPT, a major Vietnamese IT company, in the amount of “20 million VND” for “for transmitting films without permission from some big broadcasting organizations in the world.”¹⁰ There have also been some positive responses from service providers related to specific sites of concern.¹¹ While the answers in all cases have not been wholly satisfactory, and while services “baamboo,” “timhanh,”¹² “ephim” and “zing” (for some repertoire) remain sites whose business model appears to be based on providing access to infringing materials in the online space, overall, IIPA views as encouraging the willingness of service providers to work with right holders to take down infringing material, and the COV’s willingness to engage with the alleged infringers on behalf of right holders. With the mobile market expanding so rapidly in 2008, estimated to rise to 70% by 2009, the government of Vietnam must remain vigilant and resist any attempt by pirates to established fixed mobile device piracy shops or services.

Business Software End-User Piracy Enforcement Waned in 2008: The government has issued Decision No. 51 with the goal for Vietnam to reduce its software piracy rate to at least meet the level attained by other countries in the region. Unfortunately, the Business Software Alliance reported only six end-user raids in 2008, a decrease from 2007. The government of Vietnam reported inspecting 1,200 computers in 2008 for unlicensed software, and indicated that some of the businesses inspected admitted using unlicensed software. In each of these cases, right holders filed complaints and

⁸ In Vietnam, the Inspectorate of the Ministry of Culture, Sports & Tourism is the leading enforcement agency, with the Division of High-Tech Crime (economic police of the Ministry of Public Security), the Customs General Department (under the Ministry of Finance) (which may suspend goods suspected of infringing copyright from entering the channels of commerce), the Market Management Bureau (under the Ministry of Industry & Commerce) (which deals principally with illegal imports being sold in Vietnam), the Inspectorate of the Ministry of Information & Communication, and the courts at various levels (under the Supreme Court) all having their own competence in certain areas to enforce copyright. The MOCST Inspectors have the right to administer administrative punishments, while MIC Inspectors may also administer punishments or remedies when the Internet is involved, and have been involved in dealing with infringing sites upon request of an MOCST Inspector.

⁹ See *supra* note 6.

¹⁰ *Id.*

¹¹ For example, upon sending notices to “sobay” and “zing,” those site operators removed some of the links mentioned in the notice. IIPA notes optimistically that FPT has shown responsiveness and a willingness to take down infringing material with respect to most sites it has been notified about, including “nhacso,” which reportedly fully cooperated in taking down infringing music material. IIPA understands that FPT remains in license negotiations or already has licenses from some major copyright owners.

¹² IIPA understands that the government may be pursuing Bamboo and Timhanh on Internet piracy; if so, this is also welcome news.

provided information and support. However, administrative fines arising out of these are non-deterrent, as they did not even amount to the cost of legalizing. The authorities have never taken *ex officio* raids against businesses engaged in end-user piracy of business software. This level of enforcement clearly cannot suffice to remove piracy from the markets.

In order to improve relations and foster greater awareness of software end-user piracy and build capacity, the Business Software Alliance provided seminars and workshops for officers of MOCST, the Police, District and higher court judges and officers of the court, all relating to the investigation of end-user piracy of business software. Such workshops were held in Ho Chi Minh City and Hanoi in February 2008, and in Đà Nẵng in April 2008. Another important capacity-building activity was the establishment in August 2008 of a Memorandum of Agreement establishing the “Partnership in Protection of Software Copyright” between BSA, the Vietnam Software Association, the Inspectorate of MOCST, and the Copyright Office of Vietnam. This MOA is intended to lead to an intensification of cooperation and coordination efforts in protecting computer programs, and enhance inspections of suspected copyright violations. Anecdotal information indicates that the BSA marketing campaign which publicized the MOA and the enforcement actions initiated by BSA members has heightened IP awareness in the country.

Courts and Judicial Reorganization: There have been very few cases involving copyright reaching final court decision in Vietnam, and thus, the courts have not been well tested and lack clear direction on how to handle copyright cases.¹³ Prosecutors have brought no cases to IIPA’s knowledge under the Criminal Code or the February 2008 Criminal Circular. This failure of the judicial system in 2008 is perhaps the greatest single disappointment for right holders, who hoped that finally, the laws in Vietnam would be applied to their maximum extent. IIPA understands that a process is underway to review and revamp the judiciary in Vietnam. Building IP expertise must be a part of this effort, to avoid what IIPA understands to be brain drain from the ranks of the procuratorate and the courts to the private sector or overseas.

COPYRIGHT LAW AND RELATED ISSUES

Criminal Code Revision Should Preserve Remedies Under Circular: In February 2008, the Supreme Court and Procuratorate of Vietnam issued a long-awaited Circular confirming that all violations listed in the 2005 Law on IP (copyright infringements, TPMs violations, and unlawful decryption of encrypted signals, etc.) are subject to criminal remedies in Vietnam, with no monetary or numerical threshold. The acts covered are criminalized as long as they are “on a commercial scale and for commercial purposes,” a phrase that poses some interpretive issues. Nonetheless, the Circular in general was viewed by industry as a step forward.

The government is now undergoing a drafting process to revise the Criminal Code of Vietnam, a process which will likely require a revision to the Circular to conform it with the Code once the Code is enacted. IIPA understands that the draft overhaul of the Criminal Code may curtail the kinds of acts that are currently considered crimes.¹⁴ IIPA opposes such a change, and in particular notes that the current Circular, appropriately, criminalizes all the acts that are deemed violations under the IP Code (namely, those enumerated in Article 28 of the Code as to works, and Article 35 as to related rights).¹⁵ Since TRIPS requires criminalization of at least all acts of commercial scale copyright piracy, and since the WCT and WPPT require adequate enforcement measures and effective remedies with respect to the normative obligations contained therein, including the communication to the public right, the interactive making available right, and protection against circumvention of TPMs, it is appropriate that the new Criminal Code retains the current structure of the Circular. IIPA understands that the draft revision was discussed in a November 2008 National Assembly hearing, and that it will

¹³ In one of the first reported copyright cases to make its way to the Supreme Court in Vietnam, the People’s Supreme Court in Hanoi issued a decision on the first major literature copyright lawsuit between two experts of the literature classic Tale of Kieu (the 3,254-verse epic work by Vietnam’s most revered poet, Nguyen Du), finding that Dao Thai Ton’s reproduction “in a faithful and comprehensive way” and use of the essays of Nguyen Quang Tuan “in their original versions” in his book titled *Tale of Kieu – Research and Discussion* was permissible under Vietnamese law (the case was brought prior to the adoption of the new IP Code) since the purpose was to provide commentary and criticism of Mr. Tuan’s interpretation. It appears that the new IP Code would not permit such wholesale copying of the essays without permission or license, would not meet the criteria of any exception under Vietnamese law, and would not meet Vietnam’s international commitments.

¹⁴ IIPA also understands that the drafters may be proposing removal of “commercial purpose,” which would be helpful, and is proposing increasing fines to the level in the new Revised Ordinance on Administrative Penalties (effective August 1, 2008).

¹⁵ These include, *inter alia*, criminalization of commercial scale unauthorized public performances, unauthorized communications to the public including making available, unauthorized importations (and exportations), rentals, violations involving circumvention of technological protection measures (TPMs) (both the act of circumvention and trafficking in circumvention devices), and certain other acts, such as distribution and export of decoding devices for encrypted signals.

come before the National Assembly again in May 2009. IIPA hopes the National Assembly will decide not to backtrack on protection achieved in the Criminal Circular, as was the case in earlier drafts, and will instead adopt a *mutatis mutandis* approach in adopting the Criminal Circular approach.

Copyright Law and Implementing Regulations to IP Code Remain Not Fully in Compliance with International Standards: Copyright law in Vietnam is governed by the “Intellectual Property Code,”¹⁶ effective July 1, 2006, and an implementing Decree.¹⁷ In addition, the Civil Code applies, as Article 5 of the IP Code retains a clause making the Civil Code supreme to the IP Code where inconsistent regarding “a civil matter.” The law resulted in a number of advances in Vietnam’s copyright system, like protection for temporary reproductions (Article 4(10)), and 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)) and against trafficking in circumvention devices (Article 28(14)). The Law still contains some deficiencies, however, 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).¹⁸ IIPA understands that the government of Vietnam has begun work to amend the IP Code to bring it fully into conformance with its international obligations, and IIPA recommends that the BTA commitments discussed herein, including term of protection and parallel imports, must be fulfilled as to the U.S. and in accordance with the most favored nation principle (TRIPS Article 4). IIPA also hopes the government will take the opportunity presented by the revision to fully comply with and accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (changes to fully implement the “making available” right and protections for technological protection measures are highlighted below). Vietnamese officials have indicated that, despite not yet having set an exact timeframe for accession, Vietnam is seriously researching the treaties and plans to accede at the appropriate time.

IIPA would greatly look forward to the opportunity to review draft proposals to improve the IP Code, and the following is a non-exhaustive list of some of the deficiencies which should be the subject of any revision:

- **Making Available Right:** The Vietnamese enacted, in Article 20(d’), an exclusive communication to the public right, namely, the right “[t]o communicate the work to the public by wire or wireless means, through electronic information network or by any other technical means.” Related rights get the same “by any other technical means” language as part of the distribution right (for example, Article 30(1)(b) provides producers of sound recordings the right to “[d]istribute to the public the original or copies of the phonogram by sale, rental or distribution or any other technical means accessible to the public.” It is believed the intention of the drafters was to encompass within these rights interactivity, i.e., the right to make available the work (performance or sound recording) in such a way that members of the public may access these works from a place and at a time individually chosen by them. In the revision of the IP Code, and to ensure proper coverage, and full implementation of the WCT Article 8, and the WPPT Articles 10 and 14, the government should adopt the making available language.
- **Technological Protection Measures:** As noted, one of the advances of the IP Code was that it provides protection against circumvention of technological protection measures used by right holders to protect their works/related rights in the digital environment (Articles 28(12) and 35(7)) and against trafficking in circumvention devices (Article 28(14)). However, it appears an inadvertent gap was created in enactment of the IP Code, namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14)) was not made applicable to related rights. This can be resolved in one of two ways: Article 28(14) can be made applicable, *mutatis mutandis*, to related rights, or a separate provision of Article 35 can provide that the following is a “related rights infringement”:
 “Producing, assembling, altering, distributing, importing, exporting, selling or leasing an item of equipment when knowing or having basis to know that such equipment is used for invalidating the technical measures taken by the related rights owner to protect his/her related rights.”
- **Restrictions on IP Rights:** Article 7(2) potentially 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 could create inconsistencies with the Berne

¹⁶ Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Session of the 10th National Assembly dated December 25, 2001.

¹⁷ Decree No. 100 on Detailed Regulations and Guidelines to the Implementation of Number of Provisions of the Civil Code and the Intellectual Property Law on Copyright and Related Rights, Decree No. 100/2006/ND-CP, September 21, 2006, at <http://www.cov.gov.vn/english/viewNew.asp?newId=79>.

¹⁸ See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

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.¹⁹ The government of Vietnam has indicated that Articles 7(2) and 7(3) are meant to be read in conjunction with the particular provisions of the IP Code, and that nothing within the IP Code curtails copyright (although admittedly, the Articles may be aimed at certain patent provisions, including provisions on patent compulsory licensing). IIPA takes little comfort from these explanations, since nothing in Articles 7(2) and 7(3) limits their coverage to patent. The government also claims Article 8 complies with TRIPS. Article is markedly similar to a provision in China's Copyright Law (Article 4) which was just found not to be in compliance with the Berne Convention, as incorporated by the TRIPS Agreement in a WTO Panel decision.

- **Civil Code Supremacy:** As mentioned above, the Civil Code is supreme to the IP Code when regarding "a civil matter." The government of Vietnam has explained this hierarchy as not threatening the applicability of any "IP matters" for which the IP Code would remain supreme (with "higher legal effect"). It remains unclear to IIPA what "a civil matter" refers to, and the lack of certainty and potential inconsistencies give rise to concern.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa. Article 35 of the implementing regulations reinforces the supremacy of copyright over related rights.
- **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). The government of Vietnam claims that Article 20 in fact does provide an exclusive importation right, noting 20(d)(1) provides the right "to circulate to the public or import the original or copies of the work." IIPA's translation of Article 20(d)(1) grants the right "[t]o circulate to the public the original or copies of the work." If IIPA's translation is incorrect, and indeed, the government's paraphrase is express in the IP Code, then Vietnam's law complies with the BTA as to works. The law with regard to related rights remains in violation of Article 4.6(b) of the BTA. The government of Vietnam refers to Article 35(8) of the IP Code, but this refers to importation of sound recordings when rights management information has been removed or altered without permission, and does not afford an importation right as required by the BTA.
- **Exceptions Overly Broad:** Certain exceptions in the IP Code may be overly broad. Explanations in Decree No. 100 are helpful at explaining the personal use copy exception. Other exceptions, e.g., Article 25 (g) on "[d]irectly recording and reporting performances for public information and educational purposes," and Article 25(k) regarding personal use imports, and Article 25(1)(e) on "dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns," remain problematic. IIPA also remains concerned that Article 25(2) of the implementing regulations appears to allow the copying of a computer program "for archives in libraries for the purposes of research," which would create a TRIPS-incompatible exception which must be remedied.
- **Impermissible Compulsory Licenses:** Article 25 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)).²⁰ Notwithstanding the attempt in Article 26(2) to limit the scope of the compulsory license to the three step test, it is hard to see how the compulsory license in clause 1 would not collide with the three step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which is a last minute addition to this

¹⁹ IIPA notes 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.

²⁰ 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.

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) do not comply with BTA Article 4.4 since they do not provide the term promised under that Agreement.²¹

Enforcement Issues

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Potential 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. The government of Vietnam’s position is that the language in Article 203, requiring right holders to provide “necessary evidence proving basis the establishment of copyrights, related rights, of which Copyright Registration Certificate and Related Right Registration Certificate are consider as acceptable an evidence” does not require right holders to provide a registration certificate. Even if it does not, the provision fails to resolve the potential conflict with the necessity under TRIPS, Berne and the BTA to afford right holders with a presumption of ownership.
- **“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 Code 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 the phrase, “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” As such, there appears to remain 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 government of Vietnam has responded, that

“Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008 regulates where laws of Vietnam or international treaties to which Vietnam is party provide that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.”

While it appears the cited Circular does conflict with the IP Code, it is unclear to IIPA that the Circular trumps the IP Code, and in any event, it remains highly doubtful that the IP Code in its current state could be interpreted as compatible with TRIPS and the BTA.

Internet Rules Need Revamping to Encourage Service Provider Cooperation: IIPA hopes that the government of Vietnam will take the opportunity in this round of amendments to the IP Code to adopt additional measures to deal with Internet (and mobile-related) piracy, by promoting service provider responsibility, creating mechanisms like statutory notice and takedown to promote cooperation, and other measures to deal with P2P file sharing, such as

²¹ 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.

implementing a policy of graduated actions leading to suspension of accounts used for repeat infringement and/or where appropriate adopting technological solutions to address repeat infringements. The basic law in Vietnam dealing with Internet issues and service provider responsibility is the Information Technology Law, No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007). Decree No. 55/2001 Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services also has helpful starting-point language on service provider issues. Specifically, Article 6(1) of the Decree provides,

Information stored, transmitted and received on Internet must comply with the corresponding provisions of the Press Law, Publication Law, Ordinance on the Protection of the State's Secrets and other law provisions on intellectual property and Internet information management.

Article 6(2) provides,

Organizations and individuals providing and/or using Internet services must be responsible for the contents of their information stored and/or transmitted on Internet.

Since the Decree was issued at an earlier time, it is in need of greater specificity with respect to copyright matters, and the IP Code revision provides a good vehicle to address the needs of right holders today. IIPA also understands Vietnam may be working on changes to the Decree and would look forward to reviewing a draft when made available.

Administrative Fines Increased, Now Must be Implemented: IIPA is very encouraged that the former maximum administrative fines, VND 20 to 30 million (US\$1,200 to \$1,800) have been increased pursuant to the Revised Ordinance on Administrative Penalties (effective August 1, 2008), to VND 500 million (US\$30,000) (matching the draft Criminal Code maximum fine for copyright infringement). IIPA strongly encourages the government of Vietnam promptly to issue a decree to implement the Revised Ordinance, so that the law can be applied to address the fundamental indifference pirates display to authorities, and to create deterrence in the Vietnamese market.

Optical Disc Regulations: IIPA understands that a draft regulation on optical disc management has been under consideration by Vietnam for some time; this should be enacted and implemented forthwith. Authorities in Vietnam report eight operating plants in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand. A comprehensive regulation on the licensing of optical disc manufacture is urgently needed that includes the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, and a prohibition on the unauthorized commercial burning of content onto CD-Rs or DVD-Rs. 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. IIPA's previous reports enumerated the essential provisions for an effective optical disc regulatory framework.

MARKET ACCESS BARRIERS IN VIETNAM

Various market access barriers exist in Vietnam today, the most serious being limitations and prohibitions on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves certain right holders, for example, sound recording producers, no choice but to license Vietnamese companies, which often refuse to do so due to the prevalence of piracy, continuing the vicious cycle of high piracy rates and little to no market access. To improve market enhancement and commercial development of Vietnam's cultural sector, Vietnam should look to internationally accepted standards and practices, recognizing that constraining market access for legitimate products complicates efforts to effectively combat piracy. The following describes the market access barriers the industries face.

AUDIOVISUAL SECTOR

Quantitative Restrictions on Foreign Films Imported for Theatrical Distribution: Under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed two-thirds of those domestically produced. Also, the number of foreign films projected by each cinema is only allowed to reach two-thirds of the total projected films in a given year. Since the domestic film industry is underdeveloped and the number of domestic films produced has generally ranged between 10-15 films or less per year, these restrictions, if enforced, would be a significant barrier to the import and distribution of foreign films in Vietnam.

Restrictions on Entity Type for Importation of Foreign Films: Foreign investors are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. The policy to modernize the cinema industry should be non-discriminatory and encourage investment in construction and renovation of all cinemas.

FAFILM Monopoly Control Over Video Importation/Distribution: Vietnam Film Import-Export and Distribution Company (FAFILM) maintains a monopoly over home video importation and distribution, leading to lack of competition, some evidence of undue influence, and other problems for the foreign audiovisual sector.

Monopoly Control Over TV Broadcasting: The Vietnamese government controls and owns all television stations in the country. It does not allow foreign-owned TV stations.

Censorship Process for Films: The Ministry of Culture & Information (MOCI) maintains strict censorship of the content of films, television and home video, including foreign content. Because of the broad discretion delegated to the reviewing authority resulting in unpredictable and arbitrary results, the process inevitably becomes highly dependent on personal relationships. The implementation of a classification and rating system would be preferred for the development of the theatrical market in Vietnam as opposed to its existing censorship process.

MUSIC/SOUND RECORDING SECTOR

One way to make headway into damaging Internet piracy is to permit legitimate copyright owners to participate in the growing mobile and Internet markets for copyright materials. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers, and foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users. Unfortunately, onerous Vietnamese restrictions are preventing U.S. record companies from engaging in vertically integrated production, publishing, distribution and marketing of sound recordings in physical and electronic form. Vietnam maintains investment barriers, many of which are of a discriminatory nature, against foreign sound recording companies, both pre- and post- establishment. Vietnam made no commitments with respect to production, publication and distribution of sound recordings under GATS as part of its WTO accession.

Vietnamese restrictions on the business of making and selling music, apart from the content itself, are also stifling the development of the Vietnamese music industry, including the participation of US companies in the market. The lack of a meaningful commercial presence of U.S. record companies in Vietnam also inhibits our members' anti-piracy efforts – the effectiveness of which is further hampered by restrictions on the ability of our industry to investigate the activities of pirates in Vietnam. This leaves it incumbent upon the Vietnamese government to enforce intellectual property rights of U.S. content largely on its own.

Under present rules in Vietnam and in the absence of bilateral or multilateral commitments, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute "cultural products" is unclear. It appears that they must license a Vietnamese company. Vietnamese companies have not been 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), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted 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. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public. Vietnam's failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, IIPA believes, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies can not do business in Vietnam, then pirates will form a unique pirate supply chain for consumers. This is what has happened in other markets – like that in China – which results in harming U.S. right holders, but also local artists.

BARRIERS TO TRADE IN SERVICES

In general, the Vietnamese government has done little to date to reduce or eliminate barriers to trade in services related to the copyright industries. The following are some examples of services for which the Vietnam government imposes restrictions and has taken no or few efforts to reduce or eliminate barriers to foreigners engaging in such services.

- **Restrictions on Trading Rights for Films and Distribution Services:** Importation (trading rights) and distribution services as to foreign films is limited to cinemas and business entities that own or have the right to operate a qualified cinema for at least five years and have a license from the Ministry of Culture and Information (MOCI). The import plan and the contents of foreign films must also be pre-approved by the Ministry of Culture and Information (MOCI).
- **Restrictions on Satellite Television Services:** Local households are prohibited from owning satellite dishes for receiving foreign satellite TV channels. Satellite dish ownership is banned except in approved government buildings, institutions, hotels and foreign compounds.

TRANS-PAC FTA

In late September 2008, U.S. Trade Representative Susan C. Schwab and Ministers of the Trans-Pacific Strategic Economic Partnership Agreement (known as the P-4 Agreement), including Brunei Darussalam, Chile, New Zealand, and Singapore, announced the launch of negotiations for the United States to join the comprehensive Trans-Pacific Strategic Economic Partnership Agreement.²² In November, Peruvian media reported that Peru and Australia announced their intention to join in the Trans-Pac FTA negotiation, and Vietnam has reportedly also expressed an interest in joining.²³ The Ministers agreed to hold the first round of Trans-Pac FTA in March 2009. Opportunities will arise to introduce intellectual property standards similar to those included in the free trade agreements negotiated between the United States and several trading partners, including (among the group) Singapore, Chile, Australia, and Peru. IIPA supports this process and hopes that the government of Vietnam will be prepared to negotiate FTA standards on intellectual property similar to those in force in Singapore, Chile, Australia, and Peru. IIPA expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date.

GENERALIZED SYSTEM OF PREFERENCES

IIPA Does Not Oppose Vietnam Bid for GSP, But Requests One Year Review: On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States on whether to designate “the Socialist Republic of Vietnam as a GSP Beneficiary Country.” The IIPA filing IIPA did not oppose granting Beneficiary Developing Country status to Vietnam under the Generalized System of Preference trade program, but did note several areas in which Vietnam may not fully meet the eligibility criteria, and formally requested that one year after the President designates Vietnam as a BDC, a review be scheduled to determine whether Vietnam has made progress in fully

²² United States Trade Representative, *Trans-Pacific Strategic Economic Partners and United States Launch FTA Negotiations*, September 22, 2008, at http://www.ustr.gov/Document_Library/Press_Releases/2008/September/Trans-Pacific_Partners_United_States_Launch_FTA_Negotiations.html.

²³ U.S., Peru, Australia to Join TransPac Free Trade Talks, November 22, 2008, at http://news.xinhuanet.com/english/2008-11/22/content_10394641.htm. See also *Trans-Pacific FTA: Australia, Peru, Vietnam Want to Join the Mega Trade Pact*, ASEAN Affairs.com, September 24, 2008, at http://www.aseanaffairs.com/page/trans_pacific_fta_australia_peru_vietnam_want_to_join_the_mega_trade_pact.

meeting its eligibility criteria sufficient to continue to enjoy GSP benefits. The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from 131 designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP statute requires the President to take into account the following, among other things,

- (4) the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country ... ;
- (5) the extent to which such country is providing adequate and effective protection of intellectual property rights; [and]
- (6) the extent to which such country has taken action to—
...
(B) reduce or eliminate barriers to trade in services...”

The piracy and market access barriers highlighted in this report are the key reasons Vietnam should be scrutinized closely when it comes to beneficiary status under the GSP program.

306 MONITORING

PARAGUAY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Paraguay remain under Section 306 monitoring in 2009.

Executive Summary: Yet another year has passed and sadly, there was no reduction in copyright piracy levels in Paraguay in 2008 -- not in the streets, not at the borders. Piracy levels remain the same, still focused primarily on physical piracy in large scale labs and blank optical disc smuggling, a situation only exacerbated due to the increase in production by the local blank optical disc plants in Ciudad del Este. In fact, the recording Industry reports that piracy has essentially eliminated any legal market and is unable to obtain dependable sales data, and as a result, the industry is also unable to provide a reasonable estimate of losses to piracy other than saying it is practically 100% of the market. IIPA members report continued cooperation with key Paraguayan authorities, especially by the special anti-piracy unit (known as UTE) in 2008, yet the all-too-familiar problem of poor results remains the standard. Corruption and an ineffective judicial system are deeply embedded systemic problems that have provided many roadblocks to criminal enforcement. One ray of light is that criminal code amendments to strengthen the copyright sanctions were adopted in 2008; it remains imperative that the overwhelmed prosecutors and the courts work together to issue deterrent sentences in piracy cases. More judicial training on IPR enforcement and the adoption of sentencing guidelines are direly needed. IIPA supports the renewed bilateral Memorandum of Understanding on Intellectual Property Rights (IPR MOU) which is in force through 2009. Unfortunately, much more work needs to be done by the Paraguayan government to implement this MOU, and as such, IIPA again recommends that the U.S. government maintain close consultations with Paraguayan authorities on progress being made on-the-ground on MOU elements.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Paraguay in order to improve the adequate and effective protection of copyrighted materials there:

Enforcement

- Investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este, including addressing the role of landlords with respect to the open and notorious illegal activities taking place on their premises.
- Improve border enforcement, including (a) the interception and seizure of piratical and counterfeit goods, (b) the interception and seizure of contraband PC hardware, and (c) the inspection of blank optical disc media.
- Improve training for officials in the special anti-piracy unit (UTE) so that they may continue their good work. The government should also provide sufficient resources for UTE to hire, train and maintain its inspectors.
- Create a Special IP Prosecutor with national competence, such as those set for drugs and corruption.
- 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 should consider creating a specialized unit familiar with the business of optical media and other exportable products.
- Impose deterrent criminal sanctions. This is even more important in 2009 as the criminal code was recently amended to cover more infringing actions and provide higher penalties.
- Improve training for both prosecutors and judges in order to improve effective deterrence against criminal copyright piracy.
- Request that the Supreme Court suspend and/or remove expert witnesses and judges reported to be involved in corruption cases from current dockets.
- Create a specialized IPR Court and a cadre of specialized IPR judges with national competence.

Legislation

- Issue and implement a software legalization decree (long overdue from the IPR MOU).

- Ease regulations for the destruction of seized evidence. Currently destruction procedures are very expensive because they require high court fees from the complainants for each individual case instead of pooling them together. Current provisions in the criminal procedure code do not allow judges to destroy seized merchandise before final ruling. Destructions are expensive because the petitioner must cover all cost related to the storage, transport, destruction, attorneys and court fees. In 2008, the Supreme Court issued a decree regulating the amount to be paid to judges for destructions. Initially, judges refused to act on cases where attorneys followed the new decree and refused to pay the high sums; however, the reduced fees appear to have now been accepted.

The IPR Memorandum of Understanding and Action Plan: Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. On December 19, 2003, both nations agreed on a Memorandum of Understanding on Intellectual Property Rights (IPR MOU). The 2003 IPR MOU was extended through 2007, and then a revised MOU that contained an action plan was signed on April 30, 2008, effective through December 31, 2009. While there has been some progress (especially with the UTE and most recently, with criminal code reform), Paraguay unfortunately has not met many of the major objectives of these IPR MOUs, including:

- Failing to significantly reduce the levels of copyright piracy;
- Not increasing *ex officio* actions at the border;
- Not strengthening deterrence by actually imposing mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods;
- Not providing for the seizure of an infringer's assets upon conviction for commercializing pirate product;
- Not finding ways to work with the judiciary to promptly resolve pending cases; and
- Not increasing the terms of copyright protection for all copyrighted materials.

PARAGUAY Estimated Trade Losses Due to Copyright Piracy <i>(in millions of U.S. dollars)</i> and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ²	NA	NA	128.0	99%	128.0	99%	128.0	99%	127.8	99%
Business Software ³	7.0	81%	7.0	82%	6.0	82%	6.0	83%	6.0	83%
Entertainment Software ⁴	NA	NA	NA	NA	NA	98%	NA	NA	NA	NA
Books	NA	NA	NA	NA	2.0	NA	2.0	NA	2.0	NA
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	2.0	86%	2.0	95%
TOTALS	7.0		135.0		136.0		138.0		137.8	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For the history of Paraguay and 301, see Appendices D and E at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to our 2009 Special 301 submission, go to <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² RIAA reports that it is unable to obtain reliable information for the legal market or its potential size and therefore cannot estimate the amount of losses to piracy in 2008. Prior estimates (such as in 2007) included both domestic piracy and estimated losses caused by transshipment.

³ BSA's 2008 statistics are preliminary and represent the U.S. software publishers' share of software piracy losses in Paraguay, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. These cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

⁴ 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."

⁵ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

Paraguay is a beneficiary country under the U.S. Generalized System of Preferences program (GSP). The GSP program requires that a beneficiary country provide "adequate and effective" protection to U.S. copyrighted materials. During 2008, \$61.8 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code; this was a 56% increase over 2007.

COPYRIGHT PIRACY IN PARAGUAY

Optical media importation, piracy and the border: Optical disc piracy levels have not been reduced in Paraguay. Even though the importation of blank media has decreased, this has been offset by the five large optical disc factories operating in the Province of Alto Parana, where Ciudad del Este is located.

The amount of optical media product legally imported into Paraguay continues to exceed possible local use. For example the year-end estimate for 2007 for legally declared imports of compact discs (including CDs and DVDs) was 90 million units, according to the RISMOMP, the Office of the Ministry of Industry and Commerce overseeing imports of optical discs. Another 100 million units of blank media that had been previously routed through Paraguay are now being diverted to the border between Uruguay and Brazil. One report indicates that Paraguay imported some 7,100 tons of polycarbonate, which is the material used to manufacture optical discs. Approximately 30% of all imported blank media come from two major manufacturers. Most of the imports come from Southeast Asia (Taiwan and China) and almost all of it is destined for pirate production of music, movies and software to be sold in Brazil. Hundreds of smaller burning labs in Ciudad del Este are supplied by pirate kingpins who coordinate their work and provide these small labs with blank CD-Rs. These "sprayed" plants serve Paraguayan, Argentine, Uruguayan and (mostly) Brazilian illegal CD-R duplicators.

There are optical disc factories in Paraguay. Several years ago, over the same objections, the Paraguayan government authorized and provided incentives under the law (*Ley de Promocion Industrial*) to then set up four new industrial CD-R and DVD-R plants in Ciudad del Este. Nowadays there is a striking lack of oversight regarding the blank optical plants. Currently there are five (5) optical disc factories, and what is stunning is the increase of output of product from these plants. The addition of the fifth plant indicates that overall output has risen from 150 million units in 2006 to more than 370 million units in 2008. One of the plants does have the authorization to legally export their products to Brazil and Argentina. It is further believed that one of these factories is partially owned by a convicted felon from a previous IPR/tax case.

Paraguay continues to be a key destination for much of the pirated optical media product produced in Southeast Asia (e.g., Malaysia, Macau, Hong Kong, Singapore, and Taiwan). Paraguay remains a significant transshipper of pirate products and optical media to its neighbors, especially Brazil.

Physical / hard goods piracy: Recorded CD-Rs/DVD-Rs, and cartridge-based video games are readily available in Paraguay, with much of the most visible piracy seen in Ciudad del Este. The level of hard goods piracy for recorded music is 99%. Pirated music and film products are still found at the wholesale and retail levels, such as the San Blas municipal market at the foot of the Friendship Bridge. Hard copies of illegal software also are available in large quantities in Ciudad del Este. Street piracy remain steady and in the cities which have borders with Brazil, such as Ciudad del Este, Pedro Juan Caballero and Salto del Guaira, which are the ones that supply the Brazilian market and have open borders. Significant piracy of mostly music and movies (CD-Rs and DVD-Rs) can be found on the streets of Asuncion.

The entertainment software industry reports that for 2008, the market remains replete with pirated and counterfeit video games. A survey of the market found that about 80% of the pirated product sold at retail consisted of imported or factory-replicated games on DVD, with the remaining 20% locally produced, burned product. The country also remains a major transshipment point for pirated and counterfeit video games from Asia into South America. Also, an increasing quantity of optical media games are smuggled into Paraguay from sources in the Middle East, specifically Dubai and Syria. In most cases, shipments of pirated entertainment software on optical media are manufactured in Malaysia, while counterfeit cartridge games and components are shipped from China—all for subsequent and further shipment into South America's key markets like Brazil. A significant quantity of factory replicated games on DVD manufactured in Argentina also entered the market. Shipments of counterfeit cartridge games and components, for example, have been seized in the U.S. and in Uruguay, with Paraguay as the

destination country. Border enforcement efforts must also focus on counterfeit game cartridges, game components and console game discs, for which the volume of suspect shipments is also as significant as optical disc products. In addition, there remains a big problem with 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 business software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay. There is also trafficking of circumvention devices with Brazil and Argentina, mostly through the border cities.

The business software industry reports that end-user piracy in businesses and government agencies continues to cause the most economic harm for this sector. With respect to piracy targeted at corporations, email is used to place orders online, and purchasers obtain the products via a distributor hired by the piratical organization. Pirate groups offer pirated compilations of business software, including those specially tailored to a particular business sector, for example, to engineers, architects, and accountants. Government implementation of a software legalization decree (required by the original IPR MOU) is long overdue. The growing availability of the Internet is starting to adversely affect this sector.

The book publishing industry continues to report concerns about use of photocopied books in universities and encourages institutions of higher learning to take a more active role to ensure use of legitimate materials by students and lecturers.

Internet piracy: Internet-based piracy in Paraguay has grown as local Internet access is becoming more affordable. Still, broadband connections are few and slow in Paraguay, and that technical fact has contributed to a less than rapid growth of this piracy. Cyber cafés have proliferated across the country, and many of the computers in these cyber cafes have installed illegal games and software. Consumers use Internet forums and webspaces to offer their products and upload links to free hosting sites such as Megaupload or Rapidshare. Piracy is also distributed via discussion forums and blogs. The levels of mobile piracy are still not determined. Importantly, Internet based piracy often works to offer the sale of hard copies of pirated goods (often in optical disc format). ESA has also noted an increase in national and regional Internet sites offering the sale of hard copy of DVD format video games. In 2008, BSA supported criminal actions that results in taking down two big Internet sites, FEJO and SUPERSOFTPY, which offered several unauthorized software products. These sites ran delivery system where they would send infringing copies of business software on DVDs to homes or businesses. In sum, Paraguay's Internet piracy problem is a cause of concern, but is not yet at the level of severity reported in Brazil and Argentina.

COPYRIGHT ENFORCEMENT IN PARAGUAY

Copyright anti-piracy actions taken by Paraguayan authorities, while well intended, continue to be largely ineffective in deterring widespread piracy. One bright note continues to be the proactive and reliable work done by the Specialized Technical Unit (UTE) in the Ministry of Industry and Commerce, which has conducted several high-impact raids and has worked well with industry representations on operations and investigations. While some criminal work is done with the Economic Crime Unit of the police, the results there have been far from reliable or satisfactory.

Criminal actions are inconsistent despite the good work of UTE: The sound recording and software industries, both of whom have enforcement programs in Paraguay, report that cooperation with UTE is very good. The UTE is the only agency of the Government to act on its own, to investigate, collect evidences and seize products. It is not a police force, but works with other agencies on actions. UTE continues to perform well on street and mid-level infringers, but needs more training in dealing with complicated or organized crime cases.

Unfortunately, it appears UTE has no political support from most national and local government agencies, with the exception of the Ministry of Industry and Commerce. UTE has no support from the prosecutors of Ciudad del Este, whom are always blocking the work of UTE Agents, creating artificial legal obstacles to prevent the good execution of procedures.

The recording and motion picture industries are represented by APDIF in Paraguay. For the past two years, APDIF has focused much of its enforcement work in Paraguay with efforts aimed at protecting the music and film markets in Brazil. These efforts include, for example: obtaining information on the importation of polycarbonate for each plant to determine

estimated production; showing evidence of falsified records or tax evasion based on false manufacturing data; investigation whether optical disc plants are manufacturing and/or exporting product to other countries in violation of their agreement with the Ministry of Industry and Commerce; working to ensure the MIC agreement is followed; conducting investigations of OD plant ownership issues; and investigating wholesale businesses that cater to purchasers of CD-R/DVD-R burners and optical blank media in Ciudad del Este that in turn supply the *sacoliero* pirate market.

While APDIF's cooperation with UTE in 2008 was excellent, the number of raids for the year decreased by 74% to 21 operations and the amount of product seized by 5% to 4.7 million units. It is clear that the authorities are not able to maintain the intensity of the campaign without major support from the industries. Although piracy is a crime to be pursued *ex officio*, IFPI reports that 70% of the anti-piracy operations are initiated by complaint of the industry. This is largely due to the high level of corruption in the National Police.

ESA has also experienced excellent cooperation from the UTE resulting in enforcement actions conducted against 15 targets. The entertainment software industry struck 14 diverse targets in Ciudad del Este and at points of entry. In early 2008, ESA seized 27 passenger suitcases in the Asuncion airport, all being brought in by one individual traveling from Dubai, resulting in the seizure of over 50,000 pirated game discs. Another airport operation targeting pirated game discs entering the Asuncion airport via international courier packages led to the seizure of 15,000 pirated game discs. All seized product was destined for Ciudad del Este and eventually, the Brazilian market. Pirated video game cartridges and game discs were seized in numerous warehouses and retail outlets raided in Ciudad del Este while the raid of a game production laboratory resulted in the seizure of 54 CD/DVD burners used for the production of pirated game discs. All enforcement actions were successfully executed with the excellent participation of the UTE.

Prosecutions are uneven and results disappointing: The District Attorney's Office is the institution that houses prosecutors specialized in intellectual property crimes. There are seven specialized IPR prosecutors (each unit usually consisting of one prosecutor and two assistants) -- four in Asunción and three in Ciudad del Este. For years, the prosecutors have had ability to pursue copyright infringement cases as "public" actions (Law No. 1.444, which entered into effect in July 1999).

Unfortunately, the quality of work between these two sets of prosecutors varies dramatically. Both the business software industry and the recording industry indicate that they have good working relationship with the prosecutors in Asuncion. BSA reports that they work very well with the authorities (both prosecutors and judges) in Asuncion. The relation with the prosecutors in Asuncion is pretty good. The level of cooperation in Ciudad del Este is different. District Attorney's office should consider the necessary changes in CDE to appoint new prosecutors really committed with the fight against piracy.

BSA also reports difficulties working with prosecutors and judges of Ciudad del Este. There has been a constant turnover of prosecutors there. BSA has experienced unnecessary delays as well as information leaks that cause, in many cases, the need to engage in even more unsuccessful procedures. Also, BSA's experience suggests that the Ciudad del Este prosecutors are not well prepared, in terms of knowledge of the law, in software cases. For example, in order to obtain a warrant and a search and seize order, BSA attorneys have to wait for hours; during these lengthy periods, informants either in the judge's office or the prosecutor's office give notice to the targets about the upcoming search so that when the search is executed, the premises are either closed or empty. To be clear, the prosecutors of Ciudad del Este also have conducted successful raids. In those cases, the problem then becomes that they do not press for deterrent sanctions, and instead accept only meagre fines to end the cases before trial. BSA then has to prepare additional information to bring appeals in those cases.

ESA found that the only method of preventing information leakage from affecting raid results was to enlist the cooperation of the Head Prosecutor in Ciudad del Este in allowing the targets to be 'covered' by the UTE and an assistant prosecutor while waiting for the raid warrant.

The reduction in the quantity of prosecutors in Ciudad del Este from five to three has created an overwhelming workload of IP cases. While some of the prosecutors already lacked motivation to investigate and pursue deterrent sanctions, this reduction greatly worsened the situation. For example, ESA reports that prosecutors that found pirated merchandise while conducting raids targeting other pirated/counterfeit goods, no longer sealed the location allowing merchandise not targeted to

later be seized. By the time another raid warrant could be issued, the location had been emptied. There is an unofficial proposal to eliminate the specialized IPR Prosecutors' responsibility for acting in tax evasion cases. If implemented, three prosecutors may be sufficient for Ciudad del Este.

During 2008, BSA continued its good relationships with UTE, but relationships alone do not provide the measure of tangible enforcement success beyond UTE. BSA took seven retail actions in Ciudad del Este, all without much success, because the leak of information and at the time we arrived with the judge and prosecutor, accompanied by local police, we found some empty stores. In this case, the prosecutor refused to seizure other counterfeit videos and video games, claiming that those products were not on the complaint. Over the objections of both BSA attorneys and the police officer in charge, the prosecutors also refused to seal the location before another complaint could be filed.

Criminal sanctions are not deterrent: As discussed above, prosecutors do not press for deterrent level sanctions, and judges similarly do not impose deterrent sanctions in criminal copyright cases. The recording industry reports that in 2006, Paraguayan courts issued 14 criminal judgments against pirates of sound recordings, but none resulted in effective incarceration. And for 2008, the recording industry confirms that no criminal convictions were issued on music piracy cases all year. ESA reports that in 2008, Paraguayan courts issued 14 criminal judgments against video game pirates; however, none resulted in incarceration.

The recording industry reports that a new problem involves the use of expert witnesses. The use of expert witnesses or *peritos* by both sides ends up giving the defendant a litigation advantage because *peritos* are paid private parties. So even in cases where the recording industry won a conviction in the lower court, they have almost all been reversed on appeal because of this evidentiary question. The problem is massive and widespread.

The majority of the expert witnesses approved by the courts have little or no qualifications, and report findings are typically subject to the whims of the highest bidder. As long as expert witness continues to be paid by the private sector instead of being employed by the courts, the window of opportunity for this corruption will remain. In 2008, the Supreme Court eliminated the designation of new experts. While this does not solve the problem with the current roster of experts, it may be a step in the right direction.

Ineffective border enforcement: The Paraguayan government needs to do much more to combat cross-border piracy and corruption of its agents. The border with Brazil remains wide open and *sacoleiros*, individuals who come to buy counterfeit products to later sell in Brazil, pass easily over the Friendship Bridge. During 2008, there was a surge in river-trafficking, so much so that Brazilian authorities on the other side of the river have been overwhelmed. An undetermined amount of merchandise is being trafficked into Brazil through 'dry' border crossings including Pedro Juan Caballero and Salto de Guaira.

In June 2008, Paraguayan Customs, through the US-funded Plan Umbral, created the Administrative Coordination of Customs Investigations (CAIA), an investigative unit with port and border verification abilities comprised of individuals screened through U.S. administered polygraphs. The unit initially proved to be capable and motivated to conduct effective enforcement actions. However, the change in the Customs administration led to the CAIA being reduced to a limited intelligence research role with very little support from the Director of Customs. DETAVE, Custom's border enforcement and anti-contraband/piracy unit, also created under Plan Umbral, has been re-focused almost exclusively to targeting contraband entering Paraguay, per the direction of the new administration. The group's success in the anti-piracy arena has been extremely limited.

The authorities, specially the UTE and the District Attorney's Office of Asuncion, are working with customs. Even though these authorities have *ex officio* powers to take their own actions, the industries are not aware of any major actions.

The recording industry reports that the situation regarding border operations continued its decline during 2008, mainly because Paraguay became an "exporter" of blank media after having been an "importer" for many years. The government doesn't have the political will to stop the smuggling of blank media (manufactured in Ciudad del Este) into Brazil. Also, the Government of Paraguay provided incentives for the installation of the CD/DVD plants. Importations of blank media decrease

from 312 million in 2006 to only 45 in 2008. In the meantime, the plants located in CDE are producing something between 350 and 391 million units in 2008 (based on the amount of polycarbonate imported).

BSA reports that it carried out 4 border actions in Ciudad del Este in 2008. Once again, the support of the UTE was effective. Unfortunately, the proceedings were initiated by the prosecutor only after excessive and unwarranted delays. The secrecy of the operation was compromised during this delay and, as a result, no pirated software was found.

Tax authorities should conduct strict audits of businesses catering to the *sacoleiro* traffic in Ciudad del Este since tax evasion is rampant. A new recordation process established with the customs authorities was a welcome development, but there must be better cooperation with the Recordation Office when suspect products are found.

Delays and low damages in civil cases: In 2008, BSA continued to face difficulties in its civil *ex parte* actions, including excessive delays and low damages awarded by the courts. 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. Because the search warrants take so long to be issued, there is a danger of leaks. BSA has met with the President of the Supreme Court to suggest that new courts with exclusive jurisdiction for intellectual property infringements be created (like those courts that exist for Drug Corruption and Terrorism).

The creation of such a court would be beneficial for the entire industry and specialized IPR training for these judges could be offered. The creation of a specialized IPR judge with national jurisdiction would also be helpful.

Internet enforcement: To date there has been very few developments in Internet piracy enforcement. For 2008, BSA reports one positive development in that they dismantled two big suppliers of software products that used the Internet to promote their products and to obtain sales. BSA also successfully removed these sites, pressing criminal charges against the owners, who were previously fully identified. The difficulty with this action is that it involved procedures and prosecutors in Ciudad del Este. Processing this case took a long time for both prosecutors and the judge to take action, during which time the potential for a leak mounted. Disappointingly, the prosecutors only sought that the court impose a fine on the defendants, instead of a more appropriately severe sanction. BSA also brought a case in 2007 where it worked with authorities to conduct a raid against one Internet pirate who operated internationally. This defendant offered franchises supplying pirated software products targeted at specific professions (e.g. architecture, medicine, law). In this action, 213 pirated DVDs were seized, many that were used as masters for these "special packages" of programs. Such packages often included four or five DVDs. As of early 2008, this criminal case was still in its early stages: the District Attorney's Office has presented an indictment against the defendant, but no preliminary court hearing has yet taken place to decide whether the case should go to trial.

The local ISPs are cooperating to protect copyright, but only in the limited circumstances when they are required to do so by judicial order, and then they are responsive. In order for rights holders to pursue enforcement and collect evidence for any investigation, they must first obtain a judicial order to request information from an ISP. Currently there is no specific legislation regarding ISP liability, but many assume that they are subject to general liability principles in the Civil Code, but this has not yet been tested.

COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY

Criminal code reform in 2008: IIPA and its members have been working for years to try to fill the troubling gaps in the criminal code to strengthen enforcement remedies for copyright infringement.⁶ The most recent solution was based on a

⁶ For years, there had been two principal problems with Paraguay's Criminal Code. First, the now former Article 184 identified cases involving acts infringing authors' rights (copyright) but did not contain any provisions regarding the infringement of neighboring right (the rights which protect producers of sound recordings). The criminal code therefore did not explicitly protect against acts of piracy involving sound recordings. The code even abrogated penalties provided under another law (Law No. 1.174 of 1985) which established relatively strong criminal prohibitions for piracy of sound recordings and clearly provided that the state could proceed *ex officio* against infringers. Second, the current criminal code provided a penalty

comprehensive criminal code effort. Amendments to the Criminal Code were approved in Law No. 3440 of July 16, 2008, which amended several provisions of Law No. 1160/97 (the previous Criminal Code), and these new provisions will enter into force in July 2009.

With respect to copyright, this legislation makes copyright infringement a major crime, upgrading infringement to a felony. This amendment significantly increases the maximum penalties of copyright infringement, going from a maximum of three years to five years, and in special and serious cases, the penalty could be extended to eight years of prison. Furthermore, the reform of Article 184 (which addresses copyright and related rights) has been expanded to include more infringing acts, including prohibitions against circumvention devices. The one drawback of this legislation is that it unfortunately keeps the minimum penalty of one month for some of the infringing acts, and as the industries have long complained, this low minimum penalty may mean that judges will refuse to issue jail sanctions, instead issuing only fines. Thus, the copyright revisions appear to continue to allow the possibility of issuing a fine as a sanction; imposition of jail time is left to the discretion of the judge. Now that the criminal code has been amended, prosecutors and judges must impose these deterrent penalties in-practice.

In addition, the 2008 reforms also expand the existing money laundering Article (196) to include copyright violation, as defined in Article 184a, as a crime used to facilitate money laundering.

Copyright Law of 1998: Paraguay adopted a new copyright law in 1998 (Law No. 1.328/98), and later deposited its instruments of ratification to both the WIPO Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Although the copyright law in general is quite good, further refinement would be needed in order to fine-tune the legislation up to the more comprehensive standards found, for example, in the intellectual property chapters found the U.S. Free Trade Agreements with nations such as Peru, Chile and Central American countries. In recent years, the copyright industries have focused on enforcement objectives, including reform of the criminal code (discussed above). One major concern for the recording industry is the term of protection for sound recordings which is only 50 years from publication. Paraguay must increase the term of protection up to 70 years to adapt its legislation to current trends in the region.

IPR Training Programs: During 2008, several firms have conducted training and seminars, both in Asuncion and Ciudad del Este. For example, BSA participated in two seminars, one in Asuncion regarding counterfeiting procedures and a second organized by the Federation of Commerce Chambers of Ciudad del Este (FEDACAMARA). ESA conducted training on identification techniques and legal aspects of video game piracy for judges, prosecutors and assistants in Ciudad del Este; however, the lack of participation in the training further demonstrates the absence of drive in these individuals to act and grow as professionals in their field.

of six months to three years or a fine. Unfortunately, this allows judges to impose either a fine or a prison sentence, and another criminal code provision (article 321) obligated judges to issue fines instead of incarceration for cases involving penalties of less than 6 months.

COUNTRIES DESERVING SPECIAL MENTION

AZERBAIJAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Azerbaijan has not completely 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 Azerbaijani Copyright Law (October 23, 1996) was amended in 2008. The 1996 Copyright Law was deficient in many key areas, and was not in compliance with the Berne Convention (Azerbaijan acceded in 1999) or the Geneva Phonograms Convention (Azerbaijan acceded in 2001). Azerbaijan acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), effective April 11, 2006. IIPA understands that the 2008 amendments to the Copyright Law – not yet available in English -- were intended to implement the digital treaties. IIPA recommends that the U.S. Government should consider Azerbaijan's full compliance with its international obligations when reviewing its eligibility for General System of Preferences (GSP) trade benefits.

Legal reform deficiencies: To meet its bilateral and multilateral obligations, IIPA recommends that Azerbaijan address the following legal reforms:

- 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) and 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 – as 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.
 - d. Providing for the confiscation and destruction of equipment used for the 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. It acceded to those treaties in 2006, and the 2008 Copyright Law amendments were intended to comply with the treaties, but are not yet available in English. A preliminary review of the amendments reveals that they appear to be a very good step forward towards implementation of the digital treaties.

7) Creation of an Inter-Ministerial committee consisting of police, prosecutors, and customs officials charged with IPR enforcement, to coordinate enforcement activities.

Enforcement deficiencies: In addition to not providing an “adequate and effective” legal regime, Azerbaijan has not taken the necessary steps to enforce intellectual property rights. Both the Criminal Procedure Code and the Customs Code appear to essentially limit *ex officio* authority to commence criminal copyright cases and suspend the release of suspected infringing material at the border. Civil *ex parte* searches are available under the Civil Procedure Code, although the procedure is not clearly defined. The administrative sanctions (Article 186-1) provide for fines that are multiple 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.

Further, while Azerbaijani law does provide criminal penalties for IPR violations, the U.S. copyright industries are aware of no criminal penalties or administrative sanctions imposed for copyright infringement in Azerbaijan this year. Pirated copyrighted works are freely traded throughout the capital city Baku. We encourage Azerbaijan to improve its enforcement efforts by providing for *ex officio* raids and seizures, as well as civil *ex parte* searches, and to fully implement the TRIPS Agreement upon accession to the WTO. We understand that changes were made in 2008 to enhance the intergovernmental authority of the Copyright Agency and to provide it with better resources. This is a positive step.

There are no reports of any optical disc plants operating in Azerbaijan.

BANGLADESH

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA submits this Special Mention report on Bangladesh to highlight continuing piracy problems there. With recent elections on December 28, 2008, and a new President coming into power,¹ the government of Bangladesh has an opportunity to strengthen protection and enforcement of copyright, in line with its international obligations and to promote the economic development of local copyright sectors in Bangladesh.

Executive Summary: The market in Bangladesh continues to be severely hampered by piracy, with piracy rates among the highest in the world. In its 2008 Special 301 Report released in April 2008, the United States Trade Representative named Bangladesh as one of the countries that “still need to adopt and implement legislation or improve existing measures to combat pirate optical disc production,” as it has “not made sufficient progress in this area.” Piracy problems abound, including unchecked book piracy in the form of print piracy and illegal commercial photocopying, especially on or around university campuses. Bangladesh hosts several optical disc factories, most of which migrated from Pakistan, and the production capacity for which far exceeds legitimate demand. Pirate discs not only destroy the domestic market but are exported to India and elsewhere, harming markets outside Bangladesh. Other problems include CD-R “burning,” including both large-scale “burning” in the optical disc plants and small-scale burning, and the sale of pirate music cassettes. The harm from piracy in Bangladesh is not only to U.S. and other foreign right holders but is felt keenly by Bangladeshi booksellers, record producers, and others. Recently, Bangladeshi record 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, and noting in an article in 2006, “[i]n the last four years alone, as many as 10 big and respected companies have had to close because of piracy.”²

Priority Actions Requested in 2009: IIPA requests that the government of Bangladesh take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Establish an anti-piracy force and take actions (including *ex officio*) against book piracy at photocopy shops and those who engage in offset printing and against rampant CD, DVD, CD-R, DVD-R and CD-ROM piracy.
- Establish a cell within the Bangladeshi Customs to intercept imports and exports.
- Inspect all optical disc plants, collecting exemplars and closing down plants engaged in piracy, seizing pirate discs and materials, and prosecuting owners and managers of pirate plants.

Legislation

- Pass and implement an effective optical disc regulation, including licensing requirements, mandatory plant visits, exemplar collection, and use of Source Identification Code master (LBR) and mold code.

¹ *Awami League's Senior Leader Zillur Rahman to Become Bangladesh's Next President*, Xinhua News, January 4, 2009, at http://news.xinhuanet.com/english/2009-01/04/content_10598556.htm.

² *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>.



BANGLADESH								
Estimated Trade Losses Due to Copyright Piracy (<i>in millions of U.S. dollars</i>) and Levels of Piracy: 2005-2008 ³								
INDUSTRY	2008		2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA
Records & Music	NA	90%	NA	NA	40.0	70%	NA	NA
Business Software	56.0	92%	55.0	92%	54.0	92%	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	8.0	NA	6.0	NA
TOTALS	56.0		55.0		102.0		6.0	

PIRACY AND ENFORCEMENT CHALLENGES IN BANGLADESH

Book Piracy – Enforcement Actions and Institutional Legalization Efforts Rare: The book publishing industry grapples with significant illegal commercial photocopying and print piracy affecting a wide range of products, including academic textbooks, English language teaching (ELT) materials, medical and other professional reference books, computer and technical books, dictionaries, and commercial bestsellers. Any book with significant sales potential is subject to high piracy rates. Neelkhet Market in Dhaka is famous for pirate sales, and other book markets in cities such as Dhaka, Chittagong, Rajshahic and Khulna teem with illegal “local reprints” as well. This is a disturbing trend in a region where legitimate local reprints are offered for sale at a very low cost, and it not only harms the market for foreign publishers but also curbs potential business for Bangladesh’s booksellers and local producers. Local booksellers and producers have begun taking steps to defend their market, and in the past couple of years, several bookseller-initiated raids of pirate enterprises in places like Neelkhet and Banglabazar have produced some success. Taking advantage of the high government taxes (which should be abolished) on legally imported books, many pirates use sophisticated technologies to reproduce and distribute pirate copies instead of importing legitimate copies. Open and blatant illegal commercial-scale photocopying of textbooks and ELT materials abounds in and around Bangladesh’s universities and schools. Photocopies or illegal reprints of textbooks sell for approximately US\$2.00 each.

The government of Bangladesh’s response to book piracy issues has been inadequate, both in terms of the results from any enforcement actions taken and from the standpoint of working with universities to ensure that they are not condoning illegal reproduction. Regarding the educational market, the authorities and universities should take proactive measures to curb piracy of academic materials, and a very select number of universities have started this process. Others, however, actively engage in or espouse illegal copying, including Dhaka University. Clearly, more needs to be done, including ensuring that publishers can participate in setting priorities for the National Education Policy, increasing awareness for users of academic materials, and, above all, encouraging integrity and transparency in the “tender system” that governs purchases of books for government institutions. Furthermore, the authorities, both from Bangladesh and abroad, must ensure that aid moneys earmarked to bolster Bangladesh’s educational system are used only for legitimate copies of learning materials.

Pirate Optical Disc Production in Bangladesh – No Regulation Enacted, and No Enforcement, Despite Good Intelligence on Location and Nature of Operations: There are several optical disc plants in Bangladesh, while as of 2007, only one plant had given industry access to the plant. Based on the most recent data (from 2007), Bangladesh had more than a dozen production lines⁴ having a production capacity of 49 million discs, and four mastering facilities. IIPA

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA’s 2008 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Bangladesh. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. The music rate is blended between Indian repertoire (which has a piracy rate around 60%) and international repertoire (which has a piracy rate of close to 100%). For more details on Bangladesh’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

⁴ As of 2007, four of the plants were in Dhaka (including one in Uttara and one in Kodamtali), one of the plants was in Konobari, Gazipur, and one was in the Kajpur area. There were four dedicated DVD lines (three DVD-9 and one DVD-5 line). In addition, there were as many as 10 CD lines. In some of the plants, it has been confirmed that the best technology available was being used. For example, molding and finishing lines from one plant were a combination of Swedish and Dutch technology, under the banner of TOOLEX and ODME respectively, while printing was done using German technology, KAMMANN Machines.

has confirmed that Pakistani nationals who ran plants in Pakistan prior to that government's crackdown own some of the plants in Bangladesh. Pirate discs destroy the local market for music, movies and software, as inexpensive CD and DVD players are becoming increasingly popular and where computer usage in households has grown. Disturbingly, some pirate discs (relatively small shipments of 900 to 1,000 discs) have been detected being "smuggled" out of the country via parcel shipments using the main post office in Dhaka, destined for India, Sri Lanka, or the European market.

Bangladesh has no effective optical disc regulation, including licensing requirements, mandatory plant visits, exemplar collection, and use of Source Identification Code master (LBR) and mold code. Nonetheless, optical disc piracy could be dealt with through business licensing regulations in conjunction with the Copyright Act. On the occasions industry has met with Bangladeshi government officials about the optical disc piracy and other problems, the government of Bangladesh has expressed its support for copyright protection and encouraged assistance from industry but indicated limitations in the detection process of pirated products and shortages of equipment to detect pirated products. It is hoped that the government will establish a national IP enforcement task force which can deal effectively with plant visits, inspections, seizures of pirate discs and equipment, closures (where necessary), and prosecutions where warranted.

"Burning" of Pirate Material on Recordable Optical Disks: The problem of CD-R burning of content onto recordable discs has become increasingly severe in Bangladesh. It is estimated that the Bangla market for audio and video CDs is catered by as many as sixty 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 approximately US\$0.10 or less.

Importation of Pirate Optical Disks: It appears there is some importation of pirate 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.

TRAINING AND PUBLIC AWARENESS

Industry has offered training on copyright and copyright enforcement to the government of Bangladesh several times. In addition, on November 2, 2008, the European Commission and the World Intellectual Property Organization launched a project which aims to modernize the intellectual property system in Bangladesh and to help the country maximize the benefits of IP protection.⁵ The project is designed, through various capacity-building measures, to promote effective management of the intellectual property systems (mainly focusing on industrial property), but will also address the challenges faced by Bangladesh in meeting its international obligations. The project will also roll out a public outreach program to promote IP awareness in key sectors including universities, R&D institutions, small and medium-sized enterprises, creative industries and the business community, and will promote IP teaching and education through fellowships, course development and linkages with WIPO's distance learning programs. IIPA supports programs such as these and hopes that, through this program, the governments and WIPO can raise public awareness and increase capacity to enforce IP rights in Bangladesh for the sake of all stakeholders.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Act Amended in 2005 – Still No WIPO Treaties Implementation, and Bangladesh Claims TRIPS Transition Until July 1, 2013: Copyright protection is afforded under the Copyright Act, 2005 (which is only available in Bengla).⁶ The 2000 Act (prior to amendment) was adequate for basic anti-piracy purposes, although it did not implement

⁵ The project was launched in Dhaka, on November 2, 2008, in the presence of Ms. Rasheda K. Choudhury, Advisor, Ministry of Cultural Affairs, Mr. Debapriya Bhattacharya, Ambassador and Permanent Representative, Permanent Mission of the People's Republic of Bangladesh to the United Nations Office and other International Organizations in Geneva and Mr. Stefan Frowein, Ambassador and Head of the Delegation of the European Commission to Bangladesh. The ceremony was also attended by Mr. Sheikh Enayet Ullah, Secretary, Ministry of Industries and other senior officials from the Government of Bangladesh.

⁶ The Copyright Act 2005 (Act No. 14 of 2005) on May 18, 2005, amending the Copyright Act 2000 (Act No. 28 of 2000), available in Bangla at http://www.copyrightofficebd.com/copyright_act.php. The Bangladeshi government, in a recent WTO review, indicated that the Copyright Amendment, 2005 is currently only in Bangla, but is being translated into English. 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

the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the government has indicated it has not yet made any decision about joining the WIPO Treaties. The Bangladesh government claims the 2013 transition period for Least Developed Countries (LDCs) to implement the TRIPS Agreement.⁷ There are some concerns that those engaged in pirate production in Bangladesh may have lobbied the government for exceptions in the 2005 amendment that would run afoul of WTO obligations by effectively permitting pirate exports to neighboring markets such as India. Bangladesh is still a member of the Berne Convention (since May 4, 1999), and as such, must adhere to the rules and principles set forth in that Convention, including abiding by the three-step test. IIPA looks forward to reviewing the amendments and providing comments.

WTO Trade Policy Review Body Report on Copyright Law and Enforcement: In Bangladesh's Trade Policy Review at the World Trade Organization in September 2006 (minutes released in November 2006), 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 explanations of civil,⁸ administrative/border,⁹ criminal,¹⁰ and provisional¹¹ remedies have been set out in writing. Also, regarding enforcement,

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." See World Trade Organization, Trade Policy Review Body, 13 and 15 September 2006, WT/TPR/M/168/Add.1 (published November 10, 2006).

⁷ 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."

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ See *id.* The government indicated the following as to provisional measures under the current law:

the government of Bangladesh essentially indicated that it does not keep regular copyright enforcement statistics, but indicated that “efforts are being made for collecting such data” and that the records/data in relation to seizure or confiscation are maintained by Bangladeshi Customs manually in a register. The government indicated that there are other enforcement agencies like BDR (Bangladesh Rifles), the Coast Guard, and the Police which are also responsible for enforcement of copyright regulations within their respective jurisdictions, and that it 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.”

We recommend that the United States take the opportunity to request information including enforcement statistics, since the government has indicated a willingness to share such data when “a request is received.”

GENERALIZED SYSTEM OF PREFERENCES

Bangladesh participates in the Generalized System of Preferences (GSP) program, a trade benefits program that provides duty-free access to the United States for certain products. The criteria of eligibility to enjoy this benefit includes that a country provides “adequate and effective” copyright protection. A small percentage of products coming into the United States from Bangladesh qualify for this duty-free treatment. Specifically, during 2007, \$23.8 million in goods, or about 0.7% of all of Bangladesh's imports to the United States, entered under the duty-free GSP code. During 2008, more than \$21.6 million in goods, or almost 0.6% of all of Bangladesh's imports to the United States, entered the United States under the duty-free GSP code. In order for Bangladesh to continue to qualify for this trade benefit, it must be able to demonstrate that it meets the eligibility criteria.

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.

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA submits this Special Mention report on Colombia to urge that additional attention be directed at book and music piracy problems in Colombia during 2009.

IIPA and its members reiterate our longstanding support for the U.S.-Colombia Trade Promotion Agreement (TPA). This agreement contains a comprehensive chapter on intellectual property rights that will raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators.

Summary on book piracy: Academic publishers, local and international alike, are plagued by continued unauthorized photocopying of books and journals in educational institutions throughout Colombia. Photocopy shops near universities in Bogotá use both traditional photocopying machines and digital scan-and print techniques to copy most textbooks used by university students and lecturers. The activity is unabashed and blatant, with some stores featuring white boards containing information about adopted texts designed to facilitate mass copying at the request of student customers. Examples of affected universities include Autónoma, Gran Colombia, Salle, Inca, Central, Católica, Piloto, Santo Tomas, Politécnico Gran Colombiano and Libertadores in Bogotá. Off-campus establishments also are prevalent in such places as the District Kennedy in Bogotá, Santa Rosa in Cali, and Centro Popular del Libro in Medellín.

Unauthorized photocopying also takes place within the universities themselves. For example, inside public universities, as the Universidad Nacional de Colombia in Bogotá and Medellín and the Universidad del Valle in Cali, commercial shops routinely sell photocopies of complete books. The push for curriculum development by local lecturers has resulted too often in unauthorized compilations passed off as original works (for example, chapters of several competing legitimate books on a particular subject are cobbled together to form a new so-called "original" book). Likewise, these types of unlicensed, unauthorized compilations, often in digital form, are often disseminated to students engaged in distance learning programs at universities such as Militar Nueva Granada and San Martín. Photocopying in libraries is also common, with some library officials even digitizing materials for public circulation without seeking appropriate clearance.

Rights holders and licensing bodies in Colombia have led educational initiatives and public awareness campaigns aimed at creating a culture of respect for intellectual property and emphasizing the socio-economic benefits that intellectual property development and protection bring to the country. It is time for the Colombian government to take affirmative actions to combat the copyright infringements -- in both hard copy and digital formats -- occurring in and near educational institutions. Furthermore, the Ministry of Education and the universities should take action to stop such illegal activities. IIPA believes it is important that all higher education institutions (both public and private) in Colombia look toward the establishment of policies that will serve to minimize the impact of this activity in the academic sector. Active measures taken by universities and the governing bodies to ensure that library activities and on-campus use of materials are legitimate will serve the Colombian educational sector, as well as the publishers trying to support it.

Summary on music piracy: The Colombian recording industry continued to be harmed by piracy during 2008. Regarding physical piracy, millions of burned CD-Rs were sold on streets and flea markets in major cities (Bogotá, Medellín, Cali). Because of this situation, the level of music piracy was 71%, the equivalent to almost 13 million units. Internet piracy of music is almost 100% of the total market, mainly because the lack of action to identify and prosecute administrators and owners of websites, blogs and "hubs" involved in the distribution of illegal music files.

The National Police (DIJIN) and the Specialized Prosecutor's Office did, however, make some strides in fighting music piracy last year. 857 raids were conducted on streets, warehouses and laboratories, resulting in the seizure of 2,290,537 pirate copies of sound recordings. A total of 1,796 CD burners and 567 DVD burners were also seized during

those operations. Considering the challenges and priorities faced by Colombian government, these results represent a valuable effort in favor of Colombian and international artists and producers. There is no doubt that police action played a role in the relatively small decrease on physical sales experienced by Colombian music industry (less than 1% compared to 2007) in the last year. These efforts should be consolidated in 2009.

Regarding its Cyber-café campaign, DIJIN also conducted a significant amount of raids (approximately 200), mainly in capital city area, for the purpose of combating the illegal exchanges of music, movies and child pornography files using facilities and computers located at these commercial places. The Cyber-café program, which was initiated in 2005, is a clear example of consistent leadership and strong actions taken by DIJIN.

The weak part of the music anti-piracy campaign involves the prosecution of cases. Although 1,132 individuals have been processed, none of them served time in jail. Piracy is still considered a minor offense by Colombian criminal judges and appellate courts. This negative perception is exemplified by the Supreme Court (Criminal Chamber) in its unfortunate decision issued on April 30, 2008. There the Court declared that "the illegal download of music to personal computers is something insignificant that can't be considered a crime." An exceptional appeal before the Constitutional Tribunal was filed by IFPI's national group along with other rights holders' organizations, and this appeal is still pending.

In 2008, Colombia continued its sustained production of successful new talents (like Fonseca, Fanilu, Jorge Celedón), all of whom are developing international audiences. The Government of Colombia should carefully consider keeping its attention toward protecting the creative output of such talents.

HONG KONG

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR actively monitor developments in Hong Kong during 2009 with respect to the issues discussed in this Special Mention report.

LEGISLATIVE ISSUES

“Digital Environment” Proposals: In April 2008, the Hong Kong government released a paper entitled “Preliminary Proposals for Strengthening Copyright Protection in the Digital Environment.” The paper marked a somewhat disappointing step in a process, launched in December 2006, to adapt Hong Kong’s Copyright Ordinance to the 21st century realities of the digital networked environment. This modernization effort takes on greater importance from the announcement by the Peoples’ Republic of China that the PRC’s accession to the WIPO Internet Treaties applies to the Hong Kong Special Administrative Region (HKSAR), effective October 1, 2008.¹ Because the “Digital Environment” consultation process is still far from completion, IIPA urges the U.S. government to monitor it closely, and to intervene as appropriate, to encourage Hong Kong to take a more ambitious path than is set out in the April 2008 proposals.

Hong Kong’s original consultation paper asked whether legislation should address the role of online service providers (OSPs) in combating Internet piracy, and should offer improved procedures for identifying online infringers so that right holders may pursue them. The HKSAR’s answer to these questions in the April 2008 proposals was “no.” Instead, the government convened a “tripartite forum” at which OSPs, right holders, and users are discussing a possible “Code of Conduct.” While IIPA strongly supports cooperative arrangements between right holders and service providers to combat piracy, without the proper legal and policy context such arrangements are unlikely to be launched, much less to thrive. That context must include clear rules on indirect liability for copyright infringement that provide strong incentives for cooperation. It is disappointing that the HKSAR has chosen an approach that puts the cart of attempted cooperation before the horse of legal incentives.

Additionally, it was disheartening that the initial agenda announced for the Tripartite Forum was less than ambitious. An effective inter-industry agreement, while it may include a “notice and notice” system for passing along to OSP subscribers notifications from right holders about specific instances of infringement occurring through peer-to-peer (p2p) networks, must also go well beyond that. Items for discussion should include, among others, a system to impose meaningful consequences on repeat infringers; preservation of identifying data on such infringing subscribers; its disclosure to right holders for legitimate enforcement purposes; and a notice and take down procedure that effectively addresses infringing material hosted on websites and servers.

Because the initial Tripartite Forum discussions bore little fruit, the government recently revamped its approach. In December 2008, it informed the participants in the Tripartite Forum that consideration of an OSP responsibility framework would first focus on execution of a Memorandum of Understanding (MOU) among a limited number of participants, which would set out the mechanisms (e.g. notice forwarding) to be adopted by OSPs willing to participate in the process on a voluntary basis. In accordance with this MOU, participating OSPs would forward notices of infringement received from rights holders to its subscribers identified as potentially engaged in infringing activity. Parallel to a trial period under the MOU, the Commerce and Economic Development Bureau (CEDB) would craft a Code of Practice, the provisions of which would take into account the results of the trial notices undertaken per the terms of the MOU. The Code of Practice would likely ultimately be given legislative effect, in a package to include some safe harbor provisions for OSPs, linked to compliance with the Code of Practice. Under CEDB’s timetable, it is unlikely that legislation would be in place until the first half of 2010.

¹ See http://www.wipo.int/pressroom/en/articles/2008/article_0046.html.

While it is encouraging that a legislative solution is back on the table, many questions remain. For instance, while CEDB had proposed that only the most “hard hit” copyright interests participate in the MOU and notice trials, all copyright sectors are “hard hit” by Internet piracy, given the prevalence of illicit file sharing services. Furthermore, the recording industry has strongly advocated that the MOU go beyond the first step of notice/notice and notice/takedown systems, by establishing a working group to identify solutions to repeat infringement. In addition, any sender of a counter-notice under the notice-and-takedown procedure should be required to provide identifying information, as under the Digital Millennium Copyright Act in the US. Questions have been raised about provisions in the draft MOU regarding indemnity, about the problem of OSP errors in identifying account addresses engaged in infringing activity, and other issues. Finally, any MOU should require OSPs to preserve information about notices, sufficient to identify subscribers who have received multiple notices, for at least a year. In terms of legislative drafting, industry is concerned that OSPs should not be eligible for safe harbors unless they meet specified criteria regarding (among other issues) notice and takedown, forwarding of right holder notices of infringement to subscribers engaged in infringing activity using p2p channels, and a termination policy for infractions of terms of service or the law. Finally, waiting until mid-2010 for legislation is a frustrating prospect for a consultation process that has already been underway since late 2006. The scope and seriousness of the problem call for a faster response; and since some OSP representatives have reportedly expressed that they are not opposed to a legislative option, this should be proactively pursued in parallel with the crafting of a voluntary cooperative framework. IIPA urges that the progress of the Tripartite Forum be closely monitored.

In the April 2008 Digital Environment proposals, the Hong Kong government also backed away from other key features of an effective copyright regime for the 21st century. It declined to apply criminal sanctions to all forms of unauthorized communication of works (including online) on a commercial scale, or to make statutory damages available, including in situations such as online piracy where calculation of full compensatory damages may be nearly impossible. HKSAR should be encouraged to reconsider these positions. The proposals also asserted that current Hong Kong law already provides criminal sanctions for uploading infringing copies of works to a peer-to-peer (p2p) file-sharing network; however, since no Hong Kong court has explicitly so held, a legislative clarification remains advisable. Hong Kong should also be encouraged to clarify that those who induce others to commit infringements (including in the online environment) should face criminal liability in appropriate circumstances. Furthermore, the proposed new exception for certain temporary copies made by OSPs should be narrowed to apply only to copies made in the course of transactions authorized by the right holder, and should preserve the ability of a right holder to obtain injunctive relief, even against a party to which the exception applies. Of course, positive features that have been carried forward in the April proposals, such as recognizing a broad exclusive right of communication to the public, should be enacted promptly.

The April 2008 proposals not only took several important issues off the law reform agenda, at least for now; they also added a major new issue for consideration: an exception to allow consumer copying for “media shifting” purposes. While no specific legislative proposal has been tabled, this concept should be approached with caution. Hong Kong should not enact such an exception unless it is demonstrably necessary, taking into account both current law and the accelerating marketplace response to consumer demand to engage in media-shifting. In crafting any such exception, Hong Kong must comply with applicable international norms (notably the “3-step test” of TRIPS Art. 13 for limitations and exceptions, now broadly applicable to Hong Kong under the WIPO Internet Treaties); must preserve the integrity of technological measures applied by copyright owners; and must respect freedom of contract. Finally, any exception in this field should be narrowly drafted and specific as to which types and formats of works are or are not affected.

The Digital Environment initiative provides an exceptional opportunity for Hong Kong to craft a world-class copyright law for the 21st century. It would be regrettable if this opportunity were squandered in favor of piecemeal tinkering with the Copyright Ordinance. IIPA urges USTR to monitor developments on the Digital Environment initiative closely.

Copyright (Amendment) Ordinance: More than a year and a half after enactment of the Copyright (Amendment) Ordinance 2007, some loose ends remain that deserve continued attention from the US government. These include:

- **Liability of business infringers of books and journals:** The 2007 amendment makes 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. The new criminal offense for businesses that engage in “regular and frequent” infringing acts of copying or distribution of books or academic journals has not yet come into force, and its usefulness is uncertain until subsidiary legislation to define the scope of a “safe harbor” from liability has been completed.² A much-delayed final version of the safe harbor proposal is expected to be submitted to the Legislative Council in the first half of 2009, and we encourage the Commerce and Economic Development Bureau (CEDB) to continue working with rights holders to find safe harbor terms that will not undermine the effectiveness of the criminal provision.

- **Copyright exceptions:** The amendment includes broad new exceptions for “fair dealing” in copyright materials for the purposes of education or public administration. “Fair dealing” would excuse some 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. The key concept underpinning the new public administration exception – that it is intended to be used only for “urgent business” of governmental bodies – remains undefined. Implementation of these provisions must be carefully watched 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.

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.

PIRACY AND ENFORCEMENT ISSUES

Internet Piracy: Internet piracy continues to worsen in Hong Kong. This is primarily due to the explosion in use of the Internet for illegal peer-to-peer (p2p) file sharing on services based both in Hong Kong and abroad. Increased availability of broadband service in Hong Kong is fueling this trend. Enforcement mechanisms have completely failed to keep up with this increased problem. Where content is stored on the server of an Internet Service Provider, providers are often co-operative with a takedown notice; but in the vast majority of cases, p2p technology is used to upload and download, and service providers have done nothing to lift the veil of anonymity from p2p users. In the audio-visual sector, pirate streaming sites based in the PRC are a growing additional problem; Hong Kong users access these through user-generated content (UGC) sites and through links from online discussion forums. The music industry encounters similar problems. IFPI filed a case to Hong Kong Customs complaining about a site whose domain name was registered in China, but which hosted infringing files in Hong Kong. Hong Kong Customs refused to investigate the case because of the involvement of a non-Hong Kong entity.

These facts underscore the urgency of a more ambitious approach to copyright law modernization in Hong Kong. The law must provide sufficient incentives for service providers to cooperate with anti-piracy efforts or face serious liability consequences. A more efficient, rapid, and cost-effective mechanism must be put in place to allow disclosure of the

² In any case, the new offense remains flawed since it provides a defense that exempts otherwise criminal infringement if a court later finds the publisher’s licensing terms to be “commercially unreasonable.”

identities of p2p and other infringers to right holders, so that they may pursue timely remedies against them. And Hong Kong's law enforcement authorities, now largely sidelined because of uncertainty about criminal liability for uploading and downloading under Hong Kong law, must get the legal tools they need to fully enter the fray. The disappointing conclusions reflected in the April 2008 proposals are having concrete detrimental impacts today.

Audio-Visual/Optical Disc Piracy: There are currently 66 licensed optical disc production plants with 446 production lines in the HKSAR, with an annual production capacity of nearly 1.6 billion units. All these figures have declined since 2007. Seizures of pirate optical media products continued at a high rate in 2008 (nearly one million DVDs and VCDs, and half a million DVD-Rs and CD-Rs, had been seized by the end of November). The majority of these were smuggled in from the PRC, mostly from Shenzhen, rather than produced within the HKSAR. Some pirate product originating on the mainland is transshipped through Hong Kong to other destinations. High profile enforcement efforts against optical disc piracy continue. For instance, in "Operation Torpedo" in late September, 120 Hong Kong Customs officers raided 19 retail shops and a warehouse, arrested 16 persons, and seized over 63,000 pirated optical discs. The "Operation Codebreaker" raids in June led to 21 arrests and seizure of HK\$1.2 million (US\$155,000) worth of pirated goods and assets. MPAA also commends authorities for initiating five criminal prosecutions in 2008 against online auction sales of pirated optical discs.

For the audio-visual sector, illegal camcording in Hong Kong cinemas is a growing source of master copies that feed both Internet and hard goods piracy. In 2008, eight titles from MPAA member companies were illegally camcordered in Hong Kong.

Entertainment Software: Game piracy continues to be a significant problem in Hong Kong. Recently, piracy of games on the Wii console platform has become much more prevalent. In 2008, the ESA supported over 150 game piracy cases that were brought by Hong Kong Customs. The cases included PC and/or Wii game disc piracy, Nintendo cartridge counterfeiting and/or console modification. The ESA appreciates Hong Kong Customs' enduring commitment to the reduction of game piracy. The game industry also applauds Hong Kong Customs for swiftly bringing its first set of enforcement actions against individuals and entities trafficking in consoles that have been modified to circumvent technological protections against piracy. These actions were based on Hong Kong's new criminal prohibitions on trafficking in anti-circumvention products and services, which went into effect in April 2008. The next month, with the game industry's support, Customs agents raided seven shops in six shopping arcades throughout Hong Kong, seizing 29 modified consoles and arresting eight people. In September, there were additional enforcement actions against two shops offering modified consoles. Hong Kong Customs will need to continue aggressive enforcement of the anti-circumvention provisions. Hong Kong's status as a global source for circumvention products, which have been seized in many other countries around the world, must be reduced. The ESA and its members will continue to provide to Customs the exporter information it receives with respect to shipments from Hong Kong of circumvention devices and pirated game products seized by foreign customs agents.

While the ESA is pleased with last year's enforcement results, as reported in past years, entertainment software publishers continue to face burdensome evidentiary requirements for prosecuting copyright offenses, which cause 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.

Business Software: The rampant use of unlicensed software in the workplace by businesses continues to cause the greatest revenue losses to the business applications sector of the software industry. Hong Kong Customs and Excise (C&E) is proactive in developing cases, running its own 24-hour hotline for tips on piracy, and conducted 13 raids in

2008. In one major operation, in March 2008, C&E targeted shops that offer pre-loading of unlicensed software for customers. Twenty-six sets of computers were seized and three men arrested, and the operation received widespread media attention. One of those arrested was ultimately sentenced to 5 months' imprisonment, marking the first time that a so-called "system builder" had been sentenced to jail. (Pirate retailers have in the past received sentences as heavy as 55 months.) Hong Kong authorities also ramped up their ongoing investment in the "Genuine Business Software Campaign," a joint venture with BSA that reached 50,000 companies in 2008 with the message of adoption of secure asset management practices to prevent end-user infringements.

Book Piracy: The book publishing industry reports that C&E has continued in its responsiveness to its complaints about illegal photocopying during 2008. The level of ongoing cooperation is commendable, even in the face of changing modes of operation for copyshops around the city. The industry remains concerned about underground photocopy operations and needs the continued cooperation of C&E in finding and tackling these hard-to-detect targets. Recent raids targeted Sai Ying Pun, Siu Sai Wan, Kwai Chung, Sham Shui Po, North Point and Tai Po and yielded multiple seizures and arrests.

Other Enforcement Observations: IIPA applauds Hong Kong authorities for continuing to use innovative legal tools to attack pirate enterprises, notably the Organized and Serious Crime Ordinance (OSCO). Since OSCO became applicable to copyright offenses in 2004, it has been used to mount several successful operations against organized pirate optical disc syndicates. OSCO was first used to order confiscation of the proceeds of piracy in October 2007 in the case of Lau Ka Pui, whose HK\$1.2 million (US\$150,000) of proceeds were identified by Hong Kong's Customs and Excise Department. OSCO's enhanced sentencing and asset seizure provisions are critical tools in the fight against piracy in Hong Kong.

JAPAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA accords Special Mention to Japan in this report to call attention to several areas where Japan is lagging in its efforts to keep its Copyright Law up to date with 21st century realities. We urge USTR to escalate its bilateral engagement with Japan in order to encourage positive action in the following areas, among others.

Online Piracy: Japan faces a serious and growing problem of online copyright piracy. The situation has worsened in the past year. All forms of copyright materials, such as musical recordings, audio-visual materials, business software, and book and journal publications, are suffering from widespread infringement via unauthorized peer to peer (p2p) and mobile services.

The motion picture industry reports that the online piracy problem continues to grow. In addition, it estimates that 90% of pirated DVDs and other optical media products sold by street vendors¹, or via Internet auction sites, originate either from illegal uploads (mostly to p2p networks) or from illegal imports. In spite of the criminal conviction of the developer of the “Winny” p2p file sharing system in 2006, it remains in operation and is the source of a great deal of online piracy. Many copyright sectors are impacted: for instance, one survey indicated that around 610,000 titles of business software with an estimated value of 19.5 billion yen (about US\$212 million at current exchange rates) were illicitly distributed using Winny over a single 6 hour period. IIPA applauds Japanese authorities for the arrest in September 2008 of an individual who added Japanese subtitles to digital files of movies, and uploaded them to the Winny system; this has already had a short-term positive impact. But p2p piracy of audio-visual products is increasing rapidly on the “Share” network, and the overall level of online piracy remains undiminished. While the enactment in 2007 of an anti-camcording law has decreased the overall number of thefts of new theatrical releases from cinema screens, technological advances have improved the quality of illegal camcords that are still being made, and well-organized criminal groups are quickly uploading and disseminating the pirate copies online.

Recording industry estimates indicate that nearly 400 million tracks were illegally downloaded to mobile phones in 2008, far more than the number of legitimate mobile music downloads, threatening the future growth of this critical market. Enabled by the rollout of third generation mobile phone receivers, Japanese consumers (particularly teenagers) flock to free unauthorized mobile sites. An October 2008 survey indicated that nearly two-thirds of mobile phone users in their early teens, and more than one-third of all users, are engaged in unauthorized music downloads. Unauthorized file sharing on PCs reached an estimated level of 84 million tracks in 2008, outstripping the legal market by a ratio of nearly 2 to 1. It is encouraging that three arrests were made in October and November 2008 of those who operated, uploaded to, and hosted mobile music piracy sites. But much more effort is needed if the mobile market segment, like others before it, is not to be lost to piracy.

One encouraging development in the past year has been a greater willingness of Internet Service Providers (ISPs) to discuss, at least, cooperative efforts to combat p2p piracy. News reports in March 2008 indicated that leading ISPs had agreed in principle to cut off the Internet connections of customers who repeatedly used them to upload files on Winny.² Soon thereafter, in a welcome break from the past, a consortium of copyright owners and service providers, with law enforcement and other government agencies as observers, began discussing how to work together more effectively, including the possibility of a coordinated “graduated response” system against repeat infringers, facilitation for the disclosure of contact details of customers who abuse the networks to commit infringements, and voluntary cooperation on technological solutions. Reportedly, the consortium is seeking to establish a guideline that would enable a coordinated

¹ Street vendors are especially prevalent in Western Japan, and some are involved with Yakuza organized crime groups.

² See http://news.cnet.com/8301-10787_3-9894891-60.html?tag=newsmag.

"graduated response" to begin operations in the spring of 2009. The Government of Japan should be more actively engaged in such private sector cooperative initiatives and ensure that concrete steps are implemented in 2009.

Beyond this, there is much more the government should do. The legally enforced anonymity of direct infringers using illicit p2p services like Winny and Share, and of unauthorized mobile music download sites, underscore the systemic inadequacy of Japan's enforcement regime against online piracy. That regime, problematic when it was instituted almost a decade ago, is now clearly outdated, and must be overhauled for 21st century realities. One touchstone for this reform should be to give greater incentives for ISPs to take their share of responsibility for identifying and remedying online infringements. Among other changes, Japan should:

- Narrow its broad statutory private use exception (Article 30(ii)) to take into account the ability of home users to download unauthorized digital copies that can be easily re-disseminated, such as over mobile platforms or p2p networks. As noted above, the reality is that such downloading is feeding retail (including offline) piracy of audio-visual works and other copyright materials. In addition, the status quo threatens to undermine the prohibition on unauthorized uploads (the "making transmittable" right). Legislation remains under consideration to make the Article 30 exception inapplicable to copies knowingly made from unauthorized sources. It would be a major step forward if this principle were enacted into law and applied to downloads of all types of copyrighted materials from illicit mobile and p2p services. Japan should be encouraged to take this long-awaited step without further delay.
- Adopt a more streamlined system for notice and takedown of infringing material from networks, from online auction sites, and from user-generated content (UGC) sites. The 7-day waiting period provided in the Service Provider Liability Law for a takedown is clearly outmoded, and is being exploited by UGC sites and others to delay unjustifiably a response to notices from right holders.
- Provide 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. In the increasingly anonymized p2p environment, pirates are fully exploiting this deficiency in current law.
- In fulfillment of Japan's obligations under the WIPO Internet Treaties to provide effective remedies against online infringements, ensure that injunctive relief is made available against indirect infringers (such as the providers of illicit mobile or p2p services) even if they do not themselves make "physical use" of infringing articles. This result appears consistent with case law from Japanese courts. If it is deemed advisable to codify this result in statute, Japan should do so in a way that clearly states, and does not unduly restrict, the range of cases in which such relief would be available.
- In line with recommendations of a subcommittee advising the Bunkacho (Culture Ministry), expand Article 113 of the copyright law to cover the situation in which the defendant offers to distribute unauthorized copies online but cannot be proven to have actually possessed the copies. Japan should be encouraged to move forward on this change as part of its effort to ensure that Article 113 covers all knowing unauthorized use of software programs, and possession of infringing copies with intent to violate any exclusive right of copyright owners.
- Relax the requirement for formal complaints before criminal proceedings can be commenced against those involved in piracy via p2p networks.

Other Issues. Along with online piracy, IIPA remains concerned about a number of legislative, regulatory and enforcement-related matters pending in Japan. The U.S. government should continue to engage actively with Japanese officials on the following issues, among others:

- **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 circumvention devices or software. These deficiencies should be remedied.

- **Exceptions to protection:** A range of exceptions to copyright protection remain under consideration in Japan. In general, Japan must proceed with caution, ensure that any new statutory exception meets a concrete and documented need, and respect all applicable international norms. With regard to specific proposals:
 - A possible exception for reverse engineering of computer programs is being studied. An international norm in this area is by now well-established, and reflected in case law in the United States and in the Software Directive in Europe. It spells out the circumstances under which decompilation of programs ought to be permissible in order to achieve interoperability. Any Japanese legislation should adhere carefully to this norm. Related proposals for more expansive exceptions, addressing error correction and research, are subject to considerable risk of abuse and raise serious questions. At a minimum these should be deferred pending further study.
 - No exception to copyright liability for the benefit of search engines should be considered without strong evidence of need. The parameters of the internationally recognized “3-step test” for restrictions on copyright protection must always be kept in mind. A better topic for study would be how to ensure that copyright law provides the maximum incentives for cooperation between search engine providers and rights owners in dealing with pervasive online copyright piracy.
 - A recently proposed exception for “information analysis” of online databases for research and development purposes needs far more study and focusing before any action is taken.
 - Japan should continue to rely on existing market mechanisms to resolve any issues faced by pharmaceutical companies in seeking to copy and distribute materials from scientific, technical and medical publications, including for disseminating information to customers in compliance with pharmaceutical regulations. No defensible justification has been offered for any proposed limitation of copyright protection in this area, and IIPA applauds the decision by the Japanese government to postpone any recommendation regarding such a proposal.
 - A recent proposal for Japan to graft a US-style “fair use” exception into its copyright law raises considerable concerns. While IIPA member associations recognize that a fair use approach can work to provide a regime of balanced and reasonable exceptions to protection, it would be extremely difficult to integrate this common-law doctrine into a civil law copyright system such as Japan’s. The likely adverse impact on the predictability of Japanese law could be highly detrimental to copyright owners and users alike.
- **Copyright term extension:** Japan has 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.
- **Statutory damages:** We urge Japan to move to implement a system of pre-set statutory damages for copyright infringement, at levels sufficient to achieve deterrence. Among other areas, such a change would substantially assist in the fight against online piracy, and against willful use of unlicensed software applications in the workplace, which is the single greatest source of piracy losses to the business software industry.
- **Educational exceptions:** IIPA remains concerned about the education exceptions in Article 35 of Japan’s copyright law. Japan should clarify the applicability of Article 35 to textbooks and course packs, and should build in technological safeguards to reduce the risk of infringement in the distance learning environment. In general,

Japan should ensure that both current and proposed exceptions do not undermine or discourage licensing arrangements and that they meet international standards.

- **Copy protections on digital free-to-air broadcasts:** IIPA is encouraged by indications that Japan's Ministry of Information and Communication will take into account the views of all affected industries in arriving at a new policy in this area, which could have a significant impact on the ability of copyright owners to prevent unauthorized re-distribution of their works contained in such broadcasts.

JORDAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA submits this Special Mention report on Jordan to highlight continuing piracy problems there, and to ensure that Jordan lives up to its obligations under the U.S.-Jordan Free Trade Agreement.

Executive Summary: More than seven years ago, the U.S.-Jordan Free Trade Agreement went into effect, and copyright owners have waited patiently since for the piracy situation to improve. U.S. copyright owners wish to conduct legitimate copyright business in Jordan, but very high piracy levels (for example, music piracy remains in the 90% range, while piracy levels for business software remain quite high around 60%) means that copyright owners can barely survive commercially. Meanwhile, Jordan has enjoyed significant benefits from the FTA, bringing into the United States almost one quarter of its imports – more than \$279.8 million worth in 2008 alone – under a special FTA customs line. Jordan continues to enjoy its benefits under the Free Trade Agreement with the United States, and must now uphold its end of the bargain by protecting U.S. copyrights. After years of waiting, finally, the government in 2008 took several initial steps recommended by IIPA to help improve the situation. An IPR Division (comparable to the successful Lebanese model) has been established within the Jordanian Police (the “IPRs Protection Division at the Public Security Directorate”). The Division is responsible for anti-piracy actions throughout Jordan. IIPA also understands that an IP Division at the Customs Department has been established. IIPA applauds the Department of the Jordan National Library Copyright Office for devoting additional resources to fight piracy in Jordan, although even more resources are now needed.

Priority Actions Requested in 2009: IIPA requests that the government of Jordan, in addition to amending its copyright law to fully implement the FTA, take the following actions to fix the enforcement system, which would result in the most significant near term commercial benefits to the copyright industries:

- Allocate more resources from the Jordan National Library, including personnel, to effectively conduct regular inspections and raids, with other bodies monitoring the National Library's performance to ensure accountability.
- Ensure that cases brought against pirates arising from raids proceed in an efficient manner to final resolution in the courts, with deterrent fines and penalties meted out in appropriate cases.
- Ensure that right holders can obtain *ex parte* orders more efficiently.
- Permit complainants and their representatives to attend raids and assist with the identification of all infringing product.
- Ensure that the IPR unit within Jordanian Customs pays particular attention to possible pirate imports coming in at the Syrian border.
- Ensure that enforcement authorities do not make unreasonable documentary demands to prove ownership.
- Amend the Law of Evidence and the Law of Criminal Courts Procedures to allow for infringing copies and tools/implements of piracy to be tagged after raids (at present, each confiscated item is registered during raids, which is onerous and time-consuming).

JORDAN				
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2007-2008 ¹				
INDUSTRY	2008		2007	
	Loss	Level	Loss	Level
Business Software	11.0	58%	11.0	60%
Records & Music	NA	90%	NA	90%
Motion Pictures	NA	NA	NA	NA
Books	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA
TOTALS	11.0		11.0	

PIRACY AND ENFORCEMENT ISSUES

Retail Piracy Remains Severe, and There Is Evidence of Smuggling from Syria: The main problem in Jordan remains the blatant selling of pirated optical discs, mainly locally burned CD-Rs/DVD-Rs but also factory-produced discs believed to be imported from neighboring Syria, on street corners and markets. Downtown Amman has several mega shops selling pirated software, videos, movies and games, and CD-R and DVD-R burning now takes place in shops in Amman and elsewhere in Jordan, destroying the legitimate markets for such products. Whereas music piracy levels have always been high in Jordan (hovering at close to 80% for international repertoire), the record industry now reports the number is over 90%. Due to piracy, the legitimate market in Jordan for music, audiovisual works, and other creative products has suffered. In previous years, intelligence revealed that some pirate CDs and DVDs had been smuggled into Jordan from neighboring Syria. While industry has had no access to the plants, industry believes that at least four optical disc plants are operational in Syria, saturating the domestic market with pirate product but also exporting product heavily to Iraq and also to Jordan and Lebanon.

Business Software Piracy Rates Remain High: Software piracy levels in Jordan have decreased over the past few years. However, losses have increased because the overall IT and software market has grown in Jordan. Retail software piracy remains rampant in markets like Gardens Street in Amman.

Enforcement Actions Continued, Although at a Lower Level than 2007: The Department of the Jordan National Library Copyright Office coordinates copyright enforcement in Jordan, while the IP Division at the Customs Department, and the newly established IPRs Protection Division at the Public Security Directorate of the Jordanian Police play crucial subsidiary roles. The relationship with these authorities improved for the industries in 2008, although information from the Library indicates that the sheer number of raids may have gone down (information shows there were 815 raids in 2007, but only 351 in 2008). IIPA welcomes the Police Department's establishment of a new IPRs Division late in 2007. The new Division has reportedly been cooperating well with the National Library. The IP Division at the Customs Department enjoys *ex officio* authority, and industry reports good relations with this IP Customs Division as well.

Court Results Remain Non-Deterrent: The court system remains a weak link at deterring piracy with low non-deterrent fines being the norm. The penalty structure in the Copyright Law is too low to deter piracy. IIPA supports statements by the Director of the Jordan National Library that deterrence could be achieved if maximum penalties, including imprisonment in appropriate cases, are regularly meted out, and would like to see this theory tested. The range of penalties is currently three months to three years imprisonment and/or JD1000 (US\$1,420) to JD6000 (US\$8,517) in fines. IIPA members are working with a U.S. Agency for International Development-funded program to establish a one year training for judges that would be the nucleus of a specialized IP Chamber within competent courts. It is hoped this training can result eventually in a highly-qualified group of judges and prosecutors able to bring efficient judicial trials in what for the most part are uncomplicated commercial copyright piracy cases.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Jordan. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Jordan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

FREE TRADE AGREEMENT IMPLEMENTATION; OTHER LEGISLATION

The United States-Jordan Free Trade Agreement went into force on December 17, 2001, 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;² national treatment [Article 4(3)-(5)]; and the substantive obligations in Article 4(10)-(16) of the FTA.
- December 17, 2003: Accede to the WCT and WPPT; it missed this deadline, but joined the WCT on April 27, 2004 and the WPPT on May 24, 2004.
- December 17, 2004: The enforcement obligations in Article 4(24)-(28) of the FTA.

Unfortunately, the government of Jordan has not met all its deadlines and the laws (including Copyright Law No. 22 of 1992, as last amended by Law No. 9 of 2005)³ remain out of compliance with the FTA as of February 2009 (which could subject the government of Jordan to Dispute Settlement under the Agreement). Since the 2005 Special 301 cycle, IIPA has urged the U.S. government to insist that the government of Jordan immediately take all steps necessary to bring its laws into compliance with the FTA. In the 2007 and 2008 reviews, IIPA reiterated several issues as ripe for consideration for possible dispute settlement if the government of Jordan did not take immediate steps to remedy them. Those issues included the following FTA requirements:

- Anti-Circumvention and Technological Protection Measures ("TPMs") [FTA Article 4(13)].
- Appropriately Narrow Exceptions and Limitations [FTA Article 4(16)].
- Compensatory Damages [FTA Article 4(24)].
- Deterrent Statutory Maximum Fines [FTA Article 4(25)].
- Seizure of Documentary Evidence [FTA Article 4(25)].
- *Ex Officio* Enforcement Authority [FTA Article 4(26)].
- Presumptions of Ownership and Subsistence of Copyright [FTA Article 4(27)].
- Fixing Provision Allowing Alteration of Features in Seized Materials, Which Impinges on Exclusive Adaptation Right [Article 47(a)].
- Customs/Border Provisions – Article 59 of TRIPS.

The U.S. government worked with its counterparts in the Jordanian government to resolve many of the remaining FTA deficiencies, and progress in 2007 had been made to deal with the deficiencies related to TPMs, exceptions, compensatory damages, seizure of documentary evidence, *ex officio* enforcement authority, and dealing with seized materials, through implementing regulations. Unfortunately, it now appears the government of Jordan has taken the position that implementing regulations will not suffice to fix FTA deficiencies, and are back to the drawing board on copyright law amendments. A new draft Copyright Law amendment has reportedly been formulated and currently sits with the Cabinet of Ministers for approval. Once approval is obtained, the draft amendments would be forwarded to Parliament for its approval. It is hoped that the amendments will be formally adopted by 2009, and that stakeholders may be consulted prior to its enactment. The amendment should at least deal with all the FTA issues bulleted above.

IIPA understands there is an initiative afoot in Jordan to draft and adopt a cybercrime law. IIPA would look forward to reviewing any draft made available, and would recommend that the drafters implement the Council on Europe Cybercrime Convention (Sept. 10, 2001). Article 10 of that Convention 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

² The FTA expressly states that the obligation to implement the WIPO Treaties does not apply to Articles 1(4) and 6(2) of the WCT, and Articles 5, 8(2), 12(2), and 15 of the WPPT.

³ Copyright Law No. 22 of 1992, amended by Law No. 14 of 1998, Law No. 29 of 1999, Amended Law No. 52 of 2001, Law No. 8 of 2005, and Law No. 9 of 2005.

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 willfully, on a commercial scale and by means of a computer system.”

IIPA also welcomes a reported draft amendment requiring government agencies to use only legitimate software.

FTA AND GSP BENEFITS

As noted, Jordan has enjoyed significant benefits from entering into a Free Trade Agreement with the United States. Specifically, Jordanian businesses brought into the United States more than \$312 million in goods in 2007 under a special FTA customs line, representing 23.5% of all Jordan's imports into this country, and more than \$279.8 million in imports to the U.S. under that customs line in 2008, representing an even higher 24.6% of all of Jordan's imports into the U.S.

In addition to the benefits Jordan receives under the FTA, Jordan continues limited participation in the Generalized System of Preferences 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.” Jordan enjoyed duty-free imports into the United States of more than \$12.1 million in 2007, or nearly 1% of its total imports to the U.S., and during the first eleven months of 2008 that number grew to \$16.2 million, or 1.4% of Jordan's imports to the U.S. that came into this country under the duty-free GSP code.

TRAINING AND PUBLIC AWARENESS

In addition to the USAID judicial training that industry representatives are participating in, industry has also regularly participated in other training events held by the government of Jordan, the World Intellectual Property Organization, and private sector associations. The Business Software Alliance has been particularly active in participation in trainings. In April 2008, IIPA staff participated in a digital video conference under the auspices of the U.S. State Department. Participants from Jordan in the DVC included several dozen government representatives, professors, private sector specialists and students, and topics ranged from copyright piracy, digital copyright issues, and copyright protection and its link to economic development.

NIGERIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA submits this Special Mention report on Nigeria to highlight piracy challenges, including high quality counterfeit product, indicating a level of criminal organization not previously detected.

Executive Summary: The piracy situation in Nigeria once again worsened in 2008, with high quality counterfeit/pirated optical discs being sourced either to plants in the country or to imports, in either case indicative of a highly-organized criminal operation. Trade losses and levels of piracy in Nigeria have traditionally been very high. Evidence suggests that Chinese and Southeast Asian pirate gangs have infiltrated Nigeria and set up more than a dozen optical disc operations, some reported to have mastering facilities. The music industry has long been an easy target, devastating local Nigerian and international music markets. Now the pirates have advanced, counterfeiting sophisticated and expensive software packages that include hacks or cracks to authenticate the products on users' machines. Illegal use of publications continues at universities and libraries. Add to these problems the nascent but growing Internet presence and a toxic brew of mainly physical, but some digital, piracy has collectively destroyed the legitimate market in Nigeria for copyright. U.S. right holders feel the damage, but Nigerian creators feel it much more emphatically, as summed up in a quote by Eddie Ugbomah, Nigerian actor and film producer, upon the enactment of the Copyright (Optical Disc Plants) Regulation 2006,

I no longer release videos or DVDs into the Nigerian market ... The last time I released VCDs to video rental outlets across the country, they never gave me any returns. In Port Harcourt, Rivers state, these rental operators even threaten to kill me if I come for my money. Same thing at Warri, Delta state. So I've made up my mind not to release VCDs in the present circumstances.¹

The relative success of Nollywood, Nigeria's home video industry, and local music market through all of this is a testament to their staying power and totally despite the piracy situation. In fact, piracy has caused the local film and music producers to suffer huge losses, meaning that, for example, musicians still depend heavily on concerts and "road shows" to capitalize on their popularity and make up for truly meager amounts they can collect in royalties from CD sales.

The United States and Nigeria signed a Trade and Investment Framework Agreement in 2000, and now the government of Nigeria must make good on its international commitments, and as the Preamble of that TIFA notes, recognize "the importance of providing adequate and effective protection and enforcement of intellectual property rights."²

Priority Actions Requested in 2009: IIPA requests that the government of Nigeria take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

- Strictly enforce the Copyright (Optical Disc Plants) Regulation 2006, shutting down pirate plants and bringing to justice those who have taken advantage of previous lax enforcement to create a piracy haven for production.
- Enforce the Copyright Law through Nigerian Copyright Commission *ex officio* actions to sweep the markets clear of pirate product as well as duplicating and photocopy equipment, and stop the unauthorized use of business software.
- Have the Nigerian Customs Service stop pirate imports from coming in at the ports, and stop those coming to Nigeria to pick up pirate exports.
- Ensure adequate funding to universities and libraries in Nigeria to purchase books and journals.
- Bring copyright piracy cases to trial, hopefully resulting in deterrent judgments with penalties actually imposed.
- Enact an amendment to prohibit unauthorized (parallel) and pirate imports, and limit any personal baggage importation exception to one legal copy of a work by a physical person for his own personal purposes.

¹ See Miebi Senge, *AAGM: NCC's Copyright Regulation 2006 Seeks to STRAP Pirates Out of Business*, Vanguard (Nigeria), April 11, 2007.

² *Agreement Between the Government of the United States of America and the Government of the Federal Republic of Nigeria Concerning the Development of Trade and Investment Relations*, February 16, 2000, at http://www.ustr.gov/assets/Trade_Agreements/TIFA/asset_upload_file172_7727.pdf.



NIGERIA										
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS)										
AND LEVELS OF PIRACY: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	NA	55.0	95%	52.0	95%	52.0	95%	50.0	99%
Business Software	67.0	81%	63.0	82%	56.0	82%	46.0	82%	30.0	84%
Books	NA	NA	NA	NA	8.0	NA	6.0	NA	4.0	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
TOTALS	67.0		118.0		116.0		104.0		84.0	

PIRACY CHALLENGES IN NIGERIA

Pirate Optical Disc Production: There are reported to be more than a dozen optical disc production plants operational in Nigeria, some of which have migrated to Nigeria from Southeast Asia and operate to supply Central and West Africa. The plants themselves have many dozens of production lines, including DVD-compatible lines, and reportedly several mastering facilities, which create the glass masters and metalized stampers used to mass-produce CDs and DVDs. In all, IIPA believes the plants are capable of producing hundreds of millions of 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 June and July 2004, and were raided again in 2006. However, no cases against these plants' owners or workers have been concluded.⁴ The massive production overcapacity is not only used 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 remains a country overrun with pirate materials, stunting the growth of any legitimate industry. Pirate CD-Rs containing copyright materials, for example, compilations of up to 300 songs by local and international artists, or popular business software titles, sell for less than the equivalent of US\$1 in the local market. Notwithstanding the increased production capacity in the market, an influx of imported pirate CDs from unknown locations in Asia continues to harm the market in Nigeria's main cities, including Lagos (which IIPA understands is a major transshipment site for pirated product to enter Nigeria and nearby countries), Port Harcourt, Aba and Abuja.

Business Software Piracy: Software piracy has significantly worsened in the past twelve months due to a lack of enforcement. Disturbingly, perfect counterfeits, including counterfeit authenticity seals/holograms of popular business software packages have appeared in Nigeria, providing further evidence of highly sophisticated syndicate activity in the country. There are some indications that these counterfeits may come from outside Nigeria and that the criminal piracy ring involved is international in its scope. Unauthorized use of business software by businesses – so-called end-user piracy – also exists in Nigeria, causing a significant loss of income to software copyright owners. Hard disk loading also occurs, whereby thousands of dollars worth of pirate business software is loaded onto a computer hard drive prior to its sale to the public, or as an after-sales service. Finally, right holders are noting that some courier companies are involved in the importation of counterfeit software, necessitating greater involvement by Nigerian Customs.

Book Piracy: Book piracy continues to be a serious problem, due in part to the Nigerian government's decision in 2003 to cut 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.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Nigeria. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Nigeria's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

⁴ There are even unsubstantiated claims that the evidence related to the Nasinma plant has been destroyed to thwart attempts to prosecute those responsible for piracy at that plant.

Internet Usage Up in Nigeria, Leading to More Downloading: Hard goods piracy dominates the market in Nigeria, but Nigeria's tremendous growth in Internet usage can no longer be ignored. The latest statistics indicate 10 million Nigerians, or 7.2% of the population, now use the Internet. Users download illegal content (like music) from Internet websites, but IIPA has also become aware of IT consultants installing illegal software or other materials onto computers. Investigators and prosecutors in Nigeria have shown little knowledge of techniques to detect or investigate Internet piracy and capacity building is needed. The courts, which once employed arcane rules regarding admissibility of computer generated evidence, now have established principles for admissibility of such documents.

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.⁵ Tear gas had to be used to quell the violence. Several thousand pirate CDs and VCDs were seized and four men were arrested. 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 CHALLENGES IN NIGERIA

Industry faces numerous enforcement challenges in Nigeria, notwithstanding some well-intentioned officials and officers of: the Nigerian Copyright Commission (NCC), which reports to the Ministry of Justice and has responsibility in Nigeria for anti-piracy activities; the Nigerian Police; the Economic and Financial Crimes Commission (EFCC), which has teamed up with the NCC to fight optical disc piracy; and the National Customs Service (NCS), the nation's gateway police, which also has a significant role to play in anti-piracy enforcement (although NCS has never to IIPA's knowledge seized product on its own initiative). NCC's effectiveness is hampered by a lack of funding and insufficient manpower. IIPA members report the police lack overall will, and EFCC generally considers copyright as a secondary issue in their mandate and would rather assist the NCC to carry out its mandate than take the lead. Another problem in Nigeria involves the willingness of authorities to take actions on an *ex officio* basis, since traditionally complaints have been required, although industry reports that both the Nigerian Police and EFCC are now willing to take actions on an *ex officio* basis. The courts in Nigeria provide no sure relief, as bringing civil claims continues to be an expensive and risky remedy for right holders, and we are unaware of criminal proceedings to combat copyright piracy, including any arising from the more recent raids highlighted below. Lack of transparency in the enforcement system means right holders are generally in the dark about ongoing investigations and cases.

Enforcement Efforts Commence in 2007, But Slow in 2008: The Nigerian government, in cooperation with industry, commenced enforcement against piracy in 2007. The NCC teamed up with the EFCC and the private sector to form a collaborative campaign called the Strategic Action Against Piracy (STRAP). Two major raids were carried out targeting optical disc piracy in 2007. In one, on April 13, 2007, in reportedly the first raid to implement the 2006 optical disc statute, NCC, EFCC, the Nigerian Police Mobile Force, and industry representatives raided two large-scale replicating plants, Magnet Integrated Ventures Company Limited, in Ajah, and Akina Music International Company Limited, in Ikeja, impounding two truck loads of suspected pirated products estimated at N32 million (approximately US\$215,000),⁶ and the arrest of the Managing Director of Akina Music, and five employees of Magnet. IIPA understands that two managers of Magnet were arraigned in court in February 2008 by the NCC, but unfortunately, while the Commission sealed the premises of Magnet pending the conclusion of post-raid investigations, and indictments were brought, Magnet unilaterally opened its premises again for operation later in 2007. IIPA has no further information on the disposition of the case or any of the defendants. In the second raid, on July 25, 2007, 16 EFCC operatives and 20 armed police officers, with assistance of record and motion picture industry representatives, raided CVL Technology Ltd., a plant with five production lines, resulting in the seizure of 714 stampers containing international music repertoire and Hollywood movies, 5,000 copies of the 'Respect 2' album, by popular Nigerian Artist K1, and 8,000 other pirate CDs and VCDs. The EFCC also recovered documents showing orders for and production of several local and foreign works including 'Grass 2 Grace' album from

⁵ IFPI Enforcement Bulletin, September 2006 (on file with IIPA). Fortunately all those wounded recovered.

⁶ See NCC, *EFCC Raid Two Piracy Coys*, All Africa, April 30, 2007. Currency exchange rate is according to OANDA, as of January 30, 2008. See <http://www.oanda.com/convert/classic>.

2Face.⁷ The EFCC arrested the company's head of marketing and an investigation was launched. IIPA has no further information on the disposition of this case or the defendant.

IIPA has little information on sustained enforcement activity in 2008. The software industry reports of exactly one raid on a counterfeit software distributor. Another case was transferred from investigators to prosecutors. One press report indicates that in another raid in 2008, based on a tip-off, pirate local and foreign music CDs and VCDs worth over N15 million (approximately US\$100,000) were confiscated by the Standards Organisation of Nigeria (SON), the Copyright Commission, and the Performing Musicians Association of Nigeria (PMAN) in Lagos.⁸ IIPA welcomes the initial efforts of STRAP in 2007, and seeks more information on further activity in 2008, but notes that continued close monitoring of replicating plants in the country is essential as is follow up prosecutions to ensure the offenders involved receive deterrent sentences.

Judicial System Slow: The judicial system is reportedly very slow and many of the judges in the Federal High Court which has exclusive jurisdiction on IP issues are not that knowledgeable on copyright matters. It is hoped that the new Rules of the Court, which became effective in January 2009, will facilitate quicker dispositions of cases.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law: 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. However, an amendment to the Copyright Act to provide stiffer penalties to serve as a deterrent to pirates is long overdue.

Copyright (Optical Disc Plants) Regulation 2006: IIPA welcomed the government issuance of the Copyright (Optical Disc Plants) Regulation 2006. The law establishes a specific enforcement mechanism that include:

- 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.
- A registration system for commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing), i.e., burning of copyrighted materials onto recordable optical discs undertaken in back rooms of traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem).
- The requirement to use source identification (SID) Codes to trace pirate discs to their source of production.
- 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 also entails 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).
- Adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.

⁷ Among the wide variety of foreign artists whose works were found were R. Kelly, Wyclef, Luther Vandross, Celine Dion, Phil Collins, Westlife, Toni Braxton, Boys II Men, 50 Cent, Backstreet Boys, Akon, 2Pac, Beyonce, Kent Village, Lucky Dube and Whitney Houston. The works were mostly titled 'Platinum' or 'Best of' indicating that they contained selected songs from each artist. The foreign films on the recovered VCDs and stampers included *Love Don't Cost, Blood Diamond, Spiderman 3, Desperado 3, Contractor, Black Snake, Naked Weapon, The Big Boss, 300, Passion of Christ, Power House, The Marine, Final Contract*, and *Cyborg*.

⁸ IIPA also received unsubstantiated reports that the Solicitor General of Nigeria, the Commissioner of Police, and the NCC Director General presided over a destruction event at the Kaduna State Trade fair complex ground involving over N150 million (approximately US\$1 million) worth of pirate CDs, DVDs, videocassettes, books and implements used to infringe.

- 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).

The Regulation also imposes the requirement of a permit for the importation of discs into Nigeria (Section 2(1)). The U.S. copyright industries do not endorse this provision, since a permit requirement on the importation of legitimate optical discs may be a GATT-incompatible restriction on trade.

GENERALIZED SYSTEM OF PREFERENCES AND AGOA

The African Growth Opportunity Act amended the U.S. trade law in 2000 to authorize the President to designate sub-Saharan African countries as eligible for duty-free tariff treatment for substantially all imports to the United States from beneficiary countries.⁹ Nigeria is a beneficiary country eligible for AGOA benefits. In order to qualify for benefits under the AGOA statute, Nigeria must demonstrate that it has made “continual progress toward establishing” the “protection of intellectual property.” The statute also conditions a country’s designation as a beneficiary by the President if the country otherwise meets the criteria for GSP beneficiaries, namely, if it provides “adequate and effective protection of intellectual property rights.” Thus, AGOA and GSP are essentially related in terms of eligibility criteria. Nigeria has already been deemed a beneficiary country under the GSP program. As a result of its AGOA and GSP status, Nigeria enjoyed more than \$30.1 billion in duty-free imports to the United States under these programs (almost all under AGOA) (only \$1 million under GSP) in 2007, and more than \$35.4 billion in duty-free imports to the U.S. in 2008 (only \$1.3 million under GSP). Nigeria must meet the discretionary criteria in these U.S. laws to maintain such favorable treatment at these levels.

TRAINING

As was the case in 2007, IIPA members, the U.S. government, and international and other non-governmental organizations continued to provide avenues for training in 2008. The software industry was particularly active, conducting a training program for EFCC officials on software piracy, its detection, and investigation techniques. Another training was conducted for computer companies and end-users jointly organized by Microsoft and EFCC. In August 2008, a “Chief Technology Officer” business and technology summit was held in Lagos, organized by the U.S. Mission to Nigeria and sponsored by leading technology organizations, including the Business Software Alliance. The summit usefully brought perspectives from the U.S. government, U.S. private sector, and Nigerian government on ways to combat the piracy situation on the ground.¹⁰ A gap that can be usefully filled in 2009 would be to provide greater training and capacity building for prosecutors and judges of the Federal High Court.

⁹ See Generalized System of Preferences, Title V of the Trade Act of 1974, as amended, 19 USC 2461 *et seq.* See discussion at United States Trade Representative, *African Growth and Opportunity Act*, at http://www.ustr.gov/Trade_Development/Preference_Programs/AGO/Section_Index.html.

¹⁰ Michael Dible, *Nigeria: Piracy - Robber of Intellectual Property*, at www.allafrica.com/stories/200808270286.html.

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: This Special Mention report urges that USTR give attention to Switzerland in 2009 and that it heighten its bilateral engagement with a view to Switzerland's revising its copyright law amendments enacted in July 2008.

Executive Summary: For the past two years, IIPA and its members have expressed concern over the direction of the Swiss effort to amend its copyright law to bring it into compliance with the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)). Switzerland adopted two sets of amendments on October 5, 2007, one to amend its copyright law to implement obligations under the WCT and WPPT (the law also authorized Switzerland to ratify the treaties) and the other to amend its copyright law on other issues effective July 1, 2008. There still remain serious problems, as the Swiss law: diverges from the protection granted in EU member states; violates Switzerland's international obligations; and has a damaging effect on the legitimate copyright-based industries in the online marketplace in Switzerland and beyond.

Priority Actions to be Taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Switzerland in order to improve the adequate and effective protection of copyrighted materials:

- Revisit its latest amendments and further amend them to bring Switzerland's copyright law in tune with the laws in the EU and other OECD countries and with Switzerland's international obligations in the WCT and WPPT and the TRIPS agreement.
- Ensure that further 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.
- Revisit its provisions on mandatory collective management in many areas, which may violate Switzerland's obligations under TRIPS and the WIPO Internet Treaties
- Adopt anti-camcording legislation.

PIRACY AND RELATED CONCERNS

There are an estimated 5.2 million Internet users in Switzerland, representing 69% of the population.¹ Switzerland remains a haven for top-level source piracy oriented towards the German market. German release groups use Switzerland as a base for recording soundtracks and for maintaining their file-servers. Cyberlockers also present a problem as there are a growing number of portal sites and forums "offering" cyberlocker links. Since there is no legal source requirement, downloading and streaming from servers operated by pirates outside Switzerland, such as www.kino.to, are legal in Switzerland, as long as there is no uploading.

Swiss Internet Service Providers (ISPs) are not willing to cooperate in dealing with P2P piracy. The Swiss copyright industries are trying to obtain governmental support for such consultations between rightsholders and the ISP community. Rights holders' proposals to amend Article 65 regarding precautionary measures to include a right of information regarding service providers have not been taken up.

Rights holders are also concerned about the decision of the Swiss Data Protection Authority prohibiting the collecting of IP addresses as well as their use in a civil case (use of IP addresses in civil cases violates the Swiss telecom law; they are personal information protected under privacy rules). A company, Logistep, was collecting IP addresses of suspected infringers and turning them over to rights holders. It was also obtaining IP addresses from prosecutors in a criminal case, which is permitted, and using them in a civil case, before the criminal case has concluded, which the Authority said was not.² This case is still pending and the judgment is expected in the first half of 2009. This is a case similar to the *Peppermint* case decided in Italy and involving the same company, Logistep. In both countries, placing such onerous limitations on the collection and use of IP

¹ www.internetworldstats.com

² See news report at http://www.infoworld.com/article/08/01/25/Antipiracy-group-tactics-violate-Swiss-law_1.html



addresses will hobble the ability of rights holders to combat piracy through civil cases, leaving all enforcement to the criminal system.³ Both cases show that ISP cooperation is essential to effectively address online piracy, and in particular peer-to-peer (“P2P”) piracy. The consultations sought by the Swiss copyright industries will only lead to meaningful results if the government backs these discussions, forcing a reasonable and effective result.

COPYRIGHT LAW REFORM AND RELATED ISSUES

On July 1, 2008, the Swiss law implementing the 1996 WIPO Internet Treaties entered into force. Rights holders’ proposals to make clear that the private copy exception did not cover copying from illegal sources and that it is subject to a general remuneration obligation; to extend the term of protection for performers and producers in sound recordings; and to remove a provision that provided a broad exception to the anti-circumvention/TPMs obligations for all non-infringing uses were not approved. In addition, the Swiss Copyright Act now establishes an “observatory” mechanism to monitor “misuse” of TPMs; it is not clear yet how the mechanism will fulfill its role. Provisions on mandatory collective management must be amended and anti-circumventing legislation should be adopted.

The vast majority of European countries have amended their laws to meet their WIPO Internet Treaties and all EU member states have implemented 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).⁴

Private Copy Exception: While efforts were made by rights holders during the debates on the bills as they were being developed to ensure that the private copy exception in Article 19 of the copyright law did not apply to copies made from obviously illegal sources, such a clarification was not made in the final law. Unfortunately, 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 whether the work or phonogram comes from a lawful or unlawful source. Consequently, it could be argued on the basis of this Memorandum that the making of copies from unlawful sources would be allowed. That position encourages copyright infringement on a massive scale, is clearly inconsistent with the three-step test and other international norms, and threatens the vitality of Switzerland’s digital environment.

Moreover, the concept of what is a “private” copy is overly broad, in that the law refers to the “private circle” (“any use in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends”) 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).

Finally, Article 19(2) allows for “private copies to be made by third parties” including libraries and “other public institutions and businesses” which provide their users with photocopiers and even if the copying is subject to payment. This is completely inappropriate for a “private copy” exception and is not consistent with the three-step test in the WCT, WPPT and TRIPS.

Technological protection measures (TPMs): Legal protection for technological measures is 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 (17 U.S.C. §1201). The Swiss law allows the circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)). While certain narrow exceptions to the act of circumvention would be justifiable, such as those in the Digital Millennium Copyright Act in the U.S., this provision sweeps so broadly as to permit circumvention of any type of technological measure for any permitted purpose. This is far too broad, particularly given the inappropriately wide scope of the private copying exception, which taken together with this provision would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends. It would thus seriously

³ The decision of the Italian privacy agency, Garante, is discussed in the Italy country survey, <http://www.iipa.com/rbc/2009/2009SPEC301ITALY.pdf>

⁴ The EC Copyright Directive, which has been implemented by all EU Member States as well as a number of other European countries provides a standard level of copyright protection across Europe. While Switzerland is not obliged to implement every aspect of the Copyright Directive, the Swiss WIPO Treaties’ implementation does not create a level playing field and is inconsistent with the rules across Europe. Such consistency 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.

undermine the legal protection of technological measures and would diminish rights holders' ability to enforce "effective legal remedies" (as required by WCT Article 11) in the event of such circumvention. While this provision is overbroad, IIPA and its members acknowledge that the Swiss Parliament limited the "permitted purpose" exception to acts of circumvention only and appropriately did not apply it to permit trafficking in circumvention tools. Adequate standards for protection against acts of circumvention 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 such acts in such a sweeping manner. 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.

On a more positive note, a new Article 69a provides for fines for the circumvention of TPMs, the manufacture, import, distribution etc. of circumvention devices, the removal or alteration of electronic rights management information and the reproduction, distribution, importation etc. of works from which electronic rights management information has been removed or altered without authority. The violation of the anti-circumvention provisions on a commercial scale is sanctioned with up to one year imprisonment or a fine. The circumvention acts penalized under Article 69a, however, should carry the same sentences as other acts of copyright infringement penalized under the copyright law. With the categorization of circumvention acts as mere "misdemeanours" ("Übertretungen") instead of offences (which can be penalized with up to 3 years' imprisonment or a fine), several procedural measures for criminal prosecution are not available. These include for example imprisonment or the sentencing for attempt which is only possible if there is an explicit reference to this in the law. This distinction in sanctions is not justified, given that these acts are intentional acts with the same degree of injustice as the other infringing acts set out in the chapter on penal provisions.

In addition, some of the penal provisions have been improved. Infringement of copyright/related rights on a commercial scale now is sanctioned with up to 5 years' imprisonment and a fine (Articles 67(2) and 69(2)); imprisonment has to be combined with a fine. The previous provisions set out a penalty of imprisonment of up to 3 years and a fine of up to 100,000 francs (US\$86,244).

The "observatory" mechanism in Article 39b: The new law sets up a review mechanism -- an "observatory" -- to review "the effects of technological measures" that might be caused by employing devices and services to protect unauthorized access to, or infringement of, copyright or related rights. The objective of the observatory as set out in the law is to promote solutions based on partnership between the opposing parties. The Federal Government may, but has not yet conferred administrative powers to the observatory. Details on the observatory mechanism were set out in a draft decree implementing Article 39b of the Copyright Act. The decree, which entered into force on July 1, 2008, focuses its attention too narrowly on abuse of technological measures, thus potentially undermining the body's authority to act as a fair mediator. Joint proposals by MPA and Swiss trade body *Audiovision Schweiz* to secure a more neutral mandate of the observatory have not been included in the decree. The decree also sweeps more broadly than the system set up in the Copyright Directive, which defaults first to the rights holder to provide the solution with the national governments acting only if voluntary action does not accomplish the result. Finally, this "observatory" system has no authority to review whether the blanket ability to engage in acts of circumvention to facilitate taking advantage of copyright exceptions can have a debilitating effect on the development of new business models in the online environment, such as on-demand and interactive services. This system should be reconsidered and brought more closely into conformity with the systems in place in the EU or in the U.S.

Mandatory collective administration: The new Articles 22a to 22c provide overbroad benefits to state-licensed broadcasting organizations in the following activities, at the expense of record producers and artists:

- Use of archive works (Article 22a): while the definition of archival productions ("archive works") is acceptable, Article 22a(1) is too broad in that it also applies to other works or parts of works which are integrated into the archive work, as far as they do not determine to "a significant degree" the character of the archive work. The Article also requires mandatory collective administration of the exploitation of archival productions only by approved collecting societies.
- Use of orphan works (Article 22b) and use of background music in connection with broadcasts (Article 22c): also these uses require mandatory collective administration, which is unnecessary and should be disfavored.

- Reproduction for broadcasting purposes: Article 24b sets out mandatory collective administration for the reproduction rights in sound recordings for broadcasting purposes ("ephemeral right"). Furthermore, efforts to include a specific time period after which the reproductions made under this article have to be destroyed were not successful, the broadcasters' preferred wide interpretation that these reproductions are to be destroyed after "they have served their purpose" unfortunately prevailed. Because no effective time limit is set for retaining such copies, the Article runs afoul Article 11bis(3) of the Berne Convention which provides that the copies must be "ephemeral."

The mandatory collective administration provisions of the mentioned uses in effect constitute an expropriation of the rights holders' exclusive rights (guaranteed under TRIPS and the WIPO Treaties) by falling short of the requirements of the three-step test. They also act as an onerous and unnecessary price control, lowering the record producers' share of remuneration inappropriately, since the Copyright Act (in Article 60(2)) limits the level of remuneration which can be collected (the cap on remuneration for related rights remained unchanged at 3% of the proceeds from or cost of utilization). This cap is not appropriate and should be abolished; furthermore, Article 35(2) should be amended to set out a separate remuneration right for record producers and not a mere (equitable) share of the remuneration granted to performers.

The Need for 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 and it is not expressly illegal in Swiss law and probably would be excused under the private copy exception if it were raised as a defense. In order to facilitate enforcement and prosecution of such piracy, anti-camcording legislation should be adopted in 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." In the absence of clarifying legislative action, MPA is considering bringing a test case that camcording is already illegal under Swiss law.

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: On January 16, 2009, USTR announced its decision on the 2008 out-of-cycle review (OCR) of Taiwan and removed it from the Watch List, for the first time since 1998. Taiwan has indeed improved its IPR and enforcement regime and IIPA commends the government. However, a number of critical reforms still need to be made, particularly with respect to Internet piracy, and other tasks remain regarding campus-related issues. IIPA therefore submits this Special Mention report to highlight these and other issues. IIPA urges that Taiwan's actions in 2009 be carefully monitored to determine whether Taiwan should remain off the Watch List.

Executive Summary: Internet piracy is, for most copyright industries, the most urgent problem in Taiwan. While the important task of reducing book piracy is still not completed, other forms of physical piracy are generally under control. Additional resources and improved training in Internet enforcement techniques are necessary particularly at the police level. Taiwan should adopt its ISP bill with the changes suggested in this submission including establishing clear secondary liability for ISPs. This would foster better cooperation among rights holders and the ISP community. Internet piracy must be made a public crime. IIPA commends the Ministry of Education for prohibiting the use of filesharing software, including that of the FOXY service, on its educational network, TANet. MOE should monitor use across all its school levels and strictly enforce its order. MOE's action plan on dealing with on-campus commercial photocopying also needs continued work and monitoring, although IIPA recognizes that there have been significant efforts toward cooperation, complemented by exemplary off-campus enforcement, in recent months.

Priority actions to be taken in 2009: IIPA requests the following actions by the government of Taiwan, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Implement the order banning use of filesharing software and promote other effective and deterrent policies and penalties for online infringements occurring over the government-owned TANet.
- Continue island-wide, self-initiated raids against illegal photocopying during peak academic copying periods, and continue to work to implement campus legalization action plans.
- Provide improved training and manpower to the IPR police (IPRP) and to the joint internet infringement inspection special taskforce (JIST).
- More effectively monitor exports of blank ODs to regions like Latin America.
- Extend coverage of the new IP courts to criminal copyright cases in Taiwan's courts of first instance.
- Lengthy copyright royalty rate reviews by TIPO should cease in favor of direct and free negotiations between collecting societies and users.

Legislation

- Adopt, as soon as possible, ISP liability legislation with an effective notice and takedown system, and with the few amendments urged by IIPA.
- Adopt anti-camcording criminal legislation.
- Adopt copyright term extension legislation.

For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.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: 2004-2008¹

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	NA	NA	NA	NA	NA	NA	98.0	51%	40.0	40%
Records & Music	4.4	22%	4.9	21%	16.2	28%	21.5	26%	49.4	36%
Business Software ³	122.0	39%	118.0	40%	91.0	41%	56.0	43%	88.0	43%
Entertainment Software ⁴	NA	NA	202.9	94%	NA	NA	161.9	42%	123.0	63%
Books	NA	NA	16.0	NA	18.0	NA	18.0	NA	20.0	NA
TOTALS	126.4		341.8		125.2		355.4		320.4	

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Over the last year, piracy of physical product and end user piracy of software in businesses has continued to decrease. Taiwan is to be commended for reducing industrial (factory) OD piracy and retail OD piracy to very low levels, and for continued reductions in end user piracy of business software. Enforcement in these areas has continued to be good. Recent months have also seen stellar cooperation between authorities and book publishing representatives in trying to address the ongoing commercial photocopying issue. However, Internet piracy continues to threaten all these gains.

Internet piracy and enforcement : Internet piracy continues and has replaced physical piracy in the marketplace for many industries, requiring a significant increased response from Taiwan's government. Over 67% of Taiwan's population used the Internet as of mid 2008 (15.4 million users), with broadband connections growing from 12.25 million in July 2006 to 12.4 million in 2007, (63.4% of all users).⁵ It is the predominant form of piracy for the music, movie and entertainment software industries in Taiwan.

To illustrate how Internet piracy has supplanted physical piracy, the local recording industry has estimated that the losses incurred from physical piracy have dropped to around US\$13 million (for all repertoire -- U.S., other foreign and local), but using raid data and monitoring done of sites with respect to issuing cease and desist letters, Internet piracy losses are roughly estimated at US\$231 million or 18 times as great. IFPI-Taiwan was involved with the authorities in 363 raids in 2005 with 35 of those involving the Internet, about 9% of raids. In 2008 there were 212 raids with 122 involving the Internet, about 58%. It reports that the number of Internet raids went down because piracy on blog sites went down, and that enforcement actions had a deterrent effect in 2007-2008 (combined with welcome education campaigns conducted by the Taiwan Intellectual Property Office (TIPO)), although as detailed below there are recent developments with prosecutions that may undermine this.

FOXY (www.gofoxy.net) is the most notorious P2P site in Taiwan and remains the most significant problem for the

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on the history of Taiwan under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>) of this submission.

²MPAA's trade loss estimates and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

³ BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Taiwan, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. The piracy level in 2005 does not reflect handheld piracy rates, which were not available for 2005. In 2004, handheld piracy rates were upward of 95%.

⁵ Source: <http://www.twinc.net.tw/download/200307/96305b.pdf>; <http://www.internetworldstats.com/>

recording industry. It is estimated that 400,000 users are online with FOXY at any one time. FOXY was raided twice and remains under investigation by prosecutors. The site is hosted in the U.S. by an American citizen originally from Taiwan. Action by the Taiwan prosecutor is still pending.⁶ The issue to be resolved now, we understand, is whether Article 87(7) is applicable. This is the new P2P law's provision added to the Copyright Law in 2007 which provides for criminalizing the provision of software or other technologies from which the infringer has "receive[d] benefit." and where there is an "intent to allow the public to infringe economic rights."

A new problem is Gogobox (www.gogobox.com.tw), which is a cyberlocker site where users pay membership fees for storage space for their own collection (legitimate and pirate). The site has no search function but it operates in a manner allowing forums and BitTorrent seeds easy access to download music and movies without authorization. Action against this site also implicates Article 87(7), discussed above.

Many P2P and auction sites are located in mainland China and it is suspected that many pirates have moved their servers to China. China is now the biggest source of pirate music in Taiwan. The Taiwan authorities must find a way to block access to these sites, where technically possible.

The recording industry reports that, while sale of physical product has been dropping precipitously every year, and was down 27% by value from the 3Q 2007 to 3Q 2008, legitimate online revenue remains at only about 10% of the total, but shrinking, legitimate market. While legitimate services are available in Taiwan, the ready availability of free music via Internet piracy has kept these services at a very low volume. The recording industry estimates that physical piracy has now been reduced to about 22%.

Even though there is no ISP legislation yet in Taiwan, its ISPs have generally been cooperative in responding to cease and desist notices in the hosted environment. In 2008, IFPI-Taiwan sent 1127 notices to ISPs and 909 sites were blocked, for a compliance rate of over 90%. ISPs have not, however, cooperated in working out a mechanism for dealing with P2P piracy by forwarding notices and suspending and terminating repeat infringer accounts. There are no negotiations ongoing between ISPs and rights holders at this time; those discussions lasted for four years and achieved little. Two years into those talks TIPO released its first ISP liability bill draft and discussions ceased while the parties struggled over shaping the bill.

MPA undertook 428 raids against Internet piracy in 2008. This number includes raids against auction sites dealing in hard goods as well. Complaints were filed in each case⁷ and prosecutors have indicted most of the defendants named. MPA also sent 335 notices to ISPs; ISPs responded to most of these by removing the infringing content.

While Internet piracy is a very serious problem for the software industry, enterprise end user piracy continues to cause the greatest losses. BSA reports that in 2008, Taiwan had the second highest number of software infringements online in Asia. BSA sent out 32,158 C&D notices but the compliance rate is unknown. It also reports many *ex officio* raids by the enforcement authorities against sites selling software online. It filed 2 criminal complaints against Internet sites.

The recording and motion picture industries report that more judges have become reluctant to issue search warrants against Internet pirates. They often have a limited knowledge of the technology and request detailed explanations while reviewing applications which delays decisions. IFPI-Taiwan reports that at least 10 applications were denied in 2008. In addition, prosecutors have also become reluctant to prosecute Internet offenses. IFPI-Taiwan filed 114 cases involving Internet piracy in 2008, 40 of which are either still pending or were juvenile cases. Prosecutors closed 74 of these cases in 2008, but "suspension of indictments" were ordered in 63 of these, more than 85% of the total. In 2007, the figure was 74%. In these cases, the judge will suspend the indictment but order the defendant to make a donation to charity! This situation does not create deterrence against further piracy.

⁶ It is reported that of the estimated 250 pirate sites/services operating in Taiwan, 50 are sourced from Taiwan and 200 from elsewhere, including the PRC and the U.S. The dilemma faced in the Foxy situation must be solved in the new ISP Bill by establishing that ISPs are at least subject to injunctive relief through a court ordering that the ISP block access to such foreign site. See 17 USC §512(a)(1) and (j)(1)(B)(ii).

⁷ Because Internet piracy is not a "public crime, rights holders must file a complaint before the police will act. Given the seriousness of these offenses, IIPA and its members urge Taiwan to make Internet piracy a public crime as well. See discussion below.

Academic publishers report a significant growth in Internet piracy, much through the Ministry of Education's university intranet system, TANet (see discussion below). Unauthorized access to electronic academic and professional journals compromises legitimacy of licenses, and scanned academic texts and reference books are increasingly subject to P2P file sharing.

Other forms of Internet piracy are also growing. Internet cafés have become hotbeds of piracy of both motion pictures and music.

The Taiwan government's university computer network, TANet, which is operated by the Ministry of Education (MOE), continues to be widely used for Internet piracy including unauthorized P2P file sharing of all types of copyright material, including scanned academic texts and journals. In April 2007, after continued urging by rights holders, MOE proposed an Action Plan to deal with a number of campus-based infringements, including the wide use of TANet for P2P filesharing and other infringements. Part of the draft Action Plan was the creation of a special task force to include all the local and international rights holder organizations which are part of the Taiwan Intellectual Property Alliance (TIPA). The task force met twice in 2008, in May and November, and the copyright industries urge that more frequent meetings be held.

IIPA reported in its 2008 submission that MOE's actual implementation of this plan had been minimal to that date (February 2008). However, on November 25, 2008, MOE announced that it has prohibited the use of P2P filesharing software on TANet and particularly targeted FOXY. Prior to this order, some universities had limited the bandwidth on TANet available to students, but this was not uniform across the system. The order allows for certain exceptions in certain circumstances, but MOE has requested each level of the educational system to implement this new policy. IIPA welcomes this development, and urges MOE to ensure that it is fully implemented. The TIPA members will carefully monitor and report on implementation.

However, it appears that a number of colleges and universities have sought to bypass MOE's TANet rules. Recently the recording industry discovered that these universities were using the ADSL broadband service from HiNet or other private ISPs other than TANet to access the Internet. These ADSL users, either students in dormitories or faculties in offices, access unauthorized copyrighted materials by using P2P software and avoid MOE's monitoring. This is a serious loophole in MOE's new policy banning the use of file-sharing software on TANet. IIPA strongly urges MOE to take all necessary steps to secure the implementation of its new policy to encompass not just TANet but all ADSL users on campus as well.

In TIPO/MOE's "Implementation Plan for Strengthening Internet Infringement Preventive Measures," JIST was given the exclusive responsibility 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). Because Internet piracy has mushroomed in Taiwan, there is an increased need for more manpower, training and equipment at the IPRP to cope with the magnitude of the problem. The IPRP is authorized to have 220 officers available for these enforcement duties. Presently it has only 200. These additional 20 officers are urgently needed. Furthermore, the IPRP needs more and better broadband connections, more computers, and other necessary equipment to take on this growing enforcement problem.

Physical piracy and enforcement: Illegal burning of copyright content onto recordable discs is now clearly the predominant form of optical disc piracy in Taiwan, though all industries report that OD piracy has significantly diminished in Taiwan. The remaining OD factory production problem now only involves the knowing export of blank media to often affiliated pirate operations outside Taiwan, particularly to Paraguay for transshipment to other countries in Latin America. While pirate factory production is a very minor problem, due to commendable enforcement by the enforcement authorities, it is important for Taiwan to continue to monitor the plants vigilantly to avoid backsliding.

The most recent report from the IPRP shows pirated optical disc and CD seizures are up from 2007 while such seizures were way down in 2007 compared to 2006, indicating that problems still exist.⁸ IFPI-Taiwan estimates there are only about 20 stalls selling pirated music OD product in Taiwan with most of these in Chung-Li City, and it believes that this form of

⁸ <http://www.tipo.gov.tw/eng/prosecution/ietf.asp>. It is believed that virtually all these seizures were of "burned" discs.

music piracy is under control. However, MPA had 345 raids against street vendors in 2008, up from the 190 in 2007, indicating that street vendor piracy for home video product is still not under control.

End-user piracy of business software: The rate of business software piracy decreased again in 2008 from 40% in 2007 to 39% in 2008 but losses to U.S. software publishers increased to \$122 million in 2008. BSA continues to have a good working relationship with the enforcement authorities and is able to get the cooperation of the police and prosecutor's office for end user enforcement actions fairly promptly. Nevertheless, many of the procedural problems noted in IIPA's past submissions, continue to persist in 2008, 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.

Book piracy: By far the most damaging piracy problem for U.S. and Taiwanese publishers alike in 2008 continued to be illegal photocopying of academic materials. Textbooks, journals, English language teaching (ELT) materials and professional reference books are being reproduced regularly, primarily on or near university campuses.⁹ Authorities have been quite cooperative in running raids against commercial photocopy shops (at least off campus) at copyright owners' requests, and we are pleased to report the occurrence of late 2008 island-wide raids, which resulted in seizures of almost 1000 infringing copies. These raids, in part self-initiated by Ministry of Justice and IPRP officials, tackled 56 shops in seven cities.¹⁰ Such *ex officio* action is essential to combat illegal photocopying, especially looking toward activities of copy shops ON campus, and this proactive role by the government should be encouraged.¹¹ Copy shops continue to grow more sophisticated in their efforts. They do not generally keep stockpiles of copies, but make them to order. Furthermore, print runs are often at night or after hours, with immediate offsite delivery to avoid detection. Thus, IIPA calls on the government to continue to strive for the employment of advanced investigative techniques to stem this form of piracy.¹²

The industry continues to suffer from some procedural inconsistencies in prosecution, especially in Tainan.¹³ Undue hurdles relating to Powers of Attorney and proof of copyright ownership still plague the attempts at convictions in this district, and IIPA calls for streamlining of these requirements to avoid unnecessary burdens in the quest for effective prosecution.

The Ministry of Education (MOE), in its Action Plan, called for the issuance of additional programs to deal with illegal photocopying on campus, with a deadline of September 2007. These programs were to include measures designed to minimize illegal copying at on-campus facilities. The action plan needs to adequately address internal sanctions for violations, such as assessments that impact the schools' budgets and mechanisms for terminating leases of on-campus photocopy shops that are caught engaging in illegal activity. The plan should also deal with on-campus enforcement concerns, including the role of campus staff and faculty in encouraging use of legitimate materials.¹⁴ To the extent that the plan fails to address all of these components now, the authorities should work with rights holders to ensure that appropriate measures are included.

Meetings with MOE have continued, with mixed messages about MOE willingness to move the on-campus plan forward. In order to make significant strides towards reducing book piracy in Taiwan, this action must follow in 2009. The next university term opens this month and next, with another window of opportunity in September and October. IIPA calls on Taiwan to keep working toward implementation of the plans it has, and to strengthen the MOE initiative regarding on-campus infringements of books.

⁹ 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.

¹⁰ Targeted cities include Taipei, Taichung, Tainan, HsinChu, I-Lan, HwaLian and TaoYuan.

¹¹ IIPA notes also that, due to the sensitivities police have expressed regarding on-campus actions, it is critical that MOE fully and effectively implement its April 2007 action plan, discussed further below.

¹² 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.

¹³ The copy shop 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.

¹⁴ One new concern is the increasing prevalence of unauthorized compilations, or "common teaching booklets." Lecturers must be instructed not to create compilations for class use without proper permissions from affected publishers.

Entertainment Software Piracy: Pirated video game products remain available in the country. Nintendo of America continues to actively pursue actions against vendors of counterfeit and pirated NOA products. In April 2008, the Taiwan High Court imposed a jail sentence of six months and 15 days on the owner of a store that had been in operation in the country since 2001. The case stemmed from a raid against the store in February 2002. Similarly, in August 2008, the Banchiao District Court sentenced a vendor of pirated and counterfeit cartridges and video games to 16 months. This case was brought as a result of a police raid in October 2007 in which the individual was found in possession of counterfeit and pirated Nintendo video games. In both cases, the sentences are to be served and neither defendant is eligible for probation. These sentences send a clear message to retailers that there will be little tolerance for piracy.

Specialized IPR Court and the IPR Branch of the Taiwan High Prosecutors office commenced on July 1, 2008: IIPA has welcomed the development of the IPR Court. Reports are that 700 civil cases have already been filed with that court. The court now consists of 8 judges and 14 technical examination officers (transferred from TIPO) who have been allocated to first instance trials. Through the end of 2008, the recording industry has three criminal cases before the IPR Court's appellate level; MPA has five.

IIPA has urged that the IPR court mechanism be extended to first instance criminal cases. We understand that the Judicial Yuan continues to believe that copyright and trademark criminal 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 remedy this deficiency and to clarify arguments now being made that, somehow, first instance criminal IPR trial courts would be "unconstitutional."

We also welcome the establishment of the IPR Branch in the prosecutors office. This was a reform that IIPA had pressed for in 2006 and 2007. It consists 4 prosecutors and 4 court clerks.

Below are comprehensive statistics on the recording industry's and motion picture industry's enforcement activities against Internet and physical piracy in 2008.

RECORDING INDUSTRY INTERNET RAIDS TAIWAN						
Type	Cases	Files	Suspects	Surf times	Members	Host Computer
P2P	16 (including 2 P2P operators and 14 P2P users)	753	18	817,342	0	10
Stream	4	2,404	4	33,545,428	81,789	1
Network	0	0	0	0	0	0
Blog	90	15,836	90	23,977,539	0	9
Club	2	673	2	244,878	0	0
Forum	2	16,841	3	461,051	1,296,982	4
Search Engine	1	80	1	0	0	1
Total	122	36,587	125	59,046,238	1,378,771	25

MOTION PICTURE ASSOCIATION INTERNET RAIDS TAIWAN						
Type	Cases	Files	Suspects	Pirated discs	Seized burners	Host Computer
P2P Platform	2	200	4	0	0	4
Blog	17	4,301	17	0	0	1
The uploaders of Gogobox	245	283,182	246	0	0	22
Forum (operator and users)	25	27,201	26	0	0	3
Streaming	39	11,490	39	0	0	0
Search Engine	1	90	1	0	0	1
Hard goods website	6	0	7	220,390	390	9
Auction sellers	93	0	101	24,565	74	22
Total	428	326,464	441	244,578	464	62

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2007 AND 2008 TAIWAN				
ACTIONS	Motion Pictures 2007	Motion Pictures 2008	Sound Recordings 2007	Sound Recordings 2008
Number of raids conducted	726	876	401	212
Number of DVD-Rs seized	396,015	731,837	86	0
Number of DVDs seized	77,600	519,890		0
Number of CDs and CD-Rs seized	40,653 (CD-R)	2,597 (cd-r)	1,286,338	22352
Number of investigations	1,648	1,523 (exclude C&D notices)	1053 (652 no raid actions but only sending C&D notices)	1339 of which were only C&D notices
Number of VCD lab/factory raids	1	2		8
Number of cases commenced	486	587	401	212
Number of Indictments	356	405	149	52
Number of Convictions (including guilty pleas)	453	526	390	135
Acquittals and dismissals	NA	6	2	0
Number of cases Pending	614	669	11	677
Number of factory cases pending	0	0	12	5
Total number of cases resulting in jail time	223	208	127	671
Suspended prison terms				
Maximum 6 months	0	0	11	28
Over 6 months	0	0	5	1
Over 1 year	132	105	5	1
Total suspended prison terms	132	105	50	30
Prison terms served (not suspended)				
Maximum 6 months	73	80	64	28
Over 6 months	16	21	4	11
Over 1 year	2	2	9	2
Total prison terms served (not suspended)	91	103	77	41
Number of cases resulting in criminal fines		15	2	2
Up to \$1,000	5	7	0	0
\$1,000 to \$5,000	5	4	1	0
Over \$5,000	1	4	1	2
Total amount of fines levied (in US\$)	\$46,488	\$34,060	NA	\$14,000

COPYRIGHT LAW AND RELATED ISSUES

The critical issue this year, discussed below in more detail, is to secure passage of the ISP liability legislation in the Legislative Yuan. However, there are some other issues which have been detailed in previous years' reports that are also important. The following is intended to provide a summary of latest developments only. Please see previous years' reports for more information about past developments at <http://www.iipa.com/countryreports.html>.

ISP liability: On August 27, 2008, the Taiwan Intellectual Property Office (TIPO) submitted its draft ISP bill to the Executive Yuan (EY) for review and approval. On October 1, 2008, The EY approved a bill and sent it to the Legislative Yuan (LY) for adoption. It is hoped that the bill will pass before the LY session ends in June. While the bill is a significant advance and is the logical next step following passage of the P2P legislation in 2007, it continues to have a few deficiencies which we hope are corrected in the LY:

- The final bill deletes the prior specific language on secondary liability. TIPO has said that existing law in Articles 28, 185 and 188 of the Civil Code are sufficient. IIPA prefers a specific reference to the secondary liability of ISPs in the circumstances noted. This will ensure clarity.
- Article 90quinquies should be clarified to that the obligations of ISPs for forwarding notices from rights holders in the P2P context (an important and welcome modification from earlier drafts) is tied directly to the obligation of ISPs to have, and to implement, a copyright policy on terminating repeat infringers. As drafted this connection is not clear.
- Article 90octies (1) and novies(1) should be modified to make clear that ISPs are liable if they know, or should have known from facts of which they were aware, that infringing activity is occurring on their service, and they fail to take down the infringing content even if the rights holder has not served a notice on the ISP. The current bill appears to absolve the ISP of liability unless it has actual notice as a result of having been sent a notice by the rights holder. This encourages ISP's to turn a "blind eye" to obviously infringing content, and do nothing unless notified by the rights holder. This is unacceptable.
- Article 90octies (2) should be amended to delete the word "directly." It should be sufficient that the ISP receive a financial benefit e.g., advertising revenue, for its service which contains infringing material. It would be impossible to connect revenue received "directly" to infringement, thus insulating ISPs from liability in these situations.
- Article 90quinquies should be amended to delete "a broad consensus" and "unless the measures impose an unreasonable burden" on the ISP. The obligation to employ technological measures on their services to reduce piracy should not be avoidable by the mere unwillingness of ISPs to become part of such a broad consensus.

P2P legislation: IIPA commends Taiwan for adopting the P2P bill amending Articles 87 and 93 and adding a new Article 97-1 to the Copyright Law. The amendments would make illegal, and subject to civil and criminal liability, the provision of file sharing services with the intent to facilitate infringement. TIPO also now has the authority to close an infringing P2P service once there is a conviction. This would prevent what occurred with Kuro, when it continued to operate illegally after the service was convicted and while on appeal. We have noted the initial raids done under these new amendments above. We also noted in our 2008 submission the fact that the services, Kupeer.com and Hip2p.com, closed immediately, and the deterrent impact the new law appears to have had. We note also that the proper scope of the "financial benefit" that must be received for there to be a criminal offense, pursuant to Article 87(7), appears unclear and has been a reason for the hold up in the criminal indictment of FOXY.

Amend the Criminal Code to make Internet piracy a "public crime": In 2003, Taiwan designated as "public crimes" all offenses related to OD piracy, obviating the need for a rights holder complaint and giving a push to the police undertaking raids directly when piracy was discovered or where it turned up in an investigation. This had an immediate and favorable impact on OD piracy in Taiwan. Given the vast increase in Internet piracy and its damaging impact on the legitimate market in Taiwan, plus the even greater difficulty for rights holders to unearth these crimes, Taiwan's criminal provisions should now be further amended to include Internet piracy as a "public crime." Rights holders would, of course, continue to work closely with enforcement authorities as they continue to do with OD piracy, but this added ability to react quickly and decisively to piracy on the Internet, is of critical importance if this growth is to be contained.

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 pirate “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: TIPO now requires that rates proposed by collecting societies must be reviewed and approved by TIPO in advance. This delays the process and moreover, TIPO then has no power to enforce the rates against users who refuse to pay such approved royalties. The recording industry reports that many users refuse to pay these royalties. If this situation does not improve, it is suggested that the review mechanism be abolished in favor of direct and free negotiation among the collecting societies and their users.

Earlier proposed legislation on rental and parallel imports: 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 further consideration was not given in the LY. However, TIPO continues to raise the rental and parallel import issues with the USG in bilateral discussions. These amendments are not needed and IIPA opposes them. However, close monitoring by the USG 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 to 95 years from publication for sound recordings and other works of juridical entities.

APPENDIX E

IIPA HISTORICAL SUMMARY
OF
COUNTRIES' SPECIAL 301 PLACEMENT

APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2008) AND IIPA 2009 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2009	2008	USTR 301 PLACEMENT (as of April/May of each year)																			
			2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
Algeria		WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL	
Argentina	PWL	PWL																				
Armenia																						
Australia																						
Austria												WL	WL	WL	WL		WL	PWL	PWL	PWL		
Azerbaijan	SM				WL	WL	WL	WL	WL	WL			OO	OO								
Bahamas				WL	WL	PWL	PWL	WL + OCR	OCR	OCR												
Bahrain												WL	WL	WL	WL							
Bangladesh	SM																					
Belarus	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO										
Belize			WL	PWL	WL	WL																
Bolivia		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO								
Bosnia and Herzegovina																						
Brazil	WL	WL	WL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei	PWL																					
Bulgaria	WL			WL	WL	WL						PWL	WL	OO	OO							
Burma (Myanmar)																						
Cambodia																						
Canada	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL	WL
Chile	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia	SM	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL							
Croatia				WL	WL	WL	WL															
Cyprus													OO	OO	OO	WL	WL	WL	WL			
Czech Republic		WL	OCR							WL	WL	WL	OO									
Denmark										WL	WL	WL	WL									
Dominican Republic		WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO								
Ecuador		WL	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL				
Egypt	PWL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	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	PWL		
Georgia									OCR													
Germany												OO	OO	OO	OO	OO		WL	WL			
Greece	WL	WL							WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL
Guatemala		WL	WL	WL	WL	WL	WL		WL	WL	PWL	PWL	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	WL	WL	PWL	PWL	WL		WL	OO	OO				PWL	PWL	WL		
Iceland																						
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL

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COUNTRY	IIPA Recommendation February 2009		USTR 301 PLACEMENT (as of April/May of each year)																		
			2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Indonesia	PWL	WL	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	WL	PWL+OCR	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL	WL	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	WL	WL									
Japan	SM								OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan	SM										WL	WL	WL	OO	OO						
Kazakhstan (GSP)	WL				WL	WL	WL	WL	WL	WL		OO									
Kenya																					
Kuwait	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic									OCR												
Laos																					
Latvia				WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	WL	WL	PWL	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 + OCR	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	PWL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova										WL											
Morocco																					
Netherlands												OO									
New Zealand								WL	WL		WL							WL	WL		
Nicaragua												OO	OO								
Nigeria	SM																				
Norway		WL																			
Oman										WL	WL	WL	WL	WL	OO						
Pakistan	PWL	PWL	WL+OCR	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	306	306	PFC	PWL	WL	OO	OO		WL			
People's Republic of China	PWL	PWL	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	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	PWL	WL + OCR	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	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	WL	WL	OO	OO	OO	WL						
Russian Federation (GSP)	PWL	PWL	PWL+OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
San Marino													WL								

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COUNTRY	IIPA Recommendation February 2009		USTR 301 PLACEMENT (as of April/May of each year)																		
			2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990
Saudi Arabia	WL + OCR	WL	WL	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										WL	WL	WL	WL	WL	WL	OO					
Slovak Republic					WL	WL	WL	WL	WL												
Slovenia										OCR											
South Africa											WL	WL		OO	WL						
South Korea	WL	WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain	WL + OCR	WL								WL	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																					
Sweden	WL										WL	WL	WL								
Switzerland	SM																				
Taiwan	SM	WL (then OFF due to OCR)	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	WL	WL											
Thailand	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Tunisia												OO									
Turkey	WL	WL	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	WL	WL											
UAE									WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	WL	WL	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	WL	WL											
Venezuela		PWL	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	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 D

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2008) & IIPA'S 2009 SPECIAL 301 RECOMMENDATIONS

APPENDIX E: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List. See IIPA's 2009 report on Argentina at <http://www.iipa.com/rbc/2009/2009SPEC301ARGENTINA.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." In April 2007, USTR repeated its concerns: "Copyright piracy also remains a significant problem in Argentina. Although cooperation has improved between Argentina's enforcement authorities and the U.S. copyright industry, and the Argentine Customs authority has taken steps to improve enforcement, the United States encourages stronger IPR enforcement actions to combat the widespread availability of pirated and counterfeit products." USTR again placed Argentina on the Priority Watch List in 2008.

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). Argentina remains a beneficiary country under the GSP trade program.

ARMENIA

Armenia does not currently appear on any of the USTR lists. IIPA did not make a submission on Armenia in 2009, 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. Armenia is a beneficiary country under the GSP trade program.

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. IIPA continues to follow copyright-related developments in Australia.

AZERBAIJAN

In 2009, IIPA includes Azerbaijan in its Special Mention section. See IIPA's 2009 report on Azerbaijan at <http://www.iipa.com/rbc/2009/2009SPEC301AZERBAIJAN.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.

THE BAHAMAS

IIPA did not file on The Bahamas in 2009, but has in various years prior; see IIPA country report page at <http://www.iipa.com/countryreports.html>.

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" but 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. 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, but removed it from the Watch List in April 2007, citing improvement in enforcement and hopes for copyright reform.

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."

BAHRAIN

IIPA did not make a submission on Bahrain in 2009, but has in various years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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. In 2007, IIPA mentioned Bahrain in its "Dispute Settlement" section, specifically highlighting deficiencies under the U.S.-Bahrain Free Trade Agreement.

BANGLADESH

In 2009, IIPA includes Bangladesh in its Special Mention section. See IIPA's 2009 report posted at <http://www.iipa.com/rbc/2009/2009SPEC301BANGLADESH.pdf>.

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." In 2007, IIPA recommended that Bangladesh be placed on the Watch List, for proliferation of optical disc production capacity and major piracy problems. See IIPA's 2008 report on Bangladesh at <http://www.iipa.com/rbc/2008/2008SPEC301BANGLADESH.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.

BELARUS

IIPA recommends that Belarus remain on the Watch List. See IIPA's 2009 report on Belarus at <http://www.iipa.com/rbc/2009/2009SPEC301BELARUS.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 2007, IIPA recommended that Belarus be retained on the Watch List, and USTR did so. In 2008, IIPA again recommended that USTR keep Belarus in the Watch List; USTR kept Belarus on the Watch List, where it has appeared since 1999. 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 2009, 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.” USTR lowered Belize to the Watch List in 2007. In 2008, USTR did not include Belize on any lists.

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.”

BOLIVIA

IIPA did not make a submission on Bolivia in 2009, but has in years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>. USTR has kept Bolivia on the Special 301 Watch List since 1999.

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. 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.” IIPA did not make a submission on Bolivia in 2007 or 2008. USTR retained Bolivia on the Watch List in 2007 and 2008.

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. Effective December 15, 2008, the Bush Administration suspended Bolivia’s duty-free access to the U.S. market, until that country improves its anti-drug cooperation with the U.S.

BOSNIA AND HERZEGOVINA

IIPA did not make a submission on Bosnia and Herzegovina in 2009, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>. To date, Bosnia and Herzegovina has not appeared on a USTR Special 301 list. This country is a beneficiary country of the GSP trade program.

BRAZIL

IIPA recommends that Brazil remain on Watch List in 2009. See IIPA’s 2009 Brazil country report at <http://www.iipa.com/rbc/2009/2009SPEC301BRAZIL.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 2007, IIPA recommended that Brazil be placed on the Watch List in light of progress made; USTR did place Brazil on the Watch List and added an out-of-cycle review in 2007, noting: “This decision recognizes Brazil’s considerable progress in enhancing copyright enforcement. Brazil’s National Anti-Piracy Council is increasingly recognized as a model of public-private collaboration in the area of IP enforcement. In addition, the Brazilian Government’s national action plan to address piracy and IP crimes has produced continuing positive results, particularly through effective police actions. While piracy and counterfeiting still exist at high levels and criminal prosecutions often lag police actions, Brazil merits recognition for its vigorous efforts. The United States looks forward to a continued healthy dialogue with Brazil on IP issues, including through the U.S. – Brazil Bilateral Consultative Mechanism and the U.S. – Brazil Commercial Dialogue.” In 2008, IIPA recommended that Brazil remain on the Watch List. USTR kept Brazil on the Watch List in April 2008.

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. Brazil is a beneficiary country under the GSP trade program.

BRUNEI

IIPA recommends that Brunei be placed on the Priority Watch List in 2009. See Brunei’s country report at <http://www.iipa.com/rbc/2009/2009SPEC301BRUNEI.pdf>.

In 2008, IIPA recommended that Brunei be placed on the Watch List; however, USTR did not include Brunei on any lists in 2008.

BULGARIA

In 2009, IIPA recommends that Bulgaria be raised to the Watch List. See Bulgaria's country report at <http://www.iipa.com/rbc/2009/2009SPEC301BULGARIA.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 2008, IIPA provided an update on the situation in Bulgaria, but made no recommendation for Bulgaria to be placed on any Special 301 list. USTR has not placed Bulgaria on any list since 2006.

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 2007, IIPA recommended that Bulgaria be added back to the Watch List, but USTR did not choose to place Bulgaria on any list in 2007. Bulgaria's eligibility as GSP beneficiary country ended when, it joined the European Union on January 1, 2007.

BURMA (MYANMAR)

Burma (Myanmar) has never appeared on any USTR list. IIPA did not make a submission on Burma (Myanmar) in 2009. 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.” In the 2007 Thailand country report, IIPA noted pirate imports from Burma (Myanmar) into Thailand.

CAMBODIA

Cambodia has never appeared on a USTR Special 301 list. IIPA did not submit a recommendation on Cambodia in 2009, but has specially mentioned it in the past, due to its location, the potential for migration of more optical disc plants remains a possibility. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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.

CANADA

In 2009, IIPA again recommends that Canada be elevated to the Priority Watch List. See <http://www.iipa.com/rbc/2009/2009SPEC301CANADA.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 in 2007. USTR, however, again kept Canada on the Watch List in 2007. In 2008, IIPA again recommended that Canada be elevated to the Priority Watch List. USTR retained Canada on the Watch List in 2008.

CHILE

In 2009, IIPA recommends that Chile remain on the Priority Watch List. See IIPA's 2009 Chile country report at <http://www.iipa.com/rbc/2009/2009SPEC301CHILE.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.” The U.S.-Chile FTA entered into effect on January 1, 2004.

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. IIPA recommended that Chile remain on the Priority Watch List in 2007, and USTR agreed in April 2007. In 2008, IIPA recommended that Chile remain on the Priority Watch List. USTR again retained Chile on the Priority Watch List in April 2008.

COLOMBIA

In 2009, IIPA included Colombia in its Special Mention section. See IIPA’s 2009 report on Colombia at <http://www.iipa.com/rbc/2009/2009SPEC301COLOMBIA.pdf>. IIPA continues to support the U.S.-Colombia Trade Promotion Agreement.

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. In February 2007, IIPA recommended that Colombia remain on the Watch List, and USTR kept Colombia on the Watch List in 2007.

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."

COSTA RICA

In 2009, IIPA recommends that Costa Rica remain on the Watch List. See IIPA's 2009 Costa Rica country report at <http://www.iipa.com/rbc/2009/2009SPEC301COSTARICA.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, intensify[ing] training activity for officials involved in enforcement, and implement[ing] a decree focused on legitimizing software used by government agencies." In its 2003 Special 301 Announcement, however, USTR pointed out several deficiencies, including "two amendments to improve penalties and enforcement infrastructures [that are] pending and an executive decree on data exclusivity [that] has yet to be signed." These failures, along with other problems such as delays in judicial proceedings and lack of official investigators, necessitated Costa Rica's continued placement on the Watch List. In 2004, IIPA highlighted copyright concerns in Costa Rica in its Special Mention section. That year, USTR kept Costa Rica on the Watch List, noting in its Special 301 Announcement that the country needed to "improve its criminal and civil systems of intellectual property," and "make significant modifications and clarifications in the area of data protection."

USTR commended Costa Rica's joining of the Central American Free Trade Agreement, and hoped that as Costa Rica begins to come into compliance with these agreements. 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. In 2007, IIPA recommended that Costa Rica be elevated to the Priority Watch List, but USTR kept Costa Rica on the Watch List in April 2007. Costa Rica was the last trading partner to ratify the U.S.-CAFTA-DR, and it is expected to enter into force in late February 2008. Once the FTA enters into force in Costa Rica, it will cease to benefit from a variety of U.S. trade programs. In 2008, for the third consecutive year, IIPA recommended that Costa Rica be elevated to the Priority Watch List. However, USTR retained Costa Rica on the Watch List in 2008.

CROATIA

IIPA did not make a submission on Croatia in 2009, 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."

CYPRUS

Cyprus does not currently appear on any of the USTR lists. IIPA did not make a submission on Cyprus in 2009, 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

IIPA did not file on the Czech Republic in 2009, 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. In 2007, IIPA did not file a recommendation on Czech Republic. USTR conducted an out-of-cycle review for Czech Republic in 2007, and in January 2008 placed it on the Watch List, primarily for weak border enforcement. IIPA did not file on the Czech Republic in 2008. In April 2008, USTR included the Czech Republic on the Watch List in April 2008.

DOMINICAN REPUBLIC

IIPA did not file on the Dominican Republic in 2009, but has in prior years; see IIPA country report page at <http://www.iipa.com/countryreports.html>.

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 initiated action against a third station.” Furthermore, GODR appointed an intellectual property rights committee to review the patent law and bring it into compliance with TRIPS. The changes made by the committee were then announced in an executive decree. These steps were sufficiently progressive for USTR to move the Dominican Republic from the Priority Watch List to the Watch List. In 2004, IIPA recommended that the Dominican Republic be elevated to the Priority Watch List, noting the problems surrounding the “government’s questionable commitment to effective and transparent copyright enforcement.” In keeping the Dominican Republic on the Watch List, USTR reported in its 2004 Special 301 Announcement that in “March 2004, the Dominican Republic concluded an FTA with the United States that will require the Dominican Republic to upgrade considerably the level of intellectual property protection.” However, USTR also noted that “concerns still remain regarding the protection and enforcement of intellectual property, particularly with respect to copyright piracy and patent protection.” 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.” IIPA recommended again in 2007 that the Dominican Republic be placed on the Priority Watch List, but USTR kept the Dominican Republic on the Watch List in April 2007. IIPA recommended that the Dominican Republic remain on the Watch List in 2008. USTR kept the Dominican Republic on the Watch List in 2008.

The U.S.-CAFTA-DR Agreement was ratified by the Dominican Republic in September 2005. The FTA entered into force on March 1, 2007 at which time the Dominican Republic ceased to benefit from most U.S. trade programs (like GSP and CBI).

ECUADOR

IIPA did not make a submission on Ecuador in 2009, 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." IIPA recommended that Ecuador remain on the Watch List in 2007, and USTR agreed in April 2007. In April 2008, USTR included Ecuador on the Watch List.

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."

EGYPT

IIPA recommends that Egypt be elevated to the Priority Watch List in 2009. See IIPA's 2009 Egypt country report at <http://www.iipa.com/rbc/2009/2009SPEC301EGYPT.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 sector 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 hoped to see improvements in Egypt’s IPR regime that will “strengthen trade and investment ties between the two countries.” In 2007, IIPA recommended again that Egypt remain on the Priority Watch List. USTR retained Egypt on the Priority Watch List in 2007. In 2008, IIPA recommended that Egypt remain on the Priority Watch List; however, USTR lowered Egypt to the Watch List.

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.

EL SALVADOR

El Salvador does not currently appear on any of the USTR lists. IIPA did not make a submission on El Salvador in 2009, 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.

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 2009, 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 through 2004, IIPA recommended that Estonia be placed on the Watch List, pointing to the country’s piracy problem and the absence of deterrent penalties. 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 2009, 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.

GERMANY

In 2009, IIPA did not make a recommendation for Germany. IIPA specially mentioned Germany in 2008 in connection with pending legislation that IIPA believes would undermine enforcement against Internet piracy. IIPA makes no recommendation for inclusion on any Special 301 lists. Germany does not currently appear on any of the USTR lists, and has not since 1998. 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. USTR did not include Germany on any lists in 2008.

GREECE

IIPA recommends that Greece be kept on the Watch List in 2009. See <http://www.iipa.com/rbc/2009/2009SPEC301GREECE.pdf>.

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. IIPA recommended that Greece be placed on

the Watch List in 2007 but USTR did not do so. In 2008, IIPA recommended that Greece be placed on the Watch List; USTR also placed Greece on the Watch List in their 2008 decision.

GUATEMALA

IIPA did not make a submission on Guatemala in 2009, 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." Although IIPA did not make a recommendation for Guatemala in 2007, USTR retained it on the Watch List in April 2007. Again in 2008, USTR included Guatemala on the Watch List.

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 ceased to benefit from a variety of U.S. trade programs (such as GSP and CBI).

HONG KONG

In 2009, IIPA again includes Hong Kong in its Special Mention section. See IIPA's 2009 report on Hong Kong at http://www.iipa.com/rbc/2009/2009SPEC301HONG_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. Again in 2007 and 2008, IIPA included Hong Kong in its Special Mention section.

HUNGARY

IIPA recommends that Hungary remain on the Watch List in 2009, where it has appeared since 2003. See IIPA's 2009 Hungary country report at <http://www.iipa.com/rbc/2009/2009SPEC301HUNGARY.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." In 2007, USTR agreed with IIPA's recommendation and kept Hungary on the Watch List. IIPA recommended that Hungary remain on the Watch List again in 2008; USTR also retained Hungary on the Watch List in April 2008.

ICELAND

IIPA did not make a submission on Iceland in 2009, 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 2009, IIPA again recommends that India remain on the Priority Watch List. See IIPA's 2009 India country report at <http://www.iipa.com/rbc/2009/2009SPEC301INDIA.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...’” In 2007 and 2008, IIPA recommended that India remain the Priority Watch List, and USTR agreed.

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.

INDONESIA

In 2009, IIPA recommends that Indonesia be elevated to the Priority Watch List. See IIPA's 2008 Indonesia country report at <http://www.iipa.com/rbc/2009/2009SPEC301INDONESIA.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 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." IIPA recommended that Indonesia remain on the Watch List in its 2007 Special 301 report. USTR agreed and kept Indonesia on the Watch List in its April 2007 announcement.

IIPA recommended that Indonesia remain on the Watch List in 2008. USTR lowered Indonesia to the Watch List 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. In April 2008, USTR placed Indonesia on the 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."

IRELAND

Ireland does not currently appear on any of the USTR lists. IIPA did not file a 2009 submission on Ireland and it has not appeared on any list since 2000. 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.

ISRAEL

IIPA recommends that Israel be lowered to the Watch List in 2009. See IIPA's 2009 Israel country report at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.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 use of software in a business setting . . . in violation of TRIPS," while also noting that piratical production of optical discs for export had abated. USTR lowered Israel to the Watch List, noting passage of a law that increased criminal penalties for piracy and strengthened the ability of Israeli authorities and courts to prosecute and punish copyright crimes. 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." In 2007, IIPA recommended that Israel remain on the Priority Watch List, due in part to concerns over draft copyright legislation. USTR retained Israel on the Priority Watch List in 2007. In 2008, IIPA recommended that Israel be put on the Watch List. USTR placed Israel on the Priority Watch List in April 2008, with an added out-of-cycle review (OCR), but that OCR did not take place.

ITALY

IIPA recommends that Italy remain on the Watch List in 2009. Italy has appeared on the Watch List since 2001. See IIPA's 2009 Italy country report at <http://www.iipa.com/rbc/2009/2009SPEC301ITALY.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."

In its April 2007 decision, USTR noted: "The United States notes that Italy increased cooperation between its government agencies and the private sector in 2006, as well as expressed renewed interest in working more closely with the United States to improve IPR protection and enforcement in Italy. However, the U.S. copyright industries report that Italy maintains one of the highest overall piracy rates in Western Europe. Italy made some progress in 2006 through increased raids, seizures, and arrests of IPR infringers, notably through enforcement actions by the Guardia di Finanza, but there continues to be inadequate judicial awareness of IPR infringement as a serious crime and therefore a lack of judicial imposition of deterrent fines and jail sentences for criminal copyright and trademark infringers. The United States continues to observe wide variations in the effectiveness of IPR enforcement activities within Italy, particularly in the courts. The U.S. copyright industries report continuing high rates of copyright piracy in Italy, especially on the Internet. The United States urges Italy to make IPR enforcement a top priority, commit high-level support for IPR enforcement, provide deterrent IPR enforcement through increased convictions and jail sentences, dedicate more resources for law enforcement and the judiciary, and implement a plan to combat Internet piracy. The United States will continue to work with Italy on these issues, with the goal of improving IPR protection and enforcement." IIPA recommended that Italy remain on the Watch List in 2008, with an added out-of-cycle review (OCR) later in 2008. USTR placed Italy on the Watch List (without an OCR) in 2008.

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.

JAPAN

In 2009, IIPA again includes Japan in its Special Mention section. See IIPA's 2009 Japan country report at <http://www.iipa.com/rbc/2009/2009SPEC301JAPAN.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 through 2008, IIPA highlighted copyright concerns and included Japan in its Special Mention section.

JORDAN

In 2009, IIPA includes Jordan in its Special Mention section. See IIPA's 2009 Jordan country report at <http://www.iipa.com/rbc/2008/2008SPEC301JORDAN.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 2007, IIPA included Jordan in its "Dispute Settlement" section, specifically highlighting deficiencies under Jordan's implementation of the U.S.-Jordan Free Trade Agreement. In 2008, IIPA included Jordan in its Special Mention section.

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."

KAZAKHSTAN

IIPA recommends that Kazakhstan be placed back on the Watch List in 2009, from which it has been off since April 2006. See IIPA's 2009 Kazakhstan country report at <http://www.iipa.com/rbc/2009/2009SPEC301KAZAKHSTAN.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.” Although IIPA recommended Kazakhstan be placed on the Watch List in 2008; USTR did not include it on any 2008 lists.

KENYA

IIPA did not make a submission on Kenya in 2009, 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.

KUWAIT

IIPA recommends that Kuwait remain on the Watch List in 2009. See IIPA’s 2009 Kuwait country report at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.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 USTR agreed, to keep Kuwait on the Priority Watch List, "due to its high rates of copyright piracy and its lack of progress in amending its copyright law to meet international obligations." USTR went on to note:

Kuwait has not yet fully implemented the 2002 work plan that outlined the steps it would take to increase IPR enforcement. In 2004, IPR enforcement efforts remained insufficient and penalties for infringement remained inadequate to deter potential offenders. Kuwait proposed a draft copyright law in 2004, which has not yet been passed by Kuwait's legislature. The U.S. copyright industry reports that Kuwait continues to have high levels of retail optical disc piracy, as well as problems with corporate end-user software piracy, cable piracy, and Internet piracy. We urge Kuwait to improve the situation by making public declarations at the highest level that piracy in Kuwait will not be tolerated, increasing the frequency of raids on suspected infringers, prosecuting offenders, imposing deterrent sentences, publishing the outcomes of inspection raids in order to deter others, and amending its copyright law in the near future to correct its deficiencies. Kuwait has made some progress, such as Kuwait Customs' creation of a special IPR unit in April 2004 that began taking some enforcement actions. The Ministry of Commerce also stepped up enforcement efforts in late 2004.

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.

In 2007, IIPA recommended that Kuwait remain on Watch List. USTR agreed with IIPA's recommendation. Again in 2008, IIPA recommended that Kuwait remain on the Watch List, and for the third year in a row USTR placed Kuwait on the Watch List.

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 2009, 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.

LAOS (LAO PEOPLE'S DEMOCRATIC REPUBLIC)

Laos does not currently appear on any of the USTR lists. IIPA did not make a submission on Laos in 2009, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>. 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." In 2007, IIPA again included Laos in its Special Mention section.

LATVIA

IIPA did not make a submission on Latvia in 2009, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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 2007, IIPA included Latvia in its Special Mention section.

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 again recommends that Lebanon remain on the Watch List in 2009. The IIPA Petition regarding Lebanon's IPR practices remains ongoing. See IIPA's 2009 Lebanon country report at <http://www.iipa.com/rbc/2009/2009SPEC301LEBANON.pdf>.

Isolated from normal world trade patterns due to years of civil strife, Lebanon did not appear in IIPA reports until 1995, when IIPA first recommended placement on the Special Mention list because of its high levels of piracy and outmoded copyright law. IIPA's 1996 filing recommended a Watch List placement, stressing pervasive TV piracy, an ineffective judicial system, and lack of any progress toward copyright and broadcast law reform. In 1997, IIPA recommended once again that Lebanon be placed on the Special 301 Watch List, noting a video market dominated by piracy, increasing book and software piracy, an immobilized copyright reform process, and backlogged and inefficient courts that continued to pose major impediments to effective enforcement of copyright infringement across the board. In 1998, IIPA again called on USTR to place Lebanon on the Watch List for failure to pass a new copyright law, and for uncertainty over whether the law would include a Berne- and TRIPS-incompatible "compulsory license" on computer software. USTR agreed for the first time to place Lebanon in its Other Observations category, noting "widespread copyright piracy and an inadequate law," and that "[u]nauthorized use of software is pervasive among private firms and government ministries." USTR's Ambassador Barshefsky called on the Lebanese Government "to pass a TRIPS-consistent copyright law, to take effective measures to eliminate use of unauthorized copies of software in government offices, and [to] reduce the rate of video piracy."

Lebanon was kept on the Watch List in 2000 largely because of the continued international deficiencies in the copyright law, pervasive piracy and inefficient enforcement against piracy. In the 2001 Special 301 submission, the IIPA recommended that Lebanon be elevated to the Priority Watch List due to a lack of enforcement against copyright piracy. USTR agreed, and elevated Lebanon to the Priority Watch List, citing continuing piracy problems, particularly cable piracy. In June of 2001, the IIPA filed a request for review of Lebanon's GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners. USTR accepted this request on September 3, 2003, and the review remains ongoing. In 2002 and 2003, IIPA continued to recommend that Lebanon remain on the Priority Watch List (and in 2002, requested that USTR conduct an out-of-cycle review to ascertain whether sufficient progress was being made in the fight against cable piracy and pervasive retail piracy; USTR did not accept the recommendation for the OCR). USTR decided to keep Lebanon on the Priority Watch List in 2002, noting the country's "severe copyright piracy problem and the lack of a comprehensive governmental commitment to eliminate piracy and foster legitimate business." USTR also retained Lebanon on the Priority Watch List in 2003, noting that while "some raids of pirate stores and operations occurred in 2002, leading to the first sentencing of a software pirate," otherwise there was very little progress; USTR also noted an "overly broad software exception for certain educational uses."

On September 3, 2003, the United States Trade Representative "accepted for review" a Petition filed by the IIPA with the U.S. Government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Lebanese products into the U.S., USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." IIPA's Petition noted three major deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing "adequate and effective" copyright protection in practice: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective. Since 2003, IIPA has testified twice, most recently on November 30, 2005, and made several supplemental submissions in the GSP Review.¹ On all of these occasions, IIPA states its view that the GSP Subcommittee should recommend to the President that he make a determination that Lebanon fails to meet the eligibility requirements of the GSP program, and remove Lebanon's eligibility to participate in the Program until such time as it has achieved adequate and effective copyright protection and enforcement as contemplated by the GSP statute.

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

¹ On October 7, 2003, IIPA testified regarding the deficiencies of Lebanon's protection of copyright that warranted immediate suspension or withdrawal of Lebanon's GSP benefits. On February 14, 2004, IIPA provided the GSP Subcommittee a copy of IIPA's February 2004 Special 301 report on Lebanon to supplement the public GSP file on this investigation. On May 25, 2004, IIPA wrote to the GSP Subcommittee advocating the immediate suspension or withdrawal of Lebanon's GSP benefits for its continuing failure to comply with the IPR obligations under the GSP program. On November 9, 2005, IIPA filed a pre-hearing Brief advocating withdrawal of GSP benefits, and on December 14, IIPA filed answers to post-hearing comments (the GSP hearing was held on November 30, 2005).

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 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." In 2007, IIPA recommended that Lebanon be lowered to the Watch List. USTR kept Lebanon on the Priority Watch List in 2007. In 2008, IIPA again recommended that Lebanon be lowered to the Watch List. The IIPA Petition regarding Lebanon's IPR practices remains ongoing. USTR agreed and lowered Lebanon to the Watch List in April 2008.

LITHUANIA

IIPA did not make a submission on Lithuania in 2009, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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 in both 2006 and 2007, with USTR noting that "despite some IPR improvements this past year, numerous IPR issues remain." In 2008, IIPA recommended that Lithuania remain on the Watch List in 2008, where it had appeared since 2000; however, USTR did not place Lithuania on any lists in 2008.

MACAU

Macau does not currently appear on any of the USTR lists. IIPA did not file a report on this country in 2009 nor in any year since 2001. 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 by USTR from the Watch List in April 2002.

MACEDONIA

Macedonia has never appeared on a USTR list. IIPA has not filed a report on this country since 2005. 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.

MALAYSIA

In 2009, IIPA recommends that Malaysia remain on the Watch List with an out-of-cycle review, where it has appeared since 2002. See IIPA's 2009 Malaysia country report at <http://www.iipa.com/rbc/2009/2009SPEC301MALAYSIA.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." In 2007, IIPA recommended that Malaysia remain on the Watch List. USTR kept Malaysia on the Watch List in 2007. In 2008, IIPA recommended that Malaysia remain on the Watch List, where it had appeared since 2002. USTR placed Malaysia on the Watch List in April 2008.

MEXICO

IIPA recommends that Mexico be elevated to the Special 301 Priority Watch List in 2009. See IIPA's 2009 Mexico country report at <http://www.iipa.com/rbc/2009/2009SPEC301MEXICO.pdf>. Mexico has been at the Watch List level since 1999.

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.” In 2007, IIPA recommended that Mexico be raised to the Priority Watch List, but USTR retained Mexico on the Watch List in 2007, but noted: “The United States encourages Mexico to follow its commendable raids with aggressive prosecutions and deterrent penalties, including prison terms, improve domestic cooperation efforts between federal, state, and local enforcement authorities, and increase IPR enforcement efforts by customs authorities. The United States urges Mexico to pass IPR legislation to give *ex officio* authority to law enforcement and customs authorities, criminalize camcording in theaters, and implement fully the WIPO Internet Treaties.” In 2008, IIPA recommended that Mexico be elevated to the Special 301 Priority Watch List; however, USTR retained Mexico on the Watch List.

MOLDOVA

Moldova does not currently appear on any of the USTR lists. IIPA did not file on this country in 2009. 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.

MOROCCO

IIPA did not make a submission on Morocco in 2009, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

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.” In 2007, IIPA included Morocco in its “Dispute Settlement” section, specifically highlighting deficiencies under the U.S.-Morocco Free Trade Agreement. USTR did not include Morocco on any lists in April 2007.

NEW ZEALAND

IIPA did not make a submission on New Zealand in 2009, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

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, 2007 and 2008, 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 2009 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 entered into force in Nicaragua, it ceased to benefit from a variety of U.S. trade programs (such as CBI).

NIGERIA

In 2009, IIPA includes Nigeria in its Special Mention section. See IIPA's 2009 Nigeria country report at <http://www.iipa.com/rbc/2009/2009SPEC301NIGERIA.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.” In 2007, IIPA recommended that Nigeria be placed on the Watch List. Nigeria does not currently appear on any USTR lists. In 2008, IIPA again recommended that Nigeria be placed on the Watch List; USTR did not place Nigeria on any lists in 2008.

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.

OMAN

IIPA did not make a submission on Oman in 2009, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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). In 2007, IIPA included Oman in its Special Mention section. USTR did not include Oman on any lists.

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."

PAKISTAN

IIPA recommends that Pakistan remain on the Priority Watch List in 2009. See IIPA's 2009 Pakistan country report at <http://www.iipa.com/rbc/2009/2009SPEC301PAKISTAN.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." In 2007, IIPA recommended that Pakistan remain on the Watch List, 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. USTR agreed to grant an OCR, and IIPA made a submission in late 2007, recommending that Pakistan remain on the Watch List. In 2008, IIPA recommended that Pakistan remain on the Watch List. USTR placed Pakistan on the Priority Watch List in 2008.

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.

PALESTINIAN AUTHORITY

The Palestinian Authority does not currently appear on any of the USTR lists. IIPA has not filed a report on the Palestinian Authority since 2001 but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>. 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."

PANAMA

Panama does not currently appear on any of the USTR lists. IIPA did not file on this country in 2009. 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 Trade Promotion Agreement (TPA) in December 2006, and U.S. Congressional approval is pending.

PARAGUAY

In 2009, IIPA recommends that Paraguay remain under Section 306 monitoring; see IIPA's 2009 Paraguay country report at <http://www.iipa.com/rbc/2009/2009SPEC301PARAGUAY.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. In 2007, IIPA and USTR again agreed that Section 306 monitoring was needed for Paraguay. Late in 2007, both governments renewed their commitments to a new IPR MOU, which was signed in early 2008 and now lasts until the end of 2009. In 2008, IIPA recommended that Paraguay remain under Section 306 monitoring; USTR again placed Paraguay under Section 306 monitoring.

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."

PEOPLE'S REPUBLIC OF CHINA

In 2009, IIPA recommends that USTR maintain China on the Priority Watch List. See IIPA's 2009 People's Republic of China country report at <http://www.iipa.com/rbc/2009/2009SPEC301PRC.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." In 2007, IIPA again recommended that China remain on the Priority Watch List. USTR retained China on the Priority Watch List in 2007 but also filed two dispute settlement cases against China in the WTO, the first challenging certain of China's IPR practices as violations of China's TRIPS enforcement obligations, and the second challenging a number of market access restrictions as violations of China's GATT and GATS obligations. In 2008, IIPA recommended that USTR maintain China on the Priority Watch List; USTR kept China on the Priority Watch List in 2008.

PERU

IIPA recommends that Peru be placed on Watch List. See IIPA's 2009 Peru country report at <http://www.iipa.com/rbc/2009/2009SPEC301PERU.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." In 2007, IIPA recommended that Peru remain on the Watch List, where it had appeared since 2001; USTR agreed with IIPA's recommendation. In 2008, IIPA recommended that Peru be raised to the Priority Watch List; however, USTR retained Peru on the Watch List where it had been every year since 2001.

Peru and the U.S. signed a Trade Promotion Agreement in April 2006, it entered into effect on February 1, 2009. After this FTA enters into force in Peru, it will cease to benefit from a variety of U.S. trade programs (such as GSP and ATPA).

THE PHILIPPINES

IIPA recommends that the Philippines be elevated to the Priority Watch List. See IIPA's 2009 Philippines country report at <http://www.iipa.com/rbc/2009/2009SPEC301PHILIPPINES.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 non-deterrent 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:

[T]he 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.

In 2007, IIPA recommended that the Philippines remain on the Watch List 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 called 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. No OCR was granted.

In 2008, IIPA recommended that the Philippines remain on the Watch List and recommended that USTR conduct an out-of-cycle review (OCR). USTR placed the Philippines on the Watch List in 2008.

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."

POLAND

IIPA recommends that Poland remain on the Watch List in 2009. See IIPA's 2009 Poland country report at <http://www.iipa.com/rbc/2009/2009SPEC301POLAND.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 2007, IIPA recommended that Poland remain on the Watch List. USTR retained Poland on the Watch List in April 2007. During 2007, the infamous Warsaw Stadium closed. In 2008, IIPA recommended that Poland remain on the Watch List, USTR retained Poland on the Watch List in 2008.



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 2009. 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 2009. See IIPA's 2009 Romania country report at <http://www.iipa.com/rbc/2009/2009SPEC301ROMANIA.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. When Romania joined the European Union on January 1, 2007, its eligibility as a GSP beneficiary country ended. In 2007, IIPA recommended that Romania remain on the Watch List. USTR retained Romania on the Watch List in April 2007. In 2008, IIPA recommended that Romania remain on the Watch List, and USTR kept Romania there.

RUSSIAN FEDERATION

In 2009, IIPA recommends that Russia remain on the Priority Watch List. See IIPA's 2009 Russia country report at <http://www.iipa.com/rbc/2009/2009SPEC301RUSSIA.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."² 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 Russia should remain on the Priority Watch List for 2004. The major problems cited in the 2004 Special 301 Announcement were Russia's copyright law and enforcement measures which are "deficient and appear to be inconsistent with the 1992 U.S.-Russian Federation Trade Agreement." In addition, Russia's copyright law does not protect pre-existing works and border enforcement has not been able to prevent the significant problem of unauthorized production and export of pirated optical media products. In its Special 301 2005 Announcement, USTR retained Russia on the Priority Watch List citing similar concerns of past 301 announcements and stating that, "...overall IPR enforcement in Russia remains inadequate and piracy and counterfeiting levels continue to rise. Problematic IPR enforcement issues include

² This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

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. In 2007, IIPA recommended 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. In 2008, IIPA recommended that Russia remain on the Priority Watch List; USTR retained Russia on the Priority Watch List in 2008.

IIPA filed a GSP petition against Russia's copyright practices more than seven 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.

SAUDI ARABIA

In 2009, IIPA recommends that Saudi Arabia remain on the Watch List with an out-of-cycle review. See IIPA's 2009 Saudi Arabia country report at <http://www.iipa.com/rbc/2009/2009SPEC301SAUDIARABIA.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 on the Watch List 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. In its 2007 submission, IIPA again recommended a Priority Watch List ranking, since nothing whatsoever had changed since its 2006 submission. In April 2007, USTR combined its Special 301 and OCR decisions and retained Saudi Arabia on the Watch List. In 2008, IIPA recommended that Saudi Arabia be elevated to the Priority Watch List; however, USTR again maintained Saudi Arabia on the Watch List in 2008.

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.

SINGAPORE

IIPA did not make a submission on Singapore in 2009, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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. In 2007, IIPA included 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. Singapore did not appear on any of USTR’s lists in 2007. In 2008, IIPA includes Singapore in its Special Mention section; Singapore did not appear on any of USTR’s list in 2008.

SLOVAK REPUBLIC

IIPA did not file on the Slovak Republic in 2009, but filed on the former Czechoslovakia many years ago; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

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. In 2006, the Slovak Republic appeared Special 301 Watch List, primarily due to patent issues, where it has been since 2001.

SOUTH AFRICA

IIPA did not make a submission on South Africa in 2009, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

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. In 2007, IIPA included South Africa in its Special Mention section; South Africa did not appear on any of USTR's lists in 2007.

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."

SOUTH KOREA

IIPA recommends that South Korea remain on the Watch List in 2009. See IIPA's 2009 South Korea country report at http://www.iipa.com/rbc/2009/2009SPEC301SOUTH_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."

In 2007, IIPA recommended that South Korea remain on the Watch List, and that an out-of-cycle review (OCR) be conducted. USTR retained South Korea on the Watch List in 2007. In 2008, IIPA recommended that South Korea remain on the Watch List; USTR retained South Korea on the Watch List in 2008.

SPAIN

In 2009, IIPA recommends that Spain stay on the Watch List, and that USTR conduct an out-of-cycle review in summer 2009. See <http://www.iipa.com/rbc/2009/2009SPEC301SPAIN.pdf>.

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 EU 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. In 2007, IIPA recommended that Spain be added to the Special 301 Watch List but USTR chose not to do so. In 2008, IIPA recommended that Spain be added to the Special 301 Watch List; USTR placed Spain on the Watch List in April 2008.

SWEDEN

In 2009, IIPA again recommends that Sweden be added to the Watch List. See IIPA's 2009 report at www.iipa.com/rbc/2009/2009SPEC301SWEDEN.pdf.

In 2008, IIPA recommended that Sweden be added to the Watch List for legislative and enforcement deficiencies in dealing with Internet piracy. In 2007, IIPA included Sweden in its Special Mention section for the same above-mentioned reasons. Sweden currently does not appear on any USTR list.

SWITZERLAND

In 2009, IIPA included Switzerland in its Special Mention section. See IIPA's 2009 report at www.iipa.com/rbc/2009/2009SPEC301SWITZERLAND.pdf. In 2008, IIPA included Switzerland in its Special Mention section for inadequacies in its legal framework with respect to Internet piracy. It was also included in IIPA's Special Mention section in 2007 to call attention to inadequate legislation then pending which then passed in 2007. Switzerland currently does not appear on any USTR list.

TAIWAN

In 2009, IIPA includes Taiwan in its Special Mention section. See IIPA's 2009 Taiwan country report at <http://www.iipa.com/rbc/2009/2009SPEC301TAIWAN.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. In 2007, IIPA recommended that Taiwan remain on the Watch List and an out-of-cycle review (OCR) be conducted primarily to monitor progress in passing legislation dealing with P2P piracy and ISP liability. USTR retained Taiwan on the Watch List in 2007. In 2008, IIPA recommended that Taiwan remain on the Watch List; USTR placed Taiwan on the Watch List and included an out-of-cycle review (OCR). In January 2009, USTR decided to remove Taiwan from the Watch List.

TAJIKISTAN

In 2009, IIPA recommended that Tajikistan remain on the Watch List. See IIPA's 2009 country report at <http://www.iipa.com/rbc/2009/2009SPEC301TAJIKISTAN.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." In 2007, IIPA again recommended that Tajikistan remain on the Watch List. USTR retained Tajikistan on the Watch List. In 2008, IIPA recommended that Tajikistan remain on the Watch List where it had appeared since 2000. USTR also included Tajikistan on the Watch List in April 2008.

THAILAND

In 2009, IIPA recommends that Thailand remain on the Priority Watch List. See IIPA's 2009 Thailand country report at <http://www.iipa.com/rbc/2009/2009SPEC301THAILAND.pdf>.

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." In 2007, IIPA recommended that Thailand be elevated to the Priority Watch List. USTR agreed with IIPA's recommendation and raised Thailand to the Priority Watch List in its April 2007 announcement. In 2008, IIPA recommended that Thailand remain on the Priority Watch List, with an out-of-cycle review. USTR included Thailand on the Priority Watch List in April 2008.

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."

TURKEY

In 2009, IIPA recommends that Turkey remain on the Watch List. See IIPA's 2009 Turkey country report at <http://www.iipa.com/rbc/2009/2009SPEC301TURKEY.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.

IIPA recommended that Turkey remain on the Priority Watch List in 2007. USTR retained Turkey on the Priority Watch List in April 2007. In 2008, IIPA recommended that Turkey remain on the Priority Watch List. USTR lowered Turkey to the Watch List in April 2008.

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.

TURKMENISTAN

In 2009, IIPA recommended that Turkmenistan remain on the Watch List. See IIPA's 2009 country report at <http://www.iipa.com/rbc/2009/2009SPEC301TURKMENISTAN.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. In 2007, IIPA recommended that Turkmenistan remain on the Watch List. USTR kept Turkmenistan on the Watch List in April 2007. IIPA recommended that Turkmenistan remain on the Watch List in 2008. In April 2008, USTR placed Turkmenistan on the Watch List where it had appeared since 2000.

UKRAINE

IIPA recommends that Ukraine remain on the Watch List in 2009. See IIPA's 2009 Ukraine country report at <http://www.iipa.com/rbc/2009/2009SPEC301UKRAINE.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.

IIPA recommended that Ukraine remain on the Priority Watch List in 2007. In 2007, USTR retained Ukraine on the Priority Watch List. In 2008, IIPA recommended that Ukraine remain on the Priority Watch List; however, USTR lowered Ukraine to the Watch List in April 2008.

UNITED ARAB EMIRATES

IIPA did not make a submission on the United Arab Emirates in 2009.

The UAE does not currently appear on any USTR lists. IIPA has not filed a report on this country since 1999. 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 2008, 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.

Negotiations with the UAE for a Free Trade Agreement with the United States are currently stalled.

URUGUAY

Uruguay currently does not appear on any Special 301 list. IIPA did not file a 2009 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 still 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.

UZBEKISTAN

IIPA recommends that Uzbekistan remain on the Watch List, where it has appeared since 2000. See IIPA's 2009 Uzbekistan country report at <http://www.iipa.com/rbc/2009/2009SPEC301UZBEKISTAN.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." IIPA recommended that Uzbekistan remain on the Watch List in 2007. USTR retained Uzbekistan on the Watch List in 2007. In 2008, IIPA recommended that Uzbekistan remain on the Watch List, where it had appeared since 2000. USTR again placed Uzbekistan on the Watch List in April 2008.

VENEZUELA

IIPA did not make a submission on Venezuela in 2009, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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." In 2007, IIPA recommended that Venezuela remain on the Priority Watch List. USTR kept Venezuela on the Priority Watch List in 2007. IIPA did not submit a recommendation on Venezuela in 2008; however, USTR retained

Venezuela on the Priority Watch List in April 2008. Venezuela is a beneficiary country of the Generalized System of Preferences (GSP) trade program.

VIETNAM

In 2009, IIPA recommends that Vietnam remain on the Watch List. See IIPA's 2009 Vietnam country report at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM>.

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. Again in 2007, IIPA recommended that Vietnam remain on the Watch List. USTR kept Vietnam on the Watch List in its April 2007 announcement. In 2008, IIPA recommended that Vietnam remain on the Watch List, and USTR retained Vietnam on the Watch List in April 2008.

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